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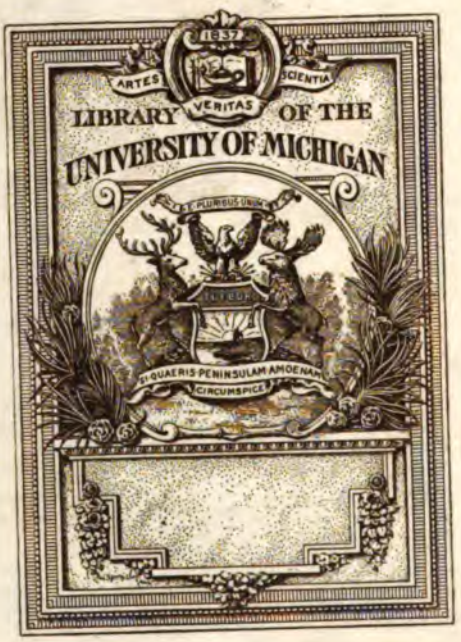
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U. S. Supreme court.

# CASES ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

OCTOBER TERM, 1902, IN

## 187, 188, 189, 190 U. S.

## BOOK 47,

LAWYERS' EDITION,

COMPLETE WITH HEADLINES, HEADNOTES, STATEMENTS OF CASES, POINTS AND AUTHORITIES OF COUNSEL, FOOTNOTES AND PARALLEL REFERENCES,

BY

THE PUBLISHERS' EDITORIAL STAFF.

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# JUSTICES

OF THE

# SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

---

CHIEF JUSTICE,

## HON. MELVILLE WESTON FULLER.

ASSOCIATE JUSTICES,

HON. JOHN MARSHALL HARLAN,

HON. DAVID JOSIAH BREWER,

HON. HENRY BILLINGS BROWN,

HON. GEORGE SHIRAS, JR.,[1]

HON. EDWARD DOUGLASS WHITE,

HON. RUFUS W. PECKHAM,

HON. JOSEPH MCKENNA,

HON. OLIVER WENDELL HOLMES,[2]

HON. WILLIAM R. DAY.[3]

ATTORNEY GENERAL,

HON. PHILANDER CHASE KNOX.

SOLICITOR GENERAL,

HON. JOHN K. RICHARDS.

HON. HENRY M. HOYT.[4]

CLERK,

JAMES HALL MCKENNEY, ESQ.

REPORTER,

HON. CHARLES HENRY BUTLER.[5]

MARSHAL,

JOHN MONTGOMERY WRIGHT, ESQ.

---

[1]Resigned February 23, 1903.
[2]Appointed December 4, 1902, to succeed Mr. Justice Gray, who died September 15, 1902. Sworn in December 8, 1902.
[3]Appointed February 23, 1903, to succeed Mr. Justice Shiras. Sworn in, March 2, 1903.
[4]Commission order recorded, March 16, 1903.
[5]Appointed December 4, 1902, to succeed Hon. J. C. Bancroft Davis who resigned October 18, 1902.

289862

ALLOTMENT, ETC., OF THE

# JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

**From October 20, 1902, to December 8, 1902,**

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see Appendix II. p. 1196, *post*.

| Names of Justices, and Whence Appointed. | By Whom Appointed. | Circuits. 1902–1903. | Commissioned. | Sworn in. |
|---|---|---|---|---|
| Associate Justice RUFUS W. PECKHAM, New York. | President Cleveland. | First. Me., N.H., Mass., Rhode Island. Second. Vermont, Conn., New York. | 1895. (Dec. 9.) | 1896. (Jan. 6.) |
| Associate Justice GEORGE SHIRAS, Jr., Pennsylvania. | President Harrison. | Third. New Jersey, Pa., Del. | 1892. (July 26.) | 1892. (Oct. 10.) |
| Chief Justice MELVILLE W. FULLER, Illinois. | President Cleveland. | Fourth. Md., Va., N. C., W. Va., S. C. | 1888. (July 20.) | 1888. (Oct. 8.) |
| Associate Justice EDWARD D. WHITE, Louisiana. | President Cleveland. | Fifth. Ga., Ala., Fla., Miss., La., Tex. | 1894. (Feb. 19.) | 1894. (Mar. 12.) |
| Associate Justice JOHN M. HARLAN, Kentucky. | President Hayes. | Sixth. Ky., Tenn., Ohio, Mich. | 1877. (Nov. 29.) | 1877. (Dec. 10.) |
| Associate Justice HENRY B. BROWN, Michigan. | President Harrison. | Seventh. Ind., Ill., Wis. | 1890. (Dec. 29.) | 1891. (Jan. 6.) |
| Associate Justice DAVID J. BREWER, Kansas. | President Harrison. | Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., New Mex.,* Okla.* | 1889. (Dec. 18.) | 1890. (Jan. 6.) |
| Associate Justice JOSEPH McKENNA, California. | President McKinley. | Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona,* Hawaii.* | 1898. (Jan. 21.) | 1898. (Jan. 26.) |

*Territories assigned to circuits by order of the Supreme Court.

ALLOTMENT, ETC., OF THE

# JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

**From December 8, 1902, to March 9, 1903**

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see Appendix V. p. 1197, *post*.

| Names of Justices, and Whence Appointed. | By Whom Appointed. | Circuits. 1902–1903. | Commissioned. | Sworn in. |
|---|---|---|---|---|
| Associate Justice OLIVER WENDELL HOLMES, Massachusetts. | President Roosevelt. | First. Me., N. H. Mass., R. I. | 1902. (Dec. 4.) | 1902. (Dec. 8.) |
| Associate Justice RUFUS W. PECKHAM, New York. | President Cleveland. | Second. Vermont, Conn., New York. | 1895. (Dec. 9.) | 1896. (Jan. 6.) |
| Associate Justice GEORGE SHIRAS, Jr., Pennsylvania. | President Harrison. | Third. New Jersey, Pa., Del. | 1892. (July 26.) | 1892. (Oct. 10.) |
| Chief Justice MELVILLE W. FULLER, Illinois. | President Cleveland. | Fourth. Md., Va., N. C., W. Va., S. C. | 1888. (July 20.) | 1888. (Oct. 8.) |
| Associate Justice EDWARD D. WHITE, Louisiana. | President Cleveland. | Fifth. Ga., Ala., Fla., Miss., La., Tex. | 1894. (Feb. 19.) | 1894. (Mar. 12.) |
| Associate Justice JOHN M. HARLAN, Kentucky. | President Hayes. | Sixth. Ky., Tenn., Ohio, Mich. | 1877. (Nov. 29.) | 1877. (Dec. 10.) |
| Associate Justice HENRY B. BROWN, Michigan. | President Harrison. | Seventh. Ind., Ill., Wis. | 1890. (Dec. 29.) | 1891. (Jan. 6.) |
| Associate Justice DAVID J. BREWER, Kansas. | President Harrison. | Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., New Mex.,* Okla.* | 1889. (Dec. 18.) | 1890. (Jan. 6.) |
| Associate Justice JOSEPH McKENNA, California. | President McKinley. | Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona,* Hawaii.* | 1898. (Jan. 21.) | 1898. (Jan. 26.) |

*Territories assigned to circuits by order of the Supreme Court.

ALLOTMENT, ETC., OF THE

# JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

**March 9, 1903.**

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see Appendix IX. p. 1201, *post*.

| Names of Justices, and Whence Appointed. | By Whom Appointed. | Circuits. 1902–1903. | Commissioned. | Sworn in. |
|---|---|---|---|---|
| Associate Justice OLIVER WENDELL HOLMES, Massachusetts. | President Roosevelt. | First. Me., N. H. Mass., R. I. | 1902. (Dec. 4.) | 1902. (Dec. 8.) |
| Associate Justice RUFUS W. PECKHAM, New York. | President Cleveland. | Second. Vermont, Conn., New York. | 1895. (Dec. 9.) | 1896. (Jan. 6.) |
| Associate Justice HENRY B. BROWN, Michigan. | President Harrison. | Third. New Jersey, Pa., Del. | 1890. (Dec. 29.) | 1891. (Jan. 6.) |
| Chief Justice MELVILLE W. FULLER, Illinois. | President Cleveland. | Fourth. Md., Va., N. C., W. Va., S. C. | 1888. (July 20.) | 1888. (Oct. 8.) |
| Associate Justice EDWARD D. WHITE, Louisiana. | President Cleveland. | Fifth. Ga., Ala., Fla., Miss., La., Tex. | 1894. (Feb. 19.) | 1894. (Mar. 12.) |
| Associate Justice JOHN M. HARLAN, Kentucky. | President Hayes. | Sixth. Ky., Tenn., Ohio, Mich. | 1877. (Nov. 29.) | 1877. (Dec. 10.) |
| Associate Justice WILLIAM R. DAY, Ohio. | President Roosevelt. | Seventh. Ind., Ill., Wis. | 1903. (Feb. 23.) | 1903. (Mar. 2.) |
| Associate Justice DAVID J. BREWER, Kansas. | President Harrison. | Eighth. Minn., Iowa, Mo., Kan., Ark., Neb., Colo., N. D., S. D., Utah, Wyo., New Mex.,* Okla.* | 1889. (Dec. 18.) | 1890. (Jan. 6.) |
| Associate Justice JOSEPH McKENNA, California. | President McKinley. | Ninth. Cal., Or., Nev., Mont., Wash., Idaho, Alaska,* Arizona,* Hawaii.* | 1898. (Jan. 21.) | 1898. (Jan. 26.) |

*Territories assigned to circuits by order of the Supreme Court.

# GENERAL TABLE OF CASES REPORTED IN THIS BOOK.

## VOLUMES 187, 188, 189, 190.

### A.


Aaronstein, London, Paris & American Bank v. (Mem.) ..... 345
A Cargo of Java Sugar, Mencke v. .... 163
Acme Flexible Clasp Co., Cary Mfg. Co. v. ..... 244
Adams, Northern P. R. Co. v. (Mem.) . 346
Pullman Co. v. ..... 877
Alabama, Jacobi v. ..... 106
Kidd v. ..... 669
Alaska Treadwell Gold Min. Co., Corbus v. ..... 256
Albaugh, Fourth Nat. Bank v. ..... 673
Albuquerque Land & Irrig. Co., Gutierres v. ..... 588
Alden, Jaquith v. ..... 717
Aldridge, Pardee v. ..... 883
Allegheny Oil Co. v. Snyder (Mem.) (187 U. S. 639) ..... 345
Allinson, Hale v. ..... 380
Allison, Southern R. Co. v. ..... 1078
Ambrosini v. United States (187 U. S. 1) ..... 49
American Bonding & Trust Co., Carstairs v. (Mem.) ..... 346
American Colortype Co. v. Continental Colortype Co. (188 U. S. 104) ..... 404
American Ice Co. v. Eastern Trust & Bkg. Co. (188 U. S. 626) .. 623
American Nat. Bank v. Watkins (Mem.) (190 U. S. 558) ... 1183
American Sales Book Co. v. Bullivant (Mem.) (190 U. S. 560) ... 1184
American School of Magnetic Healing v. McAnnulty (187 U. S. 94) ..... 90
American Surety Co. v. Ballman (Mem.) (187 U. S. 646) .. 347
Gilbert use of Bishop v. (Mem.) 1184
Ames v. Boston Street Comrs. (Mem.) (188 U. S. 743) ..... 678
Champion v. ..... 492
Andrews v. Andrews (188 U. S. 14) .. 360
Anglo-American Land, Mortg. & Agency Co., Nashua Sav. Bank v. ..... 782
Anglo-American Provision Co. v. United States (Mem.) (190 U. S. 558) ..... 1184
Annie Wright Seminary v. Tacoma (Mem.) (187 U. S. 639) ... 345
Antonio Suarez, The, United States v. . 900
Antonio Y Paco, The, United States v. 900
Argonaut Min. Co., Kennedy Min. & Mill. Co. v. ..... 685
Atlantic & P. Teleg. Co. v. Philadelphia (190 U. S. 160) ..... 995
Atlantic Trust Co. v. Chapman (Mem.) (188 U. S. 741) ... 678
Austin v. Bartholomew (Mem.) (187 U. S. 650) ..... 349
Ayres v. Polsdorfer (187 U. S. 585) ... 314


### B.


Baker v. Baldwin (187 U. S. 61) ..... 75
Baldwin, Baker v. ..... 75
Ballman, American Surety Co. v. (Mem.) ..... 347
Baltimore & O. R. Co., Tubman v. ..... 946
v. Wabash R. Co. (Mem.) (187 U. S. 650) ..... 349
Winslow v. ..... 635
Bank, American Nat., v. Watkins (Mem.) (190 U. S. 558) .. 1183
Black River Nat., Security Trust Co. v. ..... 147
Chase Nat., Rankin v. ..... 594
Exchange, Lockwood v. ..... 1061
Fourth Nat., v. Albaugh (188 U. S. 734) ..... 673
London, Paris & American, v. Aaronstein (Mem.) (187 U. S. 641) ..... 345
Nashua Sav., v. Anglo-American Land, Mortg. & Agency Co. (189 U. S. 221) ..... 782
of Commerce v. Wiltsie (Mem.) (189 U. S. 505) ..... 921
of Iron Gate v. Brady (Mem.) (187 U. S. 635) ..... 343
Second Nat., v. Fitzpatrick (Mem.) (189 U. S. 508) ... 922
Union & Planters', v. Memphis (189 U. S. 71) ..... 712
Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. S. M. R. Co. (Mem.) (187 U. S. 648) ..... 348
Barbour County Ct., Rommel v. (Mem.) ..... 351
Barker, Metcalf Bros. Co. v. ..... 122

Barnes v. District of Columbia (Mem.) (187 U. S. 654) ..... 350
District of Columbia v. (Mem.) 344
Barnett, United States v. ..... 908
Barringer, United States v. ..... 602
Bartholomew, Austin v. (Mem.) ..... 349
Bauendahl & Co. v. Bernheimer & Bro. (Mem.) (189 U. S. 513) .. 924
Beals v. Cone (188 U. S. 184) ..... 435
Beckwith, Commercial Pub. Co. v. .. 598
Behymer, Texas & P. R. Co. v. ..... 905
Bell v. Commonwealth Title Ins. & T. Co. (189 U. S. 131) ..... 741
Belleville & S. I. R. Co. v. Citizens' Sav. & L. Asso. (Mem.) (187 U. S. 645) ..... 347
Belt, Robinson & Co. v. ..... 65
Bender, King v. (Mem.) ..... 346
Benziger v. United States (Mem.) (186 U. S. 486) ..... 1185
Berliner Gramaphone Co., Seaman v. (Mem.) ..... 347
Bernheimer & Bro., Bauendahl & Co. v. (Mem.) ..... 924
Bettman, Snyder v. ..... 1035
Bigby v. United States (188 U. S. 400) 519
Billings v. Illinois (188 U. S. 97) .... 400
Billingslea v. Kansas City S. R. Co. (Mem.) (189 U. S. 515) .. 925
Binns, Illinois ex rel. Rayburn v. (Mem.) ..... 921
Bird v. United States (187 U. S. 118) . 100
Birney, Chicago House Wrecking Co. v. (Mem.) ..... 346
Bishop, Gilbert use of, v. American Surety Co. (Mem.) (190 U. S. 560) ..... 1184
Blackfeather v. United States (190 U. S. 368) ..... 1099
Black River Nat. Bank, Security Trust Co. v. ..... 147
Blackstone v. Miller (188 U. S. 189) .. 439
Bleistein v. Donaldson Lithographing Co. (188 U. S. 239) ..... 460
Blinn v. Jenkins (Mem.) (187 U. S. 652) ..... 349
Bockfinger v. Foster (190 U. S. 116) .. 975
Boston & M. Consol. Copper & Silver Min. Co. v. Chile Gold Min. Co. (188 U. S. 645) ..... 634
v. Montana Ore Purchasing Co. (188 U. S. 632) ..... 626
v. Montana Ore Purchasing Co. (188 U. S. 645) ..... 634
Boston Fruit Co. v. Hall (Mem.) (187 U. S. 640) ..... 345
Boston Street Comrs., Ames v. (Mem.) 678
Lawrence v. (Mem.) ..... 925
Sears v. (Mem.) ..... 925
Bowman, James v. ..... 979
Bowring, The Ely, v. (Mem.) ..... 924
Braden, Cope v. (Mem.) ..... 349
Brady, Bank of Iron Gate v. (Mem.) .. 343
Bridges, Chesebrough v. (Mem.) ..... 678
Brill v. Peckham Motor Truck & Wheel Co. (189 U. S. 57) .. 706
Brooks v. Pratt (Mem.) (187 U. S. 647) ..... 348
Brown v. Drain (Mem.) (187 U. S. 635) ..... 343
Equitable Life Assur. Soc. v. .. 190
Lanyon Zinc Co. v. (Mem.) .... 347
Brown, MacFarland v. ..... 159
Smith v. (Mem.) ..... 344
Brownfield v. South Carolina (189 U. S. 426) ..... 882
Bryce Bros. Co., National Glass Co. v. (Mem.) ..... 348
Buchanan v. Patterson (190 U. S. 353) 1093
Buffalo Electric Carriage Co. v. Electric Storage Battery Co. (Mem.) (188 U. S. 741) .. 678
Bullivant, American Sales Book Co. v. (Mem.) ..... 1184
Burgdorf v. United States use of Vermont Marble Co. (Mem.) (187 U. S. 654) ..... 350
Burget v. Robinson (Mem.) (188 U. S. 739) ..... 677
Burlington Trust Co. v. Porter (Mem.) (187 U. S. 641) ..... 345
Burr, Leach v. ..... 567
Burt v. Union Cent. L. Ins. Co. (187 U. S. 181) ..... 216
Buston v. Pennsylvania R. Co. (Mem.) (189 U. S. 511) ..... 923
Byrnes, MacFarland v. ..... 162

C.

Cable v. United States L. Ins. Co. (Mem.) (186 U. S. 482) .. 1185
Caldwell v. North Carolina (187 U. S. 622) ..... 336
California, Sexton v. ..... 833
California Fig Syrup Co., Worden & Co. v. ..... 282
Calumet Canal & Improv. Co., Kean v. 1134
Calumet Grain & Elevator Co. v. Chicago (188 U. S. 431) ..... 532
Calvert v. Southern R. Co. (Mem.) (187 U. S. 636) ..... 343
Capdevielle v. United States ex rel. Kilpatrick (Mem.) (189 U. S. 510) ..... 923
Carlin, Texas & P. R. Co. v. ..... 849
Carnahan v. Connolly (Mem.) (187 U. S. 636) ..... 343
Carnegie Steel Co., Witherow v. (Mem.) ..... 925
Carpenter, Raub v. ..... 119
Carr, National Bank & Loan Co. v. .... 881
Carson, Earle v. ..... 373
Carstairs v. American Bonding & Trust Co. (Mem.) (187 U. S. 644) ..... 346
Cartwright, Olcott v. (Mem.) ..... 1184
Cary Mfg. Co. v. Acme Flexible Clasp Co. (187 U. S. 427) ..... 244
Cauca Co., Colombia v. ..... 1159
Cayadutta Plank Road Co., New York ex rel., v. Cummings (Mem.) (187 U. S. 650) ... 349
Central Trust Co., Julian v. (Mem.) .. 923
Chadwick v. Kelly (187 U. S. 540) .... 293
Chamberlin v. Peoria, D. & E. R. Co. (Mem.) (189 U. S. 517) .. 926
Champion v. Ames (188 U. S. 321) ... 492
Chapman, Atlantic Trust Co. v. (Mem.) ..... 678
Chase Nat. Bank, Rankin v. ..... 594
Chattanooga Nat. Bldg. & L. Asso. v. Denson (189 U. S. 408) .. 870

Cherokee Nation v. Hitchcock (187 U. S. 294) ..... 183
Chesebrough v. Bridges (Mem.) (188 U. S. 742) ..... 678
Chicago, Calumet Grain & Elevator Co. v. ..... 532
Cummings v. ..... 525
Chicago & E. R. Co. v. Shaw (Mem.) (187 U. S. 640) ..... 345
Chicago, B. & Q. R. Co. v. Wolfe (Mem.) (187 U. S. 638) ..... 344
Chicago City R. Co., Robinson v. (Mem.) ..... 1184
Chicago Horse Shoe Co., Dupee v. (Mem.) ..... 677
Chicago House Wrecking Co. v. Birney (Mem.) (187 U. S. 642) ..... 346
Chicago Hydraulic Press Brick Co., Kimbell v. (Mem.) ..... 924
Chicago Theological Seminary v. Illinois ex rel. Raymond (188 U. S. 662) ..... 641
Chick v. Fuller (Mem.) (187 U. S. 640) ..... 345
Chile Gold Min. Co., Boston & M. Consol. Copper & Silver Min. Co. v. ..... 634
Ching v. United States (Mem.) (189 U. S. 509) ..... 923
Chisolm v. Johnson (Mem.) (187 U. S. 644) ..... 346
Church, Nester v. (Mem.) ..... 921
Citizens' Sav. & L. Asso., Belleville & S. I. R. Co. v. (Mem.) ..... 347
City Trust, Safe Deposit & Surety Co. v. Glencove Granite Co. (Mem.) (187 U. S. 649) ..... 348
Clarke v. Larremore (188 U. S. 486) ..... 555
v. Northampton (Mem.) (189 U. S. 513) ..... 924
Clement, Cuddy v. (Mem.) ..... 348
Cleveland, C. C. & St. L. R. Co. v. Clyde (Mem.) (189 U. S. 516) ..... 925
Clyde, Cleveland, C. C. & St. L. R. Co. v. (Mem.) ..... 925
Clyde S. S. Co., Ropes v. (Mem.) ..... 347
Coler, Vanderbilt v. (Mem.) ..... 350
Coler & Co., Stanley County v. ..... 1126
Wilkes County v. ..... 971
Wilkes County v. (Mem.) ..... 923
Collins v. New Hampshire (Mem.) (187 U. S. 637) ..... 344
Colombia v. Cauca Co. (190 U. S. 524) 1159
Colorado, Reid v. ..... 108
Commercial Pub. Co. v. Beckwith (188 U. S. 567) ..... 598
Commonwealth Title Ins. & T. Co., Bell v. ..... 741
Condon, Tennessee ex rel. Maloney v. ..... 709
Cone, Beals v. ..... 435
Conemaugh, The. See Union S. B. Co. v. Erie & W. Transp. Co.
Conley v. Mathieson Alkali Works (190 U. S. 406) ..... 1113
Connecticut Mut. L. Ins. Co. v. Hillmon (188 U. S. 208) ..... 446
Connolly, Carnahan v. (Mem.) ..... 343
Continental Colortype Co., American Colortype Co. v. ..... 404
Continental Trust Co., Contracting & Bldg. Co. v. (Mem.) ..... 925
Rhode Island Locomotive Works v. (Mem.) ..... 348
Contracting & Bldg. Co. v. Continental Trust Co. (Mem.) (189 U. S. 514) ..... 925
Cook v. Tennessee (Mem.) (187 U. S. 639) ..... 344
Cope v. Braden (Mem.) (187 U. S. 651) ..... 349
Corbus v. Alaska Treadwell Gold Min. Co. (187 U. S. 455) ..... 256
Corkran, New York ex rel., Hyatt v. ..... 657
Cosmos Exploration Co. v. Gray Eagle Oil Co. (190 U. S. 301) ..... 1064
Crabb v. Williams (Mem.) (187 U. S. 645) ..... 347
Craig, Southern R. Co. v. (Mem.) ..... 345
Creed & C. C. Min. & Mill. Co. v. Uinta Tunnell Min. & Transp. Co. (Mem.) (189 U. S. 511) 923
Crooks, Ocean S. S. Co. v. (Mem.) ..... 1184
Crowley v. United States (Mem.) (187 U. S. 651) ..... 349
Cuatro De Settembre, The, United States v. ..... 900
Cuddy v. Clement (Mem.) (187 U. S. 647) ..... 348
Cummings v. Chicago (188 U. S. 410) ..... 525
New York ex rel. Cayadutta Plank Road Co. v. (Mem.) 349
Cunningham v. Metropolitan Lumber Co. (Mem.) (187 U. S. 647) 347

## D.

Davis & F. Mfg. Co. v. Los Angeles (189 U. S. 207) ..... 778
De Baca v. United States (Mem.) (189 U. S. 505) ..... 921
De Cambra v. Rogers (189 U. S. 119) 734
De Farconnet, Western Assur. Co. v. (Mem.) ..... 1183
Delaware, L. & W. R. Co. v. Devore (Mem.) (190 U. S. 561) ..... 1184
Denson, Chattanooga Nat. Bldg. & L. Asso. v. ..... 870
Dent, Security Trust Co. v. ..... 158
Detroit, Ft. W. & B. I. R. Co. v. Osborn (189 U. S. 383) ..... 860
Devore, Delaware, L. & W. R. Co. v. (Mem.) ..... 1184
Dewey, Stovell v. ..... 463
v. The Don Juan de Austria (188 U. S. 254) ..... 463
United States v. ..... 463
Diamond Glue Co. v. United States Glue Co. (187 U. S. 611) ..... 328
Diamond Match Co. v. Ontonagon (188 U. S. 82) ..... 394
Dimmick v. United States (Mem.) (189 U. S. 509) ..... 923
District of Columbia, Barnes v. (Mem.) ..... 350
v. Barnes (Mem.) (187 U. S. 637) ..... 344
Dobney, Farmers' & M. Ins. Co. v. ..... 821
Doherty v. Vermont (Mem.) (189 U. S. 514) ..... 925

Donaldson Lithographing Co., Bleistein v. . . . . 460
Don Juan de Austria, The, Dewey v. . 463
Dorr, United States v. (Sup. Ct. Philippine Islands). . .appx. I., 1187
Dowagiac Mfg. Co., Minnesota Moline Plow Co. v. (Mem.) . . . . . 346
Dowman v. German Ins. Co. (Mem.) (189 U. S. 513) . . . . . 924
Downs v. United States (187 U. S. 496) . . . . . 275
Drain, Brown v. (Mem.) . . . . . 343
Dreyer v. Illinois (187 U. S. 71) . . . . 79
Dunbar v. Dunbar (190 U. S. 340) . . . 1084
Dupee v. Chicago Horse Shoe Co. (Mem.) (188 U. S. 740) . . 677
Du Shen Tau v. United States (Mem.) (187 U. S. 652) . . . . . 350
Duss, Schwartz v. . . . . 53
Duthie, Mexican C. R. Co. v. . . . . 715
Dutton, Mifflin v. . . . . 1043

E.

Eagle Point, The v. Liverpool, B. & R. P. Steam Nav. Co. (Mem.) (189 U. S. 510) . . . . . 923
Earle v. Carson (188 U. S. 42) . . . . . 373
Eastern Bldg. & L. Asso. v. Willamson (189 U. S. 122) . . . . . 735
Eastern Trust & Bkg. Co., American Ice Co. v. . . . . 623
Easton v. Iowa (188 U. S. 220) . . . . . 452
Eckman, Mexican C. R. Co. v. . . . . 245
Edmunds, Page v. . . . . 318
Electric Storage Battery Co., Buffalo Electric Carriage Co. v. (Mem.) . . . . . 678
Elliott & Co. v. Toeppner (187 U. S. 327) . . . . . 200
Elwood Oil Co., Pacific Land & Improv. Co. v. . . . . 1073
Ely, The v. Bowring (Mem.) (189 U. S. 514) . . . . . 924
Emsheimer v. New Orleans (Mem.) (189 U. S. 511) . . . . . 923
Engracia, The, United States v. . . . . 900
Equitable Life Assur. Soc. v. Brown (187 U. S. 308) . . . . . 190
Erie & W. Transp. Co., Union S. B. Co. v. . . . . 854
Espana, The, United States v. . . . . 900
Eudora, The, Patterson v. . . . . 1002
Eufaula Cotton Oil Co. v. Stillwell (Mem.) (189 U. S. 509) . . 923
Evans v. Nellis (187 U. S. 271) . . . . . 173
Exchange Bank, Lockwood v. . . . . 1061
Ex parte Post (Mem.) (190 U. S. 557) . . . . . 1183
Expresso, The v. United States (Mem.) (189 U. S. 515) . . . . . 925

F.

Fairfield, Rural Independent School Dist. v. (Mem.) . . . . . 346
Farmers' & M. Ins. Co. v. Dobney (189 U. S. 301) . . . . . 821
Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. (Mem.) (190 U. S. 559 . . . . . 1184
Faul v. French (187 U. S. 401) . . . . . 233
Ferguson v. Helliesen (Mem.) (189 U. S. 510) . . . . . 923
Fernandito, The, United States v. . . . . 900
Fidelity & D. Co. v. L. Bucki & Son Lumber Co. (189 U. S. 135) 744
v. United States use of Smoot (187 U. S. 315) . . . . . 194
Fidelity Ins. T. & S. D. Co., Rankin v. 792
Finney v. Guy (189 U. S. 335) . . . . . 839
Fisher, Home L. Ins. Co. v. . . . . 667
Yamataya v. . . . . 721
Fiske, Washington Nat. Bldg. & L. Asso. v. (Mem.) . . . . . 677
Fitzpatrick, Second Nat. Bank v. (Mem.) . . . . . 922
Flack, Waggoner v. . . . . 609
Florida, Tarrance v. . . . . 572
Foerster v. United States (Mem.) (187 U. S. 644) . . . . . 347
Forney, Winebrenner v. . . . . 754
Fort Scott, W. G. Eads Brokerage Co. v. (Mem.) . . . . . 348
Foster v. Pryor (189 U. S. 325) . . . . . 835
Bockfinger v. . . . . 975
Fourth Nat. Bank v. Albaugh (188 U. S. 734) . . . . . 673
Francis v. United States (188 U. S. 375) . . . . . 508
French, Faul v. . . . . 233
Young Women's Christian Home v. . . . . 233
Fuller, Chick v. (Mem.) . . . . . 345
Fuller & J. Mfg. Co. v. Seiler (Mem.) (190 U. S. 558) . . . . . 1183

G.

Galvin v. Grand Rapids (Mem.) (188 U. S. 741) . . . . . 677
Gano, Minneapolis & St. L. R. Co. v. (Mem) . . . . . 1183
Gee v. Gee (Mem.) (190 U. S. 557) . . 1183
Geer v. Mathieson Alkali Works (190 U. S. 428) . . . . . 1122
German Ins. Co., Dowman v. (Mem.) 924
Hearne v. (Mem.) . . . . . 678
Gibara Habana, The v. United States (Mem.) (189 U. S. 515) . . 925
Gilbert use of Bishop v. American Surety Co. (Mem.) (190 U. S. 560) . . . . . 1184
Giles v. Harris (189 U. S. 475) . . . . . 909
Gillett, Romig v. . . . . 97
Given v. Times-Republican Printing Co. (Mem.) (189 U. S. 513) . . . . . 924
Glencove Granite Co., City Trust, Safe Deposit & Surety Co. v. (Mem.) . . . . . 348
Glenn, Moss v. (Mem.) . . . . . 921
Glidden v. Harrington (189 U. S. 255) 798
Globe Refining Co. v. Landa Cotton Oil Co. (190 U. S. 540) . . . . . 1171
Glucose Sugar Ref. Co. v. Harding (Mem.) (187 U. S. 651) . . . 349
Gombret, Lyon v. (Mem.) . . . . . 922
Goodyear Tire & Rubber Co., Rubber Tire Wheel Co. v. (Mem.) 345
Gordon v. Randle (189 U. S. 417) . . . . 875
Gottlieb, Missouri ex rel., Western U. Teleg. Co. v. . . . . 1116

Graff, Perkins County v. (Mem.).... 346
Grand Rapids, Galvin v. (Mem.).... 677
Gray Eagle Oil Co., Cosmos Exploration Co. v..... 1064
Great Southern Fire Proof Hotel Co. v. Jones (Mem.) (187 U. S. 649)..... 348
Grin v. Shine (187 U. S. 181)..... 130
Guarantee Co. of N. A. v. Phenix Ins. Co. (Mem.) (187 U. S. 640) 345
Gurney v. The John H. Starin (Mem.) (190 U. S. 559)..... 1184
Gutierres v. Albuquerque Land & Irrig. Co. (188 U. S. 545). 588
Guy, Finney v..... 839

H.

Hale v. Allinson (188 U. S. 56)..... 380
v. Hilliker (Mem.) (188 U. S. 739)..... 677
Hall, Boston Fruit Co. v. (Mem.).... 345
Potter v. ..... 817
Hamilton County, Zane v..... 858
Hanley v. Kansas City S. R. Co. (187 U. S. 617)..... 333
Hardin v. Shedd (190 U. S. 508).... 1156
Harding, Glucose Sugar Ref. Co. v. (Mem.)..... 349
v. Hart (Mem.) (187 U. S. 638) 344
Harrington, Glidden v..... 798
Harris, Giles v..... 909
Hart, Harding v. (Mem.)..... 344
Hartford F. Ins. Co. v. Wilson (187 U. S. 467)..... 261
Hawaii v. Mankichi (190 U. S. 197..) 1016
Hearne v. German Ins. Co. (Mem.) (188 U. S. 742)..... 678
Hegeman v. Springer (Mem.) (189 U. S. 505)..... 921
Helliesen, Ferguson v. (Mem.)..... 923
Helwig v. United States (188 U. S. 605)..... 614
Heman, Schulte v. (Mem.)..... 922
Hendryx, Perkins v. (Mem.)..... 346
Henkel, Wright v..... 948
Hennessy v. May (189 U. S. 35).... 698
v. Moise (189 U. S. 35)..... 698
v. Richardson Drug Co. (189 U. S. 25)..... 697
Herard, Wyman v. (Mem.)..... 678
Herman, Kansas City Suburban Belt R. Co v..... 76
Herriot, Scottish Union & Nat. Ins. Co. v. (Mem.)..... 349
Herriott, Manchester Fire Assur. Co. v. (Mem.)..... 349
Hill, Mutual L. Ins. Co. v. (Mem.)... 678
Hilliker, Hale v. (Mem.)..... 677
Hillmon, Connecticut Mut. L. Ins. Co. v. ..... 446
Hitchcock, Cherokee Nation v..... 183
Lone Wolf v..... 299
United States ex rel. Phillips v. (Mem.) ..... 922
United States ex rel. Riverside Oil Co. v..... 1074
Holmes v. The Queen Elizabeth (Mem.) (190 U. S. 560)..... 1184
Home for Incurables v. New York (187 U. S. 155)..... 117
Home Ins. Co., Virginia-Carolina Chemical Co. v. (Mem.)... 926
Home Land & Cattle Co., McNamara v. (Mem.)..... 346
Home L. Ins. Co. v. Fisher (188 U. S. 726)..... 667
Hooker v. Los Angeles (188 U. S. 314) 487
Horman v. United States (Mem.) (187 U. S. 641)..... 345
Hume v. United States (Mem.) (189 U. S. 510)..... 923
Hunnewell v. Presho (Mem.) (190 U. S. 561)..... 1185
Hutchings, Lamson v. (Mem.)..... 924
Hutchinson v. Otis, W. & Co. (190 U. S. 552) ..... 1179
Hyatt v. New York ex rel. Corkran (188 U. S. 691)..... 657

I.

Illinois, Billings v..... 400
Dreyer v..... 79
Illinois ex rel. Rayburn v. Binns (Mem.) (189 U. S. 505).. 921
Raymond, Chicago Theological Seminary v..... 641
Indiana Mfg. Co. v. Koehne (188 U. S. 681) ..... 651
Indiana Power Co. v. St. Joseph & E. Power Co. (Mem.) (187 U. S. 636)..... 343
Infanta Maria Teresa, The. See United States v. Taylor.
Insurance Co., Connecticut Mut. L., v. Hillmon (188 U. S. 208).. 446
Farmers' & M., v. Dobney (189 U. S. 301)..... 821
German, Dowman v. (Mem.)... 924
German, Hearne v. (Mem.).... 678
Hartford F., v. Wilson (187 U. S. 467) ..... 261
Home, Virginia-Carolina Chemical Co. v. (Mem.)..... 926
Home L., v. Fisher (188 U. S. 726)..... 667
Iowa L., v. Lewis (187 U. S. 335) ..... 204
Mutual L., v. Hill (Mem.) (188 U. S. 742)..... 678
Mutual L., v. McGrew (188 U. S. 291) ..... 480
New York L., Johnson v..... 273
Orient, v. Leonard (Mem.) (187 U. S. 645)..... 347
Phenix, Guarantee Co. of N. A. v. (Mem.) ..... 345
Phenix, v. Leonard (Mem.) (187 U. S. 645)..... 347
Scottish Union & Nat., v. Herriot (Mem.) ..... 349
Sun L., v. McCabe (Mem.) (187 U. S. 650)..... 349
Union Cent. L., Burt v..... 216
United States L., Cable v. (Mem.) ..... 1185
Interstate Bldg. & L. Asso., Thomas v. (Mem.) ..... 350
Interstate Commerce Commission v. Louisville & N. R. Co. (190 U. S. 273)..... 1047

Iowa, Easton v. .... 452
v. Rood (187 U. S. 87) .... 86
Iowa L. Ins. Co. v. Lewis (187 U. S. 335) .... 204

J.

Jack, Southern P. R. Co. v. (Mem.) .. 350
Jackson, Mexican Nat. R. Co. v. (Mem.) .... 924
Jacobi v. Alabama (187 U. S. 133) .. 106
James v. Bowman (190 U. S. 127) .. 979
Japanese Immigrant Case, The. See Yamataya v. Fisher.
Jaquith v. Alden (189 U. S. 78) .... 717
v. Rowley (188 U. S. 620) .... 620
Jarman, Knights Templars' & Masons' Life Indemnity Co. v. .... 139
Jasper, San Diego Land & Town Co. v 892
Jenkins, Blinn v. (Mem.) .... 349
Johanson v. Washington (190 U. S. 179) .... 1008
John H. Starin, The, Gurney v. (Mem.) 1184
Johnson, Chisolm v. (Mem.) .... 346
v. New York L. Ins. Co. (187 U. S. 491) .... 273
v. Southern P. Co. (Mem.) (190 U. S. 559) .... 1184
Jones, Great Southern Fire Proof Hotel Co. v. (Mem.) .... 348
Reid v. .... 116
Julian v. Central Trust Co. (Mem.) (189 U. S. 511) .... 923

K.

Kansas City S. R. Co., Billingslea v. (Mem.) .... 925
Hanley v. .... 333
Kansas City Suburban Belt R. Co. v. Herman (187 U. S. 63) .... 76
Kean v. Calumet Canal & Improv. Co. (190 U. S. 452) .... 1134
Kearney County v. Vandriss (Mem.) (187 U. S. 642) .... 346
Kelley v. Rhoads (188 U. S. 1) .... 359
Kelly, Chadwick v. .... 293
Kennedy Min. & Mill. Co. v. Argonaut Min. Co. (189 U. S. 1) .... 685
Kentucky, Louisville & J. Ferry Co. v. 513
Louisville & J. Ferry Co. v. .... 519
Ketchum v. United States (Mem.) (187 U. S. 653) .... 350
Key, Re (189 U. S. 84) .... 720
Kidd v. Alabama (188 U. S. 730) .... 669
Kilham v. Wilson (Mem.) (187 U. S. 648) .... 348
Kilpatrick, United States ex rel., Capdevielle v. (Mem.) .... 923
Kimbell v. Chicago Hydraulic Press Brick Co. (Mem.) (189 U. S. 512) .... 924
King v. Bender (Mem.) (187 U. S. 643) .... 346
King Dung v. United States (Mem.) (187 U. S. 655) .... 351
Kirwan v. Murphy (189 U. S. 35) .... 698
Kitselman, Kokomo Fence Mach. Co. v. 689
Knights Templars' & Masons' Life Indemnity Co. v. Jarman (187 U. S. 197) .... 139
Knoxville, Knoxville Water Co. v. .... 887
Knoxville Water Co. v. Knoxville (189 U. S. 434) .... 88
Koehne, Indiana Mfg. Co. v. .... 65
Kokomo Fence Mach. Co. v. Kitselman (189 U. S. 8) .... 68

L.

Lackmann, Tsukamoto v. (Mem.) .... 34
Lake Street Elev. R. Co., Farmers' Loan & T. Co. v. (Mem.) 118
Lamson v. Hutchings (Mem.) (189 U. S. 514) .... 92
Landa Cotton Oil Co., Globe Refining Co. v. .... 117
Lanyon Zinc Co. v. Brown (Mem.) (187 U. S. 646) .... 34
La Republique Francaise v. Saratoga Vichy Spring Co. (Mem.) (186 U. S. 486) .... 118
Larremore, Clarke v. .... 55
Lawder v. Stone (187 U. S. 281) .... 17
Lawler, Wiser v. .... 80
Lawrence v. Boston Street Comrs. (Mem.) (189 U. S. 516) .. 92
Lawrence & Co. v. Weis (Mem.) (187 U. S. 646) .... 34
Layton v. Missouri (187 U. S. 356) .. 21
L. Bucki & Son Lumber Co., Fidelity & D. Co. v. .... 74
Leach v. Burr (188 U. S. 510) .... 56
Lee Ah Yin v. United States (Mem.) (187 U. S. 655) .... 35
Lee Chin Ching v. United States (Mem.) (187 U. S. 652) .. 35
Lee Ling v. United States (Mem.) (187 U. S. 655) .... 35
Lemon, Turpin v. .... 7
Leonard, Orient Ins. Co. v. (Mem.) .. 34
Phenix Ins. Co. v. (Mem.) .... 34
Leslie, Standard Sewing Mach. Co. v. (Mem.) .... 67
Lewis, Iowa L. Ins. Co. v. .... 20
v. Trowbridge (Mem.) (190 U. S. 557) .... 118
Liverpool, B. & R. P. Steam Nav. Co., The Eagle Point, v. (Mem.) 92
Lockwood v. Exchange Bank (190 U. S. 294) .... 106
Lola, The, United States v. .... 90
London, Paris & American Bank v. Aaronstein (Mem.) (187 U. S. 641) .... 34
Lone Wolf v. Hitchcock (187 U. S. 553) .... 29
Los Angeles, Davis & F. Mfg. Co. v. .. 77
Hooker v. .... 48
Lottery Case. See Champion v. Ames
Louisville & J. Ferry Co. v. Kentucky (188 U. S. 399) .... 51
v. Kentucky (188 U. S. 385) .... 51
Louisville & N. R. Co., Interstate Commerce Commission v. .... 104
Wright v. (Mem.) .... 92
Lynah, United States v. .... 53
Lyon v. Gombret (Mem.) (189 U. S. 507) .... 92

M.

McAnnulty, American School of Magnetic Healing v. .... 9

McCabe, Sun L. Ins. Co. v. (Mem.) .. 349
McCann v. Pennsylvania use of Wells (Mem.) (187 U. S. 653) .. 350
McCarthy v. McCarthy (Mem.) (189 U. S. 515) ..... 925
McClung v. Penny (189 U. S. 143) .. 751
MacFarland v. Brown (187 U. S. 239) 159
v. Byrnes (187 U. S. 246) .... 162
McGrew, Mutual L. Ins. Co. v..... 480
McKeon, New York, N. H. & H. R. Co. v. (Mem.) ..... 922
McKinley, Van Buren v. (Mem.) .... 925
McNamara v. Home Land & Cattle Co. (Mem.) (187 U. S. 642) 346
Maloney, Tennessee ex rel., v. Condon (189 U. S. 64) ..... 709
Manchester Fire Assur. Co. v. Herriott (Mem.) (187 U. S. 651) .. 349
Mangrove Prize Money, The. See United States v. Officers & Crew of The Mangrove.
Manila Prize Cases, The. See United States v. Dewey.
Mankichi, Hawaii v..... 1016
Manley v. Park (187 U. S. 547) ..... 296
Maryland, Northern C. R. Co. v..... 167
Mathieson Alkali Works, Conley v.... 1113
Geer v..... 1122
May, Hennessy v..... 698
Memphis, Union & Planters' Bank v.. 712
Memphis & C. R. Co., Rothschild v. (Mem.) ..... 677
Mencke v. A. Cargo of Java Sugar (187 U. S. 248) ..... 163
Metcalf Bros. & Co. v. Barker (187 U. S. 165) ..... 122
Metropolitan Lumber & C. Co., Cunningham v. (Mem.) ..... 347
Mexican C. R. Co. v. Duthie (189 U. S. 76) ..... 715
v. Eckman (187 U. S. 429) .... 245
Mexican Nat. R. Co. v. Jackson (Mem.) (189 U. S. 512) ..... 924
Slater v. (Mem.) ..... 348
Michigan, Reetz v..... 563
United States v..... 1103
Mifflin v. Dutton (190 U. S. 265) .... 1043
v. R. H. White Co. (190 U. S. 260) ..... 1040
Miller, Blackstone v..... 439
Minneapolis & St. L. R. Co. v. Gano (Mem.) (190 U. S. 557) .. 1183
Minneapolis, St. P. & S. S. M. R. Co., Bankers' Mut. Casualty Co. v. (Mem.) ..... 348
Minnesota Moline Plow Co. v. Dowagiac Mfg. Co. (Mem.) (187 U. S. 644) ..... 346
Mission Rock Co., United States v.... 865
Mississippi County, Read v. (Mem.) 677
Missouri, Layton v..... 214
Missouri ex rel. Gottlieb, Western U. Teleg. Co. v..... 1116
Missouri P. R. Co. v. United States (189 U. S. 274) ..... 811
Mobile, Mobile Transp. Co. v..... 266
Mobile Transp. Co. v. Mobile (187 U. S. 479) ..... 266
Moise, Hennessy v..... 698
Montana Ore Purchasing Co., Boston & M. Consol. Copper & Silver Min. Co. v..... 626
Montana Ore Purchasing Co., Boston & M. Consol. Copper & Silver Min. Co. v..... 634
Montgomery v. Portland (190 U. S. 89) 965
Moore v. Parker (Mem.) (187 U. S. 644) ..... 347
v. Southern R. Co. (Mem.) (189 U. S. 513) ..... 924
Moseley, United States v..... 198
Moss v. Glenn (Mem.) (189 U. S. 506) 921
Moy Yee Tai v. United States (Mem.) (187 U. S. 652) ..... 350
Muir, United States Fidelity & G. Co. v. (Mem.) ..... 348
Mullins, United States v. (Mem.) .... 924
Murphy, Kirwan v..... 698
Mutual L. Ins. Co. v. Hill (Mem.) (188 U. S. 742) ..... 678
v. McGrew (188 U. S. 291) .... 480
Mutual Reserve Fund Life Asso. v. Phelps (190 U. S. 147) .... 987

N.

Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. (189 U. S. 221) ..... 782
National Bank & Loan Co. v. Carr (189 U. S. 426) ..... 881
v. Petrie (189 U. S. 423) ..... 879
National Glass Co. v. Bryce Bros. Co. (Mem.) (187 U. S. 648) .. 348
National Railway Pub. Co., United States ex rel., Payne v. (Mem.) ..... 924
Nellis, Evans v..... 173
Nelson v. Northern P. R. Co. (188 U. S. 108) ..... 406
Nester v. Church (Mem.) (189 U. S. 505) ..... 921
New Hampshire, Collins v. (Mem.) ... 344
New Hope, Western U. Teleg. Co. v. 240
New Orleans, Emsheimer v. (Mem.) .. 923
New Orleans & W. Packet Co. v. Railroad Commission (Mem.) (187 U. S. 652) ..... 349
New York, Home for Incurables v..... 117
New York ex rel. Cayadutta Plank Road Co. v. Cummings (Mem.) (187 U. S. 650) .. 349
Corkran, Hyatt v..... 657
New York L. Ins. Co., Johnson v.... 273
New York, N. H. & H. R. Co. v. McKeon (Mem.) (189 U. S. 508) ..... 922
Nex v. United States (189 U. S. 199) 775
United States v..... 775
Northampton, Clarke v. (Mem.) ..... 924
North Carolina, Caldwell v..... 336
Northern C. R. Co. v. Maryland (187 U. S. 258) ..... 167
Northern P. R. Co. v. Adams (Mem.) (187 U. S. 643) ..... 346
Nelson v..... 406
v. Soderberg (188 U. S. 526) .. 575
v. Townsend (190 U. S. 267) .. 1044

O.

O'Brien v. Shine (Mem.) (189 U. S. 516) ..... 925

Ocean S. S. Co. v. Crooks (Mem.) (190 U. S. 559) ..... 1184
Officers & Crew of The Mangrove, Officers & Enlisted Men of The New York, The Indiana & The Wilmington v..... 664
United States v..... 664
Officers & Enlisted Men of The New York, The Indiana & The Wilmington v. Officers & Crew of the Mangrove (188 U. S. 720)..... 664
Oklahoma, Queenan v..... 1175
Olcott v. Cartwright (Mem.) (190 U. S. 560)..... 1184
Witherspoon v. (Mem.)..... 923
Old Colony Trust Co., Wall v. (Mem.) 344
Omaha Bldg. & Constr. Co., United States Fidelity & Guaranty Co. v. (Mem.)..... 346
O'Neal v. United States (190 U. S. 36) 945
Onondaga Nation v. Thacher (189 U. S. 306)..... 826
Ontonagon, Diamond Match Co. v.... 394
Orcutt, Supreme Council A. L. of H. v. (Mem.)..... 1183
Oregon & C. R. Co. v. United States (189 U. S. 103)..... 726
v. United States (189 U. S. 116) 732
v. United States (190 U. S. 186) 1012
Oriente, The, United States v..... 900
Orient Ins. Co. v. Leonard (Mem.) (187 U. S. 645)..... 347
Osborn, Detroit, Ft. W. & B. I. R. Co. v..... 860
Osceola, The (189 U. S. 158)..... 760
Oshkosh, Oshkosh Waterworks Co. v... 249
Oshkosh Waterworks Co. v. Oshkosh (187 U. S. 437)..... 249
Otis & Gassman v. Parker (187 U. S. 606)..... 323
Otis, W. & Co., Hutchinson v..... 1179
Owens, Wilkinson v. (Mem.)..... 347

P.

Pacific Coast Co. v. Reynolds (Mem.) (187 U. S. 640)..... 345
Pacific Coast S. S. Co. v. United States (187 U. S. 454)..... 256
Pacific Land & Improv. Co. v. Elwood Oil Co. (190 U. S. 316).. 1073
Pacific Steam Whaling Co. v. United States (187 U. S. 447).... 253
Page v. Edmunds (187 U. S. 596).... 318
Pam-to-pee v. United States (187 U. S. 371)..... 221
Paquete Habana, The. See United States v. The Paquete Habana.
Paquete Habana, The, United States v. 900
Pardee v. Aldridge (189 U. S. 429).. 883
Park, Manley v..... 296
Parker, Moore v. (Mem.)..... 347
Otis & Gassman v..... 323
Williams v..... 559
Patterson, Buchanan v..... 1093
v. The Eudora (190 U. S. 169) 1002
v. Wade (Mem.) (188 U. S. 741) 677
Payne v. United States ex rel. National Railway Pub. Co. (Mem.) (189 U. S. 512)..... 924
Payne v. United States ex rel. Railway List Co. (Mem.) (189 U. S. 512)..... 924
Peck Bros. & Co., Peck Bros. Co. v. (Mem.)..... 346
Peck Bros. Co. v. Peck Bros. & Co. (Mem.) (187 U. S. 643).. 346
Peckham Motor Truck & Wheel Co., Brill v..... 706
Peerless Rubber Mfg. Co., White v. (Mem.)..... 349
Pennsylvania use of Wells, McCann v. (Mem.)..... 350
Pennsylvania R. Co., Buston v. (Mem.) 923
Penny, McClung v..... 751
Peoria, D. & E. R. Co., Chamberlin v. (Mem.)..... 926
Perkins v. Hendryx (Mem.) (187 U. S. 643)..... 346
Perkins County v. Graff (Mem.) (187 U. S. 642)..... 346
Petrie, National Bank & Loan Co. v... 879
Phelps, Mutual Reserve Fund Life Asso. v..... 987
Phenix Ins. Co., Guarantee Co. of N. A. v. (Mem.)..... 345
v. Leonard (Mem.) (187 U. S. 645)..... 347
Philadelphia, Atlantic & P. Teleg. Co. v..... 995
Phillips, United States ex rel., v. Hitchcock (Mem.) (189 U. S. 507)..... 922
United States ex rel., v. Ware (Mem.) (189 U. S. 507)... 922
Pickens v. Roy (187 U. S. 177)..... 128
Piper, Sawyer v..... 757
Poder De Dios, The, United States v.. 900
Polsdorfer, Ayres v..... 314
Porter, Burlington Trust Co. v. (Mem.) 345
Portland, Montgomery v..... 965
Post, Ex parte (Mem.) (190 U. S. 557) 1183
Potter v. Hall (189 U. S. 292)..... 817
Pratt, Brooks v. (Mem.)..... 348
Presho, Hunnewell v. (Mem.)..... 1185
Prout v. Starr (188 U. S. 537)..... 584
Pryor, Foster v..... 835
Pullman Co. v. Adams (189 U. S. 420) 877

Q.

Queenan v. Oklahoma (190 U. S. 548) 1175
Queen Elizabeth, The, Holmes v. (Mem.)..... 1184

R.

Railroad Co., Baltimore & O., Tubman v..... 946
Baltimore & O., v. Wabash R. Co. (Mem.) (187 U. S. 650) 349
Baltimore & O., Winslow v.... 635
Belleville & S. I., v. Citizens' Sav. & L. Asso. (Mem.) (187 U. S. 645)..... 347
Chicago & E. v. Shaw (Mem.) (187 U. S. 640)..... 345
Chicago, B. & Q., v. Wolfe (Mem.) (187 U. S. 638).. 344

Railroad Co., Delaware, L. & W., v. Devore (Mem.) (190 U. S. 561) .... 1184
Lake Street Elev., Farmers' Loan & T. Co. v. (Mem.) .. 1184
Louisville & N., Interstate Commerce Commission v. .... 1047
Louisville & N., Wright v. (Mem.) .... 924
Memphis & C., Rothschild v. (Mem.) .... 677
Mexican Nat., v. Jackson (Mem.) (189 U. S. 512) .... 924
Mexican Nat. Slater v. (Mem.) 348
Minneapolis & St. L. v. Gano (Mem.) (190 U. S. 557) .. 1183
New York, N. H., v. McKeon (Mem.) (189 U. S. 508) 922
Oregon & C., v. United States (189 U. S. 116) .... 732
Oregon & C., v. United States (189 U. S. 103) .... 726
Oregon & C., v. United States (190 U. S. 186) .... 1012
Pennsylvania, Buston v. (Mem.) 923
Southern P., v. United States (189 U. S. 447) .... 896
Southern P., v. Wood (Mem.) (187 U. S. 652) .... 350
Wabash, Baltimore & O. R. Co. v. (Mem.) .... 349
Railroad Commission, New Orleans & W. Packet Co. v. (Mem.) .. 349
Railroad Equipment Co. v. Southern R. Co. (Mem.) (187 U. S. 653) 350
Railway Co., Chicago City, Robinson v. (Mem.) .... 1184
Cleveland, C. C. & St. L., v. Clyde (Mem.) (189 U. S. 516) .... 925
Detroit, Ft. W. & B. I., v. Osborn (189 U. S. 383) .... 860
Kansas City S., Billingslea v. (Mem.) .... 925
Kansas City S., Hanley v. .... 333
Kansas City Suburban Belt, v. Herman (187 U. S. 63) ... 76
Mexican C., v. Duthie (189 U. S. 76) .... 715
Mexican C., v. Eckman (187 U. S. 429) .... 245
Minneapolis, St. P. & S. S. M., Bankers' Mut. Casualty Co. v. (Mem.) .... 348
Missouri P., v. United States (189 U. S. 274) .... 811
Northern C., v. Maryland (187 U. S. 258) .... 167
Northern P., v. Adams (Mem.) (187 U. S. 643) .... 346
Northern P., Nelson v. .... 406
Northern P., v. Soderberg (188 U. S. 526) .... 575
Northern P., v. Townsend (190 U. S. 267) .... 1044
Peoria, D. & E., Chamberlin v. (Mem.) .... 926
Rio Grande W., Telluride Power Transmission Co. v. .... 307
Southern v. Allison (190 U. S. 326) .... 1078
Southern, Calvert v. (Mem.) ... 343
Railway Co., Southern v. Craig (Mem.) (187 U. S. 641) .. 345
Southern, Moore v. (Mem.) .... 924
Southern P., v. Jack (Mem.) (187 U. S. 653) .... 350
Southern, Railroad Equipment Co. v. (Mem.) .... 350
Texas & P., v. Behymer (189 U. S. 468) .... 905
Texas & P., v. Carlin (189 U. S. 354) .... 839
Texas & P., v. White (Mem.) (187 U. S. 654) .... 350
Texas & P. v. Watson (190 U. S. 287) .... 1057
Railway List Co., United States ex rel., Payne v. (Mem.) .... 924
Randle, Gordon v. .... 875
Randolph v. Scruggs (190 U. S. 533) . 1165
Rankin v. Chase Nat. Bank (188 U. S. 557) .... 594
v. Fidelity Ins. T. & S. D. Co. (189 U. S. 242) .... 792
Raub v. Carpenter (187 U. S. 159) .. 119
Rawson v. Western Sand Blast Co. (Mem.) (187 U. S. 649) .. 348
Rayburn, Illinois ex rel., v. Binns (Mem.) (189 U. S. 505) .. 921
Raymond, Illinois ex rel., Chicago Theological Seminary v. .... 641
Read v. Mississippi County (Mem.) (188 U. S. 739) .... 677
Reetz v. Michigan (188 U. S. 505) .. 563
Reid v. Colorado (187 U. S. 137) .... 108
v. Jones (187 U. S. 153) .... 116
Reid, M. & Co. v. United States (Mem.) (190 U. S. 560) .... 1184
Re Key (189 U. S. 84) .... 720
Sachs (190 U. S. 1) .... 933
Watts (190 U. S. 1) .... 933
Reynolds, Pacific Coast Co. v. (Mem.) 345
Rhoads, Kelley v. .... 359
Rhode Island Locomotive Works v. Continental Trust Co. (Mem.) (187 U. S. 649) .... 348
R. H. White Co., Mifflin v. .... 1040
Richardson Drug Co., Hennessy v. .... 697
Rickert, United States v. .... 532
Rio Grande W. R. Co., Telluride Power Transmission Co. v. 307
Riverside Oil Co., United States ex rel., v. Hitchcock (190 U. S. 316) .... 1074
Roanoke, The (189 U. S. 185) .... 770
Robinson, Burget v. (Mem.) .... 677
v. Chicago City R. Co. (Mem.) (190 U. S. 559) .... 1184
Robinson & Co. v. Belt (187 U. S. 41) 65
Rogan, Weber v. .... 363
Rogers, De Cambra v. .... 734
Rood, Iowa v. .... 86
Ropes v. Clyde S. S. Co. (Mem.) (187 U. S. 645) .... 347
Romig v. Gillett (187 U. S. 111) .... 97
Rommel v. Barbour County Ct. (Mem.) (187 U. S. 654) .... 351
Rothschild v. Memphis & C. R. Co. (Mem.) (188 U. S. 740) .. 677
Rowley, Jaquith v. .... 620
Roy, Pickens v. .... 128
Royston v. Weis (Mem.) (187 U. S. 646) .... 347

Rubber Tire Wheel Co. v. Goodyear Tire & Rubber Co. (Mem.) (187 U. S. 641) ..... 345
Rural Independent School Dist. v. Fairfield (Mem.) (187 U. S. 643) ..... 346

S.

Sachs, Re (190 U. S. 1) ..... 933
St. Joseph & E. Power Co., Indiana Power Co. v. (Mem.) ..... 343
Sampson, United States v ..... 248
San Diego Land & Town Co. v. Jasper (189 U. S. 439) ..... 892
San Jose Land & Water Co. v. San Jose Ranch Co. (189 U. S. 177) ..... 765
San Jose Ranch Co., San Jose Land & Water Co. v ..... 765
Santiago Apostol, The, United States v. 900
Saratoga Vichy Spring Co., La Republique Francaise v. (Mem.) 1185
Sawyer v. Piper (189 U. S. 154) .... 757
Say On v. United States (Mem.) (187 U. S. 655) ..... 351
Schaefer v. Werling (188 U. S. 516) 570
Schulte v. Heman (Mem.) (189 U. S. 507) ..... 922
Schwartz v. Duss (187 U. S. 8) ..... 53
Scottish Union & Nat. Ins. Co. v. Herriot (Mem.) (187 U. S. 651) ..... 349
Scruggs, Randolph v ..... 1165
Seaman v. Berliner Gramaphone Co. (Mem.) (187 U. S. 646) .. 347
Sears v. Boston Street Comrs. (Mem.) (189 U. S. 515) ..... 925
Second Nat. Bank v. Fitzpatrick (Mem.) (189 U. S. 508) . 922
Security Trust Co. v. Black River Nat. Bank (187 U. S. 211) .... 147
v. Dent (187 U. S. 237) ..... 158
Seiler, Fuller & J. Mfg. Co. v. (Mem.) 1183
Sena v. United States (189 U. S. 233) 787
Severita, The, United States v ..... 900
Sexton v. California (189 U. S. 319) 833
Shaw, Chicago & E. R. Co. v. (Mem.) 345
Shedd, Hardin v ..... 1156
Shine, Grin v ..... 130
O'Brien v. (Mem.) ..... 925
Shurtleff v. United States (189 U. S. 311) ..... 828
Siegel v. Swarts (Mem.) (187 U. S. 638) ..... 344
Slater v. Mexican Nat. R. Co. (Mem.) (187 U. S. 647) ..... 348
Smith v. Brown (Mem.) (187 U. S. 637) ..... 344
Smoot, United States use of, Fidelity & Deposit Co. v ..... 194
Smythe v. United States (188 U. S. 156) ..... 425
Snyder, Allegheny Oil Co. v. (Mem.) 345
v. Bettman (190 U. S. 249) .. 1035
Soderberg, Northern P. R. Co. v..... 575
South Carolina, Brownfield v ..... 882
Southern P. Co., Johnson v. (Mem.) .. 1184
Southern P. R. Co. v. Jack (Mem.) (187 U. S. 653) ..... 350
v. United States (189 U. S. 447) 896
Southern P. R. Co. v. Wood (Mem.) (187 U. S. 652) ..... 350
Southern R. Co. v. Allison (190 U. S. 326) ..... 1078
Calvert v. (Mem.) ..... 343
v. Craig (Mem.) (187 U. S. 641) 345
Moore v. (Mem.) ..... 924
Railroad Equipment Co. v. (Mem.) ..... 350
Spratt, Thayer v ..... 845
Springer, Hegeman v. (Mem.) ..... 921
S. P. Shotter Co., United States v. (Mem.) ..... 678
Standard Sewing Mach. Co. v. Leslie (Mem.) (188 U. S. 740) .. 677
Stanly County v. Coler & Co. (190 U. S. 437) ..... 1126
Starr, Prout v ..... 584
Stewart v. Washington & A. S. S. Co. (187 U. S. 466) ..... 261
Stillwell, Eufaula Cotton Oil Co. v. (Mem.) ..... 923
Stone, Lawder v ..... 178
Stovell v. Dewey (188 U. S. 254) .... 463
Sun L. Ins. Co. v. McCabe (Mem.) (187 U. S. 650) ..... 349
Supreme Council A. L. of H. v. Orcutt (Mem.) (190 U. S. 558) ..... 1183
Swan & F. Co. v. United States (190 U. S. 143) ..... 984
Swann v. West Virginia (Mem.) (188 U. S. 739) ..... 677
Swarts, Siegel v. (Mem.) ..... 344
Sweet, United States v ..... 907

T.

Tacoma, Annie Wright Seminary v. (Mem.) ..... 345
Tarrance v. Florida (188 U. S. 519) 572
Taylor, United States v ..... 477
Telluride Power Transmission Co. v. Rio Grande W. R. Co. (187 U. S. 569) ..... 307
Tennessee, Cook v. (Mem.) ..... 344
v. Virginia (190 U. S. 64) ..... 956
Tennessee ex rel. Maloney v. Condon (189 U. S. 64) ..... 709
Texas & P. R. Co. v. Behymer (189 U. S. 468) ..... 905
v. Carlin (189 U. S. 354) ..... 849
v. Watson (190 U. S. 287) .... 1057
v. White (Mem.) (187 U. S. 654) ..... 350
Thacher, Onondaga Nation v ..... 826
Thayer v. Spratt (189 U. S. 346) .... 845
The Osceola (189 U. S. 158) ..... 760
The Roanoke (189 U. S. 185) ..... 770
Thomas v. Interstate Bldg. & L. Asso. (Mem.) (187 U. S. 652) .. 350
Times-Republican Printing Co., Given v. (Mem.) ..... 924
Toeppner, Elliott & Co. v ..... 200
Townsend, Northern P. R. Co. v..... 1044
Travers, Whalley v. (Mem.) ..... 678
Trowbridge, Lewis v. (Mem.) ..... 1183
Tsukamoto v. Lackmann (Mem.) (187 U. S. 635) ..... 343
Tubman v. Baltimore & O. R. Co. (190 U. S. 38) ..... 946
Turpin v. Lemon (187 U. S. 51) ..... 70

## U.


Uinta Tunnel Min. & Transp. Co., Creed & C. C. Min. & Mill. Co. v. (Mem.) ..... 923
Union & Planters' Bank v. Memphis (189 U. S. 71) ..... 712
Union Cent. L. Ins. Co., Burt v ..... 216
Union S. B. Co. v. Erie & W. Transp. Co. (189 U. S. 363) ..... 854
United States, Ambrosini v ..... 49
Anglo-American Provision Co. v. (Mem.) ..... 1184
v. Barnett (189 U. S. 474) ..... 908
v. Barringer (188 U. S. 577) ..... 602
Benziger v. (Mem.) ..... 1185
Bigby v ..... 519
Bird v ..... 100
Blackfeather v ..... 1099
Ching v. (Mem.) ..... 923
Crowley v. (Mem.) ..... 349
De Baca v. (Mem.) ..... 921
v. Dewey (188 U. S. 254) ..... 463
Dimmick v. (Mem.) ..... 923
v. Dorr (Sup. Ct. Philippine Islands) appx. I., ..... 1187
Downs v ..... 275
Du Shen Tau v. (Mem.) ..... 350
Foerster v. (Mem.) ..... 347
Francis v ..... 508
Helwig v ..... 614
Horman v. (Mem.) ..... 345
Hume v. (Mem.) ..... 923
Ketchum v. (Mem.) ..... 350
King Dung v. (Mem.) ..... 351
Lee Ah Yin v. (Mem.) ..... 351
Lee Chin Ching v. (Mem.) ..... 350
Lee Ling v. (Mem.) ..... 351
v. Lynah (188 U. S. 445) ..... 539
v. Michigan (190 U. S. 379) ..... 1103
v. Mission Rock Co. (189 U. S. 391) ..... 865
Missouri P. R. Co. v ..... 811
v. Moseley (187 U. S. 322) ..... 198
Moy Yee Tai v. (Mem.) ..... 350
v. Mullins (Mem.) (189 U. S. 513) ..... 924
v. Nix (189 U. S. 199) ..... 775
Nix v ..... 775
v. Officers & Crew of The Mangrove (188 U. S. 720) ..... 664
O'Neal v ..... 945
Oregon & C. R. Co. v ..... 732
Oregon & C. R. Co. v ..... 726
Oregon & C. R. Co. v ..... 1012
Pacific Coast S. S. Co. v ..... 256
Pacific Steam Whaling Co. v ..... 253
Pam-to-pee v ..... 221
Reid, M. & Co. v. (Mem.) ..... 1184
v. Rickert (188 U. S. 432) ..... 532
v. Sampson (187 U. S. 436) ..... 248
Say On v. (Mem.....) ..... 351
Sena v ..... 787
Shurtleff v ..... 828
Smythe v ..... 425
Southern P. R. Co. v ..... 896
v. S. P. Shotter Co. (Mem.) (188 U. S. 742) ..... 678
Swan & F. Co. v ..... 984
v. Sweet (189 U. S. 471) ..... 907
v. Taylor (188 U. S. 283) ..... 477
United States v. The Antonio Suarez (189 U. S. 453) ..... 900
v. The Antonio Y Paco (189 U. S. 453) ..... 900
v. The Cuatro De Settembre (189 U. S. 453) ..... 900
v. The Engracia (189 U. S. 453) 900
v. The Espana (189 U. S. 453) 900
The Expresso v. (Mem.) ..... 925
v. The Fernandito (189 U. S. 453) ..... 900
The Gibara Habana v. (Mem.) 925
v. The Lola (189 U. S. 453) ... 900
v. The Oriente (189 U. S. 453) 900
v. The Paquete Habana (189 U. S. 453) ..... 900
v. The Poder De Dios (189 U. S. 453) ..... 900
v. The Santiago Apostol (189 U. S. 453) ..... 900
v. The Severita (189 U. S. 453) 900
v. Williams (188 U. S. 485) ... 554
Yee Toy v. (Mem.) ..... 351
United States ex rel. Kilpatrick, Capdevielle v. (Mem.) ..... 923
Phillips v. Hitchcock (Mem.) (189 U. S. 507) ..... 922
Riverside Oil Co. v. Hitchcock (190 U. S. 316) ..... 1074
National Railway Pub. Co., Payne v. (Mem.) ..... 924
Railway List Co., Payne v. (Mem.) ..... 984
Phillips v. Ware (Mem.) (189 U. S. 507) ..... 922
United States use of Smoot, Fidelity Deposit Co. v. ..... 194
Vermont Marble Co., Burgdorf v. (Mem.) ..... 350
United States Fidelity & G. Co. v. Muir (Mem.) (187 U. S. 648) ..... 348
v. Omaha Bldg. & Constr. Co. (Mem.) (187 U. S. 642) ..... 346
United States Glue Co., Diamond Glue Co. v. ..... 328
United States L. Ins. Co., Cable v. (Mem.) ..... 1185


## V.


Van Buren v. McKinley (Mem.) (189 U. S. 516) ..... 925
Vanderbilt v. Coler (Mem.) (187 U. S. 654) ..... 350
Vandriss, Kearney County v. (Mem.) 346
Vermont, Doherty v. (Mem.) ..... 925
Vermont Marble Co., United States use of, Burgdorf v. (Mem.) ..... 350
Virginia, Tennessee v. ..... 956
Virginia-Carolina Chemical Co. v. Home Ins. Co. (Mem.) (189 U. S. 517) ..... 926


## W.


Wabash R. Co., Baltimore & O. R. Co. v. (Mem.) ..... 349
Wade, Patterson v. (Mem.) ..... 677
Waggoner v. Flack (188 U. S. 595) ..... 609

Wall v. Old Colony Trust Co. (Mem.) (187 U. S. 637) ..... 344
Ware, United States ex rel. Phillips v. (Mem.) ..... 922
Washington, Johanson v. ..... 1008
Washington & A. S. S. Co., Stewart v. 261
Washington Nat. Bldg. & L. Asso. v. Fiske (Mem.) (188 U. S. 740) ..... 677
Watkins, American Nat. Bank v. (Mem.) ..... 1183
Watson, Texas & P. R. Co. v. ..... 1057
Watts, Re (190 U. S. 1) ..... 933
Weber v. Rogan (188 U. S. 10) ..... 363
Weis, Lawrence & Co. v. (Mem.) .... 347
Royston v. (Mem.) ..... 347
Wells, Pennsylvania use of, McCann v. (Mem.) ..... 350
Werling, Schaefer v. ..... 570
Western Assur. Co. v. De Farconnet (Mem.) (190 U. S. 558) . 1183
Western Sand Blast Co., Rawson v. (Mem.) ..... 348
Western U. Teleg. Co. v. Missouri ex rel. Gottlieb (190 U. S. 412) 1116
v. New Hope (187 U. S. 419) .. 240
West Virginia, Swann v. (Mem.) ..... 677
W. G. Eads Brokerage Co. v. Fort Scott (Mem.) (187 U. S. 647) .. 348
Whalley v. Travers (Mem.) (188 U. S. 741) ..... 678
White v. Pearless Rubber Mfg. Co. (Mem.) (187 U. S. 649) .. 349
Texas & P. R. Co. v. (Mem.) .. 350
v. Wright (Mem.) (189 U. S. 507) ..... 922
Wilkes County v. Coler & Co. (Mem.) (189 U. S. 511) ..... 923
v. Coler & Co. (190 U. S. 107) 971
Wilkinson v. Owens (Mem.) (187 U. S. 646) ..... 347
Williams, Crabb v. (Mem.) ..... 347
v. Parker (188 U. S. 491) ..... 559
United States v. ..... 554
Williamson, Eastern Bldg. & L. Asso. v. 735
Wilson, Hartford F. Ins. Co. v. ..... 261
Kilham v. (Mem.) ..... 348
Wiltsie, Bank of Commerce v. (Mem.) 921
Winebrenner v. Forney (189 U. S. 148) ..... 754
Winslow v. Baltimore & O. R. Co. (188 U. S. 646) ..... 635
Winston v. Winston (Mem.) (189 U. S. 506) ..... 922
Wiser v. Lawler (189 U. S. 260) ..... 802
Witherow v. Carnegie Steel Co. (Mem.) (189 U. S. 516) .. 925
Witherspoon v. Olcott (Mem.) (189 U. S. 509) ..... 923
Wolfe, Chicago, B. & Q. R. Co. v. (Mem.) ..... 344
Wood, Southern P. R. Co. v. (Mem.) 350
Worden & Co. v. California Fig Syrup Co. (187 U. S. 516) ..... 282
Wright v. Henkel (190 U. S. 40) .... 948
v. Louisville & N. R. Co. (Mem.) (189 U. S. 512) ..... 924
White v. (Mem.) ..... 922
Wyman v. Herard (Mem.) (188 U. S. 743) ..... 678

Y.

Yamataya v. Fisher (189 U. S. 86) .. 721
Yee Toy v. United States (Mem.) (187 U. S. 655) ..... 351
Young Women's Christian Home v. French (187 U. S. 401) ... 233

Z.

Zane v. Hamilton County (189 U. S. 370) ..... 888

# CITATIONS

## IN OPINIONS OF THE JUDGES CONTAINED IN THIS BOOK.

### A.


Abbey v. W. B. Grimes Dry Goods Co. 44 Kan. 415, 418, 24 Pac. 426 ..... 176
Abbott v. Doe ex dem. Kennedy, 5 Ala. 393 ..... 270, 271
v. Hills, 158 Mass. 396, 33 N. E. 592 ..... 405
Adams v. Bancroft, 3 Sumn. 384, Fed. Cas. No. 44 ..... 986
v. Batchelder, 173 Mass. 258, 53 N. E. 824 ..... 445
v. Johnson, 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246 ..... 378, 379, 794
v. Shelbyville, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114 571
Adams Exp. Co. Cases, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527..... 1121
v. Ohio State Auditor, 165 U. S. 194, 220, 41 L. ed. 683, 695, 17 Sup. Ct. Rep. 305 ..... 999
Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Supp. Ct. Rep. 96 ..... 502, 505, 999
Agincourt, The 1 Hagg. Adm. 271.... 763
A. Heaton, The, 43 Fed. 592..... 764
Alden v. Gross, 25 Mo. App. 123 ..... 288
Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576 ..... 100
Alexander v. State, 86 Ga. 246, 10 L. R. A. 859, 12 S. E. 408 ..... 507
Alhambra, The, L. R. 6 Prob. Div. 68.: 166, 167
Allen v. Carter, 119 Pa. 192, 13 Atl. 70 ..... 458
v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525 ..... 801
v. Massey, 17 Wall. 351, 21 L. ed 542 ..... 68
v. National State Bank, 92 Md. 509, 52 L. R. A. 760, 48 Atl. 78 ..... 444
v. United States, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154 ..... 106
v. Walsh, 25 Minn. 543... 386, 387, 843–845
Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427 ..... 501, 1005
Almy v. California, 24 How. 169, 16 L. ed. 644 ..... 498
Aloe v. Fidelity Mut. Life Asso. 164 Mo. 675, 55 S. W. 993 ..... 144
Aloe v. Mutual Reserve Life Asso. 147 Mo. 561, 49 S. W. 553 .... 144
Amalia, The, 34 L. J. Adm. N. S. 21.. 904
American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758 ..... 721
American Net & Twine Co. v. Worthington, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55 986
American Pub. Co. v. Fisher, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618 ..... 1029
American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 47 L. ed. 90, 23 Sup. Ct. Rep. 33 ..... 1078
American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.. 672, 673
v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646 ..... 245, 714
Ames v. Swett, 33 Me. 479 ..... 773
Amicable Soc. v. Bolland, 4 Bligh N. R. 194, 211 ..... 218
An Arbitration Between Goodbody and Balfour, Williamson, & Co., Re, 4 Com. Cas. 119 ..... 167
Anderson v. Black, 70 Cal. 226, 11 Pac. 700 ..... 485
v. Philadelphia Warehouse Co. 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525.. 795, 797
v. Waco State Bank, 86 Tex. 618, 28 S. W. 344 ..... 612
Anderson County v. Beal, 113 U. S. 227, 28 L. ed. 966 ..... 1134
Andrews v. Andrews, 188 U. S. 14, 47 L. ed. 366, 23 Sup. Ct. Rep. 237 ..... 922
v. Mockford (1896) 1 Q. B. 372 807
v. Swartz, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389 ..... 566
Anglo-American Land, Mortg. & Agency Co. v. Dyer, 181 Mass. 593, 64 N. E. 416 ..... 787
Annie Wright Seminary v. Tacoma, 23 Wash. 169, 62 Pac. 499 345
Anonymous, 1 Salk. 260 ..... 675
Anvil Min. Co. v. Humble, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876 ..... 751
Ard v. Brandon, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406 ..... 412, 731

Arivaca Land & Cattle Co. v. United States, 184 U. S. 649, 46 L. ed 731, 22 Sup. Ct. Rep. 525 790
Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47.. 485, 486, 632
Arkansas Valley Smelting Co. v. Belden Min. Co. 127 U. S. 379, 32 L. ed. 246, 8 Sup. Ct. Rep. 1308 ..... 405
Armour Packing Co. v. Howe, 62 Kan. 587, 64 Pac. 43 ..... 753
Armstrong v. Athens County Treasurer, 16 Pet. 281, 285, 10 L. ed. 965, 966 ..... 119
v. Lake Champlain Granite Co. 147 N. Y. 495, 42 N. E. 186 583
Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023 ..... 922
Asher v. Texas, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1.... 339
999
Ashland Lumber Co. v. Detroit Salt Co. (Wis.) 89 N. W. 904.. 331
Aspden v. Nixon, 4 How. 498, 11 L. ed. 1074 ..... 155
Assessments of Lands, Re, 60 N. Y. 398 398
Assessor, The, v. Osborne, 9 Wall. 567, 19 L. ed. 748..... 103
Atchison, T. & S. F. R. Co. v. Franklin, 23 Kan. 74 ..... 449
v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609 ..... 673, 1183
Atherton v. Atherton, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544 ..... 372, 373
Atkins v. Fibre Disintegrating Co. 18 Wall. 272, 21 L. ed. 841 .. 1021
Atlanta, The, 2 Sprague, 251, Fed. Cas. No. 619, 3 Wall. 425, 18 L. ed. 253..... 667
Atlantic & P. R. Co. v. Hopkins, 94 U. S. 11, 24 L. ed. 48 ..... 995
Atlantic, The, Abb. Adm. 451, Fed. Cas. No. 620..... 764
Atlas Min. Co. v. Johnston, 23 Mich. 36 ..... 449
Atty.Gen. v. Welsh Granite Co. 35 Week. Rep. 617 ..... 584
v. Western U. Teleg. Co. 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889 ..... 999, 1121
Audubon v. Shufeldt, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735 ..... 1090
Ayers v. Watson, 113 U. S. 595, 28 L. ed. 1093, 5 Sup. Ct. Rep. 641 ..... 915
v. Wiswall, 112 U. S. 187, 28 L. ed. 693, 5 Sup. Ct. Rep. 90 1125
Ayres v. Polsdorfer, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196 ..... 245

B.

Backus v. Ft. Street Union Depot Co. 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445 ..... 562
Bacon v. Hooker ,177 Mass. 335, 58 N. E. 1078 ..... 445
Bagnell v. Broderick (1839) 13 Pet. 436, 10 L. ed. 235 ..... 1147
Bailey v. Birkenhead, L. & C. Junction R. Co. 12 Beav. 433 ..... 786
v. District of Columbia, 4 App. D. C. 356 ..... 198
v. Tillinghast, 40 C. C. A. 93, 99 Fed. 801 ..... 393
Bain, Ex parte, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781.. 1033
Baker, Re, 96 Fed. 954 ..... 1093
v. Baldwin, 187 U. S. 61, 47 L. ed. 75, 23 Sup. Ct. Rep. 19 90
v. Grice, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323 921
v. Kenworthy, 41 N. Y. 215... 558
v. Nachtrieb, 19 How. 126, 15 L. ed. 528 ..... 55, 59
Baldwin v. Baker, 121 Mich. 259, 80 N. W. 36 ..... 76
v. Kansas, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193 108
Balfour v. Portland, 28 Fed. 738.... 1122
Ballock v. State, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184..... 327, 507
Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231 ..... 103
v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503 ..... 275, 484, 922
Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972.. 275, 739
Bank of Commerce, Re, 153 Ind. 460, 47 L. R. A. 489, 53 N. E. 950, 55 N. E. 224 ..... 921
v. Tennessee (1881) 104 U. S. 493, 26 L. ed. 810 ..... 715
v. Tennessee Use of Memphis, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456.. 648
715
v. Wiltsie, 153 Ind. 460, 47 L. R. A. 489, 53 N. E. 950, 55 N. E. 224 ..... 921
Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1345, 26 So. 70.. 294
Barden v. Northern P. R. Co. 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030 ..... 424
Bardes v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000... 129, 130, 203
622, 623
Bardon v. Northern P. R. Co. 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856 ..... 900, 1014
Barney v. Keokuk (1876) 94 U. S. 324, 24 L. ed. 224.....271, 1145
1146, 1148
v. Latham, 103 U. S. 212, 26 L. ed. 517 ..... 1124, 1126
v. Winona & St. P. R. Co. 117 U. S. 228, 29 L. ed. 858, 6 Sup. Ct. Rep. 654 ..... 731
Barnitz v. Beverly, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042 ..... 251
Barrows v. Downs, 9 R. I. 446, 11 Am. Rep. 283 ..... 785

Barry v. Edmunds, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501 ..... 918
Bartlett v. Bramhall, 3 Gray, 257 .... 1170
v. Kane, 16 How. 263, 14 L. ed. 931 ..... 619
Bass, Re, 3 Woods, 382, Fed. Cas. No. 1,091 ..... 1063
Bath Gaslight Co. v. Claffy, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390 ..... 741
Bauerman v. Radenius, 7 T. R. 663 ... 675
Bauman v. Ross, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966 ..... 294
Bauserman v. Blunt, 147 U. S. 652, 37 L. ed. 318, 13 Sup. Ct. Rep. 466 ..... 156
Baxendale v. Eastern Counties R. Co. 4 C. B. N. S. 63 ..... 816
Baxter, Re, 12 Fed. 72 ..... 1182
v. Wade, 39 W. Va. 281, 19 S. E. 404 ..... 73
Beals v. Cone, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275 572
Beard v. Union & American Pub. Co. 71 Ala. 60 ..... 873
Beaupre v. Noyes, 138 U. S. 402, 34 L. ed. 992, 11 Sup. Ct. Rep. 296 ..... 1183
Beaver Coal Co., Re, 110 Fed. 630.... 127
Bedford v. Eastern Bldg. & L. Asso. 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597.. 332, 875
Beecher v. Wetherby (1877) 95 U. S. 525, 24 L. ed. 441 ..... 306
Belfast, The, v. Boon, 7 Wall. 624, 19 L. ed. 266..... 773
Belford, C. & Co. v. Scribner, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734 ..... 461, 1042
Bell v. Bell, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551.. 372, 373, 922
v. Wilson, 2 Drew. & S. 395 ... 584
Belleville & I. R. Co. v. Gregory (1853) 15 Ill. 20, 58 Am. Dec. 589 ..... 859, 860
Belleville Sav. Bank v. Bornman, 124 Ill. 200, 16 N. E. 210 ..... 264
Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 239, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533, 535 ..... 74
Belo v. Forsythe County, 76 N. C. 489 973
Belt, Re, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987 .... 1183
Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747 ..... 849
Ben Flint, The, 1 Abb. (U. S.) 126, 1 Biss. 562, Fed. Cas. No. 1,229.. ..... 764
Bennett v. Missouri P. R. Co. 105 Mo. 645, 16 S. W. 947 ..... 216
Benson, Ex parte, 18 S. C. 38, 44 Am. Rep. 564 ..... 816
v. McMahon, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240 ..... 138, 725, 954
Benton v. Martin, 52 N. Y. 570 ..... 264
Berrendo Stock Co. v. McCarty, 20 S. W. 933 ..... 612
Bevans v. United States, 13 Wall. 56, 20 L. ed. 531 ..... 429
Bigelow v. Baldwin, 1 Gray, 245 ..... 1170
Biggs v. McBride, 17 Or. 640, 5 L. R. A. 115, 21 Pac. 878 ..... 831
Bigler v. Waller, 14 Wall. 297, 20 L. ed. 891 ..... 100
Birkley v. Presgrave, 1 East, 220 ..... 391
Bissell v. Michigan S. & N. I. R. Cos. 22 N. Y. 258 ..... 741
Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.. 438, 632
Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277 ..... 672
Blagge v. Balch, 162 U. S. 439, 40 L. ed. 1032, 16 Sup. Ct. Rep. 853 ..... 1096, 1097
Blair, Re, 108 Fed. 529 ..... 127
Blake v. United States, 103 U. S. 227, 26 L. ed. 462 ..... 831
Blakemore, Ex parte (1877) L. R. 5 Ch. Div. 372 ..... 1090, 1091
Bleistein v. Donaldson Lithographing Co. 188 U. S. 239, 47 L. ed. 460, 23 Sup. Ct. Rep. 298.. 921
Bloodgood v. Grasey, 31 Ala. 575 ..... 68
Blunt v. Patten, 2 Paine, 397, Fed. Cas. No. 1,580 ..... 462
Blythe v. Hinckley, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497 ..... 247, 917
v. Hinckley, 180 U. S. 338, 45 L. ed. 561, 21 Sup. Ct. Rep. 390 ..... 192, 193
Blythe Co. v. Blythe, 172 U. S. 644, 43 L. ed. 1183, 19 Sup. Ct. Rep. 873 ..... 917
Boese v. King, 108 U. S. 379, 27 L. ed. 760, 2 Sup. Ct. Rep. 765 .. 1170
Bogy v. Daugherty, 184 U. S. 696, 46 L. ed. 763, 22 Sup. Ct. Rep. 938 ..... 344
Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287 ..... 1024
Booth v. Clark, 17 How. 322, 15 L. ed. 164 ..... 388
v. Illinois, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425 ..... 327, 328
Borgmeyer v. Idler, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34 ..... 580
Boring v. Griffith, 1 Heisk. 457 ..... 712
Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434 ..... 634, 635
Boston & W. R. Corp. v. Old Colony R. Corp. 12 Cush. 605, 3 Allen, 142 ..... 864
Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15 ..... 162
Boulo v. New Orleans, M. & T. R. Co. 55 Ala. 480 ..... 270, 271
Bouverie v. Prentice, 1 Bro. Ch. 200 391

Bowden v. Johnson, 107 U. S. 251, 27 L. ed. 386, 2 Sup. Ct. Rep. 246 . . . . . 378, 379, 794
Bowman v. Chicago & N. W. R. Co. 125 U. S. 482, 31 L. ed. 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689.... 499, 503 999
Boyd, Ex parte, 105 U. S. 647, 26 L. ed. 1200 ..... 995
Boyden v. United States, 13 Wall. 17, 20 L. ed. 527 ..... 429
Brady v. Williams, 23 Land Dec. 533, 25 Land Dec. 55 ..... 757
Braly v. Seaman, 30 Cal. 610 ..... 100
Brant v. Virginia Coal & I. Co. 93 U. S. 326, 23 L. ed. 927 ..... 810
Brashear v. West, 7 Pet. 608, 8 L. ed. 801 ..... 67
Brennan v. Titusville, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829 . . . . . 340, 341, 999
v. Willson, 71 N. Y. 502 ..... 639
Bridges, Second Comptroller's Letter Book, vol. 18, p. 184 ..... 907
Brill v. Third Ave. R. Co. 103 Fed. 289 . . . . . 706, 707
Brinckerhoff v. Lansing, 4 Johns. Ch. 65, 8 Am. Dec. 538 ..... 810
Bristol v. Washington County, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585 ..... 444
British Columbia & V. I. Spar, Lumber & Saw-Mill Co. v. Nettleship, L. R. 3 C. P. 499 1173
Bromage v. Gemming, 1 Rolle, 368... 1173
Bronson v. Kinzie, 1 How. 311, 11 L. ed. 143 ..... 250
v. Schulten, 104 U. S. 410, 26 L. ed. 797 ..... 947
Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443 ..... 108
Brophy v. Richeson (1894) 137 Ind. 114, 36 N. E. 424 ..... 1140
Brown v. American Cent. Ins. Co. 70 Iowa, 390, 30 N. W. 647.. 264
v. Clements, 3 How. 650, 11 L. ed. 767 ..... 1149, 1156
v. Hitchcock, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485 . . . . . 705, 1150
v. Houston, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091 . . . . . 361, 398, 399, 445, 499, 531, 970
v. Keene, 8 Pet. 115, 8 L. ed. 886 916
v. M'Gran, 14 Pet. 479, 10 L. ed. 550 . . . . . 797
v. Maryland, 12 Wheat. 419, 6 L. ed. 678.. 340, 498, 531, 970
v. Overton, 1 Sprague, 462, Fed. Cas. No. 2,024 ..... 764
v. Shannon, 20 How. 55, 15 L. ed. 826 ..... 915
v. The Bradish Johnson, 1 Woods, 301, Fed. Cas. No. 1,992 . . . . . 764
v. United States, 8 Cranch, 110, 3 L. ed. 504 ..... 473
Browne v. Turner, 176 Mass. 9, 56 N. E. 969 ..... 991
Browning v. Powers, 142 Mo. 322, 44 S. W. 224 ..... 216
Bruecher v. Port Chester, 101 N. Y. 240, 4 N. E. 272 ..... 1122
Bryan v. Bernheimer, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557 ..... 622, 623, 1170
v. Brasius, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803 . . . . . 100
Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974 ..... 785
Budd's Case, 3 De G. F. & J. 297 ..... 378
Buffalo v. Balcolm, 134 N. Y. 532, 32 N. E. 7 ..... 741
Buffington v. Day, 11 Wall. 113, 20 L. ed. 122 ..... 52, 1038
Buford v. Houtz, 133 U. S. 320, 33 L. ed. 618, 10 Sup. Ct. Rep. 305 . . . . . 363
Building & Loan Asso. v. Price, 169 U. S. 45, 42 L. ed. 655, 18 Sup. Ct. Rep. 251 ..... 917
Bullock v. Wilson, 2 Port. (Ala.) 436 . 271
Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018 . . . . . 96, 735
Burgess v. Seligman, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10 . . . . . 154, 1131, 1132
Burke v. Dulaney, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816 . . . . . 264
Burlington Lumber Co. v. Willetts, 118 Ill. 559, 9 N. E. 254 ... 361
Burmeister v. Howard, 1 Wash. Ter. 208 . . . . . 408
Burns, Re, 20 Land Dec. 28, 23 Land Dec. 430 ..... 704
Buron v. Denman, 2 Exch. 167 ..... 903
Burroughs v. State, 17 Fla. 643 ..... 575
Burrow-Giles Lithographing Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279 . . . . . 461
Burruss v. National Life Asso. 96 Va. 543, 32 S. E. 49 ..... 452
Burst v. Jackson, 10 Barb. 219 ..... 773
Burton v. State, 115 Ala. 1, 22 So. 585 107
Butler v. Gage, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235.. 921
Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100 . . . . . 411, 412, 419 422, 423
Buttz Case. See Buttz v. Northern P. R. Co. 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100
Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906 . . . . . 155
Byrne v. Romaine, 2 Edw. Ch. 445 ... 640

C.

Cagle v. Mendenhall, 20 Land Dec. 446, 26 Land Dec. 177 ..... 787

Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513 ..... 1071
Cairo v. Zane, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803 .. 1134
Caldwell v. Deposit Bank, 22 Ky. L. Rep. 684, 58 S. W. 589 .. 995
Calhoun v. Violet, 173 U. S. 60, 43 L. ed. 614, 19 Sup. Ct. Rep. 324 ..... 819
California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350. 490
Callahan v. Woodbridge, 171 Mass. 595, 51 N. E. 176 ..... 444
Callan v. Wilson, 127 U. S. 540, 32 L. ed. 223, 8 Sup. Ct. Rep. 1301 ..... 1026
Calvert v. Southern R. Co. 64 S. C. 143, 41 S. E. 963 ..... 343
Cambridge v. Railroad Comrs. 153 Mass. 161, 26 N. E. 241... 894
Cameron v. United States, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184 ..... 922
v. United States, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595 ..... 1013
Campbell v. Chicago, M. & St. P. R. Co. 86 Iowa, 587, 17 L. R. A. 443, 4 Inters. Com. Rep. 403, 53 N. W. 351..... 336
v. United States, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759, 765 ..... 986
Canada Southern R. Co. v. Gebhard, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363 786
Canal & C. Streets R. Co. v. Hart, 114 U. S. 654, 29 L. ed. 226, 5 Sup. Ct. Rep. 1127 ..... 995
Canal Appraisers v. People ex rel. Tibbits, 17 Wend. 604 ..... 548
Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423 ... 531
Carey v. Williams, 25 C. C. A. 227, 51 U. S. App. 204, 79 Fed. 906 797
Carleton v. Carleton, 85 N. Y. 313.... 100
Carlisle v. United States, 16 Wall. 147, 21 L. ed. 426 ..... 1021
Carnahan v. Connolly (Colo. App.) 68 Pac. 836 ..... 343
Carpenter v. United Statees, 17 Wall. 489, 21 L. ed. 680 ..... 523
v. Wood, 1 Met. 409 ..... 1163
Carr v. Ellison (1838) 20 Wend. 178 639
v. Quigley, 149 U. S. 652, 37 L. ed. 885, 13 Sup. Ct. Rep. 961 ..... 1013
Carrell v. Mitchell, 37 W. Va. 130, 136, 16 S. E. 453 ..... 73
Carrick v. Lamar, 116 U. S. 423, 29 L. ed. 677, 6 Sup. Ct. Rep. 424 ..... 705
Carrier's Case, 57 Fed. 578 ..... 956
Carroll County v. Smith, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539 ..... 154
Carte v. Evans, 27 Fed. 861 ..... 461
Carter v. Mutual L. Ins. Co. 10 Hawaii, 117 ..... 482, 486
Carter v. Texas, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687 ..... 574, 883
Cary v. Curtis, 3 How. 236, 11 L. ed. 576 ..... 256
Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211 ..... 946
Casey v. Galli, 94 U. S. 673, 24 L. ed. 168 ..... 393
Cashman v. Root, 89 Cal. 373, 12 L. R. A. 511, 26 Pac. 883 .... 328
Cass Farm Co. v. Detroit, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644 ..... 572
Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229 ..... 921
Castro v. De Uriarte, 16 Fed. 93 ..... 136
Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120 ..... 68
Catholic Bishop v. Gibbon, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779 ..... 1011, 1071
Cedar Rapids & M. River R. Co. v. Herring, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485 ..... 731
Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80 ..... 272, 365
Central P. R. Co. v. Beck, 19 Land Dec. 100 ..... 421
v. California, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766 ..... 333, 1000
Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387 ..... 1170
Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478 .....880, 1153
Chadwick v. Kelly, 187 U. S. 540, 47 L. ed. 293, 23 Sup. Ct. Rep. 175 ..... 922
Champion v. Ames, 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321 ..... 510, 512, 513
Chanute v. Trader, 132 U. S. 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67 ..... 192, 193
Chapin v. Bourne, 8 Cal. 294 ..... 869
Chapman, Re, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 331 1183
v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426 915
Chappell v. United States, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397 ..... 780
Charles River Bridge v. Warren Bridge, 11 Pet. 420, 9 L. ed. 773 ..... 1153
Cherokee Nation v. Georgia (1831) 5 Pet. 1, 8 L. ed. 25 ..... 306
v. Hitchcock, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115 ..... 307, 537
v. Journeycake, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55 ..... 190, 756

Cherokee Nation v. Southern K. R. Co. 135 U. S. 641, 653, 34 L. ed. 295, 300, 10 Sup. Ct. Rep. 965.....189, 537, 562
Cherokee, The, 2 Sprague, 235, Fed. Cas. No. 2,640..... 667
Cherokee Tobacco, 11 Wall. 616, 20 L. ed. 227 ..... 306
Cherokee Trust Funds, The, 117 U. S. 288, 308, 29 L. ed. 880, 886, 6 Sup. Ct. Rep. 718..... 190
Chester City v. Western U. Teleg. Co. 154 Pa. 464, 25 Atl. 1734 244
Chetwood, Re, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385 946
Chicago v. Taylor, 125 U. S. 161, 31 L. ed. 638, 8 Sup. Ct. Rep. 820 549
Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398... 715, 739, 740
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581 .... 982
Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797 445
v. Zernecke, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229 ..... 344
Chicago, St. P. M. & O. R. Co., Re, 12 Land Dec. 259 ..... 421
Chinese Exclusion Case, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623 ..... 306
Chinnock's Case, Johns. V. C. (Eng.) 714 ..... 377
Chipman v. Manufacturers' Nat. Bank, 156 Mass. 147, 30 N. E. 610 444
Chisholm v. Georgia, 2 Dall. 419, 1 L. ed. 440 ..... 698
Chittenden v. Brewster, 2 Wall. 191, 17 L. ed. 839 ..... 588
Choctaw Nation v. United States, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75.. 301, 537, 538
Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523 ..... 787
Church v. Hubbart, 2 Cranch, 187, 2 L. ed. 249 ..... 785
Churchill v. Crease, 5 Bing. 177 ..... 777
v. Utica, 3 Wall. 573, 18 L. ed. 229 ..... 1037
Church of Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511 .....1021
Chusan, The, 2 Story, 455, Fed. Cas. No. 2,717..... 773
Cincinnati, N. O. & T. P. R. Co. v. Kentucky, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57 ..... 801, 802
Cincinnati, P. B. S. & P. Packet Co. v. Catlettsburg, 105 U. S. 559, 26 L. ed. 1169 ..... 1000
Cincinnati Siemens-Lungren Gas Illuminating Co. v. Western Siemens-Lungren Co. 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523 ..... 751
Citizens' Sav. Bank v. Owensboro, 173 U. S. 636, 641, 43 L. ed. 840, 842, 19 Sup. Ct. Rep. 530.. 172
City Nat. Bank v. Charles Baker Co. 180 Mass. 40, 61 N. E. 223 445
City of Alexandria, The, 17 Fed. 390.. 763, 764
City R. Co. v. Citizens' Street R. Co. 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653 ..... 145, 780
Civil Rights Cases, 109 U. S. 3, 13, 27 L. ed. 835, 3 Sup. Ct. Rep. 18 ..... 981
Clark v. Fredericks, 105 U. S. 4, 26 L. ed. 938 ..... 69
v. Gifford, 10 Wend. 310 ..... 264
v. Herington, 186 U. S. 206, 46 L. ed. 1128, 22 Sup. Ct. Rep. 872 ..... 900
v. Sawyer, 151 Mass. 64, 23 N. E. 726 ..... 1170, 1171
Clarke v. Rist, 3 McLean, 494, Fed. Cas. No. 2,861 ..... 127
Clayton v. Johnson, 36 Ark. 406, 424, 38 Am. Rep. 40 ..... 69
Clements v. Warner, 24 How. 394, 16 L. ed. 695 ..... 413
Cleveland P. & A. R. Co. v. Pennsylvania, 15 Wall. 300, 21 L. ed. 179 ..... 445
Clinch v. Financial Corporation, L. R. 4 Ch. 117 ..... 1126
Clotworthy v. Schepp, 42 Fed. 62 ..... 290
Clute v. Fisher, 65 Mich. 48, 31 N. W. 614 ..... 1148, 1149
Cobb v. Overman, 54 L. R. A. 369, 48 C. C. A. 223, 109 Fed. 65 1092
Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475... 333, 362, 399, 444, 445, 672
Cohen v. Virginia, 6 Wheat. 264, 5 L. ed. 257 ..... 418, 506
Collector, The v. Day, 11 Wall. 113, 20 L. ed. 122..... .....52, 1038
Collier v. Davis, 47 Ark. 367, 58 Am. Rep. 758, 1 S. W. 684 ..... 69
Colliery Engineer Co. v. United Correspondence Schools Co. 94 Fed. 152 ..... 461
Collins v. New Hampshire, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768 ..... 506
Collumb v. Read, 24 N. Y. 505..... 1171
Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579 ..... 1134
Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.....315–317, 580
Comegys v. Vasse, 1 Pet. 193, 7 L. ed. 108 ..... 1097
Commander-in-Chief, 1 Wall. 43, 17 L. ed. 609 ..... 904
Commercial Bank v. Buckingham, 5 How. 317, 12 L. ed. 169 ... 275
Com. v. Boston & M. R. Co. 3 Cush. 25 ..... 864
v. Comly, 3 Pa. St. 372 ..... 430
v. Felton, 101 Mass. 204 ..... 458
v. Hartnett, 3 Gray, 450 ..... 68
v. O'Connell, 8 Gray, 464 ..... 135

Com. v. Peaslee, 177 Mass. 267, 59 N. E. 55 ..... 510
v. Pindar, 11 Met. 539 ..... 135
v. Roark, 8 Cush. 210 ..... 135
v. Wolcott, 110 Mass. 67 ..... 135
Com. ex rel. Torrey v. Ketner, 92 Pa. 372, 37 Am. Rep. 692 ..... 457
Bowman v. Slifer, 25 Pa. 23, 64 Am. Dec. 680 ..... 831
Conde v. York, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234 ..... 880
Condon v. Maloney, 108 Tenn. 82, 65 S. W. 871 ..... 711
Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728..... 1124
Connecticut Mut. L. Ins. Co. v. Lathrop, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. Rep. 533... 1177
v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308 ..... 332, 994
v. Union Trust Co. 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119 ..... 785
Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397 ..... 288
Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431 ..... 328, 880
Conway v. Taylor, 1 Black, 603, 17 L. ed. 191 ..... 517
Cook v. Hart, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40 ... 662
Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435 ..... 343
Cooke v. Avery, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340 ..... 581
Cooley v. O'Connor, 12 Wall. 391, 20 L. ed. 446 ..... 1163
v. Philadelphia Port Wardens, 12 How. 299, 13 L. ed. 996 774
Cooper v. Cooper, 147 Mass. 370, 17 N. E. 892 ..... 524
v. Newell, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506 ..... 715
v. Roberts, 18 How. 173, 15 L. ed. 338 ..... 1010
Coosaw Min. Co. v. South Carolina, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689 ..... 539
Corbus v. Alaska Treadwell Gold Min. Co. 99 Fed. 338..... 258, 781
Cosmos Exploration Co. v. Gray Eagle Oil Co. 190 U. S. 301, 47 L. ed. 1064, 23 Sup. Ct. Rep. 692 ..... 1074
Cottingham v. Weeks, 54 Ga. 275 ... 220
Couch v. Steel, 3 El. & Bl. 402 ..... 765
Courier Lithographing Co. v. Donaldson Lithographing Co. 44 C. C. A. 296, 104 Fed. 993.461, 463
Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087 ..... 336, 499
Cowman v. Rogers, 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64 ..... 236
Cox v. United States, 6 Pet. 202, 8 L. ed. 370 ..... 431
v. United States ex rel. McGarrahan, 9 Wall. 298, 19 L. ed. 579 ..... 705
Coy, Re, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263 ..... 918
Craib v. D'Aeth, 7 T. R. 670 ..... 675
Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 744 ..... 498
Crapo v. Kelly, 16 Wall. 610, 21 L. ed. 430 ..... 444
Crespin v. United States, 168 U. S. 208, 42 L. ed. 438, 18 Sup. Ct. Rep. 53 ..... 791
Cropley v. Vogeler, 2 App. D. C. 28, 2 App. D. C. 340 ..... 198
Cross v. Harrison, 16 How. 184, 14 L. ed. 897 ..... 1022
v. North Carolina, 132 U. S. 131, 33 L. ed. 287, 10 Sup. Ct. Rep. 47 ..... 460
Crotty v. McKenzie, 10 Jones & S. 192 1181
Croucher v. Oakman, 3 Allen, 185 ... 764
Cruickshank v. Bidwell, 176 U. S. 73, 44 L. ed. 377, 20 Sup. Ct. Rep. 280 ..... 654, 705, 706
Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851 ..... 339, 499, 818, 999
Crystal Springs Land & Water Co. v. Los Angeles, 82 Fed. 114, Affirmed in 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573 ..... 491, 633
Culbertson v. Blanchard, 79 Tex. 486, 15 S. W. 700 ..... 612
Cumberland v. North Yarmouth, 4 Me. 459 ..... 1163
Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472 ..... 532, 969, 970
v. Missouri, 4 Wall. 277, 18 L. ed. 356 ..... 567
Cunningham v. German Ins. Bank, 41 C. C. A. 609, 101 Fed. 977, 4 Am. Bankr. Rep. 192 ... 1182
v. Macon & B. R. Co. 156 U. S. 400, 39 L. ed. 471, 15 Sup. Ct. Rep. 361 ..... 675
v. Pattee (1868) 99 Mass. 248 639
Curnutt v. Jones (1895) 21 Land Dec. 40 ..... 820
Curtis, Re, 91 Fed. 737, 36 C. C. A. 430, 94 Fed. 630 ..... 943
v. Fiedler, 2 Black, 461, 17 L. ed. 273 ..... 256
v. Whitney, 13 Wall. 68, 20 L. ed. 513 ..... 332

D.

Dahl v. Nelson, L. R. 6 App. Cas. 38.. 167
Daley v. People's Bldg. Loan & Sav. Asso. 172 Mass. 533, 52 N. E. 1090..... 740
Dalling v. Matchett, Willes Rep. 215.. 1163
Daniel Ball, The v. United States, 10 Wall. 557, 19 L. ed. 1002.. 399

**Dashiel** Case. See United States v. Dashiel, 4 Wall. 182, 18 L. ed. 319.
**Davidson** v. New Orleans, 96 U. S. 97, 24 L. ed. 616.....566, 801, 922
**Davis** v. Bohle, 34 C. C. A. 372, 92 Fed. 325..... 1170
v. Elmira Sav. Bank, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502..... 459
v. Fredericks, 105 U. S. 4, 26 L. ed. 938..... 69
**Deady** v. Townsend, 57 Cal. 298..... 485
**Dean** v. Simmons, 17 Land Dec. 526.. 818
**Debnam** v. Southern Bell Teleph. & Teleg. Co. 126 N. C. 831, 36 S. E. 269..... 1084
**Debs**, Re, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900..... 816
**Decatur** v. Paulding, 14 Pet. 497, 10 L. ed. 559..... 1078
**Degant** v. Michael, 2 Ind. 396..... 774
**De Groot** v. United States, 5 Wall. 431, 18 L. ed. 703..... 431
**Dejarnett** v. Haynes, 23 Miss. 600.... 781
**De Lamar's** Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715..... 90
**Delano** v. Butler, 118 U. S. 638, 30 L. ed. 261, 7 Sup. Ct. Rep. 39. 378
**Delaware** County v. Diebold Safe & Lock Co. 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399..... 247
**Delaware** Railroad Tax, 18 Wall. 206, 21 L. ed. 888..... 999
**Demarest** v. Hardham, 34 N. J. Eq. 469..... 392
**Demopolis** v. Webb, 87 Ala. 659, 6 So. 408..... 271
**Dempsey** v. Chambers, 154 Mass. 330, 13 L. R. A. 219, 28 N. E. 279..... 903
**Den** ex dem, Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372.....566, 725
**Dent** v. West Virginia, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231.....565, 567
**Detroit** v. Dean, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 560 259
v. Detroit Citizens' Street R. Co. 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410..... 891
v. Parker, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624..... 572
**Devonshire**, The, 8 Sawy. 209, 13 Fed. 39..... 68
**Deweese** v. Smith, 45 C. C. A. 408, 106 Fed. 438..... 344
**Dewey** v. Des Moines, 173 U. S. 200, 43 L. ed. 667, 19 Sup. Ct. Rep. 379..... 343
v. United States, 35 Ct. Cl. 172, 178 U. S. 510, 44 L. ed. 1170, 20 Sup. Ct. Rep. 981 465
**Dewey's** Case, 188 U. S. 254, 47 L. ed. 463, 23 Sup. Ct. Rep. 415 479
**Dickson** v. Wyman, 55 L. R. A. 349, 49 C. C. A. 574, 111 Fed. 726 717, 719
**District of Columbia** v. Bailey (1897) 171 U. S. 161, 43 L. ed. 118, 18 Sup. Ct. Rep. 868..... 173
v. Barnes, 187 U. S. 637, 47 L. ed. 344, 23 Sup. Ct. Rep... 226
v. Eslin, 183 U. S. 62, 46 L. ed. 85, 22 Sup. Ct. Rep. 17.. 226, 344
**Dodd** v. Ghiselin, 27 Fed. 405..... 156
**Dodge** v. Woolsey, 18 How. 331, 15 L. ed. 401.....258, 259, 781
**Doe** v. Childress, 21 Wall. 642, 22 L. ed. 549..... 126
**Doe** ex dem. Hallett v. Beebe (1851) 13 How. 25, 14 L. ed. 35..272, 1145
Kennedy v. Beebe, 8 Ala. 909.. 271
Pollard v. Greit, 8 Ala. 930.... 271
**Donch** v. Lake County, 4 Ind. App. 374, 30 N. E. 204..... 655
**Donnell** v. Kittrell (1892) 15 Land Dec. 580..... 820
**Doolan** v. Carr, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228.....581, 1013
**Dooley** v. United States, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762.....256, 550
**Douglas** v. Kentucky, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.....370, 501, 504
**Douglas County** v. Bolles, 94 U. S. 104, 24 L. ed. 46..... 1134
**Dow** v. Beidelman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.. 895
**Dower** v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.....203, 787
**Downes** v. Bidwell, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.....1023, 1024, 1030
**Dows** v. Chicago, 11 Wall. 108, 20 L. ed. 65..... 255
**Doyle** v. Heath, 22 R. I. 213, 47 Atl. 213..... 127
**Dreyer** v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28 108, 566, 921
**Drinkwine** v. Eau Claire, 83 Wis. 428, 53 N. W. 673....251, 252, 253
**Drinkwine** Case. See Drinkwine v. Eau Claire, 83 Wis. 428, 53 N. W. 673.....
**DuBois** v, Lake County, 4 Ind. App. 138, 30 N. E. 206..... 655
v. Lake County, 10 Ind. App. 347, 37 N. E. 1056..... 655
**Dudley** v. Collier, 87 Ala. 431, 6 So. 304..... 873
**Dullam** v. Willson, 53 Mich. 392, 51 Am. Rep. 128, 19 N. W. 112 831
**Duncan** v. Landis, 45 C. C. A. 666, 106 Fed. 839.....202, 203
v. Missouri, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570..... 216
**Dundee**, The, 1 Hagg. Adm. 109..471, 472
**Dunlop** v. Peter, 1 Cranch, C. C. 403, Fed. Cas. No. 4,168..... 570

Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588..... 886
Dwight v. Boston, 12 Allen, 316..... 672
Dyer v. Osborne, 11 R. I. 321, 23 Am. Rep. 460..... 672

E.

Early v. Homans, 16 How. 610, 14 L. ed. 1079..... 568
Eastern Band of Cherokee Indians v. United States, 117 U. S. 288, 308, 29 L. ed. 880, 886, 6 Sup. Ct. Rep. 718..... 190
Eastern Bldg. & Loan Asso. v. Ebaugh, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566..735, 739
v. Williamson, 189 U. S. 122, 47 L. ed. 735, 23 Sup. Ct. Rep. 527..... 844
Eastern Transp. Line v. Hope, 95 U. S. 297, 24 L. ed. 477..... 1059
Easton v. Iowa, 188 U. S. 220, 47 L. ed. 452, 23 Sup. Ct. Rep. 288..... 774
East Tennessee, V. & G. R. Co. v. Interstate Commerce Commission, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516 816, 1056
Eaton v. Boston, C. & M. R. Co. 51 N. H. 504, 12 Am. Rep. 147.. 549
Edgeworth v. Edgeworth, L. R. 4 H. L. 35..... 239
Edith, The, 94 U. S. 518, 24 L. ed. 167 772
Edith Godden, The, 23 Fed. 43..... 764
Edwards v. Elliott, 21 Wall. 532, 22 L. ed. 487..... 69
v. Kearzey, 96 U. S. 595, 24 L. ed. 793..... 250
v. Ogle (1881) 76 Ind. 302 1139, 1140
Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300 768, 849
Eidman v. Martinez, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515..... 444
Elbinger Actien-Gesellschafft v. Armstrong, L. R. 9 Q. B. 473.. 1173
Eldridge v. Cowell, 4 Cal. 87..... 869
Electric Co. v. Dow, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645..... 1183
Ella & Anna, The, 2 Sprague, 267, Fed. Cas. No. 4,368..... 666, 667
Elliott v. Swartwout, 10 Pet. 137, 9 L. ed. 373..... 255
Ellis v. Kreutzinger, 27 Mo. 311, 72 Am. Dec. 270..... 626
Elsebe, The, 5 C. Rob. 173..... 475
Emblem Re, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487..978, 979
Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622..... 786
Emmons v. Alvord, 177 Mass. 466, 59 N. E. 126..... 1174
Emulous, The, 1 Gall. 575, Fed. Cas. No. 4,479..... 473
Endowment & Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499.. 108
Ennis v. Smith, 14 How. 400, 14 L. ed. 472..... 739
Equitable Life Assur. Soc. v. Clements, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822..... 145
v. Pettus, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822 145
Erie R. Co. v. Purdy, 185 U. S. 148, 154, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605, 607.. 216
343, 484, 921
Erskine v. Van Arsdale, 15 Wall. 75, 21 L. ed. 63..... 256
Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185 530
Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131.....343, 344, 922
Evans v. Jones, 5 Mees, & W. 77..... 220
v. Nellis, 187 U. S. 271, 47 L. ed. 173, 23 Sup. Ct. Rep. 74.....387, 388
Evansville v. Dennett, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613..... 1133
Evey v. Mexican C. R. Co. 38 L. R. A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294.. 247
Exchange, The v. M'Faddon, 7 Cranch, 116, 3 L. ed. 287..... 1007
Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403.....126, 623

F.

Fagin v. Connoly, 25 Mo. 94, 69 Am. Dec. 450..... 797
Fairbank v. United States, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.....418, 506
Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 163, 41 L. ed. 390, 17 Sup. Ct. Rep. 56..343, 491, 593
922
Farez, Re, 7 Blatchf. 34, 345, Fed. Cas. Nos 4,644, 4,645..... 138
Fargo v. Michigan, 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857.... 999
v. Stevens, 121 U. S. 230, 30 L. ed. 888, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857.... 999
Farley v. People, 138 Ill. 97, 27 N. E. 927..... 82
Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 23 L. ed. 196, 456
459, 774
Farmers' Loan & T. Co. v. Penn Plate Glass Co. 186 U. S. 434, 46 L. ed. 1234, 22 Sup. Ct. Rep. 842.....625, 626
Farrell v. West Chicago Park, 181 U. S. 404, 45 L. ed. 924, 21 Sup. Ct. Rep. 609..... 572
Farrington v. Tennessee (1877) 95 U. S. 679, 24 L. ed. 558..... 715
Farrior v. New England Mortg. Secur. Co. 88 Ala. 275, 7 So. 200 873
Felix v. Scharnweber, 125 U. S. 54, 59, 31 L. ed. 687, 8 Sup. Ct. Rep. 759..... 119

Fellows v. Denniston, 5 Wall. 761, 18 L. ed. 708 ..... 537
Ferguson v. Wilson, L. R. 2 Ch. 90.. 1126
Fetridge v. Wells, 4 Abb. Pr. 144.... 288
v. Wells, 13 How. Pr. 385..... 289
F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 654, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709.. .. .. .. ..119, 485
Fidelity Mut. L. Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662..214, 668, 826
Filor v. United States, 9 Wall. 45, 19 L. ed. 549 ..... 551
Fink v. O'Neill (1882) 106 U. S. 283, 27 L. ed. 200, 1 Sup. Ct. Rep. 325 ..... 1148
Fire Asso. of Philadelphia v. New York, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108 768
First Nat. Bank v. Hawkins, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739 ..... 881
v. Hoch, 89 Pa. 324, 33 Am. Rep. 769 ..... 881
v. Kentucky, 9 Wall. 353, 19 L. ed. 701 ..... 69
v. Klug, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899 203
v. Lanier, 11 Wall. 377, 20 L. ed. 174 ..... 376
v. National Exch. Bank, 92 U. S. 122, 23 L. ed. 679 ..... 880
v. Shuler, 153 N. Y. 163, 47 N. E. 262 ..... 126
Fishback v. Western U. Teleg. Co. 161 U. S. 96, 40 L. ed. 630, 16 Sup. Ct. Rep. 506 ..... 914
Fisher v. Tifft (1878) 12 R. I. 56.... 1092
Fisk, Ex parte, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.. 785
Fitchburg R. Co. v. Gage, 12 Gray, 393 816
Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.. ..... ....255, 587, 780
Fleming v. Appleton, 55 Wis. 90, 12 N. W. 462 ..... 252
Fletcher v. Peck (1810) 6 Cranch, 142, 3 L. ed. 179 ..... 1144
Flint & P. M. R. Co. v. Detroit & B. C. R. Co. 64 Mich. 350, 31 N. W. 281.. .... .... ..... 864
Florence, E. D. & W. Valley R. Co. v. Ward, 29 Kan. 354 ..... 449
Flying Scud, The, 6 Wall. 263, 18 L. ed. 755 ..... 904
Fok Yung Yo v. United States, 185 U. S. 296, 46 L. ed. 917, 22 Sup. Ct. Rep. 686....724, 725
Folsom v. Township Ninety-Six, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174 ..... 1132
Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016....724, 725
Ford v. Chicago Milk Shippers' Asso. 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651 ..... 333
Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665 ..... 572
Fowle v. Spear, 4 Clark (Pa.) 145, Fed. Cas. No. 4,906 ..... 288
Fox v. Ohio, 5 How. 410, 12 L. ed. 213 834
France v. United States, 164 U. S. 676, 41 L. ed. 595, 17 Sup. Ct. Rep. 219.... .... .. .... 512
Frank & Willie, The, 45 Fed. 494.... 764
Fraser v. Jennison, 106 U. S. 194, 27 L. ed. 132, 1 Sup. Ct. Rep. 171 ..... 1125
Frazer v. Bigelow Carpet Co. 141 Mass. 126, 4 N. E. 620 ..... 904
Frazier v. Southern Loan & T. Co. 40 C. C. A. 76, 99 Fed. 707.. 127, 130
Freeborn v. Smith, 2 Wall. 160, 17 L. ed. 922 ..... 103
Freedman's Sav. & T. Co. v. Earle, 110 U. S. 710, 28 L. ed. 301, 4 Sup. Ct. Rep. 226 ..... 126
Freeman v. Swan, 22 Ala. 106 ..... 108
Freezer v. Sweeney, 8 Mont. 508, 21 Pac. 20 ..... 582
French v. Barber Asphalt Paving Co. 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625 295, 343, 572, 922
French-Glenn Live Stock Co. v. Springer, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563 .....1137, 1149
Fresno Canal & Irrig. Co. v. Park, 129 Cal. 437, 62 Pac. 87.. 896
Frisbie v. United States, 157 U. S. 160 39 L. ed. 657, 15 Sup. Ct. Rep. 586 ..... 1006
v. Whitney, 9 Wall. 187, 19 L. ed. 668 ..... 424
Fristoe v. Blum, 92 Tex. 76, 45 S. W. 998.. .... .... .. ..612, 613
Fritts v. Palmer, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93 874
Fuller v. Shedd, 161 Ill. 462, 33 L. R. A. 146, 44 N. E. 286 ..... 1158
Funk v. Haldeman, 53 Pa. 229 ..... 583

G.

Gaas v. Ellison, 52 C. C. A. 366, 114 Fed. 734 ..... 719
Gaines v. Thompson, 7 Wall. 347, 19 L. ed. 62 .....705, 1078
Gale v. Laurie, 5 Barn. & C. 156 ..... 471
Gano v. Minneapolis & St. L. R. Co. 114 Iowa, 713, 55 L. R. A. 263, 87 N. W. 714 ..... 1183
Gardner v. Babcock, 3 Wall. 240, 18 L. ed. 31 ..... 787
v. Bonestell, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399.. .. .. .. ....96, 735, 849
Garland, Ex parte, 4 Wall. 333, 18 L. ed. 366 ..... 567
Garrett v. Weinberg, 54 S. C. 127, 31 S. E. 341 ..... 121
Gates v. Osborne, 9 Wall. 567, 19 L. ed. 748 ..... 103
Gazelle, The, 128 U. S. 474, 32 L. ed. 496, 9 Sup. Ct. Rep. 139.. 166
Gazzam v. Phillips (1857) 20 How. 372, 15 L. ed. 958....1149, 1151, 1155

Gee v. Gee, 84 Minn. 384, 87 N. W. 1116 ..... 1183
v. Lancashire & Y. R. Co. 6 Hurlst. & N. 211 ..... 1173
General Smith, The, 4 Wheat. 438, 4 L. ed. 609 .....772, 773
Generes v. Campbell, 11 Wall. 193, 20 L. ed. 110 ..... 787
George v. People, 167 Ill. 447, 47 N. E. 741 ..... 85
v. Young, 45 La. Ann. 1232, 14 So. 137 ..... 295
George, The, 1 Sumn. 151, Fed. Cas. No. 5,329 ..... 763
George M. West Co. v. Lea Bros. 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836 .....202, 1170
George R. Barse Live Stock Co. v. Range Valley Cattle Co. 16 Utah, 59, 50 Pac. 630 .... 313
Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47 ..... 891
Gerling v. Baltimore & O. R. Co. 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533 ..... 995
German Bank v. United States, 148 U. S. 573, 37 L. ed. 564, 13 Sup. Ct. Rep. 702 ..... 523
Germania Ins. Co. v. Ashby, 23 Ky. L. Rep. 1564, 65 S. W. 611 .. 994
Germania Iron Co. v. United States, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337 ..978, 979, 1016
Germania Nat. Bank v. Case, 99 U. S. 628, 25 L. ed. 448 ....377, 378, 794, 795, 797
Gibbons v. Ogden, 9 Wheat. 1,189, 6 L. ed. 23 ..114, 115, 497, 498, 501, 504, 507, 531, 970
v. United States, 8 Wall. 274, 19 L. ed. 453 .....522, 523
Gibson v. Chouteau, 8 Wall. 314, 19 L. ed. 317 ..... 768
v. Chouteau (1872) 13 Wall. 92, 20 L. ed. 534 ..... 1147
v. Tyson, 5 Watts, 34 ..... 583
v. United States, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578 .....549, 554
Gilderaleeve v. New Mexico Min. Co. 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663 ..... 791
Gill v. United States, 160 U. S. 426, 40 L. ed. 480, 16 Sup. Ct. Rep. 322 ..... 461
v. Weston, 110 Pa. 313, 1 Atl. 921 ..... 583
Gillis v. Stinchfield, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131 .....345, 572, 922
Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96 ..... 530
Gim v. New England Mortg. Secur. Co. 92 Ala. 135, 8 So. 388 .... 874
Gird v. California Oil Co. 60 Fed. 531 583
Gladden v. State, 13 Fla. 623 ....574, 575
Glass, Re, 119 Fed. 509 ..... 1182
Gleason v. Hoeke, 5 App. D. C. 1, 12 App. D. C. 161 ..... 198
Glen, The, Blatchf. Prize Cas. 375, Fed. Cas. No. 5,479 ..... 904
Glenn v. Garth, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350 .. 275, 739
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826 ....335, 499, 513, 518, 999
Gluckstein v. Barnes (1900) A. C. 240 807
Glynn v. Central R. Co. 175 Mass. 510, 56 N. E. 698 ..... 907
Goad v. State, 106 Tenn. 175, 61 S. W. 79 ..... 122
Goding v. Rosenthal, 180 Mass. 43, 61 N. E. 222 ..... 1092
Goesele v. Bimeler, 14 How. 589, 14 L. ed. 554 ..... 59
Golden v. Cole, 16 Land Dec. 375 .... 820
Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 13 Sup. Ct. Rep. 559 ..... 1115
Gonzales v. De Funiak Havana Tobacco Co. 41 Fla. 471, 26 So. 1012 ..... 749
Goodrich v. Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397 ..... 572
Goodtitle v. Kibbe, 9 How. 471, 13 L. ed. 220 .....270, 272
Goodtitle ex dem. Pollard v. Kibbe (1850) 9 How. 471, 13 L. ed. 220 ..... 1145
Gordon, Ex parte, 104 U. S. 515, 26 L. ed. 814 ..... 946
v. United States, 117 U. S. 697, 2 Wall. 561, 17 L. ed. 921 .. 296, 344
Gormley v. Bunyan, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453 ..... 759
Grace Girdler, The, 6 Wall. 441, 18 L. ed. 790 ..... 915
Grace Girdler, The, 7 Wall. 196, 19 L. ed. 113 ..... 665
Granada County v. Brown, 112 U. S. 261, 28 L. ed. 704, 5 Sup. Ct. Rep. 125 ..... 145
Grand Junction R. Co. v. Middlesex County, 14 Gray, 553 ..... 864
Grand Rapids & I. R. Co. v. Butler (1897) 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991 1137, 1138, 1146, 1157
Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308 ..... 449
Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co. 102 Mich. 227, 25 L. R. A. 815, 60 N. W. 681 ..... 1149
Grand Towner Min. Mfg. & Transp. Co. v. Phillips, 23 Wall. 471, 23 L. ed. 71 ..... 1174
Grand Trunk R. Co. v. Richardson, 91 U. S. 454, 23 L. ed. 356 .. 1047, 1059
Grapeshot, The, 9 Wall. 129, 19 L. ed. 651 ..... 772
Gratiot v. United States, 4 How. 112, 11 L. ed. 898 ..... 431

Graves v. Johnson, 156 Mass. 211, 15 L. R. A. 834, 30 N. E. 818 331
v. Johnson, 179 Mass. 53, 60 N. E. 383 510
Gray Eagle Oil Co. v. Clarke, 30 Land Dec. 570 1073
Great Falls Mfg. Co. v. Atty. Gen. 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631 545
v. Garland, 124 U. S. 581, 31 L. ed 527, 8 Sup. Ct. Rep. 631 545
Great Falls Mfg. Co. Case. See United States v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306
Great Western R. Co. v. Sutton, L. R. 4 H. L. 226 816
Great Western Teleg. Co. v. Purdy, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810 786
Grebert-Borgnis v. Nugent, L. R. 15 Q. B. Div. 85 1173
Greely v. Thompson, 10 How. 225, 13 L. ed. 397 619
Green v. Biddle, 8 Wheat. 1, 5 L. ed. 547 250
v. Mills, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852 912
Gregg v. Von Phul, 1 Wall. 274, 17 L. ed. 536 809
Greves v. Shaw, 173 Mass. 205, 53 N. E. 372 444
Grin v. Shine, 187 U. S. 181, 47 L. ed. 130, 23 Sup. Ct. Rep. 98 954, 955
Grindley v. Barker, 1 Bos. & P. 229 1163
Grinnell v. Chicago, R. I. & P. R. Co. 103 U. S. 739, 26 L. ed. 456 731
Groff v. Miller, 30 Wash. L. Rep. 434 721
Gross v. United States Mortg. Co. 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940 768
Grotius, The, 9 Cranch, 368, 3 L. ed. 762 666
Guaranty Sav. Bank v. Bladow, 176 U. S. 448, 44 L. ed. 540, 20 Sup. Ct. Rep. 425 848, 1071
Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26 172
Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255 403, 672
v. Styron, 66 Tex. 421, 1 S. W. 161 248
Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390 1134
Gurr v. Scudds, 11 Exch. 190 986
Gutierres v. Albuquerque Land & Irrig. Co. 188 U. S. 545, 47 L. ed. 588, 23 Sup. Ct. Rep. 338 1147
Gutwillig, Re. 90 Fed. 475, 34 C. C. A. 377, 63 U. S. App. 191, 92 Fed. 337 1170

H.

Hadley v. Baxendale, 9 Exch. 341 1173
Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663 74, 801
Halbert v. State ex rel. Martin County, 22 Ind. 125 431
Hale v. Allinson, 188 U. S. 56, 47 L. ed. 380, 23 Sup. Ct. Rep. 244 705, 840, 843, 845
v. Hardon, 89 Fed. 283 389, 390
v. Tyler, 104 Fed. 757 389
Hall v. Costello, 48 N. H. 176, 2 Am. Rep. 207 785
v. De Cuir, 95 U. S. 485, 24 L. ed. 547 336, 774
v. Russell, 101 U. S. 503, 25 L. ed. 829 1016
Halliburton v. United States, 13 Wall. 63, 20 L. ed. 533 431
Halsey v. Fairbanks, 4 Mason, 206, 227, Fed. Cas. No. 5,964 67
Ham v. Boston Bd. of Police, 142 Mass. 90, 7 N. E. 540 831
Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 268, 13 Sup. Ct. Rep. 353 759
Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 18 L. ed. 904 1037
Hammond v. Bussey, L. R. 20 Q. B. Div. 79 1174
v. Shepard, 186 Ill. 235, 57 N. E. 867 1158, 1159
Hancock v. Hazzard, 12 Cush. 112, 59 Am. Dec. 171 431
Hancock Nat. Bank v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506 388, 393, 845
Hanford v. Davies, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051 272, 365
v. Massachusetts Ben. Asso. 122 Mo. 50, 26 S. W. 680 144
Hanley v. Donoghue, 116 U. S. 1, 29 L. ed. 535, 6 Sup. Ct. Rep. 242 371, 740
v. Kansas City Southern R. Co. 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214 500
Hannewinkle v. Georgetown, 15 Wall. 547, 21 L. ed. 231 255
Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 472, 24 L. ed. 527, 531 115
v. Missouri River Packet Co. 125 U. S. 260, 31 L. ed. 731, 8 Sup. Ct. Rep. 874 986
Hannon v. Siegel-Cooper Co. 167 N. Y. 244, 52 L. R. A. 429, 60 N. E. 597 741
Hans v. Louisiana, 134 U. S. 10, 33 L. ed. 845, 10 Sup. Ct. Rep. 504 587, 912
Hansen v. Boyd, 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571 787
Hans Oleson, Re, 28 Land Dec. 25 421
Hanson v. Davison, 73 Minn. 454, 76 N. W. 254 386, 387, 388, 845
Hardee v. Wilson, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39 721

**Harden** v. Gorden, 2 Mason, 541, Fed. Cas. No. 6,047 ..... 763
**Hardin** v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808..271, 1136–1138, 1143–1145 1148, 1151–1153, 1155, 1157–1159
v. Shedd, 177 Ill. 123, 52 N. E. 380 ..... 1158
**Hardin's Case.** See Hardin v. Jordan, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808.
**Harding** v. Hart, 186 U. S. 483, 46 L. ed. 1261, 22 Sup. Ct. Rep. Rep. 943 ..... 344
**Harkrader** v. Wadley, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119 .....255, 587, 588, 780
**Harnickell** v. New York L. Ins. Co. 111 N. Y. 390, 2 L. R. A. 150, 18 N. E. 632 ..... 265, 266
**Harper** v. Carroll, 66 Minn. 487, 69 N. W. 610 ..... 386, 387
v. The New Brig, Gilpin, 536, Fed. Cas. No. 6,090 ..... 773
**Harris, Re,** 32 Fed. 583..... 138
**Harrison** v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742 ..... 343
v. Perea, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129 ..... 361
v. Vose, 9 How. 372, 13 L. ed. 179 ..... 179
**Hart** v. Smith, 64 N. E. 661 ..... 656
v. Stribling, 25 Fla. 435, 6 So. 455 ..... 749
**Hartranft** v. Wiegmann, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240 ..... 986
**Hartwell** v. Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448..... 583
**Haseltine** v. Central Nat. Bank, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49 ..344, 922, 1183
**Hastings** v. Spencer, 1 Curt. C. C. 504, Fed. Cas. No. 6,201 ..... 1170
**Hastings & D. R. Co.** v. Whitney, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112 ..... 1014
**Hatch** v. Chicago, R. I. & P. R. Co. 6 Blatchf. 105, Fed. Cas. No. 6,204 ..... 1125, 1126
v. Mutual L. Ins. Co. 120 Mass. 550, 522, 21 Am. Rep. 541, 542 .....219
**Hathaway** v. National L. Ins. Co. 48 Vt. 335 ..... 1177
**Havemeyer** v. Loeb, 5 Abb. N. C. 338.. 1171
**Hawes** v. Contra Costa Water Co. 104 U. S. 450, 26 L. ed. 827.... 258 259, 260, 781
v. Oakland, 104 U. S. 450, 26 L. ed. 827 .....258, 259, 260, 781
**Hawker** v. New York, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573 ..... 565, 567
**Hawkins** v. Glenn, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739 ..... 389, 794
**Hawley** v. Diller, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986 ..... 848, 849, 1071
**Hayes** v. United States, 170 U. S. 637, 42 L. ed. 1174, 18 Sup. Ct. Rep. 735 ..... 791
**Haynie** v. Knights Templars & Masonic Life Indemnity Co. 139 Mo. 416, 41 S. W. 461 ..... 144
**Hays** v. Heatherly, 36 W. Va. 613, 15 S. E. 223 ..... 73
v. Pacific Mail S. S. Co. 17 How. 596, 15 L. ed. 254 .... 444, 518
v. United States, 175 U. S. 248, 44 L. ed. 150, 20 Sup. Ct. Rep. 80 ..... 791
**Hayward** v. Leeson, 176 Mass. 310, 49 L. R. A. 725, 57 N. E. 656 390 807
**Hazard** v. Durant, 19 Fed. 471 ..... 389
**Heath** v. Erie R. Co. 8 Blatchf. 347, Fed. Cas. No. 6,306, 8 Blatchf. 413, Fed. Cas. No. 4,513 ..... 1126
v. Wright, 3 Wall. Jr. 141, Fed. Cas. No. 6,310 ..... 288
**Heckman** v. Swett, 99 Cal. 303, 33 Pac. 1099 ..... 870
**Hedley, Ex parte,** 31 Cal. 108 ..... 138
v. Pinkney & Sons' S. S. Co. 7 Asp. M. L. Cas. 135 (1894) A. C. 222 ..... 763, 765
**Hegeman** v. Springer, 49 C. C. A. 86, 110 Fed. 374 ..... 462
**Heinrich Case,** 5 Blatchf. 414, Fed. Cas. No. 6,369 ..... 135, 138
**Heman** v. Schulte, 166 Mo. 409, 66 S. W. 163 ..... 922
**Hendee** v. Taylor, 29 Conn. 448 ..... 135
**Henderson** v. New York, 92 U. S. 259, 268, 23 L. ed. 543, 548 .. 115 498, 504
v. Smith, 28 Land Dec. 303 .... 820
v. Tompkins, 60 Fed. 758 ..... 462
v. Wickham, 92 U. S. 259, 268, 23 L. ed. 543, 548.. 115, 498 504
**Henderson Bridge Co.** v. Henderson, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553.. 333 517
**Hennen, Ex parte,** 13 Pet. 230 ..... 831
**Hennington** v. Georgia, 163 U. S. 299, 317, 41 L. ed. 166, 173, 16 Sup. Ct. 1086 ..... 114
**Hensley** v. Waner, 24 Land Dec. 92... 820
**Hestetun** v. St. Paul, M. & M. R. Co. 12 Land Dec. 27 ..... 420
**Hewitt** v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309 ..... 419, 420, 730
**Hext** v. Gill, L. R. 7 Ch. 699 ... 581, 584
**Heydenfeldt** v. Daney Gold & Silver Min. Co. 93 U. S. 634, 23 L. ed. 995 ..... 1021
**Heywood** v. Shreve (1882) 44 N. H. L. 94 ..... 1092
**Hicks** v. Westport, 130 Mass. 478 ... 1122
**Higgins** v. Adams, 18 Land Dec. 598 .. 820
v. Carlton, 28 Md. 115, 92 Am. Dec. 666 ..... 570
**Hill, Ex parte,** 38 Ala. 429 ..... 774
v. Epley, 31 Pa. 331 ..... 810
v. Forsythe County, 67 N. C. 367 ..... 972

Hill v. Harding, 130 U. S. 699, 32 L. ed. 1083, 9 Sup. Ct. Rep. 725 ..... 126
v. United States, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011 ..... 523, 544, 551
v. Yates, 12 East, 229 ..... 121
Hilliker v. Hale, 117 Fed. 224 ..... 389
Hilton v. Merritt, 110 U. S. 97, 28 L. ed. 83, 3 Sup. Ct. Rep. 548.. 725
Hitch v. United States, 66 Fed. 937 ... 776
Holladay v. Frisbie, 15 Cal. 635 ..... 869
Hollingsworth v. Duane, Wall, C. C. 147, Fed. Cas. No. 6,618..... 122
Hollister v. Benedict & B. Mfg. Co. 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717 ... 544, 546
Holmes v. Hurst, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606 ..... 1042
Holmes, B. & H. v. Willard, 125 N. Y. 75, 11 L. R. A. 170, 25 N. E. 1083 ..... 741
Holt v. Indiana Mfg. Co. 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272 ... 911, 913, 914, 916
Home Ben. Soc. v. Muehl, 22 Ky. L. Rep. 1378, 59 S. W. 520 ... 994
Home for Incurables v. New York, 187 U. S. 155, 47 L. ed. 117, 23 Sup. Ct. Rep. 84 ..... 485
Home Ins. Co. v. New York, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593 ..... 1037
Hooker v. New Haven & N. Co. 14 Conn. 146, 36 Am. Dec. 477 ..... 548
Hooper v. California, 155 U. S. 648, 657, 39 L. ed. 297, 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207. 145, 505, 506
Hopkins v. Grimshaw, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401 ..... 65
v. United States, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40..... 333
Horne v. George H. Hammond Co. 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167 ..... 717
v. Midland R. Co. L. R. 7 C. P. 583, S. C. L. R. 8 C. P. 131 ..... 1173, 1174
v. Smith, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988.. 1137 1149
Horner v. United States, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522 ..... 247, 668, 780
Houdayer, Re, 150 N. Y. 37, 34 L. R. A. 235, 44 N. E. 718 .... 445
Houston v. Moore, 5 Wheat. 26, 5 L. ed. 25 ..... 834
Houston & T. C. R. Co. v. Bradley, 45 Tex. 171, 176 ..... 248
Howard v. Stillwell & B. Mfg. Co. 139 U. S. 199, 35 L. ed. 147, 11 Sup. Ct. Rep. 500.... 751, 1173
Howard County v. Armstrong, 91 Ind. 528 ..... 655
Howard F. Ins. Co. v. Chase, 5 Wall. 509, 18 L. ed. 524 ..... 639
Howarth v. Lombard, 175 Mass. 574, 49 L. R. A. 301, 56 N. E. 888 ..... 787
Hoyt v. Sprague, 103 U. S. 613, 26 L. ed. 585 ..... 247
Hubbard, Re, 98 Fed. 710 ..... 1093
v. Weare, 79 Iowa, 678, 44 N. W. 915 ..... 807
Hubbell v. Denison, 20 Wend. 181 ... 773
Hudmon v. Cuyas, 6 C. C. A. 381, 13 U. S. App. 443, 57 Fed. 355 ..... 669
Huguley Mfg. Co. v. Galeton Cotton Mills, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452 ..... 245, 315, 344
Hulbert v. Hart, 1 Vern. 133 ..... 1173
Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603.. 74
Hume v. Bowie, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582 ..... 161, 947
v. United States, 132 U. S. 406, 33 L. ed. 393, 10 Sup. Ct. Rep. 134 ..... 705
Humphreys v. Norfolk, 25 Gratt. 97.. 1037
Humphries v. District of Columbia, 174 U. S. 190, 43 L. ed. 944, 19 Sup. Ct. Rep. 637 ..... 161
Hunker v. Bing, 9 Fed. 277 ..... 1171
Huntington v. Laidley, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526 ..... 917
Hurley v. Hamilton, 37 Minn. 160, 33 N. W. 912 ..... 152, 154
Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111 ..... 566, 1020, 1024
Huse v. Glover, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313 .. 531 1000
Hutchings v. Low, 15 Wall. 77, 21 L. ed. 82 ..... 424
Hyam's Case, 1 De G. F. & J. 75 ..... 377
Hyde v. Ruble, 104 U. S. 409, 26 L. ed. 824 ..... 1124, 1125
v. Woods, 94 U. S. 525, 24 L. ed. 265 ..... 321, 322
Hydraulic Engineering Co. v. McHaffie, L. R. 4 Q. B. Div. 670 ... 1173
Hyman v. Read, 13 Cal. 445 ..... 869

## I.

Illinois C. R. Co. v. Chicago (1900) 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509 ..... 1145
v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110 ..... 272, 1146
Independent School Dist. v. Stone, 106 U. S. 183, 27 L. ed. 90, 1 Sup. Ct. Rep. 84 ..... 1134
Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898.. 1022
Inman v. Northern P. R. Co. 28 Land Dec. 95 ..... 421
Innell v. Newman, 4 Barn. & Ald. 419 ..... 675
Insurance Co. v. Mordecai, 22 How. 111, 117, 16 L. ed. 329, 331 69

**Internal** Improvement Fund v. Greenough, 105 U. S. 527, 26 L. L. ed. 1157 ..... 1171
**Interstate** Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844 ..... 816
v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125 ..... 999
**Iowa** v. Rood, 187 U. S. 87, 47 L. ed. 86, 23 Sup. Ct. Rep. 49... 491
**Iowa** C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344 ..... 491
**Irvine** v. Marshall (1858) 20 How. 558, 15 L. ed. 994.. 1144, 1147, 1148, 1154

J.

**Jack** v. Martin, 12 Wend. 311 ..... 774
**Jackson**, Ex parte, 96 U. S. 727, 24 L. ed. 877 ..... 505
v. Kittle, 34 W. Va. 207, 12 S. E. 484 ..... 73
**Jacobi** v. Alabama, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48 ..... 215, 484
**Jacobs** v. Marks, 182 U. S. 583, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865 ..... 599
v. Omaha Life Asso. 142 Mo. 49, 43 S. W. 375 ..... 144
v. San Francisco, 100 Cal. 121, 34 Pac. 630 ..... 894
**Jaffray** v. McGehee, 107 U. S. 361, 27 L. ed. 495, 2 Sup. Ct. Rep. 367 ..... 68
**James** Case. See St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 821.
**Janvrin**, Petitioner, 174 Mass. 514, 47 L. R. A. 319, 55 N. E. 381.. 894
**Jencks** v. Quidnick Co. 135 U. S. 457, 34 L. ed. 200, 10 Sup. Ct. Rep. 655 ..... 68
**Jenkins** v. Neff, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905 ..... 849
**J. E. Rumbell**, The, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498.. ..... 773
**Jervis** v. Smith, Hoffm. Ch. 470 ..... 640
**John Hancock** Mut. L. Ins. Co. v. Warren, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535.. 826
**Johnson** v. Bishop, Woolw. 324, Fed. Cas. No. 7,373 ..... 127
v. Drew, 171 U. S. 93, 99, 43 L. ed. 88, 91, 18 Sup. Ct. Rep. 800 ..... 96, 735
v. Long Island R. Co. 162 N. Y. 462, 56 N. E. 992 ..... 827
v. M'Intosh (1823) 8 Wheat. 543, 5 L. ed. 681 ..... 306, 1144
v. Merithew, 80 Me. 111, 13 Atl. 132 ..... 236
**Johnson** v. New York L. Ins. Co. 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194 ... 739, 843
v. Pensacola & P. R. Co. 16 Fla. 623, 26 Am. Rep. 731.... 816
v. Towsley, 13 Wall. 72, 20 L. ed. 485 ..... 977, 979
**Johnston** v. Harrington, 5 Wash. 78, 31 Pac. 316 ..... 583
**Joliffe** v. Madison Mut. Ins. Co. 39 Wis. 119, 20 Am. Rep. 35.. 212
**Jones** v. Black, 48 Ala. 540 ..... 781
v. Hoar, 5 Pick. 285 ..... 550
v. Maffet, 5 Serg. & R. 523 ..... 785
v. Smart, 1 T. R. 44 ..... 1034
**Jones** Case, 131 U. S. 1, 33 L. ed. 90, 9 Sup. Ct. Rep. 669 ..... 551
**Julia Fowler**, The, 49 Fed. 277..... 764

K.

**Kahn** v. Matthai, 115 Cal. 689, 47 Pac. 698 ..... 100
**Kaine's** Case, 14 How. 129, 14 L. ed. 355 ..... 138
**Kalleck** v. Deering, 161 Mass. 469, 37 N. E. 450 ..... 764
**Kalorama**, The, 10 Wall. 204, 19 L. ed. 943..... 772
**Kansas** City Suburban Belt R. Co. v. Herman, 68 Pac. 46 ..... 77
**Kansas** P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208 ..... 731
v. Dunmeyer, 113 U. S. 639, 28 L. ed. 1125, 5 Sup. Ct. Rep. 566 ..... 1014
**Kaukauna** Water Power Co. v. Green Bay & M. Canal Co. 142 U. S. 255, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.. 271, 863, 1146
**Kavanaugh**, Re, 99 Fed. 928 ..... 127
**Kean** v. Calumet Canal & Improv. Co. 190 U. S. 452, 47 L. ed. 1134, 23 Sup. Ct. Rep. 651.. 1159
v. Roby (1896) 145 Ind. 221, 42 N. E. 1011..1137, 1139, 1142, 1148
**Kelley**, Re, 2 Low. Dec. 339, Fed. Cas. No. 7,655 ..... 138
v. Rhoads, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259.. 398, 399, 444
**Kelly** v. Morris, L. R. 1 Eq. 697 ..... 462
v. Pittsburgh, 104 U. S. 78, 26 L. ed. 658 ..... 74
**Kenaday** v. Sinnott, 179 U. S. 616, 45 L. ed. 344, 21 Sup. Ct. Rep. 233 ..... 237
**Kennedy** v. Gibson, 8 Wall. 498, 19 L. ed. 476 ..... 393
**Kentucky** v. Dennison, 24 How. 66, 16 L. ed. 717.... 660, 663, 664
**Kentucky** Railroad Tax Cases, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57 ... 801, 802
**Kern** Oil Co. v. Clarke, 30 Land Dec. 550 ..... 1072
**Keyser** v. Sutherland, 59 Mich. 455, 26 N. W. 865 ..... 1149

Keystone Manganese & Iron Co. v. Martin, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32 .. 344
Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6 .... 333
Kimball v. Rosenham Co. 52 C. C. A. 33, 114 Fed. 85 ..... 719
Kimmish v. Ball, 129 U. S. 217, 222, 32 L. ed. 695, 697, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277 ..... 116
King v. Hargadine-McKittrick Dry Goods Co. 60 Ark. 1, 28 S. W. 514 ..... 69
v. Meyer, 35 Cal. 646..... 485
v. Mullins, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925 ..... 677
v. Portland, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290 ..... 343, 572, 801
v. Watson, 3 Price, 6 ..... 67
King Bridge Co. v. Otoe County, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552 ..... 915
Kingman, Petitioner, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778 ..... 563
v. Graham, 51 Wis. 232, 8 N. W. 181 ..... 810
Kingston v. Kincaid, 1 Wash. C. C. 448, Fed. Cas. No. 7,821.. 1163
Kingston Bank v. Eltinge, 40 N. Y. 391, 100 Am. Dec. 516 .... 558
Kintrea, Ex parte, L. R. 5 Ch. 95 .... 377
Kirkpatrick v. Gibson, 2 Brock. 388, Fed. Cas. No. 7,848 ..... 68
Kirtley v. Dykes, 10 Okla. 18, 62 Pac. 808 ..... 753
Kitrol v. State, 9 Fla. 9 ..... 574, 575
Kittredge v. Warren, 14 N. H. 509 ... 126
Klein v. New York L. Ins. Co. 104 U. S. 88, 26 L. ed. 662 .... 211
Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 21 L. ed. 493 ... 202
Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 L. ed. 689. 210, 211
v. Pendleton, 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. Rep. 314 ..... 212, 214
Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258 ..... 1078, 1146
Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 47 L. ed. 139, 23 Sup. Ct. Rep. 108 ..... 741
Knouff v. Thompson, 16 Pa. 357 ..... 810
Knowlton v. Moore, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747 ... 444, 445, 672, 1036–1039
v. Rock County, 9 Wis. 410 .... 839
Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531..... 895
Koch v. Ashland, 83 Wis. 361, 53 N. W. 674 ..... 252
Kohl v. Lehlback, 160 U. S. 293, 301, 40 L. ed. 432, 435, 16 Sup. Ct. Rep. 304 ... 121, 122, 1178
Kohl v. United States, 91 U. S. 367, 23 L. ed. 449 ..... 545
Krauss v. Jos. R. Peebles' Sons Co. 58 Fed. 585 ..... 290
Kunckle v. Kunckle, 1 Dall. 364, 1 L. ed. 178 ..... 1163
Kurth, Re, 17 Nat. Bankr. Reg. 573, Fed. Cas. No. 7,948 ..... 1171

L.

Labuan, The, Blatchf. Prize Cas. 165, Fed. Cas. No. 7,964..... 904
Lackey v. United States, 53 L. R. A. 660, 46 C. C. A. 189, 107 Fed. 114 ..... 980
Lackland v. North Missouri R. Co. 31 Mo. 180 ..... 548
Lacon v. Higgins, 3 Starkie, 178 .... 785
Laing v. Rigney, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366 ..... 740, 844, 995
Lains, Re, 16 Nat. Bankr. Reg. 168, Fed. Cas. No. 7,989 ..... 1170
Lake Front Case (Illinois C. R. Co. v. Illinois), 146 U. S. 463, 36 L. ed. 1046, 13 Sup. Ct. Rep. 110 ..... 870
Lake Shore & M. S. R. Co. v. Ohio, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357.. 530, 531, 970
Lamar v. Browne, 92 U. S. 188, 23 L. ed. 651 ..... 903
Landes v. Perkins, 12 Mo. 238 ..... 791
Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313 ..... 825
Lange, Ex parte, 18 Wall. 175, 21 L. ed. 878 ..... 86
Langford v. United States, 101 U. S. 341, 25 L. ed. 1010.. 523, 544, 545, 551
La Touretta v. Burton, 1 Wall. 43, 17 L. ed. 609 ..... 904
Lau Ow Bew v. United States, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517 ..... 1021
Laura, The, 14 Wall. 336, 20 L. ed. 814 479
Lawler v. Walker, 14 How. 152, 14 L. ed. 365 ..... 118
Lawrence v. Caswell, 13 How. 488, 14 L. ed. 235 ..... 180
v. Nelson, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440 ..... 155
Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499 ..... 327
Layden v. Endowment Rank, K. of P. 128 N. C. 546, 39 S. E. 47.. 1084
Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137 ..... 484
Leadville Coal Co. v. McCreery, 141 U. S. 475, 35 L. ed. 824, 12 Sup. Ct. Rep. 28 ..... 995
Leather Cloth Co. v. American Leather Cloth Co. 1 Hem. & M. 271, 4 De G. J. & S. 136, 289, 291
Leavenworth, L. & G. R. Co. v. United States (1875) 92 U. S. 733, 23 L. ed. 634 ..... 306, 1013

Leddy v. Gibson, 11 Ct. Sess. Cas. 3d series, 304 ..... 763
Lee v. Buckheit, 49 Wis. 54, 4 N. W. 1077 ..... 251
Leeds & H. Theatres, Re (1902), 2 Ch. 809 ..... 807
Lees v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163 ..... 616
Leghorn Seizures, The, 27 Ct. Cl. 224.. 1096
Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806 ..... 336
Lehigh Water Co. v. Easton, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916 ..... 253
Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.. 503
999
Leloup v. Port of Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380 ..... 499, 999, 1121
Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967 .. 724, 725
Lent v. Tillson, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825 ..... 801
Leppoc v. National Union Bank, 32 Md. 136 ..... 264
Levy v. San Francisco City & County Super. Ct. 167 U. S. 175, 177, 42 L. ed. 126, 127, 17 Sup. Ct. Rep. 769 ..... 119
Lewis v. People, 44 Ill. 452, 454 ..... 82
License Cases, 5 How. 504, 12 L. ed. 256 ..... 505, 507
License Tax Cases, 5 Wall. 462, 18 L. ed. 497 ..... 1037
Life Asso. of America v. Rundle, 103 U. S. 222, 26 L. ed. 337.. 389
786
Lightfoot v. Cole, 1 Wis. 26, 34 ..... 251
Lincoln v. Claflin, 7 Wall. 132, 19 L. ed. 106 ..... 904
v. Power, 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387 ..... 906
v. Worcester, 8 Cush. 55 ..... 1122
Lindo v. Rodney, 2 Dougl. 613 ..... 472
Lippincott v. Barker, 2 Binn. 174, 4 Am. Dec. 433 ..... 68
Litchfield v. Richards, 9 Wall. 575, 19 L. ed. 681 ..... 705
v. The Register & Receiver, 9 Wall. 575, 19 L. ed. 681 .. 705
Little v. Barreme, 2 Cranch, 170, 2 L. ed. 243 ..... 903
v. Chambers, 27 Iowa, 522 .... 100
Little Rock & Ft. S. R. Co. v. Worthen, 120 U. S. 97, 30 L. ed. 588, 7 Sup. Ct. Rep. 469 ..... 922
Lively, The, 1 Gall. 315, Fed. Cas. No. 8,403.. ..... 904
Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469 ..... 785
Livingston v. Maryland Ins. Co. 6 Cranch, 274, 3 L. ed. 222 .. 739
Lloyd v. Fulton, 91 U. S. 479, 485, 23 L. ed. 363, 365 ..... 68
v. Hough, 1 How. 153, 11 L. ed. 83 ..... 523
v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70 ..... 275, 739, 740
v. Preston, 146 U. S. 630, 36 L. ed. 1111, 13 Sup. Ct. Rep. 131 ..... 669
Lockport v. Gaylord, 61 Ill. 276 ..... 860
Lockwood v. The Grace Girdler, 6 Wall. 441, 18 L. ed. 790 ... 915
v. The Grace Girdler, 7 Wall. 196, 19 L. ed. 113 ..... 665
Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174 ... 315–317, 485, 714
Logan v. United States, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617 ..... 86, 104
Logan County Nat. Bank v. Townsend, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496 ..... 880
London v. Perkins, 3 Bro. P. C. Tomlins's ed. 602 ..... 390
London Assur. Co. v. Companhia de Moagens do Barreiro, 167 U. S. 149, 42 L. ed. 121, 17 Sup. Ct. Rep. 785 ... 331, 1006
Lone Wolf v. Hitchcock, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216 ..... 537
Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718 ..... 491
Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224... 336
v. Underdunck, 1 Sandf. Ch. 46 640
Los Angeles County v. Ballerino, 99 Cal. 594, 32 Pac. 581, 34 Pac. 329 ..... 1122
Lottawanna, The, 21 Wall. 558, 22 L. ed. 654.....762, 772, 773
Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817 ..... 1083, 1084
Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348.. 774
Louisville Trust Co. v. Comingor, 184 U. S. 18, 26, 46 L. ed. 413, 416, 22 Sup. Ct. Rep. 293.. 128
946
Louisville Underwriters, Re, 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587 ..... 1021
Lowe v. State, 86 Ala. 47, 5 So. 435.. 107
Lowther Castle, The, 1 Hagg. Adm. 384 763
Lynch v. Bernal, 9 Wall. 315, 19 L. ed. 714 ..... 1171
v. Clarke, 1 Sandf. Ch. 583 .... 774
v. Johnson, 48 N. Y. 27 ..... 126
Lyndhurst, The, 48 Fed. 839.....773, 774

Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725 ..... 339, 999
Lyon v. Gombert, 63 Neb. 630, 88 N. W. 774 ..... 922

M.

McAllister v. United States, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949 ..... 832
McCall v. California, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881 ..... 999
McCallister v. Cottrille, 24 W. Va. 173 73
McCardle, Ex parte, 7 Wall. 506, 19 L. ed. 264 ..... 103
McClure v. Northern P. R. Co. 9 Land Dec. 155 ..... 421
McCormick v. Market Bank, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433 ..... 880
v. Sullivant, 10 Wheat. 192, 6 L. ed. 300 ..... 904
McCracken v. Flanagan, 127 N. Y. 493, 28 N. E. 385 ..... 100
McCready v. Virginia (1876) 94 U. S. 391, 24 L. ed. 248 ..... 1146
M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.. 445, 456, 500, 507, 518, 536, 537, 774, 1039
McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134 ..... 251
McDaid v. Oklahoma, 150 U. S. 209, 37 L. ed. 1055, 14 Sup. Ct. Rep. 59 ..... 978, 979
McDaniel v. State, 97 Ala. 14, 12 So. 241 ..... 108
McDermutt v. Strong, 4 Johns. Ch. 687 126
McDonald v. Chemical Nat. Bank, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787 ... 457
v. Cooper, 32 Fed. 745 ..... 100
v. Moore, 15 Nat. Bankr. Reg. 26, Fed. Cas. No. 8,763 .. 1171
v. Morrill, 154 Mass. 270, 28 N. E. 259 ..... 797
v. Thompson, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297 ..... 344
Macdonnell, Re, 11 Blatchf. 79, Fed. Cas. No. 8,771 ..... 138
M'Elmoyle v. Cohen, 13 Pet. 312, 10 L. ed. 177 ..... 371
Macfarland v. Brown, 187 U. S. 239, 47 L. ed. 159, 23 Sup. Ct. Rep. 107 ..... 163, 947
McGahey v. Virginia, 135 U. S. 685, 34 L. ed. 312, 10 Sup. Ct. Rep. 972 ..... 251
McGrew v. McGrew, 9 Hawaii, 475 ... 482
v. McGrew, 10 Hawaii, 600 ... 482
McGuire v. Massachusetts, 3 Wall. 387, 18 L. ed. 226 ..... 1037
McIntyre v. People, 38 Ill. 514, 518 .. 82
McKane v. Durston, 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913 ..... 566
McKeon v. New York, N. H. & H. R. Co. 75 Conn. 343, 53 Atl. 656 ..... 922
Mackin v. Boston & A. R. Co. 135 Mass. 201, 46 Am. Rep. 456 ..... 907
McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118 ..... 315
McMillen v. Anderson, 95 U. S. 37, 24 L. ed. 335 ..... 74
McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839 ..... 332
v. United States, 146 U. S. 360, 36 L. ed. 1007, 13 Sup. Ct. Rep. 127 ..... 777, 778
M'Niel v. Holbrook, 12 Pet. 84, 9 L. ed. 1009 ..... 785
McNulty v. Batty, 10 How, 72, 13 L. ed. 333 ..... 103
McQuillen v. State, 8 Smedes & M. 587 575
McReynolds v. Dedman, 47 Ark. 347, 1 S. W. 552 ..... 69
Maddox v. Burnham, 156 U. S. 544, 39 L. ed. 527, 15 Sup. Ct. Rep. 448 ..... 416
Madison & I. R. Co. v. Norwich Sav. Soc. 24 Ind. 457 ..... 880
Magee v. Doe ex dem. Hallett, 22 Ala. 699 ..... 270, 271
Mager v. Grima, 8 How. 490, 12 L. ed. 1168 ..... 444, 445
Magone v. King, 2 C. C. A. 383, 1 U. S. App. 267, 51 Fed. 525.. 777
Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.. 401, 402, 403, 444, 445, 1036, 1038
Magoun Case. See Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.
Mahan v. State, 10 Ohio, 234 ..... 449
Maine v. Grand Trunk R. Co. 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121 ..... 336
Maine C. R. Co. v. Waterville & F. R. & Light Co. 89 Me. 328, 36 Atl. 453 ..... 865
Mali v. Hudson County Common Jail Keeper, 30 L. ed. 565, 7 Sup. Ct. Rep. 385 ..... 1007
Mallett v. North Carolina, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730.... 108, 485, 768, 921
Manchester v. Massachusetts (1891) 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559 ..... 1146
Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436 .. 289, 291
Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 28 L. ed. 462, 4 Sup. Ct. Rep. 510.. 916
Marbury v. Madison, 1 Cranch, 176, 2 L. ed. 73 ..... 507
March v. Walker, 48 Tex. 372 ..... 248
Marchant v. Pennsylvania R. Co. 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894 ..... 550

**Markham** v. O'Connor, 52 Ga. 183, 21 Am. Rep. 249 ..... 810
**Marknson** v. Boucher, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76 ..... 343, 921
**Marquette**, The, Brown, Adm. 354, Fed. Cas. No. 9,101..... 773
**Marquez** v. Frisbie, 101 U. S. 473, 25 L. ed. 800 ..... 979, 1070, 1078
**Marqueze** v. Caldwell, 48 Miss. 23 .... 68
**Marriott** v. Brune (1850) 9 How. 619, 13 L. ed. 282 ..... 179–181
**Marselis** v. Morris Canal & Bkg. Co. 1 N. J. Eq. 31 ..... 391
**Martin** v. Baltimore & O. R. Co. 151 U. S. 673, 38 L. ed. 311, 14 Sup. Ct. Rep. 533 ..... 995
v. Mott, 12 Wheat. 19, 6 L. ed. 537 ..... 724
v. Waddell (1842) 16 Pet. 367, 10 L. ed. 997 ..... 1145, 1153
**Marx** v. Hanthorn, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508 ..... 74
**Marye** v. Baltimore & O. R. Co. 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037 ..... 999
**Mason** v. Ashland, 98 Wis. 540, 74 N. W. 357 ..... 252
v. Calumet Canal & Improv. Co. 150 Ind. 699, 50 N. E. 85.. 1137
v. Pomeroy, 151 Mass. 164, 7 L. R. A. 771, 24 N. E. 202 ... 1170
v. United States, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1002 .....721
**Massachusetts** C. R. Co. v. Boston, C. & F.R. Co. 121 Mass. 124.. 864
**Mast, F. & Co.** v. Stover Mfg. Co. 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708 ..... 708
**Masury** v. Southworth, 9 Ohio St. 348 ..... 626
**Mathis** v. Southern R. Co. 53 S. C. 257, 31 S. E. 240 ..... 1084
**Matteson** v. Dent, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419 ..... 375, 379
**Matthews** v. State, 96 Ala. 62, 11 So. 203 ..... 107
**Mattingly** v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098... 294
v. Northwestern Virginia R. Co. 158 U. S. 57, 39 L. ed. 895, 15 Sup. Ct. Rep. 727 ..... 916
**Maxwell** v. Dow, 176 U. S. 584, 44 L. ed. 597, 20 Sup. Ct. Rep. 448 ..... 1024
v. Griswold, 10 How. 242, 13 L. ed. 405 ..... 619
**Mayer** v. Hellman, 91 U. S. 496, 23 L. ed. 377 ..... 1170
**Maynard** v. Frederick, 7 Cush. 247 .. 1163
v. Hill (1888) 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723 ..... 369, 1016
**Meagher** v. Minnesota Thresher Mfg. Co. 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 876.. 922
**Memphis** v. Union & Planters' Bank (1892) 91 Tenn. 546, 19 S. W. 758 ..... 715
**Memphis & C. R. Co.** v. Alabama, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432 ..... 1083
**Menotti** v. Dillon, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945 ..... 410, 420, 423
**Mercer County** v. Hacket, 1 Wall. 83, 17 L. ed. 548 ..... 1134
**Merchants' & Mfrs. Bank** v. Pennsylvania, 167 U. S. 461, 42 L. ed. 236, 7 Sup. Ct. Rep. 829 ..... 562
**Merchants' Exch. Bank** v. Luckow, 37 Minn. 542, 35 N. W. 434 .. 264
**Merchants' Ins. Co.** v. Ritchie, 5 Wall. 541, 18 L. ed. 540 ..... 103
**Messinger** v. Eastern Oregon Land Co. 176 U. S. 58, 44 L. ed. 370, 20 Sup. Ct. Rep. 271 .. 411, 423
**Messmore** v. New York Shot & Lead Co. 40 N. Y. 422 ..... 1173
**Metcalf** v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67 ..... 130
v. Framingham, 128 Mass. 370.. 237
v. Watertown, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173 ..... 717, 915
v. Watertown, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947 ..... 715
**Metcalf Bros.** v. Barker, 187 U. S. 165, 47 L. ed. 122, 23 Sup. Ct. Rep. 67 ..... 558
**Metcalfe** v. State Bd. of Registration, 123 Mich. 661, 82 N. W. 512 ..... 566
**Mexican C. R. Co.** v. Eckman, 187 U. S. 432, 47 L. ed. 245, 23 Sup. Ct. Rep. 212..... 946
v. Marshall, 34 C. C. A. 133, 91 Fed. 933 ..... 247
v. Pinkney, 149 U. S. 201, 37 L. ed. 702, 13 Sup. Ct. Rep. 859 ..... 717
**Meyer** v. Phillips, 97 N. Y. 485, 49 Am. Rep. 538 ..... 392
v. Richmond, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106 ..... 550
v. Tupper, 1 Black, 522, 17 L. ed. 180 ..... 773
**Michigan Land & Lumber Co.** v. Rust, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208.... 1150
**Micklethwait** v. Winter, 6 Exch. 644 . 584
**Middleport** v. Ætna L. Ins. Co. 82 Ill. 562 ..... 860
**Midland R. Co.** v. Checkley, L. R. 4 Eq. 19 ..... 584
v. Haunchwood Brick & Tile Co. L. R. 20 Ch. Div. 552 .. 581
584
**Milk Producers' Protective Asso.** v. Delaware, L. & W. R. Co. 7 Inters. Com. Rep. 92 .... 336
**Miller** v. Aldrich, 31 Mich. 411 ..... 626
v. Cornwall R. Co. 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34 ..... 107, 215
v. Sherry, 2 Wall. 237, 17 L. ed. 827 ..... 126

Miller v. Texas, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874 ..... 365
Milligan, Ex parte, 4 Wall. 120, 18 L. ed. 295 ..... 1033
Millingar v. Hartupee, 6 Wall. 258, 18 L. ed. 829 ..... 759
Mills v. Green, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852 ... 712, 911, 917
v. United States, 12 L. R. A. 673, 46 Fed. 738 ..... 550
Millville Mut. M. & F. Ins. Co. v. Collerd, 38 N. J. L. 480 .. 265, 452
Milwaukee v. Koeffler, 116 U. S. 219, 29 L. ed. 612, 6 Sup. Ct. Rep. 372 ..... 255
Miner v. Aylesworth, 18 Fed. 199 ..... 156
Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.. 880
Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331.386, 387, 388
Minnesota v. Barber, 136 U. S. 320, 34 L. ed. 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862 ..... 504
v. Brundage, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455 .....117, 343, 921
v. Hitchcock, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650 ..... 538, 1010
Minot v. Philadelphia, W. & B. R. Co. 18 Wall. 206, 21 L. ed. 888 999
Mirzan, Re, 119 U. S. 584, 30 L. ed. 513, 7 Sup. Ct. Rep. 341.. 1183
Mississippi & M. R. Co. v. Rock, 4 Wall. 177, 18 L. ed. 381.. 118, 119
Missouri v. Andriano, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385 ..... 76
Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446..216, 298, 749
v. Haber, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488 ..... 114, 115
v. Roberts, 152 U. S. 114, 38 L. ed. 377, 14 Sup. Ct. Rep. 496 ..... 306
Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389..313, 922, 1081
Mitchell v. Clark, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170 574
v. Harmony, 13 How. 115, 14 L. ed. 75 ..... 551
v. Smale, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819 .... 1136, 1137, 1143, 1157, 1158
Mobile v. Eslava, 9 Port. (Ala.) 577, 33 Am. Dec. 325 ..... 270, 271
Mobile County v. Kimball, 102 U. S. 691, 26 L. ed. 238 ..... 499
Mobile Transp. Co. v. Mobile (1903) 187 U. S. 479, 47 L. ed. 266, 23 Sup. Ct. Rep. 170.. 1146
Moch v. Market Street Nat. Bank, 47 C. C. A. 49, 107 Fed. 897.. 1092
Moffat v. United States, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10 ..... 705
Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622 ..... 549
Monroe Cattle Co. v. Becker, 147 U. S. 47, 37 L. ed. 72, 13 Sup. Ct. Rep. 217 ..... 979
Montana Co. v. St. Louis Min. & Mill. Co. 152 U. S. 160, 38 L. ed. 398, 14 Sup. Ct. Rep. 506.. 549
Moore v. Kellogg, 17 Land Dec. 391 .. 900
v. Missouri, 159 U. S. 678, 40 L. ed. 303, 16 Sup. Ct. Rep. 179 ..... 216
v. Robbins, 96 U. S. 530, 24 L. ed. 848 ..... 978, 979
v. United States, 160 U. S. 268, 40 L. ed. 422, 16 Sup. Ct. Rep. 294 ..... 138
Morbeck v. State ex rel. Jackson Twp. 28 Ind. 86 ..... 431
Morgan v. Hamlet, 113 U. S. 449, 28 L. ed. 1043, 5 Sup. Ct. Rep. 583 ..... 155
v. Louisiana (1876) 93 U. S. 217, 23 L. ed. 860 ..... 176
v. Parham, 16 Wall. 471, 21 L. ed. 303 ..... 518
v. Wordell, 178 Mass. 350, 55 L. R. A. 33, 59 N. E. 1037.. 1092
Morgan Case. See United States v. Morgan, 11 How. 154, 13 L. ed. 643. .....
Morgan's L. & T. R. & S. S. Co. v. Louisiana Bd. of Health, 118 U. S. 455, 464, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114 ..... 114
Morley v. Lake Shore & M. S. R. Co. 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54.. 444, 677
Morris v. Wright, L. R. 5 Ch. 279 ... 462
Morton v. Nebraska, 21 Wall. 660, 22 L. ed. 639 ..... 581
Moseley Case, 35 Ct. Cl. 347 ..... 200
Moss v. Cohen, 158 N. Y. 240, 53 N. E. 8 ..... 741
Moulor v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466... ..... 669
Mountain View Min. & Mill. Co. v. McFadden, 180 U. S. 535, 45 L. ed. 656, 21 Sup. Ct. Rep. 488 .....343, 485, 486
Mrs. Alexander's Cotton, 2 Wall. 404, 17 L. ed. 915 ..... 473, 474
Mudge v. Rowan (1868) L. R. 3 Exch. 85 ..... 1091
Mueller v. Nugent, 184 U. S. 1, 9, 46 L. ed. 405, 409, 22 Sup. Ct. Rep. 269 .... 203, 622, 623
Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273 ..... 327, 503, 542
Mullan v. United States, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041 ..... 581

Mullens v. American Freehold Land Mortg. Co. 88 Ala. 280, 7 So. 201 ..... 874
Muller's Case, 5 Phila. 289 ..... 955
Mumford v. Wardwell (1867) 6 Wall. 423, 18 L. ed. 756 ..... 1145
Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429 ..... 768
v. Ward, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775 ..... 1037
Murphy v. Colorado Paving Co. 166 U. S. 719, 41 L. ed. 1188, 17 Sup. Ct. Rep. 997 ..... 917
v. Utter, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. Rep. 776.. 103
Murray v. Charleston, 96 U. S. 432, 24 L. ed. 760 ..... 250
Mutual L. Ins. Co. v. French, 30 Ohio St. 240, 27 Am. Rep. 443.. 211–213
v. McGrew, 188 U. S. 291, 47 L. ed. 480, 23 Sup. Ct. Rep. 375 ..... 921
v. Terry, 15 Wall. 580, 21 L. ed. 236 ..... 143
Myres v. Parker, 6 Ohio St. 502 ..... 252

N.

Nashua Sav. Bank v. Anglo-American Land, M. & A. Co. 189 U. S. 221, 47 L. ed. 782, 23 Sup. Ct. Rep. 517 ..... 739
Nathan v. Louisiana, 8 How. 73, 12 L. ed. 993 ..... 506
National Bank v. Elmira, 53 N. Y. 49 ..... 1122
National Bank of Commerce v. New Bedford, 175 Mass. 257, 56 N. E. 288 ..... 895
National L. Ins. Co. v. Minch, 53 N. Y. 144 ..... 452
National Metropolitan Bank v. Hitz, MacArth. & M. 198 ..... 198
National Park Bank v. Harmon, 25 C. C. A. 214, 51 U. S. App. 148, 79 Fed. 891, S. C. 172 U. S. 644, 43 L. ed. 1182, 19 Sup. Ct. Rep. 877 ... 795
Neal, Ex parte, L. R. 14 Ch. Div. 579 1091
v. Delaware, 103 U. S. 370, 26 L. ed. 567 ..... 574
Nelson v. Kerr, 59 N. Y. 224 ..... 558
v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302 ..... 730–732
Nevitt v. Clarke, Olcott, 316, Fed. Cas. No. 10,138 ..... 764
New Brunswick & C. R. & Land Co. v. Muggeridge, I Drew & S. 363 ..... 807
Newell v. Nichols, 12 Hun, 604, Affirmed in 75 N. Y. 78, 31 Am. Rep. 424 ..... 236, 237
New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138, 28 L. ed. 379, 4 Sup. Ct. Rep. 364 192
Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769 ..... 1013
Newman v. Livingston County, 45 N. Y. 676 ..... 1122
New Mexico v. United States Trust Co. 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128..... 1046
New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905..... 715
v. De Armas, 9 Pet. 224, 9 L. ed. 109.....90, 491
v. Gaines, 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428..... 247
v. New Orleans Waterworks Co. 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142...759, 891
v. Stempel, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.....444, 445
v. Whitney, 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428..... 247
New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 26 L. ed. 121, 12 Sup. Ct. Rep. 406..... 648
New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691 90, 192, 193, 253, 759
Newport v. Taylor, 16 B. Mon. 699... 517
Newport Light Co. v. Newport, 151 U. S. 527, 537, 38 L. ed. 259, 262, 14 Sup. Ct. Rep. 429.. 119
New Providence v. McEachron, 33 N. J. L. 339..... 431
Newsom v. Bartholomew County, 92 Ind. 229..... 655
Newson v. Pryor, 7 Wheat. 7, 5 L. ed. 382..... 1137
New York v. Eno, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30. 117
New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 260, 14 Sup. Ct. Rep. 437..... 922
New York & N. H. R. Co. v. Schuyler, 17 N. Y. 592.....392, 880
New York Indians, 5 Wall. 761, 18 L. ed. 708..... 537
New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431, 39 L. ed. 1043, 15 Sup. Ct. Rep. 896..... 1000
v. Winter, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356... 906
New York L. Ins. Co. v. Cravens, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962..505, 506
v. Stratham, 93 U. S. 24, 23 L. ed. 789 ..... 211
New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 591, 600, 29 L. ed. 997, 1000, 6 Sup. Ct. Rep. 877, 881..... 219
New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. 418..... 114
Nichols v. Baxter, 5 R. I. 491..... 626
Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522.. 672
Niles v. Cedar Point Club, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124....1149, 1150, 1151

Nishimura Ekiu v. United States, 142 S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336.....724, 725
Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271..... 706
Noddleburn, The, 12 Sawy. 129, 28 Fed. 855 ..... 764
Norcross v. The Laura, 14 Wall. 336, 20 L. ed. 814..... 479
North American Transp. & Trading Co. v. Morrison, 178 U. S. 262, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869.....918, 1172
North Carolina v. Temple, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509..... 587
Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133..... 266
Northern P. R. Co. v. Amato, 144 U. S. 471, 36 L. ed. 508, 12 Sup. Ct. Rep. 740.....316, 317
v. Anrys (1890) 10 Land Dec. 258..... 414
v. Benz, 19 Land Dec. 229..... 415
v. Bowman, 7 Land Dec. 238... 415
v. Colburn, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98.....416, 425
v. Collins, 14 Land Dec. 484.... 421
v. Davis, 19 Land Dec. 87..... 730
v. De Lacey, 174 U. S. 622, 43 L. ed. 1111, 19 Sup. Ct. Rep. 791..... 1015
v. McCrimmon, 12 Land Dec. 554 415
v. Miller, 7 Land Dec. 100..... 419
421, 422, 730
v. Musser-Sauntry Land, Logging & Mfg. Co. 168 U. S. 604, 42 L. ed. 596, 18 Sup. Rep. 205..... 420
v. Plumb, 16 Land Dec. 80.... 415
v. Potter, 11 Land Dec. 531.... 415
v. Pressey, 2 Land Dec. 551.... 421
v. Sanders, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671.....410, 412, 423, 424
v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794.. 547
1047
v. Townsend, 190 U. S. 267, 47 L. ed. 1044, 23 Sup. Ct. Rep. 671..... 1110
Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336..... 549
Northwestern Life Assur. Co. v. Sturdivant, 24 Tex. Civ. App. 331, 59 S. W. 61, 94 Tex. 706..... 214
Northwestern Mut. L. Ins. Co. v. Neeves, 46 Wis. 147, 49 N. W. 832..... 251
Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387.... 649
Noyes v. Hall, 97 U. S. 34, 24 L. ed.909 100
Nuestra Senora de Regla, The, 108 U. S. 92, 27 L. ed. 662, 2 Sup. Ct. Rep. 287 ..... 904
Nugent's Case. See Mueller v. Nugent, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269
Nutting v. Massachusetts, 183 U. S. 553, 46 L. ed. 324, 22 Sup. Ct. Rep. 238..... 506
v. Minnesota F. Ins. Co. 98 Wis. 26, 73 N. W. 432..... 265

O.

Oakland v. Oakland Water Front Co. 118 Cal. 160, 50 Pac. 277.. 870
Oelrichs v. Spain, 15 Wall. 211, 21 L. ed. 43..... 749
v. Williams, 15 Wall. 211, 21 L. ed. 43..... 749
Oglesby v. Attrill, 105 U. S. 605, 26 L. ed. 1186 ..... 786
Ohio v. Thomas, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453..... 459
Old Colony & F. River R. Co. v. Plymouth County, 14 Gray, 155 864
Oliver v. Mutual Commercial Marine Ins. Co. 2 Curt. C. C. 277, Fed. Cas. No. 10,498..... 452
Olson v. Flavel, 13 Sawy. 232, 34 Fed. 477..... 764
Orchard v. Alexander, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635..... 1071
Oregon & C. R. Co. v. United States, 189 U. S. 103, 47 L. ed. 726, 23 Sup. Ct. Rep. 615..... 733
Oregon R. & Nav. Co. v. Oregonian R. Co. 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409.. 313
Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281..... 826
Ornelas v. Ruiz, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689..... 954
Orton v. Smith, 18 How. 263, 15 L. ed. 393..... 588
Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204.. 255
456, 537
Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214..... 878
v. San Diego Land & Town Co. 178 U. S. 22, 44 L. ed. 961, 20 Sup. Ct. Rep. 860..... 896
Oshkosh Waterworks Co. v. Oshkosh, 106 Wis. 85, 81 N. W. 1040 252
Oteiza y Cortes v. Jacobus, 136 U. S. 330, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031.....137, 725
Ottawa v. People ex rel. Caton, 48 Ill. 233..... 859
Ouachita & M. River Packet Co. v. Aiken, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907... 1000
Ould v. Richmond, 23 Gratt. 464, 14 Am. Rep. 139..... 1037

## P.


Pacific Coast S. S. Co. v. Railroad Commissioners, 9 Sawy. 253, 18 Fed. 10..... 336
Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250..... 672
Pacific Gas Improv. Co. v. Ellert, 64 Fed. 421.... .... .... .. 869
Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932..... 587
Pacific Steam Whaling Co. v. United States, 187 U. S. 447, 47 L. ed. 253, 23 Sup. Ct. Rep. 154 ..... 260
Packer v. Bird, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210.....271, 1046, 1146, 1148
Page v. Hardin, 8 B. Mon. 668..... 831
Paine v. Woodworth, 15 Wis. 298.... 251
Palmer v. Bank of Zumbrota, 65 Minn. 90, 67 N. W. 893.....386, 387
v. Dodd, 64 Mich. 474, 31 N. W. 209.... .... .. .. .. .... 1148
Pam-to-pee v. United States, 148 U. S. 691, 37 L. ed. 613, 13 Sup. Ct. Rep. 742.....227, 230, 232
Pancoast v. Gowen, 93 Pa. 66....321, 322
Paquete Habana, The, 175 U. S. 711, 44 L. ed. 332, 20 Sup. Ct. Rep. 290 . . . ..... 473
475, 903, 911, 914
Parker v. Ince (1859) 4 Hurlst. & N. 52.... .... .... .... .. 1091
v. Ormsby, 141 U. S. 83, 35 L. ed. 655, 11 Sup. Ct. Rep. 912.... .... .... ..... 915
Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732..... .. .. .. 1000
Parkes, Re, 10 Nat. Bankr. Reg. 82, Fed. Cas. No. 10,754..... 1182
Parmelee v. Lawrence, 11 Wall. 36, 38, 20 L. ed. 48, 49..... 118
Parsons v. Bedford, 3 Pet. 448, 7 L. ed. 737.. .... .... ..202, 203
v. District of Columbia, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.... .... .... 294
v. United States, 167 U. S. 324, 42 L. ed. 185, 17 Sup. Ct. Rep. 880.... .... .... .. 831
Passavant v. United States, 148 U. S. 214, 37 L. ed. 426, 13 Sup. Ct. Rep. 572..... 619
Passenger Cases, 7 How. 283, 12 L. ed. 702.... .... .... .... .. 498
Patrick v. Graham, 132 U. S. 627, 33 L. ed. 460, 10 Sup. Ct. Rep. 194.... .... .... .... .. 786
Patton v. Brady, 184 U. S. 614, 46 L. ed. 717, 23 Sup. Ct. Rep. 493.... .... .. .... .. .. 256
v. Texas & P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.... .... .... 569
Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357..... .....505, 506, 512
Paulsen v. Portland, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750.... .... .. .... ..74, 801
Pauly v. State Loan & T. Co. 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465.... .....795, 797
Payne v. Hook, 7 Wall. 430, 19 L. ed. 261.. .... .... .... .... 156
v. Robertson, 169 U. S. 323, 42 L. ed. 764, 18 Sup. Ct. Rep. 337.....757, 819, 978, 979
v. Rogers, 1 Dougl. 407..... 675
Payne's Case, L. R. 9 Eq. 223..... 377
Pearpoint v. Graham, 4 Wash. C. C. 232, Fed. Cas. No. 10,877.. 68
Pease, Re, 4 Am. Bankr. Rep. 547.... 127
Peek v. Derry, L. R. 37 Ch. Div. 541, L. R. 14 App. Cas. 337.... 895
v. Jenness, 7 How. 612, 12 L. ed. 841.....126, 127, 588
Pendergast v. The Kalorama, 10 Wall. 204, 19 L. ed. 943..... 772
Penn Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223.....368, 780
Pennock v. Dialogue, 2 Pet. 1, 7 L. ed. 327.... .... .... .... .. 68
Pennoyer v. McConnaughy, 140 U. S. 10, 35 L. ed. 365, 11 Sup. Ct. Rep. 699.... .... .... 587
Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708..... ... ....499, 513
People v. Abbott, 53 Cal. 284, 31 Am. Rep. 59.... .... .... .. 138
v. American Bell Teleph. Co. 117 N. Y. 241, 22 N. E. 1057.. .... .... .... .. 1115
v. City, 31 Chicago Legal News, 247.. .... .... .... .... 53
v. Fonda, 62 Mich. 401, 29 N. W. 26.. .... .. .. ..458, 774
v. Gold Run Ditch & Min. Co. 66 Cal. 151, 56 Am. Rep. 80, 4 Pac. 1152.. .. .. .. 870
v. Hasbrouck, 11 Utah, 291, 39 Pac. 918.... .... .... .. 566
v. Raschke, 73 Cal. 378, 15 Pac. 13.... .... .... .... .. 138
v. Tomlinson, 102 Cal. 19, 36 Pac. 506.... .... .... .. 138
v. Utica Ins. Co. 15 Johns. 358, 8 Am. Dec. 243.... ..... 1021
v. Welch, 141 N. Y. 266, 24 L. R. A. 117, 36 N. E. 328.. 835
People ex rel Glenn v. Binns, 192 Ill. 68, 61 N. E. 376.....: 921
Lawrence v. Brady, 56 N. Y.182 661
Standerfer v. Hamill, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280.... .... .... ..859, 860
Davis v. Sturtevant, 9 N. Y. 263, 59 Am. Dec. 536..... 1125
Perry v. State, 87 Ala. 30, 6 So. 425.. 107
Perry-Mason Shoe Co. v. Sykes, 72 Miss. 390, 28 L. R. A. 277, 17 So. 171..... ..1170, 1171
Pervear v. Massachusetts, 5 Wall. 475, 18 L. ed. 608..... 1037
Peter Paul Book Co., Re, 104 Fed. 786 1170

Peters v. Bain, 133 U. S. 670, 686, 33 L. ed. 696, 702, 10 Sup. Ct. Rep. 354.... ..... .... 68
Peyroux v. Howard, 7 Pet. 324, 8 L. ed. 700.... .... .... .... 773
Phalen v. Virginia, 8 How. 163, 12 L. ed. 1030..... ... ..... 501
Phelps v. Oaks, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714.. 717
Philadelphia v. Western U. Teleg. Co. 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454..244, 1001
Philadelphia & R. R. Co. v. Pennsylvania, 15 Wall. 232, 21 L. ed. 146.... .... .... .... 340
v. Pennsylvania, 15 Wall. 284, 21 L. ed. 164..... 999
Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118.... .... ..... 999
Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 448, 10 L. ed. 535.. 725
Phillips v. Minear, 40 W. Va. 58, 20 S. E. 924.... .... ..... 73
v. Mound City Land & Water Asso. 124 U. S. 605, 31 L. ed. 588, 8 Sup. Ct. Rep. 651 491
v. Negley, 117 U. S. 665, 29 L. ed. 1013, 6 Sup. Ct. Rep. 201.... .... ..... ..161, 947
v. Thompson, 1 Johns. Ch. 131 640
Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471..572, 715
Phoenix Mut. L. Ins. Co. v. Raddin, 120 U. S. 183, 30 L. ed. 644, 7 Sup. Ct. Rep. 500.. 669
Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635...499, 999
Pickens v. Dent, 45 C. C. A. 522, 106 Fed. 653.... .... .... .. 127
v. Roy, 187 U. S. 177, 47 L. ed. 128, 23 Sup. Ct. Rep. 78.. 127
Pidding v. How, 8 Sim. 477..... 289
Pierce v. Indseth, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418 739
v. Somerset R. Co. 171 U. S. 648, 43 L. ed. 319, 19 Sup. Ct. Rep. 64..... 922
v. Tennessee Coal, I. & R. Co. 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335..... 1090
Piggot v. Mason (1829) 1 Paige, 412.. 639
Pillow v. Roberts, 13 How. 472, 476, 14 L. ed. 228, 230..... 74
Pim v. St. Louis, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322.... .... .... .... .. 343
Pinney v. Nelson, 183 U. S. 144, 147, 46 L. ed. 125, 22 Sup. Ct. Rep. 52 .... ....253, 332, 445
Pirie v. Chicago Title & T. Co. 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906..718, 719, 720
Pittsburg & S. Coal Co. v. Bates, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415..362, 398, 499
Pittsburgh & L. A. Iron Co. v. Cleveland Iron Min. Co. 178 U. S. 279, 44 L. ed. 1068, 20 Sup. Ct. Rep. 931..... 345
Pittsburgh, C. C. & St. L. R. Co. v. Backus, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114.... ...566, 801, 999
v. West Virginia Bd. of Public Works, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90 654
Planters' Bank v. Sharp, 6 How. 301, 12 L. ed. 447..... 250
Plant Investment Co. v. Jacksonville, T. & K. W. R. Co. 152 U. S. 71, 38 L. ed. 358, 14 Sup. Ct. Rep. 483..... ..... 405
Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214.. .... ... 1171
Plessy v. Ferguson, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138.. ..... ..... ... 774
Plummer v. Coler, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774.. .... ....1036, 1037, 1038
Plumstead Dist. Bd. of Works v. Spackman, L. R. 13 Q. B. Div. 878.... .... .... .. 1021
Plymouth Consol. Gold Min. Co. v. Amador & S. Canal Co. 118 U. S. 270, 30 L. ed. 233, 6 Sup. Ct. Rep. 1034..... 79
Pollak v. Brush Electric Asso. 128 U. S. 446, 32 L. ed. 474, 9 Sup. Ct. Rep. 119.... .... .... 669
Pollard v. Hagan, 3 How. 212, 11 L. ed. 565.....270, 272, 1145, 1146
v. Hagan, 3 Ala. 291..... 270
Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673....258, 1038, 1039
Poole v. Tyler, 94 U. S. 518, 24 L. ed. 167.... .. .... .... .... 772
Porter v. United States, 106 U. S. 607, 27 L. ed. 286, 1 Sup. Ct. Rep. 539.. .... .... 470, 471
v. Wheeler, 105 Ala. 451, 17 So. 221.... .... .... .... .. 810
Portland v. Montgomery, 38 Or. 215, 62 Pac. 755.... .... .... 969
Portsmouth Bank Case. See State v. Portsmouth Sav. Bank (1886) 106 Ind. 459, 7 N. E. 379.... .... ..... ....
Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268.... 999, 1000
v. Baltimore, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356 . ..... 1000
Potsdamer v. State, 17 Fla. 895..... 575
Pottawatomie Indians v. United States, 27 Ct. Cl. 403, 421... 228, 231
Potts, Re, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520..... 904
Powell v. Brunswick County, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166.. 118, 485

Powers v. Barney, 5 Blatchf. 202, Fed. Cas. No. 11,361..... 986
v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264..... 78, 79
Prather v. Ross, 17 Ind. 495..... 797
Pratt v. Fitzhugh, 1 Black. 271, 17 L. ed. 206 ..... 915
Prescott Case. See United States v. Prescott, 3 How. 578, 11 L. ed. 734.
Presser v. Illinois, 116 U. S. 252, 269, 29 L. ed. 615, 620, 6 Sup. Ct. Rep. 580 ..... 145
Press Pub. Co. v. Monroe, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40 ..... 581
Price v. Forrest, 173 U. S. 410, 43 L. ed. 749, 19 Sup. Ct. Rep. 434 ..... 1005
Priestman v. United States, 4 Dall. 30, note, 1 L. ed. 728, note..... 1034
Prigg v. Pennsylvania, 16 Pet. 539, 10 L. ed. 1060 ..... 459
Primrose v. Western U. Teleg. Co. 154 U. S. 1, 38 L. ed. 883, 14 Sup. Ct. Rep. 1098..... 1173
Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 24, 17 L. R. A. 129, 31 N. E. 990.. 288
Proprietors of Locks and Canals v. Nashua & L. R. Corp. 10 Cush. 385 ..... 864
Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398.. 780
Providence v. Babcock, 3 Wall. 240, 18 L. ed. 31..... 787
Provident Inst. for Savings v. Massachusetts, 6 Wall. 611, 18 L. ed. 907 ..... 1037
Pruitt v. State, 92 Ala. 41, 9 So. 406.. 107
Pulaski County v. Senn, 117 Ind. 410, 20 N. E. 276..... 655
Pulliam v. Pulliam, 10 Fed. 55, 78... 155
Pullman v. Upton, 96 U. S. 328, 24 L. ed. 818 ..... 794
Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808 ..... 714, 880, 881
v. Pennsylvania, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876 ..... 444, 999
Pulte v. Derby, 5 McLean, 328, Fed. Cas. No. 11,465 ..... 1042
Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 177, 20 L. ed. 560 ..... 541, 542, 548, 549
Purcell v. Coleman, 4 Wall. 513, 18 L. ed. 435 ..... 640
v. Miner, 4 Wall. 513, 18 L. ed. 435 ..... 640

## Q.

Quebec Bank v. Hellman, 110 U. S. 178, 28 L. ed. 111, 4 Sup. Ct. Rep. 76 ..... 264
Queen v. Anderson, L. R. 1 C. C. 161.. 1007
v. Leeds & L. Canal Nav. Co. 7 Ad. & El. 671..... 1145
Queen v. Spilsbury [1898] 2 Q. B. 615 ..... 956
Quincy v. Steel, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520 ..... 259

## R.

Rae v. Homestead Loan & Guaranty Co. 176 U. S. 121, 44 L. ed. 398, 20 Sup. Ct. Rep. 341.. 76
Ragan v. Aiken, 9 Lea, 609, 42 Am. Rep. 684 ..... 891
Rahrer, Re, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.. 502, 503, 999
Ramsay v. Quinn, Ir. Rep. 8 C. L. 322.. 763
Randolph v. Quidnick Co. 135 U. S. 457, 34 L. ed. 200, 10 Sup. Ct. Rep. 655 ..... 68
Rapier, Re, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374..... 505
Rasmussen v. Idaho, 181 U. S. 198, 200, 45 L. ed. 820, 821, 21 Sup. Ct. Rep. 594.... 114, 562
Ratterman v. Western U. Teleg. Co. 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127... 499, 1121
Raub v. Carpenter, 187 U. S. 159, 47 L. ed. 119, 23 Sup. Ct. Rep. 72 ..... 1178
Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047... 587, 780, 781
v. United States, 182 U. S. 419, 46 L. ed. 1162, 21 Sup. Ct. Rep. 845 ..... 831
Rebeckah, The, 1 C. Rob. 227..... 1153
Rector v. Ashley, 6 Wall. 142, 18 L. ed. 733 ..... 768
Redlands, L. & C. Domestic Water Co. v. Redlands, 121 Cal. 312, 53 Pac. 791..... 896
Reed v. Canfield, 1 Sumn. 195, Fed. Cas. No. 11,641..... 763
Reeves v. Little, 7 Bush, 470..... 517
v. State, 95 Ala. 31, 11 So. 158.. 136
Reggel, Ex parte, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148 ..... 662, 664
Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92 ..... 117, 502, 774
Reilley v. United States, 46 C. C. A. 25, 106 Fed. 896..... 510
Relfe v. Rundle, 103 U. S. 222, 26 L. ed. 337 ..... 389, 786
Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664 ..... 503
Rice, Re, 155 U. S. 403, 39 L. ed. 201, 15 Sup. Ct. Rep. 149..... 721
v. Ames, 180 U. S. 377, 45 L. ed. 582, 21 Sup. Ct. Rep. 406 ..... 956
v. Dewey, 54 Barb. 455..... 810
v. Minnesota & N. W. R. Co. 1 Black, 358, 17 L. ed. 147.. 1111

**Richardson** v. Louisville & N. R. Co. 169 U. S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268.. 192
193, 343
**Richmond** v. Milwaukee, 21 How. 80, 16 L. ed. 72..... 915
v. Southern Belt Teleph. & Teleg. Co. 174 U. S. 761, 43 L. ed. 1162, 19 Sup. Ct. Rep. 778 ..... 1000
**Richmond** Min. Co. v. Eureka Min. Co. 103 U. S. 839, 26 L. ed. 557 ..... 689
Ricketson v. Richardson, 26 Cal. 149.. 100
Rider Life Raft Co. v..Roach, 97 N. Y. 378 ..... 741
Ridgway v. Ludlow (1877) 58 Ind. 248 ..... 1139, 1140
Riggin v. Magwire, 15 Wall. 549, 21 L. ed. 232 ..... 1090
Riley v. Welles, 154 U. S. 578, 19 L. ed. 648, 14 Sup. Ct. Rep. 1166 ..... 421
Ring v. Maxwell, 17 How. 147, 15 L. ed. 25 ..... 619
Rio Grande Case. See United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 704, 43 L. ed. 1142, 19 Sup. Ct. Rep. 770.
Ritter v. Mutual L. Ins. Co. 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300 ..... 144, 219
Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544 ..... 661
Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.... 338, 340
506, 999
**Roberts** v. Bonaparte, 73 Md. 191, 10 L. R. A. 689, 20 Atl. 918.. 797
v. Graham, 6 Wall. 578, 18 L. ed. 791 ..... 786
v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756 ..... 547
v. Reilly, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep 291... 660
662
v. Sacra, 38 Tex. 580..... 248
v. United States, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 396 ..... 1078
**Robertson** v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326 ..... 1006
v. Cease, 97 U. S. 646, 24 L. ed. 1057 ..... 916
v. Robinson, 65 Ala. 610, 39 Am. Rep. 17 ..... 108
v. Sichel, 127 U. S. 507, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286 ..... 523
**Robinson** v. Anderson, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1012 ..... 633
v. Belt, 187 U. S. 50, 47 L. ed. 69, 23 Sup. Ct. Rep. 19.... 921
v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343 ..... 245, 315, 714
**Robinson** v. Southern Nat. Bank, 189 U. S. 295, 45 L. ed. 536, 21 Sup. Ct. Rep. 383..... 795
Robison v. Female Orphan Asylum, 123 U. S. 702, 31 L. ed. 293, 8 Sup. Ct. Rep. 327... 237
Roby v. Colehour, 146 U. S. 153, 159, 36 L. ed. 922, 13 Sup. Ct. Rep. 47 ..... 119
Rockport Water Co. v. Rockport, 161 Mass. 279, 37 N. E. 168... 891
Rodd v. Heartt, 21 Wall. 558, 22 L. ed. 654 ..... 762, 772, 773
Roehm v. Horst, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780.. 1090
Rogers, Ex parte, 7 Cow. 526..... 1163
Rogers' Locomotive Mach. Works v. American Emigrant Co. 164 U. S. 559, 41 L. ed. 552, 17 Sup. Ct. Rep. 188..... 1150
Romaine, Re, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759..... 444
Romanow, Re, 92 Fed. 510..... 1170
Ronkendorff v. Taylor, 4 Pet. 349, 7 L. ed. 882 ..... 568
Rose v. Himely, 4 Cranch, 269, 2 L. ed. 617 ..... 371
Rosenthal v. Wehe, 58 Wis. 621, 17 N. W. 318 ..... 251
Ross, Re, 140 U. S. 473, 35 L. ed. 583, 11 Sup. Ct. Rep. 897..... 1024
v. Faust (1876) 54 Ind. 471, 23 Am. Rep. 655 ..... 1139, 1140
v. Hatch, 5 Iowa, 149..... 431
v. McIntyre, 140 U. S. 473, 35 L. ed. 583, 11 Sup. Ct. Rep. 897..... 1024
Rosse v. Wainman, 14 Mees. & W. 859 ..... 583
Roth v. Ehman, 107 U. S. 319, 27 L. ed. 499, 2 Sup. Ct. Rep. 312, 486
v. Roth, 104 Ill. 35, 44 Am. Rep. 81 ..... 486
Rouse v. Letcher, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266 ..... 344
Rouse, H. & Co., Re, 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96 ..... 1182
Rowbotham v. Jones, 47 N. J. Eq. 337, 19 L. R. A. 663, 20 Atl. 731 ..... 392
Rowe v. Granite Bridge Corp. 21 Pick. 344 ..... 548
Royall, Ex parte, 117 U. S. 241, 29 L. ed. 868, 6 Sup. Ct. Rep. 734 ..... 117
v. Virginia, 116 U. S. 572, 29 L. ed. 735, 6 Sup. Ct. Rep. 510 ..... 1037
Russell v. Hallett, 23 Kan. 276..... 236
v. Southard, 12 How. 139, 13 L. ed. 927 ..... 100
Ryan v. Bindley, 1 Wall. 66, 17 L. ed. 559 ..... 785
v. Central P. R. Co. 99 U. S. 382, 25 L. ed. 305.... 731, 900

S.

Sagor, Re, 9 Am. Bankr. Rep. 361.... 719

St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. (1897) 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157 . . . . . 1146, 1148, 1157
St Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354 . . . . . 1116
St. Ivan, The, Edw. Adm. 376 . . . . . 475
St. Joseph & D. C. R. Co. v. Baldwin, 103 U. S. 426, 26 L. ed. 578 . . . . . 1047
St. Joseph & G. I. R. Co. v. Steele, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925 . . . . . 759
St. Lawrence, The, 1 Black, 522, 17 L. ed. 180 . . . . . 773
St. Louis v. Myers (1885) 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640 . . . . . 1146
v. Rutz, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337 . . 271, 1146
v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990 . . . . . 244, 1000
v. Wiggins Ferry Co. 11 Wall. 423, 20 L. ed. 192 . . . . 398, 518
St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621 . . . . 343, 1081, 1086, 1084
St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419 . . . . . 1183
St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875 . . . . . 979
St. Paul & P. R. Co. v. Northern P. R. Co. 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389 . . 410, 423, 424
v. Schurmeir, 7 Wall. 272, 19 L. ed. 74 . . . . . 1137, 1138
St. Paul & S. C. R. Co. v. Winona & St. P. R. Co. 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334 . . . . . 731
St. Paul Gaslight Co. v. St. Paul, 181 U. S. 142, 45 L. ed. 788, 21 Sup. Ct. Rep. 575 . . . . . 780
Sanders v. People, 124 Ill. 218, 16 N. E. 81 . . . . . 82
San Diego Flume Co. v. Souther, 32 C. C. A. 548, 61 U. S. App. 134, 90 Fed. 164, 44 C. C. A. 143, 104 Fed. 706, 112 Fed. 228 . . . . . 896
San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804 . . . . . 894
Sands Ale Brewing Co., Re, 3 Biss. 175, Fed. Cas. No. 12,307 . . 626
San Francisco v. Le Roy (1891) 138 U. S. 656, 34 L. ed. 1096, 11 Sup. Ct. Rep. 364 . . . . . 1146
v. Randall, 54 Cal. 408 . . . . . 136
San Francisco v. Scott, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688 . . . . . 490
v. Straut, 84 Cal. 124, 24 Pac. 814 . . . . . 869
Sanger v. Newton, 134 Mass. 308 . . . . . 1182
Sapphire, The, v. Napoleon III. 11 Wall. 164, 20 L. ed. 127 . . . 1162
Saratoga County v. Deyoe, 77 N. Y. 219 . . . . . 392
Savage v. State, 18 Fla. 909 . . . . . 449
Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392 . . 445
Sawdon v. Andrew, 30 L. T. N. S. 23 . . 1173
Sawyer, Re, 124 U. S. 200, 31 L. ed. 417, 8 Sup. Ct. Rep. 482 . . . 255, 780
Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777 . . . . . 485, 491, 768
Scarff v. Metcalf, 107 N. Y. 211, 13 N. E. 796 . . . . . 764
Scattergood v. Tutton, 2 Fed. 28 . . . . . 181
Schell v. Plumb, 55 N. Y. 592 . . . . . 1090
Schillinger v. United States, 24 Ct. Cl. 278 . . . . . 544
v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85 . . . 523, 544, 551, 552
Schillinger's Case. See Schillinger v. United States, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85.
Schmidt v. Stark, 61 Minn. 91, 63 N. W. 255 . . . . . 152, 154
Schoeffler v. State, 3 Wis. 823 . . . . . 449
Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757 . . . . . 999
Scholtz, Re, 106 Fed. 834 . . . . . 1171
Schriber v. Rapp, 5 Watts, 351, 30 Am. Dec. 327 . . . . . 55, 59
Schultz v. Blackford County, 20 Ind. 178 . . . . . 654
Schuyler County v. People ex rel. Rock Island & A. R. Co. (1860) 25 Ill. 181 . . . . . 859
Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148 . . . . . 158
v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265 . . . . . 587, 918
v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108 . . . . . 982
Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48 . . . . . 549, 554
Scribner v. Clark, 50 Fed. 473 . . . . . 461
Seaman v. Smith, 24 Ill. 521 . . . . . 1158
Seawell v. Kansas City, Ft. S. & M. R. Co. 119 Mo. 222, 5 Inters. Com. Rep. 262, 24 S. W. 1002 . . . . . 336
Secretary of State v. Kamachee Boye Sahaba, 13 Moore P. C. C. 22 . . . . . 903
Secretary, The, v. McGarrahan, 9 Wall. 298, 19 L. ed. 570 . . . . . 706

Security Sav. & L. Asso. v. Elbert, 153 Ind. 198, 54 N. E. 753.... 332
Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. Rep. 52 ..... 159
v. Dent, 43 C. C. A. 594, 104 Fed. 380 ..... 149
v. Dodd, 173 U. S. 624, 633, 43 L. ed. 835, 839, 19 Sup. Ct. Rep. 545 ..... 67
Sedgwick v. Menck, 6 Blatchf. 156, Fed. Cas. No. 12,616..... 127
Seegar v. Ashland, 101 Wis. 515, 77 N. W. 880 ..... 252
Selma, The, 1 Low. Dec. 30, Fed. Cas. No. 12,647 ..... 470
Seneca Nation v. Christie, 126 N. Y. 122, 27 N. E. 275..... 827
Sharp v. Bedell, 10 Ill. 88..... 252
Shattuck v. Robbins, 68 N. H. 565, 44 Atl. 694 ..... 787
v. State, 51 Miss. 575..... 778
Shaw, Ex parte, 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935 ..... 247
v. Dix, 72 Fed. 166..... 182
v. Quincy Min. Co. 145 U. S. 444, 36 L. ed. 768, 12 Sup. Ct. Rep. 935 ..... 247
Shehane v. Bailey, 110 Ala. 308, 20 So. 359 ..... 781
Shelby County v. Union & Planters' Bank (1895) 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558 ..... 714, 715
Shelton v. Pease (1847) 10 Mo. 473.. 1092
Shepard v. Adams, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214 ..... 917
Shewalter v. Missouri P. R. Co. 152 Mo. 551, 54 S. W. 224..... 216
Shillaber v. Robinson, 97 U. S. 68, 24 L. ed. 967 ..... 100
Shire Case, 10 Land Dec. 85..... 421
Shirley v. Bishop, 67 Cal. 545, 8 Pac. 82 ..... 870
Shively v. Bowlby (1894) 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.. 869, 870, 1046, 1146 1148, 1152, 1154, 1157, 1158
Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726 ..... 438, 632
Shumate v. Heman, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645 ..... 572, 922
Sideck v. Duran, 67 Tex. 256, 3 S. W. 264 ..... 791
Siebold, Ex parte, 100 U. S. 371, 25 L. ed. 717 ..... 918
Siegert v. Abbott, 61 Md. 276, 48 Am. Rep. 101 ..... 288
Sievers, Re, 91 Fed. 366..... 1170
Sigua Iron Co. v. Greene, 44 C. C. A. 221, 104 Fed. 854..... 797
Simmons v. United States, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171 ..... 86
Simon v. Craft, 182 U. S. 427, 46 L. ed. 1165, 21 Sup. Ct. Rep. 836 ..... 801
Simonson v. Sinsheimer, 37 C. C. A. 337, 95 Fed. 948 ..... 943
Sinclair v. Jackson, 8 Cow. 543..... 781
Sinnickson v. Johnson, 17 N. J. L. 129, 34 Am. Dec. 184..... 548
Sinnott v. Davenport, 22 How. 227, 243, 16 L. ed. 243, 247.... 114 774
Sioux City & St. P. R. Co. v. Chicago, M. & St. P. R. Co. 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790 ..... 731
Siren, The, 13 Wall. 389, 20 L. ed. 505 ..... 467, 472, 473, 474
680 Pieces Merchandise, 2 Sprague, 233, Fed. Cas. No. 12,915.. 473
Sizer v. Many, 16 How. 104, 14 L. ed. 863 ..... 915
Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394 ..... 508, 982
Slidell v. Grandjean, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475 ..... 791
Smead v. Southern P. R. Co. 29 Land Dec. 135 ..... 900
Smith, Ex parte, 94 U. S. 455, 24 L. ed. 165 ..... 916
v. Hatch, 46 N. H. 146..... 550
v. Maryland (1855) 18 How. 74, 15 L. ed. 270..... 1145
v. McKay, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490 ..... 247, 912, 917, 946
v. Mississippi, 162 U. S. 592, 40 L. ed. 1082, 16 Sup. Ct. Rep. 900 ..... 574, 883
v. Morrison, 22 Pick. 430..... 332
v. Morse, 2 Cal. 524..... 869
v. National Ben. Soc. 123 N. Y. 85, 9 L. R. A. 616, 25 N. E. 197 ..... 451
v. Strother, 68 Cal. 194, 8 Pac. 852 ..... 804
v. The Eastern Railroad, 1 Curt. C. C. 253, Fed. Cas. No. 13,039 ..... 773
v. Townsend, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634 ..... 757, 819, 820
v. Wise, 132 N. Y. 172, 30 N. E. 229 ..... 1170
Smoot v. Rittenhouse, 27 Wash. L. Rep. 741 ..... 197, 198
Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418 ..... 335, 585, 586, 587
Smythe v. Fiske, 23 Wall. 374, 23 L. ed. 47 ..... 1021
Society for Savings v. Coite, 6 Wall. 594, 18 L. ed. 897..... 1037
South Branch Lumber Co. v. Ott, 142 U. S. 622, 627, 35 L. ed. 1136, 1138, 12 Sup. Ct. Rep. 318 ..... 68
South Carolina v. Georgia, 93 U. S. 4, 23 L. ed. 782..... 547
v. Seymour, 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871 ..... 922
Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44 ..... 717

Southern P. R. Co. (Branch) v. Lopez (1884) 3 Land Dec. 130... 414
v. Moore, 11 Land Dec. 534.... 900
v. United States, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154 ..... 899
v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18 ..... 900
Southwick v. The Clyde, 6 Blackf. 148, 773
Spalding v. Chandler, 160 U. S. 394, 40 L. ed. 469, 16 Sup. Ct. Rep. 360 ..... 306
v. Crawford, 3 App. D. C. 361.. 121
Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104 ..... 321
Speed v. McCarthy, 181 U. S. 275, 45 L. ed. 858, 21 Sup. Ct. Rep. 613 ..... 345
Speidel v. Henrici, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610.. .. .....55 59
Spencer v. Merchant, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921 ..... 74, 294
v. Slater, L. R. 4 Q. B. Div. 13.. 67
Spicer v. Northern P. R. Co. 10 Land Dec. 440 ..... 415
Spies, Ex parte, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21.. 108 484
v. Illinois, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21.. 108 343, 484
v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898..... 449
Springhead Spinning Co. v. Riley, L. R. 6 Eq. 558..... 781
Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910.... 894
v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48 ..... 894
Squire v. 100 Tons of Iron, 2 Ben. 21, Fed. Cas. No. 13,270..... 773
Stairs v. Peaslee, 18 How. 521, 15 L. ed. 474 ..... 619
Standard Oil Co. v. Bachelor, 89 Ind. 1 361
Stanley v. Albany County, 121 U. S. 535, 30 L. ed. 1001, 7 Sup. Ct. Rep. 1234 ..... 1122
Stanly County v. Snuggs, 121 N. C. 394, 39 L. R. A. 439, 28 S. E. 539 ..... 1128, 1131, 1132
Starr v. United States, 164 U. S. 627, 41 L. ed. 577, 17 Sup. Ct. Rep. 223 ..... 106
State v. Bank of Commerce, 95 Tenn. 231, 31 S. W. 993..... 715
v. Barton, 142 Mo. 450, 44 S. W. 239 ..... 216
v. Cantlin, 118 Mo. 111, 23 S. W. 1091 ..... 216
v. Combs, 47 Kan. 136, 27 Pac. 818 ..... 136
v. Chicago, R. I. & P. R. Co. 61 Neb. 545, 85 N. W. 556... 586
v. Clarke, 25 N. J. L. 54..... 777
v. Earle, 24 La. Ann. 38, 13 Am. Rep. 109 ..... 449
State v. Field, 98 Iowa, 748, 62 N. W. 653 ..... 456
v. Foster, 9 Tex. 65..... 574
v. Hunter, 94 N. C. 829..... 778
v. Kidd, 125 Ala. 413, 28 So. 418 ..... 672
v. Laycock, 141 Mo. 274, 42 S. W. 723 ..... 216
v. Lewis, 113 N. C. 622, 18 S. E. 69 ..... 778
v. McConnell, 3 Lea, 332..... 712
v. Manuel, 20 N. C. (4 Dev. & B. L.) 20 ..... 698
v. Menke, 56 Kan. 77, 42 Pac. 350 ..... 458
v. Miller, 45 Mo. 495..... 146
v. Pike, 15 N. H. 83..... 774
v. Portsmouth Sav. Bank (1886) 106 Ind. 459, 7 N. E. 379.. 1140 1141, 1142, 1151, 1154, 1155
v. Powers, 10 Or. 145, 45 Am. Rep. 138 ..... 122
v. Robey, 8 Nev. 312..... 68
v. Sacre, 141 Mo. 64, 41 S. W. 905 ..... 216
v. Southern P. Co. 52 La. Ann. 1822, 28 So. 372..... 313
v. Stripling, 113 Ala. 120, 36 L. R. A. 81, 21 So. 409..... 507
v. Trolson, 21 Nev. 419, 32 Pac. 930 ..... 136
v. Wolff, 34 La. Ann. 1153.... 136
State ex rel. Wolfe v. Bronson, 115 Mo. 271, 276, 21 S. W. 1125, 1126 ..... 146
Johnson v. Campbell, 8 Lea, 74.. 711
Railroad Warehouse Commission v. Chicago, St. P. M. & O. R. Co. 40 Minn. 267, 3 L. R. A. 238, 2 Inters. Com. Rep. 519, 41 N. W. 1047.. 336
Wyandotte County v. Harper, 6 Ohio St. 607, 67 Am. Dec. 363 ..... 431
Atty. Gen. v. Hawkins, 44 Ohio St. 98, 5 N. E. 228..... 831
Kirkwood v. Heege, 135 Mo. 112, 118, 36 S. W. 614..... 146
Robinson v. Lindsay, 103 Tenn. 635, 53 S. W. 950..... 712
Rambo v. Maloney, 92 Tenn. 62, 20 S. W. 419..... 711
Dickason v. Marion County Ct. 128 Mo. 440, 30 S. W. 105.. 146
Godfroy v. Miami County, 63 Ind. 497 ..... 654
Dana v. Ramsey County Probate Ct. 40 Minn. 296, 41 N. W. 1033 ..... 152
Matteson v. Ramsey County Probate Ct. 84 Minn. 289, 87 N. W. 783..... 152
Lindekugel v. Sibley County Probate Ct. 33 Minn. 94, 22 N. W. 10..... 151
Burroughs v. Webster, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750 ..... 565
Railroad Comrs. v. Western U. Teleg. Co. 113 N. C. 213, 22 L. R. A. 570, 18 S. E. 389.. 336
Curry v. Wright, 5 Heisk. 612.. 711

State, Detmold, Prosecutor, v. Engle, 34 N. J. L. 425..... 361
State Freight Tax, 15 Wall. 232, 21 L. ed. 146 ..... 340
State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663.... 255, 256
State Tax on Foreignheld Bonds, 15 Wall. 300, 21 L. ed. 179... 445
State Tax on Railway Gross Receipts, 15 Wall. 284, 21 L. ed. 164 ..... 999
Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389.. 979
Stephens v. Cherokee Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722 ..... 188
189, 190, 537
v. Choctaw Nation, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722 ..... 307
Sternberger v. Cape Fear & Y. Valley R. Co. 29 S. C. 510, 2 L. R. A. 105, 7 S. E. 836..... 336
Stevens v. Middlesex Canal, 12 Mass. 466 ..... 548
v. Stevens, 3 Dana, 371 ..... 518
Stine v. Bennett, 13 Minn. 153, Gil. 138 ..... 332
Stirneman v. Smith, 40 C. C. A. 581, 100 Fed. 600 ..... 52
Stockard v. Morgan, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576 .....340, 999
Stoddard v. Treadwell, 29 Cal. 281.. 485
Stone v. Mississippi, 101 U. S. 814, 25 L. ed. 1079 .....370, 501
v. South Carolina, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799 ..... 1081
Stoner v. Rice (1889) 121 Ind. 51, 6 L. R. A. 387, 22 N. E. 968 1137
1140, 1141, 1142, 1148, 1155
Stoneroad v. Stoneroad, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822 ..... 1137
Storm v. Waddell, 2 Sandf. Ch. 494.. 126
Stout v. Hyatt, 13 Kan. 232..... 449
Stoutenburgh v. Hennick, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256 ..... 335
339, 999
Straker v. Hartland, 2 Hem. & M. 570 904
Strauss v. Hensey, 7 App. D. C. 289, 36 L. R. A. 92 ..... 198
Streitwolf v. Streitwolf, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553 .....372, 373, 922
Strong v. Waterman, 11 Paige, 607.. 827
Stuart v. Easton, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268 ..... 698
v. Hayden, 169 U. S. 2, 42 L. ed. 639, 18 Sup. Ct. Rep. 274 379
794
Studebaker v. Perry, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463 ..... 344
Sturges v. Carter, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014 ..... 672
Sturges v. Crowninshield, 4 Wheat. 122, 4 L. ed. 529..... 774
Sullivan v. Davis, 29 Kan. 28 ..... 810
v. Sullivan Timber Co. 103 Ala. 371, 25 L. R. A. 543, 15 So. 941. ..... 874
Sulphine v. Dunbar, 55 Miss. 255 .... 810
Sulz v. Mutual Reserve Fund Life Asso. 145 N. Y. 163, 28 L. R. A. 379, 40 N. E. 242... 193
Sumner v. Hicks, 2 Black, 532, 17 L. ed. 355 ..... 68
v. Seaton, 47 N. J. Eq. 103, 19 Atl. 884 ..... 810
Supreme Commandery K. of G. R. v. Ainsworth, 71 Ala. 436, 447, 46 Am. Rep. 332, 336. 219
Surgett v. Lapice (1850) 8 How. 48, 12 L. ed. 982 .....1150, 1151
Sutton Mfg. Co. v. Hutchinson, 11 C. C. A. 320, 24 U. S. App. 145, 63 Fed. 501 ..... 458
Swafford v. Templeton, 185 U. S. 487, 493, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783..... 192
193, 911, 914, 918
Swan v. United States, 19 Ct. Cl. 51.. 470
Swanston v. Morton, 1 Curt. C. C. 294, Fed. Cas. No. 13,677 ..... 619
Sweet v. Rechel, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43 562
Sweringen v. St. Louis, 185 U. S. 46, 46 L. ed. 799, 22 Sup. Ct. Rep. 569 .....485, 886
Sybil, The, Blatchf. Prize Cas. 615, Fed. Cas. No. 13,706..... 904
Sylph The, L. R. 2 Adm. & Eccl. 24.. 765
Syms v. New York (1887) 105 N. Y. 153, 11 N. E. 369 ..... 639

T.

Talbot v. Seaman, 1 Cranch, 1, 2 L. ed. 15 ..... 739
Tarpey v. Madsen, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849 .....413, 731, 732
Tarpey Case. See Tarpey v. Madsen, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849
Taylor v. Postal Teleg. Cable Co. 202 Pa. 583, 52 Atl. 128..... 244
v. Ranney, 4 Hill, 619 ..... 1181
v. Secor, 92 U. S. 575, 23 L. ed. 663 .....255, 256
v. Taylor, 59 N. J. Eq. 86, 45 Atl. 440 ..... 127
v. Underhill, 40 Cal. 473 ..... 869
Taylor Dist. Twp. v. Morton, 37 Iowa, 551 ..... 431
Telford v. Ashland, 100 Wis. 238, 75 N. W. 1006 ..... 252
Telluride Power Transmission Co. v. Rio Grande Western R. Co. 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245..... 311
v. Rio Grande Western R. Co. 187 U. S. 569, 47 L. ed. 307, 23 Sup. Ct. Rep. 178..... 828
Tennessee v. Condon, 189 U. S. 64, 47 L. ed. 709, 23 Sup. Ct. Rep. 579 ..... 894

**Tennessee** v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654..632, 633
**Terlinden** v. Ames, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484 ..... 954
**Tervin** v. State, 37 Fla. 396, 20 So. 551 ..... 574, 575
**Texas & P. R. Co.** v. Archibald, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777 ..... 906
**Texas P. R. Co. & Southern P. R. Co.** 4 Land Dec. 215 ..... 900
**Thelusson** v. Smith, 2 Wheat. 396, 4 L. ed. 271 ..... 431
**Theta** The (1894) Prob. 280..... 765
**Third Ave.** R. Co. v. New York, 54 N. Y. 159 ..... 392
**Third Street & Suburban R. Co.** v. Lewis, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 541 ..... 632
**Thomas**, Re, 12 Blatchf. 370, Fed. Cas. No. 13,887 ..... 138
Re, 82 Fed. 304 ..... 459
v. Gay, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340.. 306, 837, 838
v. Vonkapff, 6 Gill & J. 372.... 626
**Thompson** v. Adams, 93 Pa. 55..... 321
v. Hubbard, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710 1043
v. Knickerbocker L. Ins. Co. 104 U. S. 252, 26 L. ed. 765... 211
v. Perrine, 106 U. S. 589, 27 L. ed. 298, 1 Sup. Ct. Rep. 564 405
v. Phœnix Ins. Co. 136 U. S. 287, 34 L. ed. 408, 10 Sup. Ct. Rep. 1019 ..... 1171
v. Saint Nicholas Nat. Bank, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66... 881
v. Shiawassee County Circuit Judge, 54 Mich. 236, 19 N. W. 967 ..... 100
v. United States, 155 U. S. 274, 39 L. ed. 149, 15 Sup. Ct. Rep. 73 ..... 86
v. Utah, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620 1020, 1033, 1178
v. Whitman (1874) 18 Wall. 457, 21 L. ed. 897.370, 371, 372
**Tide Water Oil Co.** v. United States, 171 U. S. 210, 43 L. ed. 139, 18 Sup. Ct. Rep. 837. 986
**Tindal** v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770 ..... 587
**Tinsley** v. Anderson, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805 ..... 946
**Tipton** v. Maloney (1896) 23 Land Dec. 186 ..... 820
**Titan** The, 23 Blatchf. 177, 23 Fed. 413 ..... 764
**Tolleston Club** v. Clough, 146 Ind. 93, 43 N. E. 647 ..... 1137, 1142, 1149, 1151, 1155
v. State (1894) 141 Ind. 197, 38 N. E. 214 ..... 1137, 1141, 1142, 1149, 1150, 1151, 1155
**Tolleston Club Cases.** See Tolleston Club v. Clough, 146 Ind. 93, 43 N. E. 647, and Tolleston Club v. State, 141 Ind. 197, 38 N. E. 214....
**Tonawanda** v. Lyon, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609 ..... 572
**Townsend** v. Little, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357 ..... 777
**Towson** v. Moore, 173 U. S. 17, 25, 43 L. ed. 597, 601, 19 Sup. Ct. Rep. 332 ..... 121
**Trade-Mark Cases**, 100 U. S. 96, 25 L. ed. 552 .....505, 983
**Tredway** v. Riley, 32 Neb. 495, 49 N. W. 268 ..... 333
**Tremaine** v. Hitchcock, 23 Wall. 518, 23 L. ed. 97 ..... 717
**Tremolo Patent**, The, 23 Wall. 518, 23 L. ed. 97 ..... 717
**Trigg** v. Glasgow, 2 Bush, 594..... 397
**Troeder** v. Hyams, 153 Mass. 536, 27 N. E. 775 ..... 675
**T. T. Haydock Carriage Co.** v. Pier, 78 Wis. 579, 47 N. W. 945... 1171
**Tucker** v. Alexandroff, 183 U. S. 424, 46 L. ed. 264, 22 Sup. Ct. Rep. 195 ..... 954
v. Ferguson, 22 Wall. 527, 22 L. ed. 805 ..... 648
v. Linger, L. R. 8 App. Cas. 508 584
v. McKay, 164 U. S. 701, 41 L. ed. 1180, 17 Sup. Ct. Rep. 1001 ..... 917
**Tullock** v. Mulvane, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372 ..... 749
**Turner** v. Bank of North America, 4 Dall. 8, 1 L. ed. 718..... 916
v. Fendall, 1 Cranch, 116, 2 L. ed. 53 ..... 558
v. Sawyer, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192 ..... 979
**Turpin** v. Lemon, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20 781, 801
**207 Half Pound Papers of Smoking Tobacco** v. United States, 11 Wall. 616, 20 L. ed. 227 306
**Twycross** v. Grant, L. R. 2 C. P. Div. 469 ..... 895
**Tyler**, Re, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785..... 587
v. Registration Court Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206.. 75, 781
v. Tyler, 19 Ill. 151 ..... 68
**Tyson** v. Tyson, 37 Md. 567..... 570

U.

**Uhla**, The, L. R. 2 Adm. & Eccl. 29, note ..... 765
**Underwood** v. Wing, 4 De G. M. & G. 633, 19 Beav. 459.....236, 238
**Union & Planters' Bank** v. Memphis (1898) 101 Tenn. 154, 46 S. W. 557 ..... 715

Union & Planters' Bank Case. See Tennessee v. Union & Planters' Bank, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654
Union Bank v. Oxford, 119 N. C. 214, 34 L. R. A. 487, 25 S. E. 966 . . . . . 1128, 1131
v. Vaiden, 18 How. 503, 15 L. ed. 472 . . . . . 155, 156
Union Mut. L. Ins. Co. v. Kirchoff, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318. 922
Union Nat. Bank v. Bank of Kansas City, 136 U. S. 223, 235, 34 L. ed. 341, 345, 10 Sup. Ct. Rep. 1013 . . . . . 68
Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843 . . . . . 316, 317
v. McShane, 22 Wall. 444, 22 L. ed. 747 . . . . . 539
United States v. Alabama Great Southern R. Co. 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306 . . . . . 419
v. Alexander, 2 Wall. 404, 17 L. ed. 915 . . . . . 473, 474
v. American Bell Teleph. Co. 29 Fed. 17 . . . . . 1115
v. Bache, 8 C. C. A. 258, 20 U. S. App. 286, 59 Fed. 762.. 180, 182
v. Baltimore & O. R. Co. 17 Wall. 322, 21 L. ed. 597.. 1038
v. Bank of the Metropolis, 15 Pet. 377, 10 L. ed. 774.... 431
v. Beebe, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083 728
v. Beebe, 180 U. S. 343, 45 L. ed. 563, 21 Sup. Ct. Rep. 371. 1113
v. Berdan Fire-Arms Mfg. Co. 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420 546
v. Blackfeather, 155 U. S. 180, 39 L. ed. 114, 15 Sup. Ct. Rep. 64 . . . . . 1102
v. Buchanan, 8 How. 105, 12 L. ed. 1006 . . . . . 431
v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575. 848
v. Central P. R. Co. 26 Fed. 479 1016
v. Colton Marble & Lime Co. 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163 768, 899
v. Cook (1873) 19 Wall. 591, 22 L. ed. 210 . . . . . 306
v. Cruikshank, 92 U. S. 542, 23 L. ed. 588 . . . . . 981
v. Dashiel, 4 Wall. 182, 18 L. ed. 319 . . . . . 428, 429
v. Delespine, 15 Pet. 319, 10 L. ed. 753 . . . . . 790
v. Eckford, 6 Wall. 484, 18 L. ed. 920 . . . . . 431
v. E. C. Knight Co. 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249 . . . . . 333, 505, 999
v. Fillebrown, 7 Pet. 48, 8 L. ed. 603 . . . . . 431
United States v. Finnell, 185 U. S. 236, 46 L. ed. 890, 22 Sup. Ct. Rep. 633 . . . . . 777, 907
v. Fisher, 2 Cranch, 358, 2 L. ed. 304 . . . . . 1005
v. 43 Gallons of Whisky, 93 U. S. 188, 23 L. ed. 846..... 508
v. Giles, 9 Cranch, 212, 3 L. ed. 708 . . . . . 431
v. Gilliat, 164 U. S. 42, 41 L. ed. 344, 17 Sup. Ct. Rep. 16 1097
v. Gilmore, 7 Wall. 491, 19 L. ed. 282 . . . . . 431
v. Gratiot (1840) 14 Pet. 526, 10 L. ed. 573 . . . . . 1147
v. Great Falls Mfg. Co. 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306 . . . . . 524, 544–547, 551
v. Harris, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601 982
v. Hawkins, 10 Pet. 125, 9 L. ed. 369 . . . . . 431
v. Hill, 1 Brock, 159, Fed. Cas. No. 15,364 . . . . . 1025
v. Holliday, 3 Wall. 417, 18 L. ed. 185 . . . . . 498
v. Iron Silver Min. Co. 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195 . . . . . 582
v. Isham, 17 Wall. 496, 21 L. ed. 728 . . . . . 986
v. Jahn, 155 U. S. 112, 39 L. ed. 89, 15 Sup. Ct. Rep. 39.... 247
v. Johnston, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446 . . . . . 907
v. Joint Traffic Asso. 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25 . . . . . 502
v. Jones, 131 U. S. 1, 33 L. ed. 90, 9 Sup. Ct. Rep. 669... 523
v. Jones, 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. Rep. 615 . . . . . 778
v. Jordan, 113 U. S. 418, 28 L. ed. 1013, 5 Sup. Ct. Rep. 585 . . . . . 1098
v. Kagama (1885) 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109 . . . . . 306, 536
v. Keehler, 9 Wall. 83, 19 L. ed. 574 . . . . . 428
v. King, 3 How. 773, 11 L. ed. 824 . . . . . 790
v. Kirby, 7 Wall. 482, 19 L. ed. 278 . . . . . 1021, 1025
v. Knox, 102 U. S. 422, 26 L. ed. 216 . . . . . 344, 393
v. Lancaster, 2 McLean, 431, Fed. Cas. No. 15,556..... 136
v. Lariviere, 93 U. S. 188, 23 L. ed. 846 . . . . . 508
v. Laub, 12 Pet. 1, 9 L. ed. 977. 431
v. Louisville Sinking Fund Comrs. 169 U. S. 249, 42 L. ed. 735, 18 Sup. Ct. Rep. 358 . . . . . 1098
v. Lynch, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114 . . . . . 922

United States v. McLaughlin, 127 U. S. 428, 32 L. ed. 213, 8 Sup. Ct. Rep. 1177 ..... 1013
v. Martinez, 184 U. S. 441, 46 L. ed. 632, 22 Sup. Ct. Rep. 422 ..... 791
v. Miranda, 16 Pet. 153, 10 L. ed. 920 ..... 790
v. Mission Rock Co. 189 U. S. 391, 47 L. ed. 865, 23 Sup. Ct. Rep. 606 ..... 1152
v. Missouri, K. & T. R. Co. 141 U. S. 360, 35 L. ed. 766, 12 Sup. Ct. Rep. 13 ..... 728
v. Mooney, 116 U. S. 104, 29 L. ed. 550, 6 Sup. Ct. Rep. 304 616
v. Moore, 12 How. 209, 13 L. ed. 958 ..... 791
v. Morgan, 11 How. 154, 13 L. ed. 643 ..... 428
429, 432, 433, 434, 435
v. Northern P. R. Co. 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598 .....410, 423
v. Old Settlers, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650 .....222, 229
v. Oregon & C. R. Co. 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261 ..... 411
412, 420, 423, 728
v. Oregon & C. R. Co. 164 U. S. 526, 41 L. ed. 541, 17 Sup. Ct. Rep. 165 .....791, 1005
v. Owens, 100 Fed. 70 ..... 52
v. Pacheco (1864) 2 Wall. 587, 17 L. ed. 865 ..... 1145
v. Palmer, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104 524
544, 546
v. Passavant, 169 U. S. 16, 42 L. ed. 644, 18 Sup. Ct. Rep. 219 ..... 277
v. Patrick, 20 C. C. A. 11, 36 U. S. App. 645, 73 Fed. 800 787
v. Pendell, 185 U. S. 189, 46 L. ed. 866, 22 Sup. Ct. Rep. 624 ..... 791
v. Perez, 9 Wheat. 579, 6 L. ed. 165 ..... 86
v. Perkins, 163 U. S. 625, 41 41 L. ed. 287, 16 Sup. Ct. Rep. 1073..445, 1036, 1038, 1039
v. Pitman, 147 U. S. 669, 37 L. ed. 324, 13 Sup. Ct. Rep. 425 ..... 777
v. Prescott, 3 How. 578, 11 L. ed. 734..427, 428, 429, 430, 432
v. Price, No. 60, December Term, 1870; S. C., 4 Ct. Cl. 164 ..... 907
v. Price, 116 U. S. 43, 29 L. ed. 541, 6 Sup. Ct. Rep. 235.. 1098
v. Reese, 92 U. S. 214, 23 L. ed. 563 .....982, 983
v. Rider, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983 ..... 247
v. Rio Grande Dam & Irrig. Co. 174 U. S. 704, 43 L. ed. 1142, 19 Sup. Ct. Rep. 770 592
593, 1147
United States v. Ripley, 7 Pet. 25, 8 L. ed. 595 ..... 431
v. Robeson, 9 Pet. 319, 9 L. ed. 142 ..... 431
v. Rogers, 4 How. 567, 11 L. ed. 1105 ..... 537
v. Ross, 1 Gall. 624, Fed. Cas. No. 16,196 ..... 472
v. Russell, 13 Wall. 623, 20 L. ed. 474 .....524, 551
v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850..... 728
v. Sayward, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371 ..... 914
v. Schurz, 102 U. S. 378, 26 L. ed. 167 .....979, 1070, 1073
v. Southern P. R. Co. 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152 .....768, 899, 900
v. Southmayd, 9 How. 637, 13 L. ed. 290 ..... 180
v. Steam Vessels of War, 106 U. S. 607, 27 L. ed. 286, 1 Sup. Ct. Rep. 539 ..... 471
v. Steever, 113 U. S. 747, 28 L. ed. 1133, 5 Sup. Ct. Rep. 765 ..... 470
v. Steffens, 100 U. S. 96, 25 L. ed. 552 .....505, 983
v. Texas, 143 U. S. 621, 36 L. ed. 285, 12 Sup. Ct. Rep. 488 ..... 1109
v. The Nuestra Senora de Regla, 108 U. S. 92, 27 L. ed. 662, 2 Sup. Ct. Rep. 287 ..... 904
v. Thomas, 15 Wall. 337, 21 L. ed. 89 ..... 430
v. Thornton, 160 U. S. 654, 40 L. ed. 570, 16 Sup. Ct. Rep. 415; S. C., 27 Ct. Cl. 342.. 907
v. Tillon, 6 Wall. 484, 18 L. ed. 920 ..... 431
v. Trans-Mission Freight Asso. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540 502
v. 269½ Bales of Cotton, Woolw. 236, Fed. Cas. No. 16,583.. 473
v. Tynen, 11 Wall. 88, 20 L. ed. 153 ..... 103
v. Warr, 3 N. Y. Legal Obs. 346, Fed. Cas. No. 16,644 ..... 955
v. Weld, 127 U. S. 51, 32 L. ed. 62, 8 Sup. Ct. Rep. 1000.. 233
v. Wilkins, 6 Wheat. 135, 5 L. ed. 225 ..... 431
v. Wong Kim Ark, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456 ..... 698
v. Yamasaka, 40 C. C. A. 454, 100 Fed. 404 ..... 725
United States ex rel. Dunlap v. Black, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12 ..... 1078
Carrick v. Lamar, 116 U. S. 423, 29 L. ed. 677, 6 Sup. Ct. Rep. 424 ..... 705
South Carolina v. Seymour, 153 U. S. 353, 38 L. ed. 742, 14 Sup. Ct. Rep. 871.. ..... 922

United States ex rel. Redfield v. Windom, 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197 ..... 1078
United States Ships of War v. United States, 13 Wall. 389, 20 L. ed. 505 .....467, 472, 473
Upton v. Tribilcock, 91 U. S. 45, 23 L. ed. 203 ..... 787

V.

Van Allen v. The Assessors, 3 Wall. 573, 18 L. ed. 229 ..... 1037
Van Brocklin v. Anderson, 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670 ..... 536
v. Tennessee, 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670 ..... 536
Vance v. Campbell, 1 Black, 427, 17 L. ed. 168 ..... 785
v. Vance, 108 U. S. 514, 518, 27 L. ed. 808, 2 Sup. Ct. Rep. 854 ..... 251
v. W. A. Vandercook Co. 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645 ....918, 946
Veazie Bank v. Fenno, 8 Wall. 533, 19 L. ed. 482 ..... 343
Vera Cruz, The, L. R. 9 Prob. Div. 96 765
Vernon v. Smith, 5 Barn. & Ald. 7... 626
Viele v. Judson, 82 N. Y. 32 ..... 810
Villa v. Rodriguez, 12 Wall. 323, 20 L. ed. 406 ..... 100
Villalobos v. United States, 10 How. 551, 13 L. ed. 535 ..... 790
Virden v. Allan, 107 Ill. 505 ..... 860
Virginia, Ex parte, 100 U. S. 313, 25 L. ed. 667 ..... 981
v. Rives, 100 U. S. 313, 25 L. ed. 667 ..... 981
v. Tennessee, Supreme Court, United States, October term, 1891 ..... 961
Voigt v. Detroit, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337 ..... 572
Von Baumbach v. Bade, 9 Wis. 559, 76 Am. Dec. 283 ..... 251
Vought v. Eastern Bldg. & L. Asso. 172 N. Y. 508, 65 N. E. 496 740

W.

Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932 ..... 906
Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4...335, 336, 499
Wabash Western R. Co. v. Brow, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126 ..... 1115
Wagoner v. Evans, 170 U. S. 588, 42 L. ed. 1154, 18 Sup. Ct. Rep. 730 ..... 838
Waite, Re, 81 Fed. 359..... 458
v. Santa Cruz, 184 U. S. 302, 46 L. ed. 552, 22 Sup. Ct. Rep. 327 ..... 1134
Wakeman v. Grover, 4 Paige, 23, 11 Wend. 187, 25 Am. Dec. 624 .....1170, 1171
v. Throckmorton, 74 Conn. 616, 51 Atl. 554 ..... 127
Wald v. Wehl, 18 Blatchf. 495, 6 Fed. 163 ..... 1171
Walker v. Beal, 9 Wall. 745, 19 L. ed. 814 ..... 155
v. United States, 4 Wall. 163, 18 L. ed. 319 ..... 915
v. Walker, 9 Wall. 745, 19 L. ed. 814 ..... 155
v. Whitehead, 16 Wall. 314, 21 L. ed. 357 ..... 250
Wall, Ex parte, 107 U. S. 265, 27 L. ed. 552, 2 Sup. Ct. Rep. 569 566
v. Old Colony Trust Co. 174 Mass. 340, 54 N. E. 846, 177 Mass. 275, 58 N. E. 1015 ..... 344
Wallace v. Myers, 4 L. R. A. 171, 38 Fed. 184 ..... 445
Waller v. Hamer, 65 Kan. 168, 69 Pac. 185 ..... 177
Walters v. Chicago, B. & Q. R. Co. 104 Fed. 377 ..... 1084
Walton, Ex parte, L. R. 17 Ch. Div. 746 ..... 1021
v. United States, 9 Wheat. 651, 6 L. ed. 182 ..... 431
Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192 343
Walworth v. Kneeland, 15 How. 348, 14 L. ed. 724 ..... 880
Ward v. Northumberland, 2 Anstr. 469 391
v. Race Horse, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076 ..... 306
Warwick v. Bettman, 102 Fed. 127, 47 C. C. A. 185, 108 Fed. 46.. 52
Wassum v. Feeney, 121 Mass. 93, 23 Am. Rep. 258 ..... 121
Weale v. West-Middlesex Waterworks, 1 Jac. & W. 358 ..... 391
Webb v. Demopolis, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289 ..... 271
Weber, 3 Decisions of the Comptroller of the Treasury, 640; 5 Decisions of the Comptroller of the Treasury, 113; 5 Decisions of the Comptroller of the Treasury, 939 ..... 907
Weber v. State Harbor Comrs. 18 Wall. 65, 21 L. ed. 801... 869
v. State Harbor Comrs. (1873) 18 Wall. 57, 21 L. ed. 798 1145 1146
Webster v. Fargo, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623 ..... 572
v. Reid, 11 How. 437, 13 L. ed. 761 ..... 1020
v. Upton, 91 U. S. 65, 23 L. ed. 384 ..... 787
Weckler v. First Nat. Bank, 42 Md. 581, 20 Am. Rep. 95 ..... 881
Weehawken, The v. The Atlanta, 2 Sprague, 251, Fed. Cas. No. 619, 3 Wall. 425, 18 L. ed. 253 ..... 667

Weevil, Second Comptroller's Letter Book, vol. 26, p. 296 ..... 907
Wehle v. Conner, 83 N. Y. 231..... 558
Welch v. Butler, 21 Land Dec. 369... 757
Well v. Deposit Bank, 18 Ky. L. Rep. 156, 35 S. W. 625..... 995
Wellington, Petitioner, 16 Pick. 87, 26 Am. Dec. 631 ..... 781
Wells v. Weston, 22 Mo. 384, 66 Am. Dec. 627 ..... 398
Welton v. Missouri, 91 U. S. 275, 23 L. ed. 347 ..... 513
Western Union Packet Co. v. St. Louis, 100 U. S. 423, 25 L. ed. 688 ..... 1000
Western U. Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961..... 999
1120, 1121
v. Hall, 124 U. S. 444, 31 L. ed. 479, 8 Sup. Ct. Rep. 577.. 1173
v. Missouri ex rel. Gottlieb, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730 ..... 1000
v. New Hope, 187 U. S. 419, 47 L. ed. 240, 23 Sup. Ct. Rep. 204 .....1000, 1001
v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126 .....499, 999
v. Taggart, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054 .....999, 1000
v. Texas, 105 U. S. 460, 26 L. ed. 1067 .....499, 999
Westmoreland & C. Natural Gas Co. v. DeWitt, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724 .... 583
Weston v. Charleston, 2 Pet. 467, 7 L. ed. 487 ..... 537
Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293 .....1172, 1174
Wheeler v. Factors' & T. Ins. Co. 101 U. S. 439, 25 L. ed. 1055.. 626
v. Miller, 16 Cal. 125 ..... 869
v. New York, N. H. & H. R. Co. 178 U. S. 321, 44 L. ed. 1085, 20 Sup. Ct. Rep. 949 922
v. Sedgwick, 94 U. S. 1, 24 L. ed. 31 ..... 69
v. Smith, 5 Wash. 704, 32 Pac. 784 ..... 583
Whitaker, The, 1 Sprague, 229, Fed. Cas. No. 17,524 ..... 773
Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248 ..... 78
White, Re, 5 C. C. A. 29, 14 U. S. App. 84, 55 Fed. 54 ..... 664
v. Hill, 148 Mass. 396, 19 N. E. 407 .....1170, 1171
v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007 ..... 127
v. Winn, 8 Gill, 499 ..... 67
Whitehead v. Shattuck, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276 ..... 633
Whitener, Re, 44 C. C. A. 434, 105 Fed. 180 ..... 1182
Whiteside v. Brawley, 152 Mass. 133, 24 N. E. 1088 ..... 881
v. United States 93 U. S. 247, 23 L. ed. 882 ..... 705
Whiting v. Price, 172 Mass. 240, 51 N. E. 1084 ..... 895
Whitman v. National Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477 .....388, 845
v. Oxford Nat. Bank, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477 ..... 176
Whitmeyer, 3 Decisions of the Comptroller of the Treasury, 397 907
Whitney v. Butler, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 47 .....375, 378
v. Taylor, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796 .....1014, 1015
Whitney Arms Co. v. Barlow, 63 N. Y. 62, 20 Am. Rep. 504..... 741
Wideman v. Taylor, 63 Kan. 884, 65 Pac. 664 ..... 753
Wiggins v. State, 1 Lea, 738 ..... 449
v. United States, 3 Ct. Cl. 412. 904
Wight v. Davidson, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616 .....294, 572
Wigton v. Bosler, 102 Fed. 70..... 389
Wilcox v. Eastern Oregon Land Co. 176 U. S. 51, 44 L. ed. 368, 20 Sup. Ct. Rep. 269...411, 423
v. Jackson ex dem. M'Connell, 13 Pet. 498, 10 L. ed. 264.. 979
1147
Wildenhus's Case, 120 U. S. 1, 30 L. ed. 565, 7 Sup. Ct. Rep. 385 1007
Wilder's S. S. Co. Ex parte, 183 U. S. 545, 46 L. ed. 321, 22 Sup. Ct. Rep. 225 ..... 191
Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17 911
914, 918
Wilkerson v. Rahrer, 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865 .....502, 503, 999
Wilkes County v. Coler, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458, 51 C. C. A. 399, 113 Fed. 725 ..... 972
v. Coler, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458, 190 U. S. 107, 47 L. ed. 971, 23 Sup. Ct. Rep. 738 ..... 1131
Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811 ..... 970
Willard v. Presbury, 14 Wall. 676, 20 L. ed. 719 ..... 294
Willard's Appeal, 4 R. I. 597 ..... 831
Willbor, Re, 20 R. I. 126, 51 L. R. A. 863, 37 Atl. 634 .....236, 239
Williams v. Fears, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128 ..... 506
v. Gibbes, 20 How. 535, 15 L. ed. 1013 ..... 1171
v. Glover, 66 Ala. 189 .....270, 271
v. Heard, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885 ..... 1097

Williams v. Hill, 19 How. 246, 15 L. ed. 570 ..... 995
v. Kirkland, 13 Wall. 306, 20 L. ed. 683 ..... 75
v. McDonald, 58 Cal. 527 ..... 485
v. Morris, 95 U. S. 444, 24 L. ed. 360 ..... 640
v. Norris, 12 Wheat. 117, 6 L. ed. 571 ..... 768
Williams's Case, L. R. 9 Eq. 225.... 377
Williamson County v. Perkins (Tenn. Ch. App.) 39 S. W. 347.. 712
Wills v. Russell, 100 U. S. 621, 25 L. ed. 607 ..... 674
Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412 530
Wilson v. Hoffman, 54 Mich. 246, 20 N. W. 37 ..... 1149
v. McNamee, 102 U. S. 572, 26 L. ed. 234 ..... 69
v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435 ..... 759
v. Southern R. Co. 64 S. C. 162, 36 S. E. 701, 41 S. E. 971.. 1084
v. Standefer, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384.... .. .. ...612, 613, 649
Winch v. Birkenhead, L. & C. Junction R. Co. 5 De. G. & S. 562.. 1125
Windsor's Case (1865), 6 Best & S. 522.. .... .... .... .... 955
Wing v. Angrave, 8 H. L. Cas. 183.. 236
238
Winona & St. P. R. Co. v. Barney, 113 U. S. 618, 28 L. ed. 1109, 5 Sup. Ct. Rep. 606..1011, 1109
Wiscart v. Dauchy, 3 Dall. 321, 1 L. ed. 619.... .... .... .... 203
Wisconsin v. Duluth, 96 U. S. 379, 24 L. ed. 668..... 547
v. Pelican Ins. Co. (1888) 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370....371, 372
Wisconsin C. R. Co. v. Price County, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341..537, 731
Wiswall v. Sampson, 14 How. 52, 14 L. ed. 322..... 886
Witch Queen, The, 3 Sawy. 201, Fed. Cas. No. 17,916..... 472
Witherspoon v. Duncan, 4 Wall. 210, 18 L. ed. 339..... 74
Wittich v. O'Neal, 22 Fla. 592..... 749
Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 689.. 420
Wolf v. Gray, 53 Ark. 75, 13 S. W. 512 69
Wolfe v. Frost, 4 Sandf. Ch. 72..... 640
Wong Wing v. United States, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977..... 724
Wood v. Beach, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410.... .... .... .... .. 416
Woodruff, Re, 96 Fed. 317..... 1063
v. New York, L. E. & W. R. Co. 129 N. Y. 27, 29 N. E. 251. 1171
v. Parham, 8 Wall. 123, 19 L. ed. 382.... .... .... .... 498
Woodward v. State, 33 Fla. 508, 15 So. 252.... .... .... .... 574
Worcester v. Georgia (1832), 6 Pet. 515, 8 L. ed. 483..... 306
Worcester County, Re, 42 C. C. A. 637, 102 Fed. 808.... ..... 1182
Wormley v. District of Columbia, 181 U. S. 402, 45 L. ed. 921, 21 Sup. Ct. Rep. 609..... 572
Wyman v. Halstead, 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417.... .... .... .... .. 445
v. United States ex rel. Halstead, 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417.... .... .... .... .. 445

## Y.

Yarbrough, Ex parte, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.... .... .... .. 918
Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 41, 47, 45 L. ed. 418, 21 Sup. Ct. Rep. 256.. 119
172
v. Thomas, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68 1005
Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536.....155, 156
York, Re, 4 Nat. Bankr. Reg. 479, Fed. Cas. No. 18,139... .... .. 1182
v. Pilkington, 1 Atk. 282..390, 391
Yosemite Valley Case, 15 Wall. 77, 21 L. ed. 82..... 424

## Z.

Zadig v. Baldwin, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639.... .... .... .... .. 485

---

## STATUTES AND CONSTITUTIONS CITED, CONSTRUED, ETC.

---

**Argentine Republic.**

*Code.*

Art. 1174 ..... 762

**Belgium.**

*Code.*

Art. 262 ..... 762

**Brazil.**

*Code.*

Art. 560 ..... 762

**Chile.**

*Code.*

Art. 944 ..... 762

**England.**

*Statutes.*

33 Geo. III. chap. 159 ..... 471
12 & 13 Vict. chap. 106, § 175 ..... 1091
177 ..... 1091
178 ..... 1091
17 & 18 Vict. chap. 104, § 222, subd. 1 .. 763
24 & 25 Vict. chap. 96, §§ 75, 83, 84 .. 950
chap. 134, § 154 ..... 1091
25 & 26 Vict. chap. 89, § 166 ....786, 951
32 & 33 Vict. chap. 71, § 31 ....1090, 1091
33 & 34 Vict. chap. 52 ..... 951
39 & 40 Vict. chap. 80, § 5 ..... 763
44 & 45 Vict. chap. 69 ..... 956

**France.**

*Marine Ordinances of Louis XIV.*

Book III. tit. 4, art. 11 ..... 762

*Commercial Code.*

Art. 191 ..... 763
Arts. 262, 263 ..... 762

**Germany.**

*Code.*

Arts. 548, 549 ..... 762

**Holland.**

*Dutch Code.*

Arts. 423, 424 ..... 762

**Italy.**

*Code.*

Art. 363 ..... 762

**Portugal.**

*Code.*

Art. 1469 ..... 762

**Russia.**

*Laws.*

1895, Nov. 20 ..... 277

**Spain.**

*Laws.*

1 Partidas, Law 50, p. 365 ..... 791

*Code.*

Arts. 718, 719 ..... 762

**United States.**

*Constitution.*

Art. 1, § 8 .....179, 254, 541, 1036
Art. 1, § 9 .....179, 254
Art. 1, § 9, cl. 5 ..... 506
Art. 1, § 10 .....332, 759
Art. 2, § 3 ..... 831
Art. 2, § 4 .....333, 832
Art. 3 ..... 203
Art. 3, § 2 .....255, 315, 317, 1162
Art. 4, § 1 ....370, 371, 485, 486, 600, 739
Art. 4, § 2 ....293, 295, 297, 298, 299, 311
508, 660
Art. 4, § 3 .....89, 1146
Art. 8, § 1 ..... 395
Art. 8, § 3 ..... 741
4th Amend. ..... 93
5th Amend. ....93, 529, 542, 548, 549, 562
1023, 1024
6th Amend. .....1023, 1024, 1026
7th Amend. ..... 203
10th Amend. ..... 501
11th Amend. ..... 587
13th Amend. ..... 1006
14th Amend. .72, 74, 75, 82, 83, 85, 86, 93
108, 117, 118, 216, 295
297, 299, 312, 333, 401
402, 573, 668, 672, 712
800, 801, 891, 910
14th Amend. § 1 .....759, 825, 826
14th Amend. § 1, cl. 2 ..... 559
15th Amend. ..... 910
15th Amend. §§ 1, 2 .....980, 982, 983

*Statutes.*

1787, July 13 (1 Stat. at L. 51) ..... 1145
1789, July 31 (1 Stat. at L. 41, chap. 5) 180
1789, Sept. 24 (1 Stat. at L. 73, chap. 20) ..... 203
§ 25 ..... 484
§ 33 ..... 956
1790, May 26 (1 Stat. at L. 122, chap. 11) .....370, 371
1790, June 14 (6 Stat. at L. 2, chap. 20) ..... 180
1790, August 4 (1 Stat. at L. 166, chap. 35) ..... 180
1793, Feb. 12 (1 Stat. at L. 302, chap. 7) ..... 660
1796, May 18 (1 Stat. at L. 464, chap. 29) § 9 ..... 1145
1797, March 3 (1 Stat. at L. 506, chap. 13) ..... 617
1797, March 3 (1 Stat. at L. 514, chap. 20) ..... 431
1797, July 6 (1 Stat. at L. 527, chap. 11) ..... 1137
1799, March 2 (1 Stat. at L. 627, 665, 680–689, chap. 22) . 180
617
1799, March 2 (1 Stat. at L. 715, chap. 24) ..... 474
§ 5 ..... 471
§ 6, subd. 13 ..... 471
1799, March 3 (1 Stat. at L. 755, chap. 48) § 25 ..... 908
1800, April 23 (2 Stat. at L. 45, chap. 33) ..... 471
§ 5 ..... 474
1802, March 16 (2 Stat. at L. 137, chap. 9) § 24 ..... 908
1803, Feb. 19 (2 Stat. at L. 201, chap. 6) ..... 180
1803, April 30 (8 Stat. at L. 200) art. 3 .....89, 90
1808, April 12 (2 Stat. at L. 483, chap. 43) § 5 ..... 908
1811, Feb. 20 (2 Stat. at L. 642, chap. 21) § 3 ..... 1151
1811, March 3 (2 Stat. at L. 662, chap. 46) §§ 2, 5 ..... 1150
1812, Jan. 11 (2 Stat. at L. 674, chap. 14) § 22 ..... 908
1813, Jan. 29 (2 Stat. at L. 796, chap. 16) § 15 ..... 908

1815, March 3 (3 Stat. at L. 225, chap. 79) § 4..... 908
1818, April 20 (3 Stat. at L. 433, 436, chap. 79) § 11..... 617
1819, Feb. 22 (8 Stat. at L. 252)..269, 272
1819, March 2 (3 Stat. at L. 489, chap. 47)..... 267
1823, March 1 (3 Stat. at L. 729, 734, chap. 21) § 13..... 618
1824, May 22 (4 Stat. at L. 29, chap. 136)..... 180
1826, May 20 (4 Stat. at L. 179, chap. 83) § 2..... 1011
1828, May 6 (7 Stat. at L. 311)..... 184
1828, May 19 (4 Stat. at L. 270, 274, chap. 55) § 9..... 618
1831, Feb. 3 (4 Stat. at L. 436, chap. 16) § 1..... 1042
§ 4..... 1042
§ 5.....1042, 1044
1833, Feb. 14 (7 Stat. at L. 414).... 184
1833, March 2 (4 Stat. at L. 632).... 103
1833, Sept. 27 (7 Stat. at L. 431, 442, 445).....227, 228, 231
1834, June 30 (4 Stat. at L. 731, chap. 161)..... 1101
1835, Dec. 29 (7 Stat. at L. 478)..184, 189
1837, Oct. 12 (5 Stat. at L. 203, chap. 2).....432, 434
1838, July 7 (5 Stat. at L. 284, chap. 174)..... 180
1841, May 20 (9 Stat. at L. 519, chap. 84)..... 1157
1841, August 19 (5 Stat. at L. 445, chap. 9) § 5...1090, 1092
1842, August 9 (8 Stat. at L. 572, 576) Art. 10..... 950
1842, August 30 (5 Stat. at L. 548, 558, 564, chap. 270) § 17.....179, 618, 619
1844, April 10 (8 Stat. at L. 588; Comp. Treaties 1899, 656)..... 486
1846, Feb. 11 (9 Stat. at L. 3, chap. 7) § 3..... 618
1846, June 5 (9 Stat. at L. 853)..... 228
1846, July 30 (9 Stat. at L. 42, 43, 68, chap. 74)..... 618
§ 8..... 619
§ 11..... 179
1846, August 6 (9 Stat. at L. 871).188, 190
1846, Dec. 28 (9 Stat. at L. 117, chap. 1)..... 89
1848, Feb. 2 (9 Stat. at L. 922).... 791
1848, August 12 (9 Stat. at L. 302, chap. 167)..... 948
1849, March 3 (9 Stat. at L. 395, chap. 108)..... 1011
1849, Dec. 20 (9 Stat. at L. 977) Art. 8 482
1850, Sept. 27 (9 Stat. at L. 496, chap. 76).....1012, 1013
§ 6..... 1015
§ 7.....1015, 1016
1850, Sept. 28 (9 Stat. at L. 519, chap. 84)..87, 1137, 1138, 1141, 1142, 1150
1851, March 3 (9 Stat. at L. 631, chap. 41) § 15..... 490
1852, August 26 (10 Stat. at L. 35, chap. 92) § 2–6.... 1104, 1110, 1111
§ 5..... 1106
1853, Feb. 14 (10 Stat. at L. 158, chap. 69)..... 1012
1853, March 2 (10 Stat. at L. 179, chap. 90) § 20..... 1010
1854, May 10 (10 Stat. at L. 1053, 1057) Art. 11..... 1100
Art. 14.....1100, 1102
1854, July 22 (10 Stat. at L. 308, chap. 103)..... 791
1857, March 3 (11 Stat. at L. 251, chap. 117)...1137, 1150
1859, Feb. 26 (11 Stat. at L. 385, chap. 58)..... 1010
1860, May 9 (12 Stat. at L. 15, chap. 40)..... 1103
1861, July 22 (12 Stat. at L. 269, chap. 9) § 5..... 908
1861, July 29 (12 Stat. at L. 280, chap. 24) § 4..... 908
1861, August 6 (12 Stat. at L. 319, chap. 60)..... 474
1862, May 20 (12 Stat. at L. 393, chap. 75)..... 1148
1862, May 30 (12 Stat. at L. 409, chap. 86)..... 1152
1862, June 2 (12 Stat at L. 410, chap. 90)..... 1152
1862, July 1 (12 Stat. at L. 432, 483, chap. 119)..... 1037
1862, July 14 (12 Stat. at L. 546, chap. 153)..... 181
1862, July 17 (12 Stat. at L. 600, chap. 204).....471, 473, 474
1863, March 3 (12 Stat. at L. 759, chap. 86) § 2..... 474
1863, March 12 (12 Stat. at L. 820, chap. 120)..... 474
1864, June 20 (13 Stat. at L. 145, chap. 145) § 8..... 908
1864, June 30 (13 Stat. at L. 202, 216, chap. 171) § 23.... 618
1864, June 30 (13 Stat. at L. 306, chap. 174).....471, 474
§ 35..... 474
1864, July 1 (13 Stat. at L. 332, 333 chap. 194) § 5..866, 870
1864, July 1 (13 Stat. at L. 343, chap. 205)..... 581
1864, July 2 (13 Stat. at L. 377, chap. 225)..... 474
1864, July 2 (13 Stat. at L. 365, chap. 217).....730, 1014
§ 1.....1044, 1045, 1047
§ 2.....576, 581, 584, 1044
§ 3...409–414, 419, 423, 576, 581, 584, 1145
§ 4..... 1045
§ 5..... 1045
§ 6...408–411, 414, 416–420, 422–425
§ 7..... 1045
§ 8..... 1045
§ 9..... 1045
§ 10..... 1045
§ 18..... 1045
1864, July 2 (13 Stat. at L. 377, chap. 225) § 7..... 474
1866, July 13 (14 Stat. at L. 92, chap. 176) § 5..... 831
1866, July 19 (14 Stat. at L. 799).... 190
Arts. 9, 15..... 1101

1866, July 24 (16 Stat. at L. 221, chap. 230) § 1 . . . .1116, 1120
§ 2 . . . . . 1117
§ 3 . . . . . 1117
§ 4 . . . . . 1117
1866, July 25 (14 Stat. at L. 239, chap. 242) . .411, 728–731, 733, 1012
1866, July 26 (14 Stat. at L. 251, 253, chap. 262) . . . .769, 1147
§ 1 . . . . . 582
§ 2 . . . . . .582, 687
§ 3 . . . . . 592
1866, July 26 (14 Stat. at L. 290, chap. 270) § 4 . . . . . 424
1866, July 27 (14 Stat. at L. 292, chap. 278) . . . . . .414, 768
§ 3 . . . . . 900
§ 6 . . . . . 899
§ 18 . . . . . .899, 900
1867, Feb. 5 (14 Stat. at L. 385, 386, chap. 28) § 2. . . . . 484
1867, March 2 (14 Stat. at L. 517, 522, 525, chap. 176) .202, 1063, 1064
§ 19 . . . . . 1092
1867, Oct. 21 (15 Stat. at L. 581, 589) Art. 12 . . . . . 300
1868, July 27 (15 Stat. at L. 196, chap. 246) . . . . . 500
1868, August 25 (15 Stat. at L. 581) Art. 6 . . . . . 305
Art. 12 . . . . . 305
1870, May 4 (16 Stat. at L. 94, chap. 69) . . . . . 733
§ 2 . . . . . 1013
1870, May 31 (16 Stat. at L. 140, chap. 114) § 3. . . . . 983
§ 4 . . . . . 983
§ 5 . . . . . 983
1870, July 1 (16 Stat. at L. 187, chap. 199) . . .1141, 1142, 1154
1870, July 9 (16 Stat. at L. 217, chap. 235) . . . . . 582
1870, July 14 (16 Stat. at L. 265, chap. 255) § 21 . . . . . 181
1870, July 14 (16 Stat. at L. 279, chap. 272) . . . . . 1015
1871, March 3 (16 Stat. at L. 544, 566, chap. 120) . . . . . 189
1871, March 3 (16 Stat. at L. 573, chap. 122) . . . . . 768
§ 9 . . . . . 899, 900
§ 12 . . . . . 899
§ 23 . . . . . 899, 900
1871, April 20 (17 Stat. at L. 13, chap. 22) § 1 . . . . . 913
1872, May 10 (17 Stat. at L. 91, chap. 152) § 1 . . . . . 582
§ 2 . . . . . 582, 687, 688
§ 3 . . . . . 687, 688
1872, June 8 (17 Stat. at L. 302, chap. 335) . . . . . 500
1873, Jan. 11 (17 Stat. at L. 409, chap. 32) . . . . . 1140, 1154
1874, Feb. 19 (18 Stat. at L. 16, chap. 30) . . . . . 1154
1874, June 18 (18 Stat. at L. 78, 79, chap. 301) § 3. . 462, 463
1874, June 22 (18 Stat. at L. 186, chap. 391) §§ 17, 18. . . . . 614
1874, Dec. 21 (18 Stat. at L. 293, chap. 5) . . . . . 1154
1875, Feb. 22 (18 Stat. at L. 333, chap. 95) . . . . . 778
1875, March 3 (18 Stat. at L. 402, 420, chap. 131) . . . . 310, 415
1875, March 3 (18 Stat. at L. 470, chap. 137) . . . . . 913
1875, March 3 (18 Stat. at L. 477, chap. 141) . . . . . 134
1876, June 30 (19 Stat. at L. 64, chap. 156) . . . . . 796
1876, July 12 (19 Stat. at L. 90, chap. 186) . . . . . 500
1876, August 14 (19 Stat. at L. 141, chap. 274) . . . . . 983
1877, Feb. 27 (19 Stat. at L. 243, 244, chap. 69) . . . . . 907
1877, March 3 (19 Stat. at L. 377, chap. 107) . . . . . 592, 593, 1147
1878, Feb. 28 (20 Stat. at L. 25, chap. 20) . . . . . 76
1878, June 3 (20 Stat. at L. 89, chap. 151) . . . . . 582
§ 2 . . . . . 846–849
1880, May 14 (21 Stat. at L. 140, chap. 89) . . . . . 424, 732
§ 1 . . . . . 413
§ 2 . . . . . 413
§ 3 . . . . . 413, 414, 416, 417
1880, June 14 (21 Stat. at L. 189, chap. 211) . . . 1107, 1112, 1113
1881, March 3 (21 Stat. at L. 470, 480, chap. 136) . . . . . 547
1881, March 3 (21 Stat. at L. 502, chap. 138) § 6 . . . . . 697, 698
1882, August 2 (22 Stat. at L. 194, 200, chap. 375) . . . . 527, 547
1882, August 3 (22 Stat. at L. 216, chap. 378) . . . . . 137
1883, March 3 (22 Stat. at L. 484, chap. 101) . . . . . 107
1883, March 3 (22 Stat. at L. 504, chap. 121) . . . . . 181
1884, May 17 (23 Stat. at L. 24, chap. 53) § 3 . . . . . 102
§ 7 . . . . . 102
1884, May 29 (23 Stat. at L. 31, 32, chap. 60) . . . . . 112, 113
§ 6 . . . . . 502
1884, June 26 (23 Stat. at L. 55, chap. 121) § 10 . . . 1002, 1007
1884, July 5 (23 Stat. at L. 133, 140, 143, chap. 229) . . . . 527, 547
1884, July 7 (23 Stat. at L. 236, 247, chap. 334) . . . . . 1102
1885, Jan. 20 (23 Stat. at L. 283, chap. 25) . . . . . 1094
§ 1 . . . . . 1096
§ 3 . . . . . 1096
1885, Feb. 26 (23 Stat. at L. 332, chap. 164) . . . . . 723
1885, Feb. 28 (23 Stat. at L. 337, chap. 265) . . . . . 900
1886, June 30 (24 Stat. at L. 91, chap. 572) . . . . . 604
1886, July 6 (24 Stat. at L. 123, chap. 637) . . . . . 768
1886, July 30 (24 Stat. at L. 170, chap. 818) § 1. . . . . 837

1886, August 4 (24 Stat. at L. 255, chap. 902) .... 604, 605
1886, August 5 (24 Stat. at L. 310, 321, 325, 331, chap. 929) ..... 528, 547
1887, Feb. 4 (24 Stat. at L. 380, chap. 104) ..... 199
§ 1 ..... 335, 1048
§ 2 ..... 1048
§ 3 ..... 1054, 1056
§ 4 ..... 814, 816, 1054–1056
§ 13 ..... 1048
§ 16 ..... 817
1887, Feb. 8 (24 Stat. at L. 388, 389, 399, chap. 119) § 1.. 534
535, 536 537
§ 5 ..... 535
1887, Feb. 23 (25 Stat. at L. 566, chap. 220) ..... 723
1887, March 3 (24 Stat. at L. 505, chap. 359) ..... 521, 522
550, 551
1887, March 3 (24 Stat. at L. 509, chap. 362) ..... 604
1887, March 3 (24 Stat. at L. 552, chap. 373) .... 247, 529
913, 916
§ 1 ..... 632
1887, March 3 (24 Stat. at L. 556, chap. 376) .... 727, 1012
§ 5 ..... 768, 769
1888, March 30 (25 Stat. at L. 47, chap. 47) ..... 604
1888, April 24 (25 Stat. at L. 94, chap. 194) ..... 547, 550
1888, August 1 (25 Stat. at L. 352, chap. 722) ..... 605
1888, August 1 (25 Stat. at L. 357, chap. 729) .... 742, 743
1888, August 8 (25 Stat. at L. 387, chap. 787) ..... 433
1888, August 11 (25 Stat. at L. 413, chap. 860) ..... 547
§ 12 ..... 968
1888, August 13 (25 Stat. at L. 433, chap. 866) .... 247, 529
632, 698
§ 1 ..... 581, 656, 911, 913
914, 916, 1162
§ 2 ..... 1079
1888, Oct. 2 (25 Stat. at L. 548, chap. 1069) ..... 605
1888, Oct. 19 (24 Stat. at L. 414, chap. 1210) ..... 723, 725
1889, Feb. 22 (25 Stat. at L. 677, chap. 180) ..... 537
§ 10 ..... 1011
1889, March 1 (25 Stat. at L. 749, chap. 308) ..... 121
1889, March 1 (25 Stat. at L. 757, chap. 317) .... 817, 819
1889, March 2 (25 Stat. at L. 855, chap. 382; Rev. Stat. Supp. 690) ..... 200
§ 12 ..... 817
1889, March 2 (25 Stat. at L. 954, 980, chap. 411; Rev. Stat. Supp. 698).... 200
605
1889, March 2 (25 Stat. at L. 980, 1005, chap. 412) ... 819
1889, July 12 (26 Stat. at L. 1508) Art. 1 ..... 950
1890, March 19 (26 Stat. at L. 24, chap. 39) ..... 221
§ 2 ..... 228, 232
1890, May 2 (26 Stat. at L. 81, 94, chap. 182) § 6..... 837
§ 9 ..... 777, 836, 837, 839
§ 10 ..... 777
§ 28 ..... 777
§ 31 ..... 68
1890, May 14 (26 Stat. at L. 109, 110, chap. 207) §§ 1–8... 976
977
1890, June 10 (26 Stat. at L. 136, chap. 349) § 13..... 614
1890, June 10 (26 Stat. at L. 131, 134, 140, chap. 407) § 7.. 614
615, 616
§ 12 ..... 829, 831
§ 23 ..... 178, 179, 181, 182
1890, June 17 (26 Stat. at L. 159, chap. 429) ..... 605
1890, July 2 (26 Stat. at L. 209, chap. 647) ..... 502
1890, July 14 (26 Stat. at L. 282, chap. 707) ..... 113
1890, August 8 (26 Stat. at L. 313, chap. 728) ..... 503
1890, August 30 (26 Stat. at L. 371, chap. 837) ..... 605
1890, Sept. 19 (26 Stat. at L. 442, chap. 907) ..... 547
§ 7 ..... 528, 539, 968, 969
§ 12 ..... 969, 970
1890, Sept. 19 (26 Stat. at L. 465, chap. 908) .....92, 500
1890, Sept. 29 (26 Stat. at L. 496, chap. 1040) ..... 411
1890, Oct. 1 (26 Stat. at L. 567, chap. 1244) ..... 180
1890, Oct. 1 (26 Stat. at L. 636, chap. 1249) § 1..... 1101, 1102
§ 2 ..... 1099, 1101–1103
§ 3 ..... 1099, 1101–1103
§ 4 ..... 1101, 1102
1891, March 3 (26 Stat. at L. 826, chap. 517) .... 159, 175
530, 972
§ 5 ..... 91, 203, 204, 245
315–317, 395, 698, 714, 772
780, 911–914, 916, 917, 946
§ 6 ..... 245, 315, 317, 318
461, 580, 1162
1891, March 3 (26 Stat. at L. 854, chap. 539) § 7..... 791
1891, March 3 (26 Stat. at L. 908, chap. 540) .... 1096, 1097
1891, March 3 (26 Stat. at L. 948, chap. 542) ..... 605
1891, March 3 (26 Stat. at L. 1035, 1036, 1038, chap. 543) art. 4 .... 534, 536
1891, March 3 (26 Stat. at L. 1085, 1086, chap. 551) § 8 ..... 722–725
§ 10 ..... 722–725
§ 11 ..... 722–725
1891, March 3 (26 Stat. at L. 1095, chap. 561) ..... 1147
§ 18 ..... 592, 593

1892, July 6 (27 Stat. at L. 86, chap. 151) .... 1099, 1102 1103
1892, July 13 (27 Stat. at L. 88, 101, 110, chap. 158) .... 547
968
1892, August 4 (27 Stat. at L. 348, chap. 375) ..... 583
1892, August 5 (27 Stat. at L. 388, chap. 380) ..... 605
1893, Feb. 27 (27 Stat. at L. 487, chap. 169) ..... 335
1893, March 3 (27 Stat. at L. 572, chap. 208) ..... 605
1893, March 3 (27 Stat. at L. 612, 640, 643, 645, chap. 209) ..... 188, 755
1893, June 5 (28 Stat. at L. 1071) ... 131
135
Art. 6 ..... 137
Art. 7 ..... 137
1894, March 12 (28 Stat. at L. 41, chap. 37) ..... 605
1894, June 19 (28 Stat. at L. 94, chap. 108) ..... 606, 607
1894, July 26 (28 Stat. at L. 122, chap. 163) § 2..... 1015, 1016
§ 3 ..... 1015, 1016
1894, August 15 (28 Stat. at L. 285, chap. 288) ..... 1152
1894, August 15 (28 Stat. at L. 286, chap. 290) ..... 229
1894, August 18 (28 Stat. at L. 351, chap. 299) ..... 547
1894, August 18 (28 Stat. at L. 372, 390, chap. 301) ... 724
777
1894, August 23 (28 Stat. at L. 424, 450, chap. 307) .... 222
229, 230
1894, August 27 (28 Stat. at L. 532, chap. 349) ..... 614
§ 22 ..... 984
1895, Jan. 12 (28 Stat. at L. 601, chap. 23) § 23 ..... 606
1895, March 2 (28 Stat. at L. 868, chap. 187) ..... 607
1895, March 2 (28 Stat. at L. 894, chap. 188) .... 222, 224
229, 230, 233
1895, March 2 (28 Stat. at L. 910, 939, chap. 189) .... 188
607
1895, March 2 (28 Stat. at L. 963, 964, chap. 191) .. 92, 93
§ 1 ..... 495, 496, 500, 504
510–512
1896, March 16 (29 Stat. at L. 63, chap. 59) ..... 908
1896, May 28 (29 Stat. at L. 184, chap. 252) ..... 135
1896, June 10 (29 Stat. at L. 321, 339, chap. 398) .... 188, 229
1896, June 11 (29 Stat. at L. 413, chap. 420) ..... 604, 607, 609
1897, Jan. 20 (29 Stat. at L. 492, chap. 68) ..... 946
1897, June 4 (30 Stat. at L. 11, 36, chap. 2) ..... 1065–1070
1072, 1074, 1076
1897, June 7 (30 Stat. at L. 62, 84, chap. 3) ..... 188
1897, July 19 (30 Stat. at L. 134, chap. 9) .. 603, 608, 609
1897, July 24 (30 Stat. at L. 205, chap. 11) § 5..... 276
§ 30 ..... 984
§ 32 ..... 618
1898, March 15 (30 Stat. at L. 316, chap. 68) § 5..... 199
1898, June 8 (30 Stat. at L. 434, chap. 394) § 6..... 568
1898, June 13 (30 Stat. at L. 448, chap. 448) ..... 1036
§ 6 ..... 49
§ 7 ..... 49
§ 17 ..... 49, 50, 52
1898, June 28 (30 Stat. at L. 495, chap. 517) .... 187, 189
§§ 11, 13, 16... 188, 189, 190
1898, July 1 (30 Stat. at L. 544, chap. 541) § 1..... 201
§ 1*a* ..... 718
§ 2 ..... 127, 201, 943
§ 2, cl. 7..... 1182
§ 2, cl. 11..... 1063, 1064
§ 3 ..... 201, 1170
§ 3*a* ..... 201, 718
§ 6 ..... 321, 1063
§ 7, cl. 8..... 1063
§ 17 ..... 127, 1093
§ 18*d* ..... 201
§ 19 ..... 203
§ 19*a* ..... 202
§ 19*b* ..... 202
§ 19*c* ..... 202
§ 23, cl. 2..... 621–623
§ 24 ..... 203
§ 24*b* ..... 203
§ 25 ..... 1182
§ 25*a* ..... 203, 1182
§ 25*b* ..... 1181
§ 25*d* ..... 203
§ 47, cl. 11..... 1063
§ 57*g* ..... 718, 719
§ 57*n* ..... 1181
§ 60 ..... 718
§ 60*a* ..... 719
§ 60*b* ..... 719
§ 60*c* ..... 719
§ 63*a* ..... 127, 1090, 1092
§ 63*b* ..... 1090, 1092
§ 67 ..... 1063, 1181
§ 67*e* ..... 127, 1170
§ 67*f* ..... 124–127, 130, 556
§ 68*a* ..... 719
§ 70 ..... 321, 1063
§§ 70*a*, *e*..... 127
1898, August 12 (30 Stat. at L. 1742) arts. 3, 6..... 464
1898, Dec. 10 (30 Stat. at L. 1757) art. 5) ..... 465
1898, Dec. 21 (30 Stat. at L. 755, 763, chap. 28) § 24.. 1002, 1005
1899, Feb. 9 (25 Stat. at L. 659, chap. 122) ..... 113
1899, March 3 (30 Stat. at L. 1007, chap. 413) § 13.... 665
1899, March 3 (30 Stat. at L. 1121, 1151, chap. 425) ... 969
§ 10 ..... 528, 529, 531
1899, March 3 (30 Stat. at L. 1161, chap. 426) .... 1094–1098

1899, March 3 (30 Stat. at L. 1253, 1285, 1336, chap. 429) § 73 ..... 954
§ 74 ..... 954
§ 219 ..... 102
§ 460 ..... 254
§ 461 ..... 254
1899, March 3 (30 Stat. at L. 1381, chap. 461) ..... 162
§ 5 ..... 159, 160
1899, July 17 (29 Stat. at L. 848, 849) art. 2) ..... 724
1900, April 30 (31 Stat. at L. 141, 157, chap. 339) ..... 486
§ 5 ..... 1022, 1024, 6
§ 86 ..... 191
1900, June 6 (31 Stat. at L. 321, chap. 786) § 4..... 102
§ 5 ..... 103
§ 10 ..... 103
§ 25 ..... 103
§ 368 ..... 103
1900, June 6 (31 Stat. at L. 677, chap. 813) ..... 162, 300, 302
1900, June 7 (31 Stat. at L. 708, chap. 860) ..... 908
1900, June 14 (31 Stat. at L. 141, chap. 339) .... 1029–1032
§ 5 ..... 1020
§ 83 ..... 1020
1901, Jan. 4 (31 Stat. at L. 727, chap. 8) ..... 302
1901, Feb. 8 (31 Stat. at L. 762, chap. 342) ..... 908
1901, March 3 (31 Stat. at L. 1078, chap. 832) ..... 302
1901, March 3 (31 Stat. at L. 1093, chap. 846) ..... 302
1901, March 3 (31 Stat. at L. 1189, chap. 854) ..... 721
1902, June 17 (32 Stat. at L. 388) .... 1147
§ 8 ..... 593
§ 17, subd. 4..... 593
§ 25 ..... 593
1902, June 30 (32 Stat. at L. 1329) .. 721
1902, Dec. 18 (32 Stat. at L. 756, chap. 5) § 2 ..... 1011, 1012
1903, Feb. 5 (32 Stat. at L. 797, chap. 487) ..... 1093
1903, Fed. 19 (32 Stat. at L. p. 848, chap. 708) § 3..... 814


*Joint Resolutions.*


1819, Dec. 14 (3 Stat. at L. 608) ..... 267
1866, July 28 (14 Stat. at L. 370, No. 97) ..... 221, 228
1870, May 31 (16 Stat. at L. 378) .... 576
1871, March 3 (16 Stat. at L. 601) ... 1015
1898, July 7 (30 Stat. at L. 750) ..... 1019
1023, 1024, 1027, 1028
1031–1034
§ 2 ..... 1027
§ 3 ..... 1027
1901, March 3 (31 Stat. at L. 1465) .. 957


*Proclamations.*


1889, March 23 (26 Stat. at L. 1546) .. 819
1893, August 19 (28 Stat. at L. 1233) . 755
1901, July 4 (32 Stat. at L. Appx. 11). 303


*Revised Statutes.*


§ 441 ..... 1071
§ 453 ..... 1071
§ 563 ..... 615, 616
§ 563, ¶ 9 ..... 474
§ 566 ..... 202
§ 629 ..... 615, 616
¶¶ 1, 2 ..... 913
¶ 6 ..... 474
¶ 16 ..... 911, 913, 914, 916
¶ 20 ..... 834, 835
§ 709 ..... 76, 108, 118, 299, 484, 486
825, 828, 1081
§ 709, cl. 3 ..... 768
§ 711 ..... 458, 834, 835
§ 720 ..... 127, 942
§ 721 ..... 785
§ 819 ..... 448
§ 828 ..... 742, 744
§ 829 ..... 776, 777
§ 861 ..... 197
§ 872 ..... 121
§ 874 ..... 908
§ 905 ..... 371, 486, 715
§ 951 ..... 431
§ 954 ..... 717
§ 957 ..... 431
§ 1014 ..... 496, 956
§ 1015 ..... 955
§ 1033 ..... 104
§ 1066 ..... 232
§ 1289 ..... 907
§ 1290 ..... 908, 909
§ 1569 ..... 475, 476
§ 1947 ..... 1010
§ 1979 ..... 911–914, 916
§ 2079 ..... 189, 301, 306
§ 2086 ..... 233
§ 2154 ..... 1100, 1101, 1103
§ 2155 ..... 1100, 1101, 1103
§ 2322 ..... 315
§ 2325 ..... 436
§ 2326 ..... 436
§ 2339 ..... 311–313
§ 2387 ..... 976, 978
§ 2395 ..... 704, 1141
§ 2396 ..... 704, 1141
§ 2397 ..... 704
§ 2476 ..... 1157
§ 2478 ..... 1071
§ 2479 ..... 1137, 1138
§ 2484 ..... 1137
§ 2921 ..... 181, 182
§ 2927 ..... 180
§ 2984 ..... 183
§§ 3015–3027 ..... 277
§ 3224 ..... 255
§ 3392 ..... 834, 835
§ 3466 ..... 433
§ 3467 ..... 433
§ 3500 ..... 427
§ 3501 ..... 427
§ 3503 ..... 427
§ 3504 ..... 427
§ 3506 ..... 427
§ 3624 ..... 433
§ 3894 ..... 500
§ 3929 ..... 93
§ 4041 ..... 93
§ 4598 ..... 1006
§ 4599 ..... 1006
§ 4613 ..... 467, 470, 474
§ 4614 ..... 467, 476
§ 4615 ..... 467, 468, 470, 478
§§ 4616, 4617 ..... 467
§ 4618 ..... 467, 903

§§ 4619–4623 . . . . . 467
§ 4624 . . . . . 467, 468, 478
§ 4625 . . . . . 467, 479
§§ 4626–4629 . . . . . 467
§ 4630 . . . . . 467, 474, 665, 667, 903
§ 4631 . . . . . 467
§ 4632 . . . . . 467, 476, 665
§§ 4633, 4634 . . . . . 467
§ 4635 . . . 465, 467–470, 472, 475, 478, 479
§§ 4636–4652 . . . . . 467
§ 4952 . . . . . 461, 462
§ 4956 . . . . . 461
§ 4965 . . . . . 461
§ 5068 . . . . . 1092
§ 5111 . . . . . 474
§ 5129 . . . . . 376
§ 5143 . . . . . 793
§ 5151 . . . . . 792, 794
§ 5191 . . . . . 375
§ 5205 . . . . . 796
§ 5209 . . . . . 954
§ 5234 . . . . . 794
§ 5242 . . . . . 376
§ 5251 . . . . . 1157
§ 5263 . . . . . 1121
§ 5270 . . . . . 134–136, 137, 951, 956
§ 5271 . . . . . 137
§ 5273 . . . . . 951, 956
§ 5278 . . . . . 660, 662
§ 5292 . . . . . 614
§ 5308 . . . . . 474
§ 5309 . . . . . 474
§ 5310 . . . . . 474
§ 5328 . . . . . 835
§ 5339 . . . . . 102
§ 5440 . . . . . 495, 509
§ 5484 . . . . . 834, 835
§ 5507 . . . . . 980, 981, 983

*Compiled Statutes, 1901.*

p. 186 . . . . . 1037
p. 252 . . . . . 1071
p. 257 . . . . . 1071
p. 285 . . . . . 113
p. 299 . . . . . 112, 113
p. 299, § 1 . . . . . 112
p. 300, §§ 2, 3 . . . . . 112
p. 359 . . . . . 948
p. 455 . . . . . 615, 616
p. 457 . . . . . 474
p. 461 . . . . . 202
p. 488 . . . . . 315
p. 503 . . . . . 615, 616, 913
p. 504 . . . . . 474
p. 506 . . . . . 911, 913, 914, 916, 983
p. 507 . . . . . 834, 835
p. 508 . . . . . 530, 913
p. 514 . . . . . 247, 632, 913
p. 547 . . . . . 972
p. 549 . . . . . 175, 200, 245, 395, 461, 580
698, 772, 780, 911, 912, 917, 946
p. 550 . . . . . 200, 245, 461, 1162
p. 554 . . . . . 530
p. 556 . . . . . 946
p. 575 . . . . . 118, 299, 484, 486, 768
825, 828, 1081
p. 577 . . . . . 458, 834, 835
p. 581 . . . . . 127, 785, 942
p. 629 . . . . . 448
p. 635 . . . . . 742, 744
p. 636 . . . . . 776
p. 666 . . . . . 121
p. 677 . . . . . 371, 486, 715
p. 695 . . . . . 431
p. 697 . . . . . 718
p. 698 . . . . . 431
p. 701 . . . . . 742, 743
p. 716 . . . . . 490
p. 718 . . . . . 955
p. 739 . . . . . 232
p. 750 . . . . . 1094
p. 751 . . . . . 1094, 1097
p. 752 . . . . . 521, 522, 550, 551
p. 765 . . . . . 791
p. 915 . . . . . 907, 908
p. 916 . . . . . 908, 909
p. 917 . . . . . 908
p. 918 . . . . . 908
p. 1078 . . . . . 476
p. 1208 . . . . . 433
p. 1262 . . . . . 911, 913, 914, 916
p. 1285 . . . . . 134
p. 1290 . . . . . 723
p. 1294 . . . . . 722, 723
p. 1298 . . . . . 724
p. 1299 . . . . . 724
p. 1303 . . . . . 724
p. 1369 . . . . . 1071
p. 1381 . . . . . 1010
p. 1392 . . . . . 732
p. 1398 . . . . . 1148
p. 1419 . . . . . 415
p. 1420 . . . . . 415
p. 1425 . . . . . 315
p. 1429 . . . . . 436
p. 1430 . . . . . 436
p. 1434 . . . . . 583
p. 1437 . . . . . 311–313, 592
p. 1457 . . . . . 976, 978
p. 1463 . . . . . 976
p. 1464 . . . . . 977
p. 1471 . . . . . 704, 1141
p. 1473 . . . . . 704, 1141
p. 1474 . . . . . 1152
p. 1489 . . . . . 604
p. 1522 . . . . . 1015
p. 1535 . . . . . 1147
p. 1541 . . . . . 1065, 1074
p. 1545 . . . . . 582, 846
p. 1549 . . . . . 592
p. 1548 . . . . . 1147
p. 1556 . . . . . 604, 607
p. 1567 . . . . . 1145, 1158
p. 1570 . . . . . 592
p. 1586 . . . . . 1071, 1137, 1138
p. 1587 . . . . . 1150
p. 1588 . . . . . 1137, 1150
p. 1595 . . . . . 728, 768, 769, 1012
p. 1598 . . . . . 411
p. 1693 . . . . . 276
p. 1886 . . . . . 829, 831
p. 1892 . . . . . 614–616
p. 1895 . . . . . 831
p. 1922 . . . . . 831
p. 1924 . . . . . 831
p. 1929 . . . . . 181, 182
p. 1930 . . . . . 179
p. 1931 . . . . . 831
p. 1932 . . . . . 614
p. 1958 . . . . . 183
pp. 1889–1994 . . . . . 277
p. 1991 . . . . . 984
p. 2088 . . . . . 255
p. 2219 . . . . . 834, 835

p. 2286 . . . . . 1036
p. 2314 . . . . . 433
p. 2339 . . . . . 427
p. 2340 . . . . . 427
p. 2341 . . . . . 427
p. 2398 . . . . . 796
p. 2418 . . . . . 433
p. 2437 . . . . . 604
p. 2543 . . . . . 606
p. 2659 . . . . . 500
p. 2923 . . . . . 605
p. 3071 . . . . . 1002
p. 3080 . . . . . 1002
p. 3115 . . . . . 1006
p. 3116 . . . . . 1006
pp. 3126–3139 . . . . . 467, 470, 474, 476
p. 3127 . . . . . 468, 470, 478
p. 3128 . . . . . 903
p. 3130 . . . . . 468, 478, 479
p. 3132 . . . . . 474, 665, 667, 903
p. 3133 . . . . . 476, 665
p. 3134 . . . . . 465, 468–470, 472, 475, 478
480
p. 3154 . . . . . 335
p. 3164 . . . . . 1048
p. 3168 . . . . . 200
p. 3177 . . . . . 503
p. 3178 . . . . . 495, 496, 500, 504, 510, 511
p. 3183, § 4 . . . . . 113
§ 5 . . . . . 113
p. 3104 . . . . . 502
p. 3184, § 6 . . . . . 113
§ 7 . . . . . 113
§ 8 . . . . . 113
p. 3185, § 9 . . . . . 113
p. 3200 . . . . . 502
p. 3401 . . . . . 697
p. 3406 . . . . . 461, 462
p. 3407 . . . . . 461
p. 3411 . . . . . 463
p. 3412 . . . . . 462
p. 3414 . . . . . 461
p. 3416 . . . . . 474
p. 3418 . . . . . 126, 127, 1063, 1090
p. 3421 . . . . . 943
p. 3429 . . . . . 201
p. 3431 . . . . . 622
p. 3432 . . . . . 203, 1189
p. 3445 . . . . . 718
p. 3450 . . . . . 556, 1170
p. 3461 . . . . . 376
p. 3463 . . . . . 793
p. 3465 . . . . . 792, 794
p. 3486 . . . . . 375
p. 3495 . . . . . 796
p. 3497 . . . . . 954
p. 3500 . . . . . 796
p. 3507 . . . . . 794
p. 3509 . . . . . 796
p. 3514 . . . . . 796
p. 3517 . . . . . 376
p. 3522 . . . . . 1158
p. 3525 . . . . . 547, 550
p. 3541 . . . . . 970
p. 3551 . . . . . 321
p. 3579 . . . . . 1116, 1121
p. 3591 . . . . . 134–137, 951, 956
p. 3593 . . . . . 137
p. 3595 . . . . . 137
p. 3596 . . . . . 951, 956
p. 3597 . . . . . 660, 662
p. 3604 . . . . . 614
p. 3606 . . . . . 614
p. 3622 . . . . . 835
p. 3676 . . . . . 495, 509
p. 3702 . . . . . 834
p. 3712 . . . . . 980, 983
p. 3768 . . . . . 607, 1065

**Alabama.**

*Constitution.*

Art. 1, § 7 . . . . . 107
Art. 8, §§ 180–188 . . . . . 910, 911
Art. 14 . . . . . 871

*Acts.*

1866–67, p. 307, § 2 . . . . . 267, 270, 271
1894–95, p. 815 . . . . . 267
1896, Dec. 5, p. 49 . . . . . 267

*Code, 1876.*

p. 68 . . . . . 267

*Code, 1886.*

§ 453, cl. 13 . . . . . 672

*Code, 1896.*

§ 1316 . . . . . 871
§ 1318 . . . . . 871
§ 1319 . . . . . 871
§ 3911, cl. 14 . . . . . 672

**California.**

*Civil Code.*

§ 1249 . . . . . 491
§ 1331 . . . . . 482

*Code of Civil Procedure.*

§ 738 . . . . . 768

*Code of Criminal Procedure.*

Art. 389 . . . . . 136

*Penal Code.*

§ 503 . . . . . 138
§ 508 . . . . . 135, 138
§§ 518, 519 . . . . . 834
§ 1426 . . . . . 136

*Statutes.*

1851, p. 309, chap. 41, §§ 1, 2, 4 . . . . 867
1870–71, p. 801 . . . . . 866, 867
1885, March 12 . . . . . 893

**Colorado.**

*Constitution.*

Art. 12, § 2 . . . . . 312
§ 6 . . . . . 312
§ 9 . . . . . 312
§ 10 . . . . . 312

*Statutes.*

1885, p. 335, § 1 . . . . . 110
§ 2 . . . . . 110, 112
§ 3 . . . . . 111
§ 4 . . . . . 111
1893, p. 614, § 427 . . . . . 312
§ 498 . . . . . 312

**District of Columbia.**

*Revised Statutes.*

Chap. 11, p. 29 . . . . . 160, 162
§ 263 . . . . . 160

*Compiled Statutes.*

231, § 4 . . . . . 640

*Code.*

§ 82 . . . . . 721
§ 226 . . . . . 721
§ 233 . . . . . 721
§ 234 . . . . . 721

**Florida.**

*Laws.*

1891, chap 1015 . . . . . 575

**Georgia.**

*Constitution.*

Art. 9, § 1 . . . . . 1062
Art. 9, § 3, ¶ 1 . . . . . 1063

*Code, 1895.*

§ 2850 . . . . . 1063

**Hawaii.**

*Code, 1897.*

§ 1109 . . . . . 1022

*Laws.*

1896, May 12, p. 70, act 24 . . . . . 482, 486
1896, act 45 . . . . . 191

*Civil Laws.*

Chap. 130 . . . . . 191

*Penal Laws.*

1897, § 616 . . . . . 1022

**Illinois.**

*Constitution, 1848.*

Art. 3 . . . . . 85
Art. 5 . . . . . 85
Art. 6 . . . . . 85
Art. 23 . . . . . 859

*Acts.*

1869, March 10 . . . . . 859
April 16 . . . . . 859
1899, April 21, § 1 . . . . . 83
§ 2 . . . . . 84
§ 3 . . . . . 84
§ 4 . . . . . 84
§ 5 . . . . . 84
§ 6 . . . . . 84
1899, p. 142 . . . . . 85

*Revised Statutes, 1874.*

Chap. 73, § 50, p. 607 . . . . . 193

*Starr & Curtis's Annotated Statutes.*

Vol. 1, 2d ed. p. 689, chap. 24 . . . . 50
Vol. 2, 2d ed. p. 1586, chap. 43 . . . . 50
p. 3529, ¶ 317, § 2 . . . . . 401, 402

*Hurd's Revised Statutes, 1901.*

§ 215, p. 630 . . . . . 80
§ 435 . . . . . 82

*Chicago Revised Code 1897.*

Vol. 1, p. 253, chap. 39 . . . . . 50, 51

*Criminal Code.*

§ 215 . . . . . 80, 82

**Indiana.**

*Laws.*

1891, § 125 . . . . . 653, 655
1895, p. 79 . . . . . 653

*Revised Statutes.*

§ 1245 . . . . . 941

*Revised Statutes, 1881.*

§ 5813 . . . . . 653–656
§ 5814 . . . . . 653–656

*Revised Statutes, 1894.*

§ 7915 . . . . . 653
§ 7916 . . . . . 653

*Burns's Revised Statutes, 1894.*

§ 4288 . . . . . 571
§ 4298 . . . . . 571
§ 4290 . . . . . 572
§ 4293 . . . . . 572
§ 4294 . . . . . 572

**Iowa.**

*Code.*

§ 1884 . . . . . 455, 456
§ 1885 . . . . . 455, 456

**Kansas.**

*Constitution.*

Art. 12, § 2 . . . . . 174

*Laws.*

1899, Jan. 11, chap. 10, § 14 . . . . . 175
§ 15 . . . 175–178

*General Statutes 1868.*

Chap. 23 . . . . . 176–178
§ 32 . . . . . 174
§ 44 . . . . . 174
§ 46 . . . . . 175

*General Statutes 1889.*

¶ 2989, § 203 . . . . . 298, 299

*General Statutes 1897.*

Chap. 107, § 147 . . . . . 299

*General Statutes 1901.*

§ 1302, p. 293 . . . . . 175
§ 1315, p. 296 . . . . . 175

**Kentucky.**

*Laws.*

1893, chap. 171, § 94 . . . . . 988
1899, § 631 . . . . . 988, 994

*Revised Statutes.*

§ 4077 . . . . . 386
§ 4078 . . . . . 386
§ 4092 . . . . . 386
§ 4079 . . . . . 387

**Maryland.**

*Constitution 1850.*

Art. 3, § 47 . . . . . 169

*Constitution 1867.*

Art. 3, § 48 . . . . . 170, 172

*Acts.*

1787, 2 Kilty, chap. 9, § 6 . . . . . 121
1827, chap. 72 . . . . . 168, 170
1854, chap. 250, § 2 . . . . . 168, 169
§ 1 . . . . . 170, 172, 173
1890, chap. 559 . . . . . 170

**Massachusetts.**

*Statutes.*

1896, chap. 313 . . . . . 559
1897, chap. 379 . . . . . 559
1898, §§ 1–3 . . . . . 559

*Public Statutes.*

Chap. 146, §§ 35, 41 . . . . . 368

*Compiled Laws 1902.*

Vol. 2, chap. 152, p. 1357 . . . . . 368

**Michigan.**

*Acts.*

1853, Feb. 5, §§ 1–7, 9 . . . . . 1105
1859, Feb. 14, Act No. 175 . . 1108, 1111, 1112
1893, Act No. 319 . . . . . 397
1895, Act No. 3 . . . . . 396
1895, Act No. 263 . . . . . 397
1899, April 8 . . . . . 397
1899, Sept. 22, § 1 . . . . . 857

*Public Acts.*

1881, March 3, Act No. 17, §§ 1, 2 . . . . 1106
1107, 1111–1113
1883, Act No. 167 . . . . . 564, 566
1891, Act No. 156, §§ 1, 4 . . . . . 857
1893, Act No. 171, § 5 . . . . . 860
1897, Act No. 20 . . . . . 1108, 1112
1899, Act No. 237 . . . . . 564

*Compiled Laws 1897.*

§ 4865 . . . . . 857

*Howell's Annotated Statutes.*

Vol. 3, § 1594 . . . . . 857

**Minnesota.**

*Constitution.*

Art. 6, § 7 . . . . . 150, 153
Art. 10, § 3 . . . . . 385

*General Statutes 1878.*

Chap. 76 . . . . . 387, 388
§§ 5905–5907, 5911 . . . . . 840

*General Statutes 1894.*

§ 4471 . . . . . 150
§ 4509 . . . . . 151, 156, 158
§§ 4510, 4511 . . . . . 151
§ 4514 . . . . . 151
§ 4517 . . . . . 151
§ 4522 . . . . . 151
§ 4523 . . . . . 150, 156, 157
§ 4524 . . . . . 150, 158
§ 4527 . . . . . 150
§ 4568 . . . . . 151
§§ 4638–4642 . . . . . 150–152
§ 4672 . . . . . 151
§ 4673 . . . . . 151
§ 4676 . . . . . 151
§ 4730 . . . . . 151, 154
§ 5897 . . . . . 385–388
§§ 5906, 5907 . . . . . 385, 388
§ 5908 . . . . . 385
§§ 5909–5911 . . . . . 386

**Mississippi.**

*Constitutions.*

§ 195 . . . . . 878

*Code 1892.*

§ 3317 . . . . . 878
§ 3387 . . . . . 878

**Missouri.**

*Constitution.*

Art. 2, §§ 4, 30 . . . . . 215
Art. 4, § 25 . . . . . 145
Art. 4, § 28 . . . . . 145, 215

*Laws.*

1887, pp. 199, 204, § 10 . . . . . 144, 145, 147
1899, p. 170, §§ 1, 2 . . . . . 214

*Revised Statutes 1879.*

§ 5982 . . . . . 143, 144

*Revised Statutes 1889.*

§ 5855 . . . . . 143, 145
§ 5869 . . . . . 144–146
§ 6570 . . . . . 144
§ 9225 . . . . . 1118

**Nebraska.**

*Constitution.*

Art. 1, § 3 . . . . . 825
Art. 3, § 15 . . . . . 825

*Laws.*

1899, chap. 48 . . . . . 825

*Compiled Statutes.*

Chap. 43, §§ 43–45 . . . . . 825

**New Mexico.**

*Laws.*

1897, §§ 468, 469 . . . . . 591
§§ 484, 492 . . . . . 592

**New York.**

*Laws.*

1882, § 868 . . . . . 117
1887, chap. 321 . . . . . 274
1896, chap. 908, § 220 . . . . . 444
1897, chap. 284 . . . . . 444

*Revised Statutes 1901.*

Vol. 3, 3d ed. p. 3592 . . . . . 444

*Code of Civil Procedure.*

§ 432, subds. 1–3 . . . . . 1115
§ 1780 . . . . . 1115

*Penal Code.*

§ 514 . . . . . 951
§ 525 . . . . . 951
§ 611, subd. 3 . . . . . 951, 954

*Penal Code 1882.*

§ 603 . . . . . 954

**North Carolina.**

*Constitution 1868.*

Art. 2, § 14 . . . . . 972, 1131, 1132
Art. 7, § 7 . . . . . 1131, 1132

*Acts.*

1852, pp. 484, 499, chap. 136, §§ 33, 35. 973
1868–69 . . . . . 1131
1870, chap. 236 . . . . . 1127
1879, Feb. 20 . . . . . 972
1883, chap. 136 . . . . . 337
1887, chap. 183 . . . . . 1127, 1130

*Public Acts.*

1899, chap. 62 . . . . . 1079
§ 3 . . . . . 1081
§ 4 . . . . . 1081

*Code 1883.*

§§ 1996–1999.....973–975, 1127, 1130–1132
§ 2000 ..... 975

*Ordinance.*

1868, March 6, §§ 1, 2, 5, 12, 13....972–974

**Oklahoma.**

*Statutes.*

Art. 2, chap. 70, § 13..... 836
§ 1852 ..... 1178
§ 3093 ..... 1178
§ 3934 ..... 100
§ 3951 ..... 98
§ 3955 ..... 98
§ 4428 .....98, 100
§ 5177 ..... 1178
§ 5182 ..... 1178
§ 5183 ..... 1178

*Session Laws.*

1895, chap. 43, art. 6 .....836–839
1899, p. 216 .....836–839

*Revised Statutes 1893.*

Art. 15, chap. 18, § 1562 ..... 752
Art. 13, chap. 67, § 4805 ..... 752

**Oregon.**

*Acts.*

1891, Feb. 18 ..... 968

**Pennsylvania.**

*Acts.*

1836, June 16 (P. L. 767), § 35 . .322, 323
(P. L. 72), §§ 37, 38 ... 323
1849, April 9 (P. L. 533), § 1 ..... 323

**South Dakota.**

*Constitution.*

Art. 22, subd. 2..... 538

**Tennessee.**

*Constitution.*

Arts. 6, 7 ..... 711

*Acts.*

1877, chap. 104, § 2..... 890
1901, Jan. 28 ..... 957
chap. 8 .....710–712

*Code.*

§ 1154 ..... 712

*Shannon's Code 1896.*

§ 5165 ..... 711
§§ 5167, 5168 ..... 711
§§ 5175, 5176 ..... 711
§ 5180 ..... 711

**Texas.**

*Acts.*

1879, chap. 28, p. 23, § 12 .. 610, 611
612, 613
1883, chap. 58, p. 85, §§ 9, 10 .610, 611
1885, chap. 13, pp. 13, 18 .....610–613
1887, chap. 99, pp. 83, 86, § 11 .610, 612
1895, chap. 47, pp. 63, 67, § 11 .610, 612
1897, chap. 37, p. 39, § 1 .....610–613
chap. 129 (2 Batt. Rev. Stat. art. 4218y) ..... 365

*Revised Statutes.*

Art. 2623 ..... 248
Art. 2624 ..... 248
Art. 2627 ..... 248
Art. 3071 ..... 204

*General Laws 1897.*

Spec. Sess. chap. 6, § 1..... 906

*Sayles's Civil Statutes 1897.*

Art. 4560*f* ..... 906
Art. 4560*g* ..... 852
Art. 4560*h* ..... 852

**Utah.**

*Compiled Laws 1888.*

§ 2293 ..... 313

*Revised Statutes 1898.*

§§ 351, 352 ..... 313

**Washington.**

*Ballinger's Codes and Statutes.*

§§ 5500, 5508 ..... 1010
Vol. 2, §§ 5953, 5954 .....771, 772

**West Virginia.**

*Acts.*

1882, chap. 130, § 12 ..... 72
§ 13 ..... 72
§ 15 ..... 72
§ 19 ..... 72
§ 25 .....73–75
§ 29 ..... 74

**Wisconsin.**

*Laws.*

Vol. 2, 1883, chap. 1, § 1 ..... 251
7, §§ 1, 10 ..... 251
Vol. 2, 1891, chap. 21, §§ 4–6 .....251, 253
59 .....251, 253
1899, chap. 351, § 27..... 333

*Revised Statutes 1898.*

§ 1770*b* ..... 331
§ 3348 ..... 765
§ 4978 .....331, 332

**Wyoming.**

*Laws.*

1895, chap. 61, §§ 1–4 ..... 361

# CASES

ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

AT

OCTOBER TERM, 1902.

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Vol. 187.

# REFERENCE TABLE

OF SUCH CASES

## DECIDED IN U. S. SUPREME COURT,

## OCTOBER TERM, 1902,

AND REPORTED HEREIN,

---

## VOLUME 187,

---

AS ALSO APPEAR IN

## OFFICIAL REPORTER'S EDITION

| Off. Rep. 187 U. S. | Title. | Here in. |
|---|---|---|
| 1–3 | Ambrosini v. United States | 49 |
| 3–5 | " " | 50 |
| 5–6 | " " | 51 |
| 6–8 | " " | 52 |
| 8 | " " | 53 |
| 8–11 | Schwartz v. Duss | 53 |
| 11–14 | " " | 54 |
| 14–16 | " " | 55 |
| 16–19 | " " | 56 |
| 19–22 | " " | 57 |
| 22–24 | " " | 58 |
| 24–27 | " " | 59 |
| 27–30 | " " | 60 |
| 30–32 | " " | 61 |
| 32–35 | " " | 62 |
| 35–38 | " " | 63 |
| 38–40 | " " | 64 |
| 40–41 | " " | 65 |
| 41–43 | Robinson & Co. v. Belt ("J. M. Robinson & Co. v. Belt") | 65 |
| 43 | " " | 66 |
| 43–46 | " " | 67 |
| 46–48 | " " | 68 |
| 48–50 | " " | 69 |
| 51–52 | Turpin v. Lemon | 70 |
| 52–54 | " " | 72 |
| 54–57 | " " | 73 |
| 57–60 | " " | 74 |
| 60–61 | " " | 75 |
| 61–62 | Baker v. Baldwin | 75 |
| 62–63 | " " | 76 |
| 63–64 | Kansas City Suburban Belt R. Co. v. Herman | 76 |
| 64–67 | " " | 77 |
| 67–69 | " " | 78 |
| 69–71 | " " | 79 |
| 71 | Dreyer v. Illinois | 79 |
| 73–74 | " " | 80 |
| 74 | " " | 81 |
| 75–77 | " " | 82 |
| 77–79 | " " | 83 |
| 79–82 | " " | 84 |
| 82–85 | " " | 85 |
| 85–87 | " " | 86 |

| Off. Rep. 187 U. S. | Title. | Here in. |
|---|---|---|
| 87 | Iowa v. Rood | 86 |
| 88–90 | " " | 87 |
| 90–92 | " " | 89 |
| 92–94 | " " | 90 |
| 94 | American School of Magnetic Healing v. McAnnulty | 90 |
| 95–97 | " " | 91 |
| 97–100 | " " | 92 |
| 100–102 | " " | 93 |
| 103–105 | " " | 94 |
| 105–107 | " " | 95 |
| 107–110 | " " | 96 |
| 110–111 | " " | 97 |
| 111–113 | Romig v. Gillett | 97 |
| 113–115 | " " | 98 |
| 115–116 | " " | 99 |
| 116–117 | " " | 100 |
| 118 | Bird v. United States | 100 |
| 120 | " " | 101 |
| 120–123 | " " | 102 |
| 123–125 | " " | 103 |
| 125–128 | " " | 104 |
| 128–131 | " " | 105 |
| 131–133 | " " | 106 |
| 133 | Jacobi v. Alabama | 106 |
| 134–135 | " " | 107 |
| 135–136 | " " | 108 |
| 137 | Reid v. Colorado | 108 |
| 138–139 | " " | 110 |
| 139–141 | " " | 111 |
| 141–144 | " " | 112 |
| 144–146 | " " | 113 |
| 146–149 | " " | 114 |
| 149–151 | " " | 115 |
| 151–153 | " " | 116 |
| 153–154 | Reid v. Jones | 116 |
| 154 | " " | 117 |
| 155–156 | Home for Incurables v. New York | 117 |
| 156–158 | " " | 118 |
| 158 | " " | 119 |
| 159 | Raub v. Carpenter | 119 |
| 160–161 | " " | 120 |
| 161–164 | " " | 121 |
| 164 | " " | 122 |

| Off. Rep. 187 U. S. | Title. | Here in. | Off. Rep. 187 U. S. | Title. | Here in. |
|---|---|---|---|---|---|
| 165–166 | Metcalf v. Barker | 122 | 287–290 | Lawder v. Stone | 151 |
| 166–169 | " " | 123 | 290–292 | " " | 152 |
| 169–171 | " " | 124 | 292–294 | " | 153 |
| 171 | " " | 125 | 294 | Cherokee Nation v. Hitchcock | 153 |
| 171–174 | " " | 126 | 295–299 | " " | 154 |
| 174–176 | " " | 127 | 299 | " " | 155 |
| 176–177 | " " | 128 | 299–301 | " " | 157 |
| 177 | Pickens v. Roy | 128 | 301–303 | " " | 158 |
| 178–180 | " " | 129 | 303–306 | " " | 159 |
| 180 | " " | 130 | 306–308 | " " | 160 |
| 181 | Grin v. Shine | 130 | 308 | Equitable L. Assur. Soc. v. Brown | 160 |
| 182–183 | " " | 131 | | | |
| 183–184 | " " | 133 | 309–310 | " " | 161 |
| 184–186 | " " | 134 | 310–313 | " " | 162 |
| 186–189 | " " | 135 | 313–315 | " " | 163 |
| 189–192 | " " | 136 | 315–317 | Fidelity & D. Co. v. United States ("Fidelity & D. Co. v. United States to the Use of Smoot") | 164 |
| 192–194 | " " | 137 | | | |
| 194–197 | " " | 138 | | | |
| 197 | " " | 139 | | | |
| 197 | Knights Templars & Masons' Life Indemnity Co. v. Jarman | | 317–319 | " " | 165 |
| | | | 319–320 | " " | 167 |
| | | 139 | 320–322 | " " | 168 |
| 198–199 | " " | 140 | 322 | United States v. Moseley | 198 |
| 199–200 | " " | 143 | 323–324 | " " | 199 |
| 200–203 | " " | 144 | 324–327 | " " | 200 |
| 203–205 | " " | 145 | 327 | Elliott v. Toeppner | 200 |
| 205–208 | " " | 146 | 328–330 | " " | 201 |
| 208–210 | " " | 147 | 330–332 | " " | 202 |
| 211 | Security Trust Co. v. Black River Nat. Bank | | 332–335 | " " | 203 |
| | | 147 | 335–337 | Iowa Life Ins. Co. v. Lewis | 204 |
| 211–213 | " " | 148 | 337–340 | " " | 205 |
| 213–214 | " " | 149 | 340–342 | " " | 206 |
| 214–216 | " " | 150 | 342–344 | " " | 207 |
| 216–219 | " " | 151 | 344 | " " | 208 |
| 219–221 | " " | 152 | 344–347 | " " | 210 |
| 221–224 | " " | 153 | 347–349 | " " | 211 |
| 224–227 | " " | 154 | 349–352 | " " | 212 |
| 227–229 | " " | 155 | 352–355 | " " | 213 |
| 229–232 | " " | 156 | 355 | " " | 214 |
| 232–235 | " " | 157 | 356–357 | Layton v. Missouri | 214 |
| 235–237 | " " | 158 | 357–360 | " " | 215 |
| 237 | Security Trust Co. v. Dent | 158 | 360–361 | " " | 216 |
| 238–239 | " " | 159 | 362 | Hurt v. Union C. L. Ins. Co. | 216 |
| 239–240 | Macfarland v. Brown | 159 | 362–363 | " " | 217 |
| 240–242 | " " | 160 | 363–365 | " " | 218 |
| 242–245 | " " | 161 | 365–367 | " " | 219 |
| 245–246 | " " | 162 | 367–370 | " " | 220 |
| 246–247 | Macfarland v. Byrnes | 162 | 370 | " " | 221 |
| 247–248 | " " | 163 | 371–372 | Pam-to-pee v. United States | 221 |
| 248–249 | Mencke v. Cargo of Java Sugar | 163 | 372–374 | " " | 222 |
| 250 | " " | 164 | 374–375 | " " | 223 |
| 250–252 | " " | 165 | 375–378 | " " | 224 |
| 253–255 | " " | 166 | 378–380 | " " | 225 |
| 255–257 | " " | 167 | 380–383 | " " | 226 |
| 258 | Northern C. R. Co. v. Maryland | 167 | 383–386 | " " | 227 |
| 258–261 | " " | 168 | 386–388 | " " | 228 |
| 261–263 | " " | 169 | 388–391 | " " | 229 |
| 264–266 | " " | 170 | 391–394 | " " | 230 |
| 266 | " " | 171 | 394–396 | " " | 231 |
| 266–269 | " " | 172 | 396–399 | " " | 232 |
| 269–270 | " " | 173 | 399–401 | " " | 232 |
| 271 | Evans v. Nellis | 173 | 401 | Young Women's Christian Home v. French; Faul v. French | |
| 271–274 | " " | 174 | | | |
| 274–276 | " " | 175 | | | 233 |
| 276–277 | " " | 176 | 402–404 | " " | 234 |
| 277–280 | " " | 177 | 404–405 | " " | 235 |
| 280 | " " | 178 | 410–411 | " " | 236 |
| 281–282 | Lawder v. Stone | 178 | 411–413 | " " | 237 |
| 283–284 | " " | 179 | 413–416 | " " | 238 |
| 284–287 | " " | 180 | 416–418 | " " | 239 |

| Page of Vol. 187 U. S. | Title. | Here in. | Off. Rep. 187 U. S. | Title. | Here in. |
|---|---|---|---|---|---|
| [illegible] | Young Women's Christian Home v. French | | 515–516 | Downs v. United States | 282 |
| | Teal v. French | 240 | 516–517 | Werden v. California Fig Syrup Co. | 282 |
| [illegible] | Western Union Teleg. Co. v. New Hope Borough | | 517–518 | " " | 283 |
| | | 240 | 518 | " " | 284 |
| [illegible] | " " | 241 | 518–519 | " " | 285 |
| [illegible] | " " | 243 | 519–521 | " " | 286 |
| [illegible] | " " | 244 | 521 | " " | 287 |
| [illegible] | Cary Mfg. Co. v. Acme Flexible Clasp Co. | | 526–529 | " " | 288 |
| | | 244 | 529–532 | " " | 289 |
| [illegible] | " " | 245 | 532–534 | " " | 290 |
| [illegible] | Mexican C. R. Co. v. Eckman | 245 | 534–537 | " " | 291 |
| [illegible] | " " | 246 | 537–540 | " " | 292 |
| [illegible] | " " | 247 | 540 | " " | 293 |
| [illegible] | " " | 248 | 540–542 | Chadwick v. Kelley | 293 |
| [illegible] | United States v. Sampson | 248 | 542–544 | " " | 294 |
| [illegible] | " " | 249 | 544–546 | " " | 295 |
| [illegible] | Oshkosh Waterworks Co. v. Oshkosh | | 546–547 | " " | 296 |
| | | 249 | 547–548 | Manley v. Park | 296 |
| [illegible] | " " | 250 | 548–549 | " " | 297 |
| [illegible] | " " | 251 | 550 | " " | 298 |
| [illegible] | " " | 252 | 550–553 | " " | 299 |
| [illegible] | " " | 253 | 553 | Lone Wolf v. Hitchcock | 299 |
| [illegible] | Pacific Steam Whaling Co. v. United States | | 553–556 | " " | 300 |
| | | 253 | 556–558 | " " | 301 |
| [illegible] | " " | 254 | 558–561 | " " | 302 |
| [illegible] | " " | 255 | 561–562 | " " | 303 |
| [illegible] | " " | 256 | 563–564 | " " | 305 |
| [illegible] | Pacific Coast Steamship Co. v. United States (No. 29) | | 564–566 | " " | 306 |
| | | | 566–568 | " " | 307 |
| | Pacific Coast Steamship Co. v. United States (No. 30) | | 569 | Telluride Power Transmission Co. v. Rio Grande W. R. Co. | 307 |
| | Pacific Coast Steamship Co. v. United States (No. 31) | | 569–571 | " " | 308 |
| | | 256 | 571–574 | " " | 309 |
| [illegible] | Cotton v. Alaska Treadwell Min. Co. | | 574–577 | " " | 310 |
| | | 256 | 577–580 | " " | 311 |
| [illegible] | " " | 257 | 580–582 | " " | 312 |
| [illegible] | " " | 258 | 582–585 | " " | 313 |
| [illegible] | " " | 259 | 585–587 | Ayres v. Polsdorfer | 314 |
| [illegible] | " " | 260 | 587–590 | " " | 315 |
| [illegible] | " " | 261 | 590–592 | " " | 316 |
| [illegible] | Stewart v. Washington & A. Steamship Co. | | 592–595 | " " | 317 |
| | | 261 | 595–596 | " " | 318 |
| [illegible] | Hartford Fire Ins. Co. v. Wilson | | 596–597 | Page v. Edmunds | 318 |
| | | 261 | 597–600 | " " | 319 |
| [illegible] | " " | 262 | 600 | " " | 320 |
| [illegible] | " " | 263 | 601–602 | " " | 321 |
| [illegible] | " " | 264 | 602–605 | " " | 322 |
| [illegible] | " " | 265 | 605–606 | " " | 323 |
| [illegible] | " " | 266 | 606 | Otis v. Parker | 323 |
| [illegible] | Mobile Transp. Co. v. Mobile | 266 | 606–607 | " " | 326 |
| [illegible] | " " | 267 | 607–609 | " " | 327 |
| [illegible] | " " | 269 | 609–611 | " " | 328 |
| [illegible] | " " | 270 | 611 | Diamond Glue Co. v. United States Glue Co. | |
| [illegible] | " " | 271 | | | 328 |
| [illegible] | " " | 272 | 611–613 | " " | 331 |
| [illegible] | " " | 273 | 613–616 | " " | 332 |
| [illegible] | Johnson v. New York Life Ins. Co. | | 616–617 | " " | 333 |
| | | 273 | 617 | Hanley v. Kansas City S. R. Co. | 333 |
| [illegible] | " " | 274 | | | |
| [illegible] | " " | 275 | 618–620 | " " | 335 |
| [illegible] | Downs v. United States | 275 | 620–621 | " " | 336 |
| [illegible] | " " | | 622 | Caldwell v. North Carolina | 336 |
| [illegible] | " " | 276 | 622–624 | " " | 337 |
| [illegible] | " " | 277 | 624–625 | " " | 338 |
| [illegible] | " " | 278 | 625–628 | " " | 339 |
| [illegible] | " " | 279 | 628–630 | " " | 340 |
| [illegible] | " " | 280 | 630–633 | " " | 341 |
| [illegible] | " " | 281 | 635–655 | Memorandum Cases | 343–351 |

# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1902.

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PETER AMBROSINI, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 1–8.)

*revenue — exemptions — liquor-tax bonds.*

required to be given to the state of Il- s and city of Chicago as a condition dent to the issue of a liquor license exempted from the stamp tax require- of the war revenue act of 1898 (30 at L. 448, chap. 448), either as bonds d by a state or city within the meaning e exemption conferred by § 17 of that or by virtue of the proviso in that sec- that it was thereby intended to exempt state and municipalities in respect of exercise of strictly governmental func-

[No. 14.]

*and Submitted December 4, 1901. Decided October 20, 1902.*

ERROR to the District Court of the ted States for the Northern District ois to review a judgment imposing on a finding of guilty of an offense the war revenue act. *Reversed* and ed, with a direction to quash the ment.

same case below, on motion to quash ment, 105 Fed. 239.

ment by Mr. Chief Justice Fuller: was a writ of error brought to re- judgment of the district court im- fine on a finding of guilty of an of- under § 7 of the act of Congress "An Act to Provide Ways and the Most War Expenditures, and for poses" (30 Stat. at L. 448, chap.

448), otherwise known as the war revenue act of 1898. The indictment contained two counts. The first charged that defendant on August 30, 1898, executed a certain bond in the penal sum of $3,000 to the people of the state of Illinois without affixing to the bond a 50-cent revenue stamp, alleged to be required by said act of Congress. The second count charged that defendant on August 30, 1898, executed a certain bond to the city of Chicago in the penal sum of $500 without affixing thereto a 50-cent revenue stamp, alleged to be required by the act. The bonds were set forth *in extenso*. A motion to quash the indictment was made and overruled, and, a jury being waived, the cause was submitted to the court for trial, defendant found guilty, and sentenced to pay a fine. The opinion is reported, 105 Fed. 239.

Sections 6, 7, and 17 of the act are as follows:

"Sec. 6. That on and after the first day of July, eighteen hundred and ninety-eight, there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in schedule A of this act, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, shall be written or printed by any person or persons, or party who shall make, sign, or issue the same, or for whose use or benefit the same shall be made, signed, or issued, the several taxes or sums of money set down in figures *against[3] the same, respectively, or otherwise specified or set forth in the said schedule. . . .

"Sec. 7. That if any person or persons shall make, sign, or issue, or cause to be made, signed, or issued, any instrument, document, or paper of any kind or description whatsoever, without the same being

duly stamped for denoting the tax hereby imposed thereon, or without having thereupon an adhesive stamp to denote said tax, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof shall pay a fine of not more than one hundred dollars, at the discretion of the court, and such instrument, document, or paper, as aforesaid, shall not be competent evidence in any court."

"Sec. 17. That all bonds, debentures, or certificates of indebtedness issued by the officers of the United States government, or by the officers of any state, county, town, municipal corporation, or other corporation exercising the taxing power, shall be, and hereby are, exempt from the stamp taxes required by this act: *Provided*, That it is the intent hereby to exempt from the stamp taxes imposed by this act such state, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity: *Provided further*, That stock and bonds issued by co-operative building and loan associations whose capital stock does not exceed ten thousand dollars, and building and loan associations or companies that make loans only to their shareholders, shall be exempt from the tax herein provided."

Schedule A contained this provision: "Bond: For indemnifying any person or persons, firm, or corporation who shall have become bound or engaged as surety for the payment of any sum of money, or for the due execution or performance of the duties of any office or position, and to account for money received by virtue thereof, and all other bonds of any description, except such as may be required in legal proceedings, not otherwise provided for in this schedule, 50 cents."

The bonds, to which it was alleged the stamps should have been affixed, were bonds required by the laws of Illinois to be given as a condition of the issue of licenses to [4]keep dramshops *or sell intoxicating liquors in the state of Illinois and in the city of Chicago.

Sections 1, 2, and 5 of an act of the general assembly of the state of Illinois, entitled "An Act to Provide for the Licensing of and against the Evils Arising from the Sale of Intoxicating Liquors," read:

"Sec. 1. That a dramshop is a place where spirituous or vinous or malt liquors are retailed by less quantity than 1 gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act.

"Sec. 2. Whoever, not having a license to keep a dramshop, shall, by himself or another, either as principal, clerk, or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than 1 gallon, or in any quantity to be drank upon the premises, or in or upon any adjacent room, building [,] yard, premises, or place of public resort, shall be fined not less than twenty dollars [$20] nor more than one hundred dollars [$100], or imprisoned in the county jail not less than ten nor more than thirty days, or both, in the discretion of the court."

"Sec. 5. No person shall be licensed to keep a dramshop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town, or village, unless he shall first give bond in the penal sum of $3,000, payable to the people of the state of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person or property, or means of support, by reason of the person so obtaining a license selling or giving away intoxicating liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant." 2 Starr & C. Anno. Stat. (Ill.) 2d ed. 1586, chap. 43.

*By article 5, chapter 24, of the statutes[5] of Illinois concerning cities, it was provided:

"Sec. 1. The city council in cities, and president and the board of trustees in villages, shall have the following powers: . . .

"Fourth. To fix the amount, terms, and manner of issuing and revoking licenses. . . .

"Forty-sixth. To license, regulate, and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed, or fermented liquor, the license not to extend beyond the municipal year in which it shall be granted, and to determine the amount to be paid for such license: . . . *Provided, further*, That in granting licenses, such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses.

. . . "Ninety-sixth. To pass all ordinances, rules, and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper: . . ." 1 Starr & C. 2d ed. 689, chap. 24.

The Revised Code of Chicago of 1897 provided: "The mayor of the city of Chicago shall, from time to time, grant licenses for the keeping of dramshops within the city of Chicago to persons who shall apply to him in writing therefor, and shall furnish evidence satisfying him of their good character. Each applicant shall execute to the city of Chicago a bond, with at least two sureties,

to be approved by the city clerk or city collector, in the sum of $500, conditioned that the applicant shall faithfully observe and keep all ordinances in force at the time of the application or thereafter to be passed during the period of the license applied for, and will keep closed, on Sundays, all doors opening out upon any street from the bar or room where such dramshop is to be kept; and that all windows opening upon any street from such bar or room shall, on Sundays, be provided with blinds, shutters, or curtains, so as to obstruct the view from such street into such room. No application for a license shall be considered until such bond shall have been filed." 1 Rev. Code 1897, p. 253, chap. 39, art. 1.

[6] *The ordinance contained many other specific regulations of the traffic, and provided that licenses might be revoked by the mayor for violation of "any provision of any ordinance of the city council relating to intoxicating liquors, or any condition of the bond aforesaid."

The conditions of the bond in the sum of $3,000 to the people of the state of Illinois were substantially in the words of the statute. The conditions of the bond in the sum of $500 to the city of Chicago were somewhat more stringent than the language of the municipal Code.

*Messrs.* **T. A. Moran** and **Levy Mayer** submitted the cause for plaintiff in error:

The war revenue act of June 13, 1898, must be strictly construed as against the government.

*United States* v. *Isham*, 17 Wall. 496, 21 L. ed. 728; *Hartranft* v. *Wiegmann*, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240; *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 35 L. ed. 821, 12 Sup. Ct. Rep. 55; *Hugus* v. *Strickler*, 19 Iowa, 413; Ash's Annotated Internal Revenue Laws, p. 360, note C.

There are exempted, by necessary implication, those cases to which the statute cannot constitutionally apply.

Endlich, Interpretation of Statutes, p. 247, § 179; *Opinion of the Justices*, 41 N. H. 553; *Prather* v. *Pritchard*, 26 Ind. 65.

The bonds in question are exacted in favor of the people by the laws and ordinances regulating the sale of intoxicating liquors, and are therefore instrumentalities of the state.

*United States* v. *Owens*, 100 Fed. 70; 31 Chicago Legal News, 247.

The state has the supreme and absolute control of the issuing and granting of licenses for the sale of intoxicating liquors within its borders, unhampered by restrictions of the Federal government.

*License Cases*, 5 How. 504, 12 L. ed. 256; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Re Hoover*, 30 Fed. 51.

The war revenue act imposes excise taxes on transactions, irrespective of who in the first instance is required to pay the same.

*Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067; *Nicol* v. *Ames*, 173 U. S. 509, 43 L.ed. 786, 19 Sup. Ct. Rep. 522; *Jones* v. *Keep*, 19 Wis. 390.

A state has no power, either directly or indirectly, by taxation or otherwise, to interfere with any of the means, instrumentalities, or agencies used by the Federal government in the exercise of its sovereign powers.

*M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Weston* v. *Charleston*, 2 Pet. 449, 7 L. ed. 481; *Dobbins* v. *Erie County*, 16 Pet. 449, 10 L. ed. 1027; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067; *Palfrey* v. *Boston*, 101 Mass. 329, 3 Am. Rep. 364; *Newark City Bank* v. *Fourth Ward Assessor*, 30 N. J. L. 13; *Nave* v. *King*, 27 Ind. 356; 1 Desty, Taxn. p. 73.

Conversely, the Federal government cannot interfere by taxation with the means, instrumentalities, or agencies used by the state in the exercise of its sovereign powers.

*The Collector* v. *Day*, 11 Wall. 113, *sub nom. Buffington* v. *Day*, 20 L. ed. 122; *United States* v. *Baltimore & O. R. Co.* 17 Wall. 327, 21 L. ed. 599; *State ex rel. Lakey* v. *Garton*, 32 Ind. 6, 2 Am. Rep. 315; *Warren* v. *Paul*, 22 Ind. 281; *Sayles* v. *Davis*, 22 Wis. 225; *Fifield* v. *Close*, 15 Mich. 505; *McGovern* v. *Hoesback*, 53 Pa. 176; *Sampson* v. *Barnard*, 98 Mass. 359; *Stirneman* v. *Smith*, 40 C. C. A. 581, 100 Fed. 600; *Warwick* v. *Bettman*, 102 Fed. 127, Affirmed in 47 C. C. A. 185, 108 Fed. 46; *United States* v. *Owens*, 100 Fed. 70, 31 Chicago Legal News, 247.

*Assistant Attorney General* **James M. Beck** argued the cause and filed a brief for defendant in error:

It is within the power of the state of Illinois, as a police regulation, to make the sale of liquor a privilege; but such sales are equally within the taxing power of the United States.

*License Tax Cases*, 5 Wall. 462, 18 L. ed. 497.

A liquor licensee has no more direct connection with the government than a corporation which receives its charter, together with pecuniary or other aid, from the United States, and which is sometimes used by the United States for governmental purposes, such as the carriage of the mails or the transportation of troops, etc.; and yet such corporation was held to be taxable on the ground that it was not an agency or instrumentality of the state.

*Union P. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Thomson* v. *Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792.

Cases in which the power of taxation has been withheld are predicated upon the fact that the things taxed are the direct property or acts or agencies of the state, and are not things done by an individual at the command of the state as an incident of police regulation.

*United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597; *Pollock* v.

*Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673.

There may be persons having relations with the government, who are not necessarily agencies of the government.

*Whitehouse* v. *Langdon*, 10 N. H. 331.

The clear distinction between a taxable subject which may be affected by legal regulations, and the direct agencies of the state, is plainly pointed out by this court in *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, where the court, while conceding that the right to regulate successions is vested in the state, yet held that inheritance duties could be imposed by Congress.

The indisposition of this court to extend this implied constitutional restriction of the taxing power is further illustrated by *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, where a bequest by a citizen of New York state to the United States was held subject to the state inheritance law.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

By the dramshop act the general assembly of Illinois legislated, as was stated in the title of the act, "against the evils arising from the sale of intoxicating liquors," not by prohibiting the traffic altogether, but by regulating it in protection of the public. The act concerning cities authorized municipal action subject to the general law.

The legislation was enacted in the exercise of the police power for the safety, welfare, and health of the community, and it is conceded that that power is a power reserved by the states, free from Federal restriction in any particular material here.

The act and the ordinance required these bonds to be given as prerequisites to the issue of licenses permitting the sale. The licenses could not be issued without compliance with this condition precedent. The statute expressly provided that no license should be granted "unless he shall first give bond in the penal sum of $3,000," and the ordinance, that "no application for a license shall be considered until such bond shall have been filed."

The bonds were obviously intended to secure the proper enforcement of the laws in respect of the sale of intoxicating liquors; [7] *the prompt payment of fines and penalties; a remedy for injuries in person, property, or means of support; and the protection of the public in divers other enumerated particulars. The granting of the licenses was the exercise of a strictly governmental function, and the giving of the bonds was part of the same transaction. To tax the license would be to impair the efficiency of state and municipal action on the subject and assumes the power to suppress such action. And considering license and bond together, taxation of the bond involves the same consequences. In themselves the bonds were not mere incidents of the regulation of the traffic, but essential safeguards against its evils, and governmental instrumentalities of state and of city, as authorized by the state, to insure the public welfare in the conduct of the business, although the business itself was not governmental. They were not mere individual undertakings to secure a personal privilege as suggested by the court below, but means for the preservation of the peace, the health, and the safety of the community in compelling strict observance of the law, and remedying injurious results.

The general principle is that, as the means and instrumentalities employed by the general government to carry into operation the powers granted to it are exempt from taxation by the states, so are those of the states exempt from taxation by the general government. It rests on the law of self-preservation, for any government whose means employed in conducting its strictly governmental operations are subject to the control of another and distinct government exists only at the mercy of the latter. Nelson, J., *The Collector* v. *Day*, 11 Wall. 113, *sub nom. Buffington* v. *Day*, 20 L. ed. 122.

Viewed in the light of that general principle, we think it clear that Congress, lest the broad language of schedule A, "and all other bonds of any description," might literally cover bonds such as those in question, and in avoidance of controversy in that regard, exempted them by § 17, wherein it was declared that it was intended "to exempt from the stamp taxes imposed by this act, such state, county, town, or other municipal corporations in the exercise only of functions strictly belonging to them in their ordinary governmental, taxing, or municipal capacity." True, this language was used in a proviso, and the *enacting clause [8] exempted bonds "issued by the officers of . . . any state, county, town, municipal corporation, or other corporation exercising the taxing power;" but as the bonds were required by the state and the city, and were issued for the benefit of the public, and not for the benefit of the individuals who executed them, it appears to us that they came fairly within the meaning of the clause, assuming that they were covered by schedule A. The question is whether the bonds were taken in the exercise of a function strictly belonging to the state and city in their ordinary governmental capacity, and we are of opinion that they were, and that they were exempted as no more taxable than the licenses. Either they were exempt, apart from the proviso, because, in the sense of the statute, issued by the state and city, or the proviso so far qualified the language of the enacting clause as to exempt them in exempting the state and city in respect of the exercise of strictly governmental functions.

We conclude, therefore, that they were not taxable within the statute. *United States* v. *Owens*, 100 Fed. 70; *Stirneman* v. *Smith*, 40 C. C. A. 581, 100 Fed. 600; *Warwick* v. *Bettman*, 102 Fed. 127, 47 C. C. A.

185, 108 Fed. 46; *People* v. *City*, 31 Chicago Legal News, 247.

*Judgment reversed* and cause remanded, with a direction to quash the indictment.

Mr. Justice **Harlan** did not hear the argument, and took no part in the decision.

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CHRISTIAN SCHWARTZ *et al.*, *Petitioners*,
*v.*
JOHN S. DUSS *et al.*

(See S. C. Reporter's ed. 8-41.)

*Presumptions — from lapse of time — communistic society—resulting trust—concurrent findings of fact.*

1. Any claim which, as a matter of right, could have been made on a communistic society under a provision of its plan that members who contributed no property to the society should, on withdrawing, receive such sum as the leaders of the society should determine, will from long lapse of time be presumed to have been demanded and the demand satisfied.
2. A communistic society will be presumed so to have discharged its obligation to deceased members who contributed no property to the society, but in consideration of support dedicated their labor and services, as to leave no undischarged obligations or rights for distant relatives of such deceased members to assert or claim against the community or its property.
3. The adoption by the members of a communistic society of a plan by which all property contributed to the use and benefit of the community was to be "joint and indivisible stock," and all contributions were to be irrevocable, was not the creation by the members of a trust in the property for the benefit of the society, as such, which, on the doctrine of resulting trusts, conferred on the descendants of members who contributed no property to the society any such proprietary right or interest as entitled them on the dissolution of the society to share in its property or assets, or to have an accounting.
4. The disputed facts involved in concurrent findings of a master and both the circuit court and the circuit court of appeals that a society had not been dissolved, either by the consent of its members or by the abandonment of the purpose for which it was founded, will not be reviewed by the Supreme Court of the United States.

[No. 38.]

*Argued April 22 and 23, 1902. Decided October 27, 1902.*

ON WRIT of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a decree of a Circuit Court dismissing a bill in a suit for the distribution of the property and assets of a society alleged to have ceased to exist. *Affirmed.*

See same case below, 43 C. C. A. 323, 103 Fed. 561.

Statement by Mr. Justice **McKenna**:

This suit was brought for the distribution of the property and assets of the Harmony Society, which the bill alleged had ceased to exist. The bill also prayed for an injunction against John S. Duss to restrain him from in anywise dealing with the property of the society, and also for a receiver. The bill was exceedingly voluminous. It stated the origin and principles and plan of government of the society; that many industries were started and conducted by it, including a savings bank; the town of Economy, Pennsylvania, founded by it; and that its acquisitions, including 3,000 acres of land in the city of Pittsburg, amounted in 1890 to upwards of $4,000,000; and "all of said possessions, up to and until the grievances hereafter complained of, were scrupulously used for the benefit of all its members, and for the advancement, benefit, and continuation of the society;" that until those grievances the society, "from the period of its inception until a recent date, adhered rigidly to its plan of government, and became illustrious and highly respected by reason of its sincere advocacy of the equality of man, its espousal of the highest principles of Christianity, and its honesty and benevolent administration of all public functions, whether in the management of its internal affairs, or in its many transactions with the citizens of western Pennsylvania."

The bill also averred that the society "but once in a period *of ninety years suffered [11] from serious internal disorder," which arose from the induction into the society of one Count De Leon, his artifices and subsequent secession. That in 1890 there "began a second conspiracy, the results of which overturned and destroyed the entire government of the society, wasted nearly its entire wealth, depleted its membership to a few aged and infirm women, and placed the management of the society and the control of its remaining assets in the hands of one man, and certain associates and confederates within and without the ranks of the society."

That the acting and directing mind of the conspiracy was John S. Duss, and he obtained his power as follows: In 1847 a plan of regulation and government of the society was adopted, by which its internal affairs were managed by a "board of elders," composed of nine members, and its external affairs were managed by a "board of trustees," composed of two members. Romulus L. Baker and Jacob Henrici were chosen the first board of trustees. Baker died in 1868, and Henrici and Jonathan Lenz became the board of trustees; the latter was succeeded, upon his death in 1890, by Ernest Woelful; Woelful also died in 1890, and Duss became his successor. Henrici died in 1892, and

NOTE.—*As to presumption of payment from lapse of time*—see Dixon v. Gourdin (S. C.) 1 L. R. A. 628, and note.

*On resulting trusts*—see notes to Fink v. Umscheid (Kan.) 2 L. R. A. 146; Hinton v. Pritchard (N. C.) 10 L. R. A. 401; and Ducie v. Ford, 34 L. ed. U. S. 1091.

one Samuel Sieber was appointed, and, on his retirement from the society, Gottlieb Riethmueller, a relative of Duss, was elected trustee. At the time of the filing of the bill, Duss and Riethmueller were trustees.

The bill detailed the acts and purposes of Duss at great length. It is, however, enough to say that the bill alleged that he became senior trustee and a member of the board of elders, and conceived the purpose of wrecking and dismembering the society, and attempted to execute such purpose. That the condition of the society gave him opportunity; that he caused the expulsion of at least one member, and induced or paid others to withdraw. That the increase in the society could only be through the admission of new members, and he directed that no new members be elected under any circumstances whatever, and as a result thereof the said Duss and Susie, his wife, were the last members admitted in the four years preceding the filing of the bill.

[12] *That he entered into certain arrangements with one Henry Hice and John Reeves, of the town of Beaver, Pennsylvania, by which he used $1,000,000 of the society's money, without the knowledge or consent of its members, "to pay off the alleged indebtedness of the Economy Savings Bank, of which said Hice and Reeves were the principal officers," though at the time he knew that the bank was wholly insolvent by reason of the overdrafts made by said Hice and Reeves, and although he knew that they had caused a loss to the society of over $2,000,000, "as officers and stockholders in said bank, and officers and stockholders in the Beaver Falls Cutlery Works and File Works, the debtors of said bank;" that he had not sued to recover back the money, but, on the contrary, had abetted them in obtaining further assets of the society.

That in pursuance of his scheme to defraud the society, and to pay the indebtedness of the Economy Savings Bank, and for paying off claims upon which the society was only partly liable, if at all, he and his cotrustee, Henrici, executed a mortgage for the sum of $400,000 upon the real estate of the society, but that Henrici, at the time of its execution, "was *in articulo mortis*, and wholly beyond any power of comprehension of his act." And on the — day of June, 1893, he caused to be executed another mortgage, without the knowledge or consent of the members, for $100,000, bearing interest at 6 per cent, upon the land described in the former mortgage, to raise a fund "wherewith to secretly secure and induce removal of those members most likely to inquire into the validity or propriety of his conduct as trustee."

It was averred that the society had certain dividend-paying stocks which Duss, in pursuance of his scheme, disposed of without the knowledge of any member of the society, except possibly his wife and Gottlieb Riethmueller. The names of ten persons were stated, who, it was alleged, Duss, "by representation, coercion, and the payment of large sums of money," induced, within two years preceding the commencement of the suit, to withdraw from the society, and that he was endeavoring to compel remaining members "to depart, by means of intimidation and oppression."

*That the membership of the society was [13] reduced to eight persons, none of whom were aware of the actions of Duss, or were consulted by him.

"That on the 12th day of April, 1894, the said Duss, without any authority from the members of the Harmony Society, and in the utmost disregard to his trust, secretly entered into an agreement with said Hice, Reeves, and one James Dickson, whereby he, the said Duss, agreed to convey the town of Economy, the surrounding properties, and certain other lands of the Harmony Society, situate in Allegheny county, to the Union Company, an alleged corporation created under the laws of the state of Pennsylvania. And your orators allege that a conveyance has been made by said Duss for the lands as aforesaid, and that the same was made without the knowledge of your orators, or any members of the said society, excepting, possibly, Susie C., wife of said Duss, and Gottlieb Riethmueller. That by the said pretended conveyance and sale of the home of the Harmony Society and its other properties, the said Duss has attempted to wholly terminate the existence of said society, not only as to the government thereof by the board of elders and by the members, but also as to the ownership of any property. That the said Union Company, in addition to said Duss and Riethmueller, is composed of said Hice and Reeves, debtors of the said Harmony Society, as hereinbefore stated, and one James Dickson, the private bookkeeper and confidential agent of said Duss, whose interest in said corporation was acquired by gift from said Duss.

"That your orators are advised that it was not competent for the said trustees to convey said properties to the said Union Company, but such transfer was a breach of trust, and wholly invalid."

It was further averred that the principle of equality had been departed from. That Duss and his family enjoyed every luxury, while the aged and infirm members were obliged "to be content with the bare necessaries of life, awarded with grudging, stinting hands."

And it was finally averred—

"That recently said Harmony Society has become dissolved *as aforesaid; that all [14] of its purposes and practices, established as aforesaid by the founder of said society and by the ancestors of your orators, have been abandoned; that the pursuit of agriculture no longer exists in said society; that its chief assets, consisting of bonds, stocks, and other securities, and the town of Economy, with its buildings, and the adjacent lands of said society, consisting of some 3,000 acres, and which constituted the basis of organization and business of said society, have been sold and conveyed away by the

said Duss as aforesaid, in fraud, however, of the rights of your orators and their cotenants; and that, by reason of the facts hereinbefore set forth, your orators and the said last members, except the said Duss and wife, are now tenants in common of all said lands and tenements, and entitled to partition thereof in proportion to their respective interests.

"That for some time past the members of said Harmony Society have been retiring therefrom, and have received the amount of their interest in said association in the land or money, or both, the land being set apart in severalty to them, and have released all of their rights and interests in said association in consideration for such payment or conveyance to them; and that, by said retirement and withdrawal, the membership of said association has been reduced to the persons hereinbefore named members; that by common consent this association has ceased to exist as an association; and that, if the property thereof has ever been impressed with a trust (which your orators deny, as being contrary to public policy, and void in law or equity), such trust has wholly ceased, and the assets of such dissolved association have reverted to the donors thereof, among whom were the ancestors and intestates of your orators, as hereinbefore fully set forth."

Duss, Hice, Reeves, and the Union Company answered separately. The other defendants joined in an answer. By agreement of the parties the case was referred to a master, with "authority to hear and take all the testimony, and to find all the issues of law and facts, and to report the testimony and such findings to the court; and if the report of such master shall suggest a decree that the plaintiffs, or any of [15] them, are entitled *to an account against the defendants, or any of them, and the same be confirmed by the court, then the case shall be referred again to the master to state such an account, and report thereon to the court."

Under the orders of the court the master considered the following questions:

"1st. Have the plaintiffs, or any of them, such a proprietary right or interest in the property and assets of the Harmony Society as entitled them, upon the dissolution of the society, to any part of, or share in, such property or assets, or as entitles them to the account prayed for in the bill?

"2d. Has the Harmony Society been dissolved by the common consent of the members or by an abandonment of the purposes for which it was formed?"

On both propositions the master reported adversely to the claim of the petitioners, and recommended a decree dismissing the bill. His conclusions of fact and law were approved and accepted by the circuit court, and a decree entered dismissing the bill. The decree was affirmed by the circuit court of appeals. The case was then brought here by certiorari on petition of the plaintiffs in the circuit court. Other facts will be stated in the opinion.

*Messrs.* **George Shiras, 3d,** and **S. Schoyer, Jr.,** argued the cause and filed a brief for petitioners.

*Messrs. S. B. Schoyer, J. J. Miller, S. Schoyer, Jr.,* and *Shiras & Dickey* filed a brief for petitioners in support of the petition for writ of certiorari.

*Messrs.* **D. T. Watson** and **Johns McCleave** argued the cause and filed a brief for respondents.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **McKenna** delivered the opinion of the court:

Two questions were submitted to the master: (1) Have the plaintiffs such a proprietary right or interest as would entitle them, upon the dissolution of the society, to share all its property or assets, or which entitles them to an accounting? (2) Has the society been dissolved by consent or by an abandonment of the purposes for which it was formed? A negative answer to either of the propositions determines the controversy against *petitioners, and both were [16] so answered by the master and by the circuit court and the circuit court of appeals. The case, therefore, seems not to be as broad or as complex as presented in the argument of counsel. The case is certainly clear from any disputes of fact, and we may dismiss from consideration the accusations against Duss, not only as to his motives in joining the society, but also as to his motives and acts as a member and officer of it. We are concerned alone with the legal aspect and consequences of his acts, and those of his associates. They, however, pertain more particularly to the second proposition.

This is not the first time that the Harmony Society has been before the courts. Its history has been recited, and its principles characterized and defined, not only by the supreme court of Pennsylvania, but by this court. *Schriber* v. *Rapp*, 5 Watts, 351, 30 Am. Dec. 327; *Baker* v. *Nachtrieb*, 19 How. 126, 15 L. ed. 528; *Speidel* v. *Henrici*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610.

The society was formed by one George Rapp, who, with his son and others, came from the Kingdom of Wurtemberg to the United States in 1803 or 1804, and settled at Harmony, in Butler county, Pennsylvania. In 1814 the society moved to Posey county, Indiana, and later removed to Economy, Pennsylvania, its present abode, in 1825. Its members "were associated and combined by the common belief that the government of the patriarchal age, united to the community of property adopted in the days of the apostles, would conduce to promote their temporal and eternal happiness." 19 How. 126, 15 L. ed. 528.

Their relations, principles of government, personal and property rights, were provided for by written contracts, executed respectively in 1805, 1821, 1827, 1836, 1847, 1890, and 1892. The present discussion is concerned with the first four.

By article 1 of the contract of 1805, each

subscriber to that contract delivered up, renounced, and remitted all of his or her property of every kind, "as a free gift or donation, for the benefit and use of the community," and bound themselves, their heirs and descendants, "to make free renunciation thereof, and to leave the same at the disposal of the superintendents of the community," as if the subscribers "never had nor possessed it."

[17] *In article 2 they pledged obedience and submission to the society, and promised "to promote the good and interest of the community," and to that they pledged their children and families. But, recognizing a possible weakness and inability to "stand to it in the community," they promised (article 3) never to demand any reward for themselves or children for "labor or services," and declared whatever they should do would be "as a voluntary service for our brethren." In consideration of this renunciation of property and dedication of labor and services, George Rapp and his associates promised to supply the subscribers to the contract with all the necessaries of life, not only in their "healthful days, but when they should become sick or unfit for labor." And if, after a "short or long period," a member should die or otherwise depart from the community, "being the father or mother of a family," such family should "not be left widows and orphans, but partakers of the same rights and maintenance."

Article 5 was as follows:

"And if the case should happen, as above stated, that one or more of the subscribers, after a short or long period, should break their promise, and could or would not submit to the laws and regulations of the church or community, and for that or any other cause would leave Harmony, George Rapp and his associates promise to refund him or them the value of his or their property brought in, without interest, in one, two, or three annual instalments, as the sum may be large or small; and if one or more of them were poor, and brought nothing into the community, they shall, provided they depart openly and orderly, receive a donation of money, according to his or their conduct while a member, or as he or their circumstances and necessities may require, which George Rapp and associates shall determine at his or their departure."

The society became the owner of about 7,000 acres of land at Harmony, which, on May 6, 1815, was conveyed by Frederick Rapp, as attorney in fact, to Abraham Ziegler for $100,000. That year, or in 1814, the society removed to Indiana. There a second agreement was entered into January 20, 1821. This agreement expressed, as that of 1805, the submission of the subscrib-[18]ers *to the society, the dedication of their service and labor, and contained the same promises of support.

The master found that "in 1825 the society removed from Indiana to Beaver county, Pennsylvania, where they purchased and settled upon a tract of land containing about 3,000 acres, now known as 'Economy,' where they have since remained, and which has since become very valuable, and on which they have erected many buildings, including dwellings and factories of various kinds, and made many valuable improvements."

In 1827 another agreement was entered into, the preamble of which was as follows:

"Whereas, by the favor of Divine Providence an association or community has been formed by George Rapp and many others, upon the basis of Christian fellowship, the principles of which, being faithfully derived from the sacred Scriptures, include the government of the patriarchal age, united to the community of property adopted in the days of the apostles, and wherein the single object sought is to approximate, so far as human imperfection will allow, to the fulfilment of the will of God, by the exercise of those affections and the practice of those virtues which are essential to the happiness of man in time and throughout eternity.

"And whereas, it is necessary to the good order and well being of said associations that the condition of membership should be clearly understood, and that the rights and privileges and duties of every individual therein should be so defined as to prevent mistake or disappointment on the one hand, and contention or disagreement on the other."

This agreement was an amplification of that of 1805. Article 5 of the latter became article 6. This agreement was signed by 522 members of the association, and afterwards, and until February 14, 1836, was signed by 144 additional members. In 1832, dissensions having arisen, a large number of the members withdrew, under the leadership of one Count De Leon. They received $110,000, and granted a release unto George Rapp and his associates of all of their right and title in any of the property "belonging to the society of George Rapp and his associates."

*In 1836 another agreement was entered [19] into revoking and annulling the 6th article of the agreement of 1827,—5th article of the agreement of 1805. The agreement recited the 6th article—

"And whereas, the provisions of the said 6th article, though assented to at the time, manifestly depart from the great principle of a community of goods, and may tend to foster and perpetuate a feeling of inequality, at variance with the true spirit and objects of the association;

"And whereas, the principle of restoration of property, besides its pernicious tendency, is one which cannot now be enforced with uniformity and fairness, inasmuch as the members of the association, in the year 1816, under a solemn conviction of the truth of what is above recited, did destroy all record and memorial of the respective contributions up to that time;

"And whereas, continued happiness and prosperity of the association, a more intimate knowledge of each other, have removed

from the minds of all members the least apprehension of injustice and bad faith:

"Now, therefore, be it known by these presents, that the undersigned, with a view to carry out fully the great principles of our union, and in consideration of the benefits to be derived therefrom, do hereby solemnly enter into covenants, and agree with each other as follows:

"1st. The said 6th article is entirely annulled and made void, as if it had never existed; all others remain in full force as heretofore.

"2d. All the property of the society, real, personal and mixed, in law or equity, and howsoever contributed or acquired, shall be deemed, now and forever, joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money, or labor; and the same rule shall apply to all future contributions, whatever they may be.

"3d. Should any individual withdraw from the society or depart this life, neither he in the one case nor his representatives in the other shall be entitled to demand an [20] account of said *contributions, whether in land, goods, money, or labor, or to claim anything from the society as matter of right. But it shall be left altogether to the discretion of the superintendent to decide whether any, and, if any, what, allowance shall be made to such member or his representatives as a donation."

The agreement was signed by all who were then members, and subsequently by thirty-three others.

Prior to his death, in 1834, Frederick Rapp, a member of the society, had been its business agent, and transacted its external affairs. After his death the members of the society (July 5, 1834) executed a power of attorney to George Rapp, constituting him such general agent, with power to appoint agents and substitutes under him. On the same day he appointed Romulus L. Baker and Jacob Henrici his substitutes. This power of attorney was signed by 402 members, and recited the death of Frederick Rapp, and the consequent necessity for the appointment of a new agent, so that the temporal affairs of the society would continue to be managed in a mode which had proved convenient and satisfactory, constituted George Rapp such agent with power of substitution, invested him with all necessary powers, including the receipt and the execution of conveyances of real and personal property. George Rapp disclaimed any greater interest in the then resources or future earnings of the society than other members.

George Rapp was the founder of the society, and continued to be its head, or superintendent, and to rule and govern it until his death, in 1847. After his death another agreement was executed (August 12, 1847). It was signed by 280 members. The agreement recited the death of Rapp, and expressed the necessity, "to the good order and well being of the association, that some plan should be agreed upon to regulate its future affairs, promote its general welfare, and preserve and maintain it upon its original basis;" and announced to all immediately concerned, that the surviving and remaining members of the Harmony Society each covenanted with all the others thereof, and with those who should thereafter become members, "to solemnly recognize, reestablish, and continue the articles of our *association (the 6th section excepted), en- [21] tered into at Economy on the 9th day of March, A. D. 1827."

This agreement created a board of elders of nine members to conduct the internal affairs of the society, and a board of trustees of two members to conduct its external affairs. The trustees disclaimed any greater personal interest in the property of the society than other members.

These agreements, the master found, "are the agreements and documents under which, or some of which, the plaintiffs claim the right to share in the property and assets of the society as heirs of former members." And as to the relations of the plaintiffs to the society, the master found as follows:

"1st. That none of the plaintiffs were ever members of the society.

"2d. That all of those members of the society through whom Christian Schwartz claims as their heir signed the agreements of 1836 and 1847, and continued members until their death.

"3d. That Antony Koterba claims as heir of his father, Joseph Koterba, and his half-brother, Andreas Koterba; that Joseph Koterba joined in the organization of the society, and also signed the agreement of 1827, and afterwards, in 1827, withdrew from the society; and that Andreas Koterba signed the agreements of 1827, 1836, and 1847, and died a member of the society.

"4th. That the grandparents of David Strohaker, *viz.*, Christian Strohaker and wife, and Matthias Rief and wife, joined the society in 1805, and all remained members until their death,—all dying between 1820 and 1825, except Mrs. Rief, who died between 1830 and 1836. That his father, Christopher Strohaker, signed the agreement of 1827, and withdrew from the society in 1827. That his aunt, Catharina Strohaker, signed the agreements of 1827, 1836, and 1847, and continued a member of the society until her death.

"5th. That Lawrence Scheel and Jacob Scheel, ancestors of Allen and G. L. Shale, joined the society in 1805; that Lawrence withdrew in 1824 or 1826; that Jacob Scheel signed the agreement of 1827, and died, a member, about 1837.

*"6th. That none of the parties through [22] whom the plaintiffs claim contributed any money or property to the society."

He divided the persons from whom the plaintiffs claim as follows:

"1st. Those withdrawn from the society before the execution of the agreement of 1836.

"2d. Those dying in the society before that time.

"3d. Those who died members of the society after having joined in the agreements of 1836 and 1847."

Manifestly, the plaintiffs cannot have other rights than their ancestors, and the rights of the latter depend upon the agreements they signed. The agreements we have recited. The signers of them certainly strove to express their meaning clearly, and, whenever occasion arose, declared their understanding, aims, and purposes, and always substantially in the same way.

The cardinal principle of the society was self-abnegation. It was manifested, not only by submission to a religious head, but by a community, instead of individual, ownership of property, and the dedication of their labor to the society. The possibility of some member or members not being able to "stand to it," to use the expressive phrase of the agreements, was contemplated, and provision was made for that event. But a very significant difference was made between a performance of service and the contribution of property. For the former it was covenanted by the members no reward should be demanded for themselves or their children or those belonging to them. As to the latter, George Rapp and his associates promised to refund the value of the property brought in, without interest, in one, two, or three annual instalments, as the same might be large or small. It was, however, provided, as to those who "were poor and brought nothing to the community," that they should receive, if they departed openly and orderly, "a donation in money, according to his or their conduct while a member, or as his or their circumstances might require," as "George Rapp and his associates shall determine" (agreement of 1805); as "in the judgment of the superintendents of the association" (agreement of 1827).

[23] *Those provisions apply to those who withdrew from the society prior to 1836,—the first class into which the master divided the plaintiffs,—and need not much comment. None of the persons who so withdrew contributed property to the association. We are not informed by the record whether their conduct when in the society, or whether their manner of withdrawing from it, entitled them to the consideration that the articles of agreement permitted as an indulgence to withdrawing members. If they could have exacted anything as a matter of right, it would now be presumed that it had been demanded and the demand satisfied.

There was another class,—the faithful and abiding members; but even these, the master found, contributed no property, and the decision of their rights becomes as easy as the decision of the right of those who "could not stand to it in the community" and withdrew. They promised, as we have seen, to endeavor, by the labor of their hands, "to promote the good and interest of the community," and to hold their "children and families to do the same." And for compensation they received instruction in church and school. They received assurance of maintenance "in healthful days," and days which might not be such; and assurance, when death should come to them, that their families would be taken care of. It may be presumed that, as the members were faithful to their covenants, the society was faithful to its covenants, and there were no undischarged obligations or rights for distant relatives of deceased members to assert or claim against the community or its property. This seems to be conceded by counsel for petitioners, and we are brought to the consideration of the third class into which the master divided the persons from whom some of the petitioners claim to derive,—those who died members of the society, after having joined in the agreements of 1836 and 1847.

Counsel for petitioners say in their brief: "The article of 1836 is the only material article bearing upon the property rights of the plaintiffs, while the articles of 1805, 1821, 1827, and 1847 are material in considering the character of the trust, the purposes and principles of the society."

In other words, as we understand counsel by the propositions *they have submitted [24] and the arguments employed to support them, that by the articles executed prior to October 31, 1836, those who joined the society made "a free gift and donation of all their property" to George Rapp and his associates, "*for the use and benefit of the community*," upon the condition, however, to have the property returned to them if they should withdraw from the society. But that, "by the articles of October 31, 1836, all the members of the society agreed with each other to surrender this right of property restitution which each possessed, and to convey the same to all the members in equal shares." In other words, the gifts before 1836 were to the community; after 1836, to "all the members in equal shares." This difference in result in 1836 and afterwards was effected, it is claimed, by the following provision of the agreement of 1836:

"All the property of the society, real, personal, and mixed, in law or equity, and howsoever constituted or acquired, shall be deemed, now and forever, joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in lands, goods, money, or labor, and the same rule shall apply to all future contributions, whatever they may be."

To the articles of 1836, it is also contended that the society, as such, was not a party, but nevertheless the property became impressed with a trust for the use of the society, as such, "by those who then (1836) represented the ownership of this joint and indivisible stock;" and as each new member came in "he became an owner of an equal share of the property, subject to the trust." And it is further contended that the mem-

bers of 1836 and those who came in afterwards became *donors* of the property, and when the society or the trust failed, from any cause, the "corpus of the trust property" reverted to them "by way of resulting trust, . . . not to the surviving members as donees, or beneficiaries of the trust." In other words, the members became at once *donees* of each other and *donors* to the society, and the descendants of members who had not and might not bring a dollar to the society excluded from any interest in the reversion of its great [25] properties the descendants of those *from whom those properties came. And this through the doctrine of resulting trusts, whose fundamental principle is to recognize an equity only in them from whom the consideration has proceeded. And this, too, would result from granting the contentions of petitioners,—a society whose chief purpose was to establish community of property would come back to the assertion and fact of individual ownership, and whose hope was self-sacrifice and self-abasement, would encourage self-interest and self-assertion. Members could go into the society or go out of it, take nothing to it, serve it ever so little, and become ultimate sharers of its property. They might die in the society, or, having withdrawn, die out of it, and will or convey their titles or rights to others. No such right was ever conceived to exist, and no such right was intended to be created. This is demonstrated by the quotations which we have made from the articles of agreement. The permanence of the community was provided for in the articles of 1805; it was continued in those of 1821 and 1827; and, on account of the secession of Count De Leon and his followers, it was asserted with emphasis in 1836. The article of that year became, and was intended to become, the complete and final consummation of community ownership,—did not become, and was not intended to become, the commencement of individual ownership. That article was but an incident in the life and evolution of the society. It asserted constancy to the principles of the association, and annulled the 6th article of 1825,—5th article of 1805,—because that article manifestly departed "from the great principle of community of goods," and it was said that, "with a view to carry out the great principles" of their union "and in consideration of the benefits to be derived therefrom," they entered into this covenant:

"Should any individual withdraw from the society, or depart this life, neither he in the one case nor his representatives in the other shall be entitled to demand an account of said contributions, whether in land, goods, money, or labor, or to claim anything from the society as matter of right. But it shall be left altogether to the discretion [26] of the superintendent to decide *whether any, and, if any, what, allowance shall be made to such member or his representatives as a donation."

The purpose was definite and clearly expressed. It was certainly thought to be clear enough by the men who framed it, to declare and accomplish the "sacrifice of all narrow and selfish feelings to the true purposes of the association," as the articles fervidly declared. And it was provided that the member who withdrew from the society could make no demand against it "as a matter of right." The member who died left no right to his representatives. It needs no argument to show that, as such members had no rights, they could transmit none to the petitioners in this case.

No trust having been created by the agreement of 1836 different from that created by the other agreements, there is no necessity to consider the arguments based on the assumption of its invalidity. That agreement was the affirmation and the continuation of the prior agreements, and they were held not to be offensive to the public policy of Pennsylvania, by the supreme court of that state, in *Schriber* v. *Rapp*, 5 Watts, 351, 30 Am. Dec. 327. The trial court in that case had instructed the jury that "there is nothing in the articles of association (those of 1805, 1821, and 1827) given in evidence, that renders the agreement unlawful or void; nothing in them inconsistent with constitutional rights, moral precepts, or public policy."

The supreme court observed that the point made against the articles, as being against public policy, was attended with no difficulty, and Chief Justice Gibson said for the court: "An association for the purpose expressed is prohibited neither by statute nor the common law." And it did not occur to this court, in *Baker* v. *Nachtrieb*, 19 How. 126, 15 L. ed. 528, to treat them as invalid contracts. See also *Goesele* v. *Bimeler*, 14 How. 589, 14 L. ed. 554; *Speidel* v. *Henrici*, 120 U. S. 377, 30 L. ed. 718, 7 Sup. Ct. Rep. 610.

An analysis of the agreements of 1847, 1890, and 1892 is not necessary. They were made to meet particular exigencies, and expressly affirmed the prior agreements, except the 6th section of that of 1827.

The master, and both the circuit court and the circuit court of appeals, found that the society had not been dissolved, either *by the consent of its members or by the [27] abandonment of the purposes for which it was founded. On account of this concurrence the disputed facts involved in that finding, under the rules of this court, and the circumstances of the record, we do not feel disposed to review. There is left, therefore, for consideration, only the agreements of 1890 and 1892, and the changes in administration effected by them, and the conveyance of the property of the society to the Union Company. So far as those agreements affect the property rights of petitioners, we have expressed an opinion of them; but their effect upon the question of the dissolution of the society, or the effect of the conveyance to the Union Company, we are not called upon to decide. In that question, we have seen, the petitioners have no concern.

*Judgment affirmed.*

Mr. Justice **Gray** and Mr. Justice **Shiras** took no part in the decision.

Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Brewer**, dissenting:

Assuming the validity of the trusts, the questions appear to be, whether the condition of things has resulted in failure to carry out, and of ability to carry out, the principles and purposes of the society, and the defeat of the trusts; and, if so, whether the destination of the corpus of the trust property has, thereupon, become such that complainants, or some of them, have a *locus standi* to ask relief in a court of equity.

The courts below held that the society still existed in law and in fact and that this case was not one of "dealing with the assets of a defunct or dissolved association;" or, in other words, that the trusts had not been defeated; and the decrees rested on this conclusion. If erroneous, the inquiry then arises, To whom does the corpus of the trust property go, in the event of the defeat of the trusts?

A brief recapitulation of the facts is necessary to indicate the grounds of my inability to concur in the opinion and judgment of the court:

[28] *In 1803 George Rapp and others located at Harmony, Butler county, Pennsylvania, removed in 1814 to Indiana, and returned in 1825 to Pennsylvania, and located at Economy, in Beaver county. They formed a society or association, which, as said by the circuit court of appeals, "was organized upon the principle of community of goods and land ownership.

"The members of the said society, who had brought with them from Wurtemberg money, combined their funds and held all their property in common, they living as members of a common household, and each member enjoying alike with every other, the fruits of their common labor in equality and brotherhood. The occupation or business of the said society was agriculture, except in so far as it was necessary to manufacture shoes, clothing, and other necessaries for the community. The members of the said society obeyed George Rapp as their spiritual and temporal leader and ruler. . . . About the year 1807 the community promulgated the doctrine of celibacy as being necessary for the success of a communistic society."

Although styled "George Rapp and his associates," Rapp was, from the beginning to his death, in 1847, the absolute and exclusive ruler, in whom all power was vested. Members were admitted by adoption, and on adoption conveyed and transferred all their property, real and personal, to "George Rapp and his associates," and, after 1836, to the Harmony Society, for the use and benefit of the community.

By article 5 of a written agreement of February 5, 1805, if for any cause one or more of the subscribers should leave Harmony, "George Rapp and his associates" promised to refund the value of his or their property brought in, while those who brought nothing in might receive a donation.

The second agreement was dated January 20, 1821, and the third, March 9, 1827.

The first branch of the preamble of this agreement of 1827 read: "Whereas, by the favor of Divine Providence, an association or community has been formed by George Rapp and many others upon the basis of Christian fellowship, the principles of which, being faithfully derived from the sacred Scriptures, include the government of the patriarchal age, united to *the com- [29] munity of property adopted in the days of the apostles, and wherein the single object sought is to approximate, so far as human imperfection may allow, to the fulfilment of the will of God, by the exercise of those affections and the practice of those virtues which are essential to the happiness of man in time and throughout eternity."

By the 1st article the subscribers gave, granted, and forever conveyed "to the said George Rapp and his associates, their heirs and assigns, all our property, real, personal, and mixed, whether it be lands and tenements, goods and chattels, money or debts due to us, jointly or severally, in possession, or in remainder, or in reversion, or in expectancy, whatsoever or wheresoever, without evasion, or qualification, or reserve, as a free gift or donation, for the benefit and use of said association or community."

Members were to be obedient to superintendents, were bound to promote the interests and welfare of the community, and were to receive support and instruction.

The 6th article (almost identical with article 5 of 1805) was as follows: "And if it should happen, as above mentioned, that any of the undersigned should violate his or her agreement, and would or could not submit to the laws and regulations of the church or community, and for that or any other reason should withdraw from the association, then the said George Rapp and his associates agree to refund to him or them the value of all such property, without interest, as he or they may have brought into the community in compliance with the 1st article of this agreement, and the said value to be refunded in one, two, or three annual instalments, as the said George Rapp and his associates shall determine. And if the person or persons so withdrawing themselves were poor, and brought nothing into the community, yet, if they depart openly and regularly, they shall receive a donation in money, according to the length of their stay and to their conduct, and to such an amount as their necessities may require, in the judgment of the superintendents of the association."

The master found, among other things, as follows:

"Prior to his death, in 1834, Frederick Rapp, a member of *the society, had been [30] the business agent of the society, transacting its external business. After his death the members of the society, on July 5th, 1834, executed a power of attorney to George Rapp—Exhibit No. 85 in evidence—consti-

tuting him general agent of the society in all its temporal affairs, with power to appoint agents and substitutes under him. Under this power, he, on the same day, appointed Romulus L. Baker and Jacob Henrici his substitutes. This power of attorney was signed by 402 members of the association, and with the substitution, and not including the signatures, is as follows:

"'Know all men by these presents: Whereas, Frederick Rapp, of Economy, in Beaver county, state of Pennsylvania, recently deceased, was for a series of years the agent in temporal affairs of the Harmonie Society, carrying on in his own name all the external business of said society, and taking to himself the titles to real estate, as well as the evidence of claims arising out of the various transactions of said society;

"'And whereas, by an instrument dated the 20th of July, 1825, under the hand and seal of said Frederick, he solemnly and irrevocably declared that all the property, real, personal, and mixed, which then was or hereafter might be in his possession or enjoyment, or the title to which he then held or might hereafter hold, was and should be considered the property of the said society, in which he, the said Frederick, had no absolute interest whatsoever; And whereas, the lamented death of the said Frederick Rapp renders it indispensable that a new agent should be appointed, by whom the temporal affairs of the society may continue to be managed in a mode which has proved convenient and satisfactory;

"'Now, therefore, be it known that we, the undersigned, constituting said Harmonie Society, do hereby nominate and appoint George Rapp, of Economy, in the county of Beaver, the general agent of said society in all its temporal affairs.

"'The powers intended to be conferred on the said George Rapp are hereby declared to be as follows; that is to say:

"'1. To ask for, demand, and receive [31] from each and every *bank or other incorporated company, partnership, or individual, person or persons, the amount which may be due therefrom, in the way of principal, interest, or dividend to the said Harmonie Society, or to Frederick Rapp, whether the same be evidenced by judgment, mortgage, bond, certificate of stock, note, bill of exchange, deposit of money, book account, verbal promise, sale or barter, loan or money, or arise in any other manner whatsoever, the check, order, receipt, acquittance, or release of the said George Rapp to be as effectual as if executed by all and each of us, or as if it had been executed by the said Frederick Rapp in his lifetime.

"'2. To execute and receive all deeds and conveyances, in fee simple or otherwise, on behalf of the society, whether the title thereto stand in the name of the society, or of Frederick Rapp, or of George Rapp and associates. The act of the said George Rapp, relative thereto, to be as valid and sufficient as if executed by us or by the said Frederick Rapp in his lifetime.

"'3. To carry on, by himself or through the agents whom he is hereinafter authorized to appoint, all the dealings and traffic of said society of every description.

"'4. To constitute and appoint an agent or agents under him, as he may deem advisable, imparting to such substitute or substitutes, should he think fit, the whole or any portion of the authority hereby conferred on himself. He may also, at his pleasure, revoke such instrument of substitution whenever he may think such revocation called for by the interests of the society.

"'5. It is distinctly understood that in accepting and acting under this power the said George Rapp disclaims all personal interest, other than that of a member of said society, in the present resources or future earnings of the society, in conformity with the principles and terms upon which the Harmonie Society was originally founded, as fully and effectually as was done by the late Frederick Rapp in the instrument already adverted to, dated 20th July, 1825, the terms of which instrument the said George Rapp hereby adopts for himself and repeats in every particular.

"'In witness whereof the undersigned members of the Harmonie *Society, who con- [32] stitute said society, have hereunto set their hands and seals at Economy, in Beaver county, this 5th day of July, in the year of our Lord, eighteen hundred and thirty-four.'

(Signatures.)

(Acknowledgment.)

"'By virtue of the authority expressed in the 4th article of the foregoing power of attorney, I do appoint and substitute in my place and stead Romulus L. Baker and Jacob Henrici, of Economy, Beaver county, Pennsylvania, to act as general agents of the Harmonie Society aforesaid, jointly or severally, in my name, and for the use of the said society, to do and perform all acts and things which, as the general agent of said society, I am authorized to do. It being distinctly understood, however, that in accepting and performing the office and business of general agents of the said society the said R. L. Baker and Jacob Henrici shall neither acquire nor claim any personal interest in the present resources or future earnings of the said society, other than that of a member of the said society, agreeably to the plans and terms of association, but shall be considered as exercising the same trust mentioned in a declaration of trust signed by Frederick Rapp on the 20th day of July, 1825, and referred to in the foregoing power of attorney to George Rapp.'"

Signed, sealed, and delivered by George Rapp.

October 31, 1836, the following agreement was executed by 391 members of the society, and afterwards accepted and adopted by 33 others:

"Whereas, the Harmonie Society, consisting of George Rapp and many others, now

established in the town of Economy, in Beaver county, Pennsylvania, did, on the 9th of March, 1827, enter into certain articles of association, of which the 6th in number is as follows, *viz.:* [here follows that article].

"And whereas, the provisions of the said 6th article, though assented to at the time, manifestly depart from the great principle of a community of goods, and may tend to foster and perpetuate a feeling of inequality at variance with the true spirit and objects of the association;

[33] *"And whereas, the principle of restoration of property, besides its pernicious tendency, is one which cannot now be enforced with uniformity and fairness, inasmuch as the members of the association, in the year 1816, under a solemn conviction of the truth of what is above recited, did destroy all record and memorial of the respective contributions up to that time;

"And whereas, continued happiness and prosperity of the association, a more intimate knowledge of each other, have removed from the minds of all members the least apprehension of injustice and bad faith;

"Now, therefore, be it known by these presents, that the undersigned, with a view to carry out fully the great principles of our union, and in consideration of the benefits to be derived therefrom, do hereby solemnly enter into covenants, and agree with each other, as follows:

"1st. The said 6th article is entirely annulled and made void, as if it had never existed; all others remain in full force as heretofore.

"2d. All the property of the society, real, personal, and mixed, in law or equity, and howsoever contributed or acquired, shall be deemed, now and forever, joint and indivisible stock. Each individual is to be considered to have finally and irrevocably parted with all his former contributions, whether in land, goods, money, or labor; and the same rule shall apply to all future contributions, whatever they may be.

"3d. Should any individual withdraw from the society or depart this life, neither he in the one case nor his representatives in the other shall be entitled to demand an account of said contributions, whether in land, goods, money, or labor, or to claim anything from the society as a matter of right. But it shall be left altogether to the discretion of the superintendent to decide whether any, and, if any, what, allowance shall be made to such member, or his representatives, as a donation.

"Invoking the blessing of God on this sacrifice of all narrow and selfish feelings to the true purposes of the association, and to the advancement of our own permanent prosperity and happiness, we have signed [34] the foregoing instrument, and affixed *thereunto our respective seals, at Economy, this 31st day of October, 1836."

George Rapp, sole patriarch and ruler, died in 1847, and thereupon, in that year, certain articles were subscribed by 288 persons as the "surviving and remaining members of the Harmonie Society, and constituting the same." These articles created and nominated a board of elders of nine members, with the power of filling vacancies, and a board of trustees, consisting of two members of the board of elders, which had power to fill vacancies in the trusteeship. Instead of a single patriarch, a dual patriarchy was substituted, and those boards alone had the power over and control of the property.

The 8th article was as follows:

"It is hereby distinctly and absolutely declared and provided, that all the property, real, personal, and mixed, which now or hereafter shall be held or acquired by any trustee or trustees, or person under them, is and shall be deemed the common property of said society, and each trustee now or hereafter appointed hereby disclaims all personal interest in the present resources and future earnings of the society, other than that of a member thereof, according to the articles of association hereby established and continued, and according to the present government."

From these documents it appears that, prior to October 31, 1836, all contributions of property were for the use and benefit of the community on the condition that any member withdrawing was to receive back the value of his contributions.

But that, by the contract of 1836, the property then held in trust was no longer held subject to reclamation on the basis of original contribution, but the whole aggregate was made a common fund in which each member was equally interested, subject to the previously existing trust for the use and benefit of the society; that the corpus of the trust property included all future contributions, accretions, and accumulations; and that the then and subsequently admitted members occupied the relation of donors, and the society, as a society, of donee.

The joint and indivisible stock embraced all present and future *property, subject to [35] the trusts declared in the articles of 1827, which were reaffirmed in 1836, except the 6th article. That trust was described "as a free gift or donation for the benefit and use of the said association." And by the agreement of 1847 the property was to be held and deemed the common property of said society, and each trustee disclaimed all personal interest therein, "other than that of a member thereof."

If, then, the trusts are defeated, I concur in the view that the trust property must go either to the owners or donors living, and to the heirs and legal representatives of those who are dead, by way of resulting trust; or to the surviving members of the society, as joint tenants with right of survivorship, or by way of tontine.

It is true that the third clause of the agreement of 1836 provided that, on withdrawal or death, no member or his representatives should be entitled to an account or "to claim anything from the society as

matter of right." But that clause referred to the society as a going concern, and this bill is not filed against the society, but proceeds on the ground of the termination of the trusts and the existence of a condition of things demanding the winding up of the society's affairs.

And if the system of patriarchal government has been abandoned; if, for the communistic scheme, a capitalistic scheme has been substituted; if the society has become a trading community and lost all its distinctive attributes; if it is undergoing the process of liquidation; if all its property and assets have passed to a trading corporation, and the power of carrying out its original principles has departed; if its membership has become practically incapable of perpetuation,—it follows that the trusts have been defeated, and the society ended to all intents and purposes.

Early in 1890 John S. Duss and two others, employees, but not members, of the society, were elected to fill vacancies in the board of elders.

In April, 1890, certain articles were executed, the number of members being stated to be forty-five.

The junior trustee having died, John S. Duss was elected to fill the vacancy, and [36]soon after, with his wife and children, *took possession of the official residence of the society. In 1892 the senior trustee died, and Duss was elected to that position, one Sieber, the town constable, who had a wife, being elected junior trustee. Later in that year other articles were entered into, describing the then number of members as thirty-seven.

In February, 1893, certain members of the society filed a bill for its dissolution, the winding up of its affairs, and the distribution of its assets.

While the bill was pending, seventeen members received from the assets money and property to the amount of something over $100,000, and gave quitclaims and acknowledgments of full satisfaction of their interest or share in the property of the society. The grantors in nearly all of these instruments acknowledged, in consideration of the money paid or land conveyed, that he or she does "hereby release, cancel, and discharge any and all claims whatsoever, which I, my heirs, assigns, or lawful representatives, may or could ever have against said society or its trustees, its property or assets, or any part thereof, I hereby declaring all such claims to be fully compensated, settled, released, and discharged;" and, after reciting the various properties and assets, "I am entirely satisfied to accept as my full share and interest therein," etc.

Two of the deeds contained this paragraph: "While it may be that said society may have and be the possessor of several hundred thousand dollars' worth of property after paying all debts, I am entirely satisfied to accept as my full share therein the sum of —— thousand dollars."

After these settlements began, the bill was dismissed by consent.

In January, 1894, a corporation styled the "Union Company" was organized, under the state statute, "for the purpose of the purchase and sale of real estate, or for holding, leasing, and selling real estate," its business "to be transacted in the borough of Beaver, county of Beaver, state of Pennsylvania."

On April 11, 1894, seventeen persons, purporting to be all the then members of the society, executed a paper stating: "We, the members of said Harmonie Society, do each hereby *express our consent with and[37] request that John S. Duss and Gottlieb Riethmueller, the present trustees of said society, shall forthwith sell, transfer, and convey to the Union Company, a corporation duly created and organized under the laws of the state of Pennsylvania, all the lands, tenements, and hereditaments situated in the Allegheny and Beaver counties, Pennsylvania, now owned and held by said trustees for the benefit of the said society, to the end that all said lands, tenements, and hereditaments may be owned, held, and managed by said incorporated company, and be sold and otherwise disposed of from time to time in pursuance of proper corporate action, as may be determined by the directors and officers of said incorporated company.

"The capital stock of said incorporated company, however, to be owned and held by the said trustees for the benefit of the society, in accordance with, and on the terms and conditions of, the articles of association of said society, and the ratifications and modifications thereof, as the same now exists, to the extent of three hundred and ninety-seven thousand five hundred ($397,500) dollars, out of a total capital of four hundred thousand ($400,000) dollars."

The vast property of the society was conveyed to the Union Company, and the stock of that corporation assigned to the trustees.

Since April 11, 1894, nine of the seventeen subscribers have died, leaving eight, consisting of John S. Duss and his wife, one Gillman, seventy-seven years of age, and unable to read or speak English; and five women of the ages of eighty, seventy-seven, fifty-eight, fifty-four, and forty-seven, respectively.

Duss and Gillman became the sole remaining male members of the society, and the women, with the exception of Mrs. Duss, were mostly old, infirm, or ignorant.

No new member has been admitted since 1893. It is suggested that this was because none desired admission. This may be so, and this would explain the diminishing of over 500 members in 1827 to 288 in 1847, and 45 in 1890. But the result is the same. The eight remaining cannot reasonably be held to represent the great *communistic[38] scheme which the Wurtembergers of 1803 sought to found on "the basis of Christian fellowship, the principles of which, being faithfully derived from the sacred Scriptures, include the government of the patriarchal age, united to the community of property adopted in the days of the apos-

tles, and wherein the single object sought is to approximate, so far as human imperfection may allow, to the fulfilment of the will of God, by the exercise of those affections and the practice of those virtues which are essential to the happiness of man in time and throughout eternity."

As the membership diminished, the wealth increased, but not from contributions by new members; and operations were carried on by hired labor.

Not one of the eight contributed to the three or four millions of property accumulated. It is conceded that Duss alone is the active member. But he is not the society, nor does the society, in respect of its avowed principles, any longer exist.

Moreover, the transactions by which seventeen members of the society, not old and infirm, but vigorous and capable, were bought out, were in themselves acts of liquidation. It is idle to say that these payments were "donations" to withdrawing members. They were purchases in terms and in effect. They were settlements by agreement, instead of through litigation.

Finally, substantially the entire property of the society and its affairs have been turned over to a corporation created under the laws of Pennsylvania, authorized to purchase and sell land. This corporation has none of the powers confided by the articles of 1847 to the board of elders and the board of trustees. It has no power to feed, lodge, maintain, and support, or to care for the spiritual welfare of, members of the society, or to perform any of the duties imposed upon the boards. The trustees have no distinct title to the society's property, but only the rights pertaining to the stock of the Union Company. All the industries carried on in Economy are carried on by tenants and lessees of the Union Company, and the society has ceased to possess the power to carry out the purposes for which its property was accumulated.

The affairs of the Union Company must be [39] wound up under *the state statutes in that behalf, and proceeds derived from the lands by sale or otherwise would go to the stockholders by way of dividends. The legal effect of the transaction was the same as a sale, out and out, for cash, and it was irrevocable. And this point so arises on the record that it must be disposed of as matter of law.

The master found, as matter of law, that the society continued to exist because the surviving members had not formally declared it to be dissolved, and that the purposes and principles of the society could not be held to have been abandoned, unless by the formal action of all its members. But this could only be so on the assumption that the scheme of the trust created a joint tenancy with the right of survivorship, or a system of tontine; and that a single surviving member might be the society, although to the integrity of a community numbers are essential. By the articles, neither the members, nor the board of elders, nor the board of trustees, nor all together, possessed the power voluntarily to formally dissolve the association; and it is for a court of equity to adjudge whether a condition of dissolution, or a condition requiring winding up, is, or is not, created by acts done or permitted.

Such being, in my opinion, the condition here, the trust property must go, as I have said, either to the surviving members as joint tenants, with right of survivorship, or by way of tontine; or to the owners or donors living, and to the heirs and legal representatives of those who are dead, by way of resulting trust.

Appellees contend for the first of these propositions. Their counsel says in his brief: "It is the society, as a society, which owns this property. It is the entire body as one whole. If at any time the society did dissolve, its property would go to the persons who then were its members. No one else has any legal or equitable claim to it except those members. To them, and to them alone, it would belong, and among them it would be divided."

It is inconceivable that the creators of the trust contemplated any such result, when they sought to perpetuate Christian fellowship by the renunciation of their property.

*The present membership has shrunk to [40] eight members, less than enough to fill the board of elders, and that board consists of Duss and his wife, an old man and five women, aged or ignorant. Practically, Duss is the last survivor, and he claims the ownership of this vast estate as such survivor. By the articles, no period was fixed for the termination of the life of the society. There is no remainder over, nor provision of any kind for the disposition of the trust estate in the event of the society's extinction.

Joint tenancy with survivorship, or tontine, excluding all but living members and casting accumulations on the survivor, are neither of them to be presumed. They are the result of express agreement, and there is none such in these documents.

On the contrary, this property was held in trust for the use and benefit of the society, as a society, and not for the individual members. The trust was for the use and benefit of the society in the maintenance of its principles as declared by its constitution and laws. When the purposes of the society were abandoned or could not be accomplished, or the society ceased to exist, the trust failed, and the property reverted, by way of resulting trust, to the owners who subjected it to the trust, living, and to the heirs and legal representatives of those of them who are dead.

This conclusion does not involve the assertion of a reversion secured by the express terms of the contracts, but rests on the familiar principle of equity jurisprudence, that when the trust clearly created by the documents terminated, a resulting trust arose to the grantors or donors, or their heirs. The distinction is thoroughly eluci-

dated by Mr. Justice Gray in *Hopkins v. Grimshaw*, 165 U. S. 342, 41 L. ed. 739, 17 Sup. Ct. Rep. 401. It was there said, among other things:

"But the trust was restricted, in plain and unequivocal terms, to the particular society to be benefited, as well as to the purpose of a burial ground, adding (as if to put the matter beyond doubt) 'and for no other purpose whatever.' The trust would end, therefore, at the latest, when the land ceased to be used as a burial ground and the society was dissolved. . . .

"In the case at bar, the trust created by [41] the deed having *been terminated, according to its express provisions, by the land ceasing to be used as a burial ground, and the dissolution and extinction of the society for whose benefit the grant was made, there arises, by a familiar principle of equity jurisprudence, a resulting trust to the grantor and his heirs, whether his conveyance was by way of gift or for valuable consideration."

The titles held by the trustees in this case were held for the benefit and use of the society in the maintenance of its principles. When the purposes of the trusts failed the property reverted, not because of special provision to that effect, but because that was the result of the termination of the trusts.

Complainants, or some of them, are the heirs and next of kin of members who signed the articles of 1836 and 1847, and who died in fellowship. The service of one of these families is said to aggregate three hundred years of unrequited toil. They are entitled to invoke the aid of the court in the winding up of this concern, and these decrees ought to be reversed.

I am authorized to state that Mr. Justice **Brewer** concurs in this dissent.

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J. M. ROBINSON & CO., *Plffs. in Err.*,
*v.*
JOHN C. BELT *et al.*

(See S. C. Reporter's ed. 41-50.)

*Courts—state laws as rules of decision—assignments for the benefit of creditors—release as condition of preference—appeal—objection not raised below.*

1. The validity of an assignment for the benefit of creditors which requires a release by creditors as a condition of preference is determinable by the state law as interpreted by its highest courts.
2. The courts of the Indian territory are bound to respect the decisions of the supreme court of Arkansas interpreting laws of that state which were adopted and extended over the Indian territory by the act of Congress of May 2, 1890.
3. An assignment for the benefit of creditors, although requiring a release by creditors as a condition of preference, must be deemed valid in the Indian territory, in view of the decisions of the courts of Arkansas upholding such assignments under the statutes of that state concerning assignments for the benefit of creditors and the statute of frauds, which were adopted and extended over the Indian territory by the act of Congress of May 2, 1890 (26 Stat. at L. 94, § 31).
4. Objections to the validity of an assignment for the benefit of creditors for want of acceptance, and to the form of the judgment, cannot be raised for the first time in the Supreme Court of the United States.

[No. 46.]

*Argued May 2, 1902. Decided October 27, 1902.*

IN ERROR to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment affirming a judgment of the Court of Appeals of the Indian Territory which had affirmed the judgment of the United States Court for the Northern District of that Territory sustaining an interplea by an assignee for the benefit of creditors to recover property attached by a creditor of his assignor. *Affirmed.*

See same case below, 40 C. C. A. 664, 100 Fed. 718.

Statement by Mr. Justice **Brown**:

This was a writ of error to a judgment of the circuit court of appeals for the eighth circuit affirming a judgment of the court of appeals of the Indian territory, which latter court affirmed the judgment of the United States court for the northern district of such territory, sustaining an interplea by one King to recover the value of certain property attached and sold by Robinson & Co., which had been conveyed to King as assignee by a deed of assignment made by his codefendant Belt.

The facts of the case are substantially as follows: One John C. Belt, a resident of Arkansas, who was engaged in business in the Indian territory, on December 29, 1891, made an assignment for the benefit of his creditors to King, as assignee.

On the following day "J. M. Robinson & Co.," plaintiffs in error, brought suit against Belt in the United States court in that territory, sued out an attachment, and levied upon the property assigned. Belt failed to plead, and judgment by default was taken against him, and the attachment sustained.

On May 31, 1892, defendant in error King filed an interplea, *setting out his deed [43] of assignment, and claiming the property as his by virtue of such deed. After so doing

NOTE.—*As to state laws as rules of decision in Federal courts*—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; and Griffin v. Overman Wheel Co. 9 C. C. A. 348.

*As to when United States Supreme Court follows decisions of state courts*—see notes to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508; United States *ex rel.* Butz v. Muscatine, 19 L. ed. U. S. 490; and Elmendorf v. Taylor, 6 L. ed. U. S. 290.

*On the necessity of raising objections in the lower courts*—see notes to O'Neill v. New York, O. & W. R. Co. (N. Y.) 5 L. R. A. 591; State v. Hope (Mo.) 8 L. R. A. 608; and Phelps v. Mayer, 14 L. ed. U. S. 643.

he entered into a stipulation with other attaching creditors, of whom there were a large number, whereby it was agreed that this interplea should be considered as filed in every suit, and, virtually, that the result of the interpleader proceedings in the suit of J. M. Robinson & Co. should control all other suits. The property was, after its attachment, sold under order of court, pursuant to statutes governing such proceedings, and at such sale realized the sum of $7,900.

A demurrer to the interplea was filed and sustained by the court, from which order King sued out a writ of error from the United States court of appeals. He gave no supersedeas bond, however, and the fund was, by order of the court, distributed *pro rata* to the attaching creditors according to their priorities. The court of appeals reversed the judgment on the demurrer, and on September 19, 1895, Robinson & Co. filed their answer to the interplea, denying that King was owner by virtue of the deed of assignment, and alleged the same to be fraudulent and void; denied that King filed a complete inventory; denied that certain personal property described in the deed of assignment was the property of the wife of Belt, and admitted that the property described in the deed was seized under the attachment.

The trial on the interplea was had before a jury, and resulted in a verdict in favor of the interpleader, which found the attached property to be the property of King, as assignee. A judgment was thereupon entered in his favor, which was subsequently affirmed, first, by the court of appeals for the Indian territory, and then by the circuit court of appeals for the eighth circuit. Whereupon a writ of error was sued out by Robinson & Co. from this court.

*Mr.* **David Goldsmith** argued the cause and filed a brief for plaintiffs in error:

Courts have vigorously assailed the insolvent debtor's right to exact a release in an assignment for the benefit of his creditors, and have declared assignments of that character fraudulent and void.

*Wakeman* v. *Grover*, 4 Paige, 23, 11 Wend. 187, 25 Am. Dec. 624; *Hubbard* v. *McNaughton*, 43 Mich. 220, 38 Am. Rep. 176, 5 N. W. 293; *Miller* v. *Conklin*, 17 Ga. 430, 63 Am. Dec. 248; *Ingraham* v. *Wheeler*, 6 Conn. 277; *Duggan* v. *Bliss*, 4 Colo. 226, 34 Am. Rep. 80; *Brown* v. *Knox*, 6 Mo. 302; *Conkling* v. *Carson*, 11 Ill. 503; *Howell* v. *Dixon*, 21 Fla. 413; *Sperry* v. *Gallaher*, 77 Iowa, 107, 41 N. W. 586; *Atkinson* v. *Jordan*, 5 Ohio, 293, 24 Am. Dec. 281; *Wilde* v. *Rawlings*, 1 Head, 34; *Ware* v. *Wanless*, 2 Wyo. 144; *Hafner* v. *Irwin*, 23 N. C. (1 Ired. L.) 490.

Courts which, in deference to prevailing practices and conditions, had sustained assignments of this character, afterwards recognized the fallacy of their ruling, and regretted their inability, under the doctrine of *stare decisis*, to change it.

*Ashurst* v. *Martin*, 9 Port. (Ala.) 572; *Livingston* v. *Bell*, 3 Watts, 201; *Phippen* v. *Durham*, 8 Gratt. 464; Bump, Fraud. Conv. 4th ed. § 420, p. 437.

If courts did not undo the ruling which was opposed to their better judgment, they nevertheless limited and qualified it by holding that the condition for a release was permissible only in a general, and not in a partial, assignment.

*Thomas* v. *Jenks*, 5 Rawle, 221; *Green* v. *Trieber*, 3 Md. 11; *Gadsden* v. *Carson*, 9 Rich. Eq. 252, 70 Am. Dec. 207; *Gordon* v. *Cannon*, 18 Gratt. 387; *Rankin* v. *Lodor*, 21 Ala. 380; *Nightingale* v. *Harris*, 6 R. I. 321.

And some cases even went to the extent of holding that the conditional assignment was invalid, unless it appeared upon its face to be a conveyance of all the property of the assignor.

*Barnits* v. *Rice*, 14 Md. 24, 74 Am. Dec. 513.

The legislatures in Maine, New Hampshire, Pennsylvania, Vermont, and Alabama undid what the courts had not the courage to undo.

*Pearson* v. *Crosby*, 23 Me. 261; *Hurd* v. *Silsby*, 10 N. H. 108, 34 Am. Dec. 142; *Perry Ins. & T. Co.* v. *Foster*, 58 Ala. 502, 29 Am. Rep. 779; Burrill, Assignm. 6th ed. §§ 159, 161.

The provision is obnoxious because it enables the debtor "to operate upon the fears of his creditors and coerce them into his own terms."

*Grover* v. *Wakeman*, 11 Wend. 200, 25 Am. Dec. 624.

No insolvent debtor has the right to prescribe terms to his creditors, to say to these, "Take up these crumbs on my own terms, or have nothing."

*Ingraham* v. *Wheeler*, 6 Conn. 283.

The requirement is repugnant to our moral sense, as well as to legal principle and authority.

Bump, Fraud. Conv. 4th ed. § 415, p. 434.

The decisions of the supreme court of Arkansas do not in any way depend upon any statute local or peculiar to Arkansas.

The utmost that can be claimed is that the invalidity of the requirement for a release in an assignment for the benefit of creditors rests upon the statute of fraudulent conveyances known as 13 Eliz. chap. 5 (Burrill, Assignm. 6th ed. §§ 11, 295; Bump, Fraud. Conv. 4th ed. § 12; 14 Am. & Eng. Enc. Law, 2d ed. p. 222); and that this statute, together with the common law, became operative in the Indian territory through the adoption of chapter 20, Mansfield's Digest of the Statutes of Arkansas, by Congress in the act of May 2, 1890.

The adoption of a statute does not carry with it the construction received in the state from which it is taken, if such construction is at variance with that which the same statute has, prior to its adoption, received in other jurisdictions.

*Coulam* v. *Doull*, 133 U. S. 216, 33 L. ed. 596, 10 Sup. Ct. Rep. 253; *Whitney* v. *Fox*, 166 U. S. 637, 41 L. ed. 1145, 17 Sup. Ct. Rep. 713.

The statute of 13 Eliz. is merely declaratory of the common law, which in itself denounces and avoids conveyances made with the intent to defraud, hinder, or delay creditors.

Wait, Fraud. Conv. § 16, p. 36; Burrill, Assignm. 6th ed. § 11, p. 20; Bump, Fraud. Conv. 4th ed. § 12; 2 Bigelow, Fr. p. 24; 14 Am. & Eng. Enc. Law, 2d ed. pp. 222, 223.

The Federal courts are free to exercise and follow their own judgment in the administration of the common law, even when exercising their functions in the states, and when their judgment leads them to conclusions in conflict with the rulings of the courts of the state in which they are sitting.

*Chicago* v. *Robbins*, 2 Black, 418, 17 L. ed. 298; *Myrick* v. *Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325, 1 Sup. Ct. Rep. 425; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

No counsel for defendants in error.

Mr. Justice **Brown** delivered the opinion of the court:

[44] *This is a contest between certain attaching creditors of John C. Belt, and one King, his voluntary assignee for the benefit of creditors.

The record is in an unsatisfactory condition. It is impossible to tell whether the plaintiffs are a corporation or a partnership; and, if the latter, who constitute the firm, or against what individuals the judgment of the court was rendered. Although the only right of the plaintiffs to contest the assignment of Belt to King arises from the levy of an attachment upon the assigned property, neither the writ of attachment nor the return of the marshal of the levy thereunder appears in the record or testimony. Nor does the record contain a copy of the complaint, in which these proceedings were probably averred. The only pleadings before us are the interplea of King, filed in the action (which appears to have been brought against Belt alone), setting up the assignment, and the answer of the plaintiffs thereto, denying the ownership of King and averring the fraudulent character of the assignment. But as the interplea of King alleges that on December 31, 1891, and just after he had completed an inventory of the property so assigned, plaintiffs caused a writ of attachment to be levied upon a portion of the property, we may treat this as a sufficient admission of plaintiffs' title to justify us in passing upon the question of the validity of the assignment, upon which the case largely depends.

1. This assignment is attacked by the plaintiffs chiefly upon the ground that it contains a provision that the preferred creditors shall accept their dividends "in full satisfaction and discharge of their respective claims, . . . and execute and deliver to said John C. Belt a legal release therefor." This provision has been the subject of discussion in England and in most of the states, and in a large number of cases has been held to avoid the assignment, upon the ground that the debtor has no right to compel his creditors to accept his terms or lose their preference. In England a clause of a somewhat similar nature was held to be void under the statute of Elizabeth as an attempt to hinder, delay, or defeat creditors (*Spencer* v. *Slater*, L. R. 4 Q. B. Div. 13), though the applicability of that case to this particular provision admits of some doubt.

*The fact that it enables the debtor to extort a settlement by playing upon the fears or apprehensions of his creditors is thought by the courts of many of the states to be sufficient to justify them in setting aside the assignment; and, where such provision has been sustained, it has usually been in deference to authority, rather than upon conviction of its propriety or wisdom. The question was discussed at considerable length by Mr. Justice Story in *Halsey* v. *Fairbanks*, 4 Mason, 206, 227, Fed. Cas. No. 5,964, and the validity of the clause sustained, largely in deference to the case of *King* v. *Watson*, 3 Price, 6, where, as he states, the very exception was taken by counsel, and the assignment held good by the court of exchequer. *King* v. *Watson*, however, has but a remote bearing, and seems to have been *pro tanto* overruled by the case of *Spencer* v. *Slater*, above cited. Mr. Justice Story finally remarks that if the question were entirely new, and many estates had not passed upon the faith of such assignments, the strong inclination of his mind would be against their validity. "As it is," said he, "I yield with reluctance to what seems the tone of authority in favor of them." Somewhat similar doubt is expressed by Mr. Chief Justice Taney in *White* v. *Winn*, a memorandum of which is found in 8 Gill, 499. The question was also incidentally considered by this court in *Security Trust Co.* v. *Dodd*, 173 U. S. 624, 633, 43 L. ed. 835, 839, 19 Sup. Ct. Rep. 545, but the case went off upon another point.

This court has never directly passed upon the validity of this provision, but, wherever it has been called in question, it has been treated as determinable by the local law of the state from which the question arose. Thus, in *Brashear* v. *West*, 7 Pet. 608, 8 L. ed. 801, the clause was upheld solely upon the ground that the courts of Pennsylvania had sustained its validity. The assignment in that case was in trust to pay and discharge the debts due from the assignor, first, to certain preferred creditors, and afterwards to creditors generally, provided that no creditor should be entitled to receive a dividend, who should not, within ninety days, execute a full and complete release of all claims and demands upon the assignor. Mr. Chief Justice Marshall, after summarizing the arguments for and against the validity of this provision, did not commit the court to the expression of *an opinion, but held that "the construction which the courts of that state [Pennsylvania] have

put on the Pennsylvania statute of frauds must be received in the courts of the United States," and decided the case upon the authority of *Lippincott* v. *Barker*, 2 Binn. 174, 4 Am. Dec. 433, in which this question arose, and was decided, after an elaborate argument, in favor of the deed. He also remarked that the question had been decided the same way in *Pearpoint* v. *Graham*, 4 Wash. C. C. 232, Fed. Cas. No. 10,877. In that case Mr. Justice Washington thought that an assignment in trust for the benefit of such creditors as should release their debts was founded upon a good and valuable consideration, and was valid, the only inquiry being whether it was bona fide. The assignment was supported in favor of such of the creditors as executed a release of their demands within sixty days after the date of the instrument, that being the time limit provided for such acceptance. Neither in *Lippincott* v. *Barker* nor in *Pearpoint* v. *Graham* were there any preferred creditors, but the assignments were in trust for all the creditors who should, within sixty days in one case, and four months in the other, execute a release of their demands. In several subsequent cases the rule laid down in *Brashear* v. *West* has been adopted, and the principle fully established that the construction and effect of a state statute regulating assignments for the benefit of creditors is one upon which the decisions of the highest courts of the state are a controlling authority in the Federal courts. They are treated as establishing a rule of property applicable within their several jurisdictions. *Sumner* v. *Hicks*, 2 Black, 532, 17 L. ed. 355; *Jaffray* v. *McGehee*, 107 U. S. 361, 27 L. ed. 495, 2 Sup. Ct. Rep. 367; *Peters* v. *Bain*, 133 U. S. 670, 686, 33 L. ed. 696, 702, 10 Sup. Ct. Rep. 354; *Randolph* v. *Quidnick Co.* 135 U. S. 457, *sub nom. Jencks* v. *Quidnick Co.* 34 L. ed. 200, 10 Sup. Ct. Rep. 655; *Union Nat. Bank* v. *Bank of Kansas City*, 136 U. S. 223, 235, 34 L. ed. 341, 345, 10 Sup. Ct. Rep. 1013; *South Branch Lumber Co.* v. *Ott*, 142 U. S. 622, 627, 35 L. ed. 1136, 1138, 12 Sup. Ct. Rep. 318.

The same rule has been held to be applicable to decisions of state courts construing the statute of frauds. *Allen* v. *Massey*, 17 Wall. 351, 21 L. ed. 542; *Lloyd* v. *Fulton*, 91 U. S. 479, 485, 23 L. ed. 363, 365.

Whatever might be our own views with regard to the validity of a release by creditors as a condition of preference under an assignment, the question is one which, upon [47] the authorities *above cited, must be held to be determinable by the state law as interpreted by the supreme court of such state.

While the case under consideration arose in the Indian territory, the law applicable thereto is determined by the laws of Arkansas, which were adopted and extended over the Indian territory by the act of Congress approved May 2, 1890 (26 Stat. at L. 94, § 31), which declares that certain general laws of Arkansas, "which are not locally inapplicable, or in conflict with this act, or with any law of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian territory," among which laws are enumerated assignments for the benefit of creditors and the statute of frauds. In adopting this law with respect to assignments, the courts of the Indian territory are also bound to respect the decisions of the supreme court of Arkansas interpreting that law.

In more than one case we have had occasion to hold that, if a foreign statute be adopted in this country, the decisions of foreign courts in the construction of such statute should be considered as incorporated into it. Thus, in *Pennock* v. *Dialogue*, 2 Pet. 1, 7 L. ed. 327, it was said by Mr. Justice Story (p. 18, L. ed. p. 333): "It is doubtless true, as has been suggested at the bar, that where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." In speaking of our patent act, which was largely taken from the English statute of monopolies, he says (p. 20, L. ed. p. 334): "The words of our statute are not identical with those of the statute of James, but it can scarcely admit of doubt that they must have been within the contemplation of those by whom it was framed, as well as the construction which had been put upon them by Lord Coke." In *Cathcart* v. *Robinson*, 5 Pet. 264, 8 L. ed. 120, Mr. Chief Justice Marshall said (p. 280, L. ed. p. 126): "By adopting them [British statutes], they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in *this country, indeed [48] to the time of our separation from the British Empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But however we may respect subsequent decisions,—and certainly they are entitled to great respect,—we do not admit their absolute authority." See also *Kirkpatrick* v. *Gibson*, 2 Brock. 388, Fed. Cas. No. 7,848. The same rule has been applied in the state courts in the construction of statutes adopted from other states. *Com.* v. *Hartnett*, 3 Gray, 450; *Tyler* v. *Tyler*, 19 Ill. 151; *Bloodgood* v. *Grasey*, 31 Ala. 575; *Marquezz* v. *Caldwell*, 48 Miss. 23; *State* v. *Robey*, 8 Nev. 312; *The Devonshire*, 8 Sawy. 209, 13 Fed. 39.

As the Arkansas statutes concerning assignments for the benefit of creditors and the statute of frauds were extended and put in force in the Indian territory by the act of Congress above cited, it becomes mate-

rial to consider the decisions of the supreme court of that state with reference to the validity of the provision of an assignment exacting a release by creditors of all their demands against the assignor as a condition of preference. The subject was first considered in *Clayton* v. *Johnson*, 36 Ark. 406, 424, 38 Am. Rep. 40, in which an assignment for the benefit of creditors without preferences was held to be valid, notwithstanding a proviso that no creditor provided for should participate in the assets "unless he accepts the same in full of his claim." The question is most elaborately considered in that case, and a distinction taken between a conveyance of the whole, and the conveyance of a part only, of the debtor's property upon condition of releasing the residue. The latter was thought to be fraudulent, and pernicious in its tendencies. In *McReynolds* v. *Dedman*, 47 Ark. 347, 1 S. W. 552, it was held that, although an assignor might make preferences and exact releases from creditors who assented to the assignment, if he reserved to himself, to the exclusion of nonassenting creditors, the surplus that remained, the deed was fraudulent upon its face. The difficulty with that assignment was that, in case the creditors refused to execute the releases, the residue, instead of being devoted to the payment of the assignor's creditors, was to revert to the assignor himself. This case is wholly consistent with that of [49] *Clayton* v. *Johnson*. In the *subsequent case, however, of *Collier* v. *Davis*, 47 Ark. 367, 58 Am. Rep. 758, 1 S. W. 684, *Clayton* v. *Johnson* was formally overruled, and an assignment which provided that no creditor should participate unless he should accept his share in full satisfaction of his claim, and gave no direction for the application of the surplus after satisfying assenting creditors, was held void upon its face. It may be noted that the personnel of the court had changed since *Clayton* v. *Johnson* was decided. In the subsequent case of *Wolf* v. *Gray*, 53 Ark. 75, 13 S. W. 512, decided a few weeks before the act of Congress of 1890, notwithstanding the former overruling of *Clayton* v. *Johnson* in *Collier* v. *Davis*, it is said that its authority upon the stipulation for a release was not impaired, except as modified by the cases before cited. It follows, said the court, that "the law is established here, in accord with much authority elsewhere, that a stipulation for a release in a general assignment, which is made only as a condition of preference, does not invalidate the instrument." The assignment in that case preferred one creditor, and provided for payment to all other creditors who should execute releases of the residue of their debts. This case was followed by *King* v. *Hargadine-McKittrick Dry Goods Co.* 60 Ark. 1, 28 S. W. 514, where the very assignment in question in this case was held to be valid, notwithstanding the provision for a release by creditors as a condition of preference. Without determining the validity of such a provision at common law, we are of opinion that the courts of the Indian territory did not err in applying the settled construction of the law of Arkansas to the assignment in this case, and in holding the provision for a release of creditors to be valid.

2. Plaintiffs also seek to impeach the assignment upon the ground that there was no evidence of its acceptance by any of the creditors, or their assent thereto; and the position is taken that, while the creditors may be presumed to accept an assignment made for their benefit, such acceptance will not be presumed where the assignment is subject to the condition that the creditors consent to a release and discharge of their claims against the estate. Error is also charged in the rendition of the judgment against persons who were not parties *to [50] the immediate case, but who had stipulated other cases into this case for a like judgment; and also in the fact that a personal judgment rendered against the plaintiffs in error for the value of the goods in controversy was not contemplated or allowed by the statute under which the proceedings were had.

It is a sufficient answer to these objections to say that neither of them appears to have been called to the attention of the courts below. They do not seem to have been raised at the time the judgment was entered. It does not appear that any assignments of error were filed in the court of appeals for the Indian territory, but the opinion states that plaintiffs relied upon four objections to the assignment, as showing upon its face that it was fraudulent in law. No objection seems to have been raised in that court to the form of the judgment. In the assignments of error in the United States court of appeals for the eighth circuit no such question is raised, and none alluded to in the opinion. Such objections could not be raised for the first time in this court. *Insurance Co.* v. *Mordecai*, 22 How. 111, 117, 16 L. ed. 329, 331; *First Nat. Bank* v. *Kentucky*, 9 Wall. 353, 19 L. ed. 701; *Wheeler* v. *Sedgwick*, 94 U. S. 1, 24 L. ed. 31; *Wilson* v. *McNamee*, 102 U. S. 572, 26 L. ed. 234; *Edwards* v. *Elliott*, 21 Wall. 532, 22 L. ed. 487; *Clark* v. *Fredericks*, 105 U. S. 4, *sub nom. Davis* v. *Fredericks*, 26 L. ed. 938.

While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*.

*The judgment of the Court of Appeals is affirmed.*

Mr. Justice **Shiras** and Mr. Justice **White** concurred in the result.

[51] *WILLIAM J. TURPIN, *Appt.*,
*v.*
JOHN B. LEMON *et al.*

(See S. C. Reporter's ed. 51-61.)

*Constitutional law—due process—tax sale — pleading — bill presenting academic case.*

1. Due process of law in making sales of land for unpaid taxes, even if it requires the observance of all the steps prescribed by a state statute, does not demand that they shall be made matter of record, much less that they shall be made matter of a particular record, such as the return of the sheriff of the sale of the lands.
2. A bill to set aside a tax sale, which does not charge that the statutory procedure was not strictly pursued, but relies on the failure of the sheriff's return of sale to set forth a compliance with such procedure, cannot be maintained on the theory that, as the statute validated tax deeds notwithstanding any irregularities in the sale not appearing on the record, plaintiff was deprived of his property without due process of law, as this is an attempt to test the constitutionality of the law without showing that plaintiff was injured by its application.

[No. 35.]

*Argued and Submitted March 17, 1902. Decided November 3, 1902.*

ON APPEAL from the Circuit Court of the United States for the District of West Virginia to review a decree sustaining a demurrer to and dismissing a bill to impeach a tax sale. *Affirmed.*

Statement by Mr. Justice **Brown:**

This was an appeal from a decree of the circuit court for the district of West Virginia sustaining a demurrer to, and dismissing, a bill filed for the purpose of impeaching a tax sale and deed of certain lands, and of obtaining a judicial declaration that the defendants, who were purchasers under such tax deed, took no title to or interest in such lands.

The facts set forth in the bill were substantially as follows: On April 30, 1874, Turpin, a citizen of the state of Pennsylvania, purchased from the executors of one Smith C. Hill 225 acres of land in the county of [52] Ritchie, West Virginia, and received *a deed therefor. In the year 1879, 100 acres of this land were sold for delinquent taxes for prior years, by which the quantity owned by Turpin was diminished to 125 acres, which were assessed to him for taxes for the years 1883 and 1884. Being absent from the state for several years, in poor health and unfit for business, he paid no attention to the land, which was returned delinquent for the nonpayment of these taxes, and was sold by the sheriff of Ritchie county for such taxes on January 12, 1886. Having failed to redeem the land within the year allowed by law from the time of the sale, on February 3, 1887, some weeks after the expiration of the year, a deed was made by the clerk of the county court of Ritchie county to the defendants.

Nothing was done, and no effort was made to pay these taxes, until about February 21, 1899, when Turpin met the defendant John B. Lemon, and tendered him the sum of $176.50, to cover the amount of the taxes paid by the defendants in the purchase of the land, and all taxes paid by them subsequently, as well as the cost of all surveys, etc., which amount he now offers to pay into court; but Lemon refused to receive the money, and has since cut large quantities of timber and removed the same from the land.

Whereupon he filed this bill, which really raises but a single question, and that is whether the laws of the state of West Virginia enacted with reference to the sale of delinquent lands for taxes are contrary to the Constitution of the United States, or constitute due process of law within the 14th Amendment. Other questions were raised in the bill, but in his petition for an appeal to this court the appellant rests his case upon the single question of the constitutionality of these laws.

*Mr.* **C. D. Merrick** argued the cause and filed a brief for appellant:

The effect of the West Virginia statute is to prevent the owner from urging any objection to the proceeding which the records do not show.

*McCallister* v. *Cottrille*, 24 W. Va. 173; *Carrell* v. *Mitchell*, 37 W. Va. 136, 16 S. E. 453; *Winning* v. *Eakin*, 44 W. Va. 19, 28 S. E. 757.

All the preliminary requirements of the statutes, designating the various proceedings which are to culminate in the sales, should have been strictly complied with; and the officers who execute the power should follow with precision the course marked out for them by the law; and the conditions subsequent to the sale, if any, should be duly observed.

Black, Tax Titles, § 155; Cooley, Taxn. 470; 25 Am. & Eng. Enc. Law, p. 374; *Williams* v. *Peyton*, 4 Wheat. 78, 4 L. ed. 518; *Thatcher* v. *Powell*, 6 Wheat. 119, 5 L. ed. 221; *Ronkendorff* v. *Taylor*, 4 Pet. 349, 7 L. ed. 882; *Early* v. *Doe ex dem. Homans*, 16 How. 610, 14 L. ed. 1079; *Rich* v. *Braxton*, 158 U. S. 375, 39 L. ed. 1022. 15 Sup. Ct. Rep. 1006; *Marx* v. *Hanthorn*, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; *Yancey* v. *Hopkins*, 1 Munf. 419; *Wilson* v. *Doe ex dem. Bell*, 7 Leigh, 24; *Martin* v. *Snowden*, 18 Gratt. 100.

It has been always considered essential that somewhere, somehow, and at some time, the party aggrieved should have the privi-

NOTE.—*As to what constitutes due process of law*—see Kuntz v. Sumption (Ind.) 2 L. R. A. 655, and note; *Re* Gannon (R. I.) 5 L. R. A. 359, and note; Ulman v. Baltimore (Md.) 11 L. R. A. 224, and note; and Gilman v. Tucker (N. Y.) 13 L. R. A. 304, and note. And see notes to People v. O'Brien (N. Y.) 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina *ex rel.* Caldwell, 42 L. ed. U. S. 865.

lege of seeking the protection of some legally constituted tribunal or court, and should have his rights adjudicated therein. Where this right is taken away or is unprotected, the statute does not provide due process of law.

*McMillen* v. *Anderson*, 95 U. S. 37, 24 L. ed. 335; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub. nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *King* v. *Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; *Scott* v. *Toledo*, 1 L. R. A. 688, 36 Fed. 385; *Speer* v. *Athens*, 85 Ga. 49, 9 L. R. A. 402, 11 S. E. 802; *Kuntz* v. *Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474.

It would not be due process of law to deprive the owner of his property by making the tax purchaser's claim to it conclusive.

*Marx* v. *Hanthorn*, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508; *Bannon* v. *Burnes*, 39 Fed. 892; *Kelly* v. *Herrall*, 10 Sawy. 161, 20 Fed. 364; *Stoudenmire* v. *Brown*, 48 Ala. 699; *Calhoun* v. *Fletcher*, 63 Ala. 574; *McCready* v. *Sexton*, 29 Iowa, 356, 4 Am. Rep. 214; *Powers* v. *Fuller*, 30 Iowa, 476; *Immegart* v. *Gorgas*, 41 Iowa, 439; *Abbott* v. *Lindenbower*, 42 Mo. 162; *Roth* v. *Gabbert*, 123 Mo. 21, 27 S. W. 528; *Larson* v. *Dickey*, 39 Neb. 463, 58 N. W. 167; Cooley, Taxn. 521.

A statute making the deed prima facie evidence does not dispense with the performance of any of the requirements prescribed by law. It only shifts the burden of proof of such performance from the party claiming under the deed to the party attacking it.

*Parker* v. *Overman*, 18 How. 137, 15 L. ed. 318; *Thomas* v. *Lawson*, 21 How. 331, 16 L. ed. 82.

Statutes conferring a purely arbitrary power upon officers are void. It is not the partial nature of the rule, so much as its arbitrary and unusual character, which condemns it as not being due process of law.

Cooley, Const. Lim. 354; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Minnesota* v. *Barber*, 136 U. S. 328, 34 L. ed. 460, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Collins* v. *New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768; *Hurtado* v. *California*, 110 U. S. 535, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Leeper* v. *Texas*, 139 U. S. 463, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Giozza* v. *Tiernan*, 148 U. S. 662, 37 L. ed. 602, 13 Sup. Ct. Rep. 721; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

There has been no actual possession of the property in question by the tax purchaser. Under those circumstances, laches will not be imputed to the owner of real estate sold for taxes, though he fails for any length of time to bring a suit to set aside the tax deed. This has been held in a number of cases.

*State* v. *Sponaugle*, 45 W. Va. 415, 43 L. R. A. 727, 32 S. E. 283; *Sommers* v. *Ward*, 41 W. Va. 76, 23 S. E. 520; *Battin* v. *Woods*, 27 W. Va. 58; *Cook* v. *Lasher*, 19 C. C. A. 655, 42 U. S. App. 42, 73 Fed. 701; *United States* v. *Insley*, 130 U. S. 263, 32 L. ed. 968, 9 Sup. Ct. Rep. 485.

A law so framed that in practice it can be enforced as to the property of one person in a manner differing from its enforcement as to the property of another, giving to one person the benefit of certain protecting provisions which are or may be denied to another, denies as to that other person the equal protection of the laws.

*Ex parte Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *Smyth* v. *Ames*, 169 U. S. 467, 42 L. ed. 835, 18 Sup. Ct. Rep. 418; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Hayes* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Janesville* v. *Carpenter*, 77 Wis. 288, 8 L. R. A. 808, 46 N. W. 128; *State* v. *Goodwill*, 33 W. Va. 179, 6 L. R. A. 621, 10 S. E. 285; *Com.* v. *Perry*, 155 Mass. 117, 14 L. R. A. 325, 28 N. E. 1126; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350; *State ex rel. Garrabad* v. *Dering*, 84 Wis. 585, 19 L. R. A. 858, 54 N. W. 1104; *Stratton Claimants* v. *Morris Claimants*, 89 Tenn. 497, *sub nom. Dibrell* v. *Lanier*, 12 L. R. A. 70, 15 S. W. 87; *State* v. *Gardner*, 58 Ohio St. 599, 41 L. R. A. 689, 51 N. E. 136; *State* v. *Jackman*, 69 N. H. 318, 42 L. R. A. 438, 41 Atl. 347.

*Mr.* **J. G. McCluer** submitted the cause for appellees:

The landowner must avail himself of any defects before the deed is made; and, if he does not, he is presumed to have waived them, and cannot thereafter make use of them to avoid the deed.

*Winning* v. *Eakin*, 44 W. Va. 27, 28 S. E. 757.

The demurrer to this bill was well taken, because it is nowhere alleged in the complainant's bill that he has been materially prejudiced and misled by any of the proceedings taken for the sale of this land, nor has he charged in his bill that, but for such irregularity, he would have redeemed the same as provided by law.

*Ibid.*

States, as a general rule, have the right of determining the manner of levying and collecting taxes on private property.

*Witherspoon* v. *Duncan*, 4 Wall. 210, 18 L. ed. 339.

The United States Constitution does not profess in all cases to protect against oppressive and unjust taxation by states.

*Memphis Gaslight Co.* v. *Shelby County Taxing Dist.* 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205.

The revenue laws of a state may be in harmony with the 14th Amendment, though they do not provide that a person shall have opportunity to be present when a tax is assessed, or that it shall be collected by suit.

*McMillen* v. *Anderson*, 95 U. S. 37, 24 L. ed. 335.

Taxes are not, as a general rule, collected by judicial proceedings, and the procedure resorted to for their imposition and collection may be properly regarded as due process of law if it conforms to customary usages.

*Wulzen* v. *San Francisco*, 101 Cal. 15, 35 Pac. 353; *Crandall* v. *Nevada*, 6 Wall. 35, 18 L. ed. 745; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 113, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *M'Culloch* v. *Maryland*, 4 Wheat. 317, 4 L. ed. 579.

Process of taxation does not require the same kind of notice as in a suit at law or proceedings under power of eminent domain. It involves no violation of due process of law when executed according to customary forms and established usage.

*Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Palmer* v. *McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324.

If the statute of the state, in connection with its Constitution, gives the taxpayer reasonable opportunity to protect his lands against a forfeiture, he has no ground to complain that his property has been taken without due process of law.

*State* v. *Sponaugle*, 45 W. Va. 415, 43 L. R. A. 727, 32 S. E. 283; *State* v. *Cheney*, 45 W. Va. 478, 31 S. E. 920.

Mr. Justice **Brown** delivered the opinion of the court:

The general charge is made by the appel-
[53] lant in his assignments *of error, that the tax sale complained of in the bill, as well as the statutes of West Virginia, are obnoxious to the 14th Amendment of the Constitution in failing to provide due process of law or the equal protection of the laws.

The particular errors which are alleged in the bill to invalidate the sale in question are,—

That it nowhere appeared in the return of the sale made by the sheriff for these taxes, either (1) that the land had been certified to him as delinquent by the auditor of the state as required by law, or (2) that he published or posted the notice of the sale as required by law, or (3) that said sale was made at a time at which he would be authorized by law to make such sale, or (4) that such sale was at a place, to wit, at the front door of the courthouse, at which the sheriff was authorized to make it, or (5) that such sale was made at public auction, or (6) that such land was sold to a person or persons who would take the least number of acres and pay the taxes thereon, or (7) that such sale was made in accordance with the provisions of the law of the state.

In making sales of land for unpaid taxes the procedure indicated by the above exceptions is undoubtedly required by the statute, the provisions of which are so numerous that they do not require citation. It will be observed, however, that there is no allegation in the bill that such requirements were not actually followed, but simply that the return of the sale failed to set forth a compliance with them. It is true the bill avers that the statements in the tax deed of a compliance with the law, "*as the record evidence shows*, were without foundation in fact." This, however, is but a restatement of the proposition theretofore stated more particularly, that the return did not show that the successive steps laid down by the statute were followed. That the pleader did not intend thereby to charge that the statutory procedure was not actually pursued is evident from the plaintiff's brief, that, "while the proceeding may have been conducted under this statute, yet the system provided is arbitrary and uncertain in its character," etc. As the statute does not require the sheriff to show in his return of sale that he has complied with these requirements, or any of them, or even to *state [54] in general terms that the sale was made in accordance with the statutes, the plaintiff fails to show that he has suffered any actual injury, or that the forms of law were not literally observed.

The act of 1882, chap. 130, §§ 12 and 13, specially provides a form of return of the sale as follows:

"12. The sheriff or collector who made the sale shall forthwith make out a list of sales so made, with a caption thereto, in form or effect as follows: 'List of real estate sold in the county of ———, in the month (or months, as the case may be) of ———, eighteen ——, for the nonpayment of the taxes charged thereon, in the said county, for the year (or years, as the case may be) eighteen ———.' Underneath shall be the several columns mentioned in the 10th section of this chapter [with a like caption to each column].

"13. There shall be appended to such list an affidavit in form or effect as follows: 'I, A— B——, sheriff (or collector or deputy for C— D—, sheriff or collector), of the county of ———, do swear that the above list contains a true account of all the real estate within my county which has been sold by me . . . during the present year, for the nonpayment of taxes thereon for the year ——, and that I am not . . . directly or indirectly interested in the purchase of any of said real estate, so help me God.' Which oath shall be subscribed and taken before some person authorized to administer oaths."

By § 15 of the same chapter "the owner of any real estate so sold, his heirs or assigns, or any person having a right to charge such real estate for a debt, may redeem the same by paying to the purchaser, his heirs or assigns, within one year from the sale thereof, the amount specified in the receipt mentioned in the 10th section of this chapter, and such additional taxes thereon as may have been paid by the purchaser, his heirs or assigns, with interest on said purchase money and taxes at the rate of 12 per cent per annum from the time the same may have been so paid." No attempt was made by the plaintiff to comply with this statute.

By § 19 of the same chapter it is provided

that after the expiration of the year the [55]purchaser may obtain from the *clerk of the county court of the county in which said sale was made a deed of conveyance for the land; and by § 25, when the purchaser shall have obtained a deed thereof, "and caused the same to be admitted to record, . . . such right, title, and interest in and to said real estate as was vested in the person or persons charged with the taxes thereon for which it was sold, . . . shall be transferred to and vested in the grantee in such deed, notwithstanding any irregularity in the proceedings under which the same was sold, not herein provided for, unless such irregularity appear on the face of such proceedings of record in the office of the clerk of the county court, and be such as materially to prejudice and mislead the owner of the real estate so sold, as to what portion of his real estate was so sold, and when and for what year or years it was sold, or the name of the purchaser thereof; and not then, unless it be clearly proved to the court or jury trying the case that but for such irregularity the former owner of such real estate would have redeemed the same under the provisions of this chapter." This same section further declares, in a subsequent clause, that "no irregularity, error, or mistake in the delinquent list, or the return thereof, or in the affidavit thereto, or in the list of sales filed with the clerk of the county court, or in the affidavit thereto, or in the recordation of such list or affidavit, or as to the manner of laying off any real estate so sold, or in the plat, description, or report thereof made by the surveyor or other person, shall, after the deed is made, invalidate or affect the sale or deed."

The substance of this legislation, then, is this: That a certain procedure is prescribed for the sheriff in making sales of land for unpaid taxes; but it is not required that he incorporate the various steps of such procedure in his report of sales,—merely that he shall swear that the list of lands to which his affidavit is appended contains a true account of all the real estate within the county sold by him during the current year for the nonpayment of taxes, and that he is not directly or indirectly interested in the purchase of any such real estate. A year is then allowed for redemption, after the expiration of which a deed of the land is executed to the [56]purchaser at the sheriff's sale by *the clerk of the county court, which deed, the statute provides, shall not be invalidated by reason of any irregularity in the proceedings under which the land was sold, unless such irregularities appear upon the face of such proceedings of record in the office of the clerk, and be such as to materially prejudice and mislead the owner.

Counsel for the plaintiff criticises this legislation, and particularly § 25, upon the ground that it does not provide for any record of the successive steps of procedure in advertising and selling lands for the nonpayment of taxes, and yet declares that the title to the land shall be vested in the purchaser, notwithstanding any irregularity, unless such irregularity appears upon the face of the proceedings. The inference is that there is no irregularity which can vitiate the sale. This is not entirely accurate. It is true that the statute prescribes a general form of return by the sheriff, which does not set forth in detail the proceedings prior to and at the sale; but that there are irregularities which appear of record, and therefore that the exception in the curative statute is not without force, is evident from the case of *McCallister* v. *Cottrille*, 24 W. Va. 173, in which it was held to be the official duty of the clerk of the county court to note in his office the day on which the sheriff returned his list of the sales of lands sold for delinquent taxes, and if he fails to make such note, or his office shows that such list was not returned and filed for more than ten days after the completion of such sales, this, in either case, is such an omission and irregularity as to materially prejudice the rights of the owner of lands sold at such sale, and therefore vitiates any deed made to the purchaser by the clerk. The court went further in this case, and held that parol evidence could not be introduced to affect the validity or invalidity of a tax deed. So, too, in *Carrell* v. *Mitchell*, 37 W. Va. 130, 136, 16 S. E. 453, it was said the fact that land was advertised and sold as delinquent under a description in the advertisement, locating it in a different district from that in which the land was situated, was such an irregularity as would void the deed made in pursuance of such sale. In *Hays* v. *Heathcrly*, 36 W. Va. 613, 15 S. E. 223, the title obtained by a purchaser was held to be defective for the reason that the affidavit *did[57] not comply with the form contained in the statute. In that case the deed had not been obtained; but in *Phillips* v. *Minear*, 40 W. Va. 58, 20 S. E. 924, the same defect was held to be fatal after the deed was obtained, and after the curative section (25) had taken effect. See also *Jackson* v. *Kittle*, 34 W. Va. 207, 12 S. E. 484; *Baxter* v. *Wade*, 39 W. Va. 281, 19 S. E. 404.

That it is competent for the legislature to provide by curative statutes that irregularities in the sales of lands shall not prejudice the purchaser after a certain time has elapsed and a deed has been given is entirely clear, although, as observed by Judge Cooley in his work upon Taxation, chap. 10, p. 227, such defective proceedings cannot be cured where there is a lack of jurisdiction to take them. "Curative laws may heal irregularities in action, but they cannot cure want of authority to act at all," and that "whatever the legislature could not have authorized originally, it cannot confirm." It may not be altogether easy in a particular case to determine whether the defect be jurisdictional or not, but certainly irregularities in the personal conduct of the officer making the sale would not be so regarded; and it is at least exceedingly doubtful whether the failure to preserve the auditor's list of delinquent lands or the evidence of the publication and posting of the

statutory notices would vitiate a deed made by the clerk, after a lapse of twelve years.

But, even if parol or other evidence were competent to impeach this sale, none such was offered, and it may well be doubted whether due process of law, within the meaning of the 14th Amendment, requires a punctilious conformity with the statutory procedure, preceding and accompanying the sale. Whether all the steps required by law were actually taken in a particular case, and whether the failure to take such steps would invalidate the sale, would seem to be a matter for the state courts, rather than for this court, to decide; and it would appear that the 14th Amendment would be satisfied by showing that the usual course prescribed by the state laws required notice to the taxpayer and was in conformity with natural justice. Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occa-[58]sion to hold *that, in proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvements, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. *Spencer* v. *Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Huling* v. *Kaw Valley R. & Improv. Co.* 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Paulsen* v. *Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750. But laws for the assessment and collection of general taxes stand upon a somewhat different footing, and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary. Due process of law was well defined by Mr. Justice Field in *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663, in the following words: "It is sufficient to observe here that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

It was said in *Witherspoon* v. *Duncan*, 4 Wall. 210, 18 L. ed. 339, that the states, as a general rule, had the right to determine the manner of levying and collecting taxes upon private property, and could declare a tract of land chargeable with taxes, irrespective of its ownership, or in whose name it was assessed or advertised; and that an erroneous assessment did not vitiate the sale. In *McMillen* v. *Anderson*, 95 U. S. 37, 24 L. ed. 335, it was held that due process of law did not require that a person should have an opportunity to be present when the tax was assessed against him, or that the tax should be collected by suit; and in *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658, that the general system of procedure for the levy and collection of taxes, established in this country, is, within the meaning of the Constitution, due process of law. In *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 239, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533, 535, *it was held that[59] the process of taxation did not require the same kind of notice as is required in a suit at law, or even in proceedings for taking private property under the power of eminent domain. "It involves no violation of due process of law when it is executed according to customary forms and established usages, or in subordination to the principles which underlie them."

The main objection to § 25, above quoted, seems to be that it makes the deed conclusive evidence of the regularity of all proceedings not appearing of record, and hence that it is obnoxious to the ruling of this court in *Marx* v. *Hanthorn*, 148 U. S. 172, 37 L. ed. 410, 13 Sup. Ct. Rep. 508, in which we held that, as the legislature could not deprive one of his property by making his adversary's claim to it conclusive of its own validity, it could not make a tax deed conclusive evidence of the holder's title to land.

But, conceding this to be so, there is another section proper to be considered in this connection, and that is § 29, which reads as follows:

"29. In all cases in which a question shall arise as to any such sale or deed, or the effect thereof, such deed shall be prima facie evidence against the owner or owners, legal or equitable, of the real estate at the time it was sold, his or their heirs and assigns, . . . that the person named in the deed as clerk of the county court was such, that the sheriff or other officer who made the sale was such sheriff or officer as stated in such deed, *that the material facts therein recited are true*, and that such estate as is mentioned in the 25th section of this chapter vested in the grantee in the deed."

Assuming the common-law rule to be, as stated by the elementary writers upon taxation, that the purchaser at a tax sale is bound to take upon himself the burden of showing the regularity of all proceedings prior thereto, it is entirely clear that statutes declaring the tax deed to be prima facie evidence, not only of regularity in the sale, but of all prior proceedings and of title in the purchaser, are valid, since the only effect of such statutes is to change the burden of proof, which rested at common law upon the purchaser, and cast it upon the party who contests the sale. Indeed, the validity of these acts was *expressly af-[60] firmed by this court in *Pillow* v. *Roberts*, 13 How. 472, 476, 14 L. ed. 228, 230, and

*Williams* v. *Kirkland*, 13 Wall. 306, 20 L. ed. 633.

Even if the provisions of § 25, making irregularities of a sale immaterial, were invalid, it would still result that under § 29 the facts recited in the deed would be presumed to be true, and the burden be thrown upon the landowner of disproving them. This burden the plaintiff has not assumed, but he is content to rely, and stake his whole case, upon the fact that the return of the sheriff did not show a compliance with the procedure marked out by the statute. Even if it were admitted that due process of law required the observance of all the steps prescribed by this statute, it does not demand that they shall be made matter of record, much less that they shall be made matter of a particular record, such, for instance, as the return of the sheriff of the sale of the lands. Under the 14th Amendment the legislature is bound to provide a method for the assessment and collection of taxes that shall not be inconsistent with natural justice; but it is not bound to provide that the particular steps of a procedure for the collection of such taxes shall be proved by written evidence; and it may properly impose upon the taxpayer the burden of showing that in a particular case the statutory method was not observed. The fact that the return of the sheriff does not recite the various steps of the procedure, when the statute does not contemplate that it shall do so, is no evidence whatever that they were not followed to the letter. If the plaintiff had alleged that in the proceedings for the sale of these lands the sheriff had failed to comply with the law, and the defendant had pleaded that by the curative section (25) irregularities not appearing of record would not vitiate the deed, the constitutionality of that section would properly be raised; but the plaintiff in this case was content to put his bill upon the ground that the record, namely, the sheriff's return of sale, did not set forth that the procedure prescribed by statute, preceding and accompanying the sale, had been followed. This is an effort to test the constitutionality of the law, without showing that the plaintiff had been injured by its application, and, in this particular, the case falls within our ruling in *Tyler* v. *Registration Court Judges*, 179 U. S. 405, 45 L. ed. [61]252, 21 Sup. Ct. Rep. 206, *wherein we held that the plaintiff was bound to show he had personally suffered an injury before he could institute a bill for relief. In short, the case made by the plaintiff is purely academic. For aught that appears, the proceedings may have been perfectly regular, and his bill rests solely upon the proposition that there may have been irregularities in the sheriff's sale, and that, if there were, the statute validating the deed, notwithstanding such irregularities, is unconstitutional and deprives him of his property without due process of law. This proposition contains its own answer.

The exact case, then, made by the bill, is this: The plaintiff seeks to avoid a sale made twelve years before by an allegation that the record, namely, the sheriff's return of the sale, does not show a compliance with the statute in certain particulars, without also averring that in fact there was a failure to perform some step required by law. To hold a sale invalid upon these allegations might result in upsetting every sale for taxes made in West Virginia for the past twenty years.

We are of the opinion that no case is made by the bill, that *the judgment of the Circuit Court is correct, and it is therefore affirmed.*

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FRED A. BAKER, *Plff. in Err.*,
*v.*
STEPHEN BALDWIN.

(See S. C. Reporter's ed. 61-63.)

*Error to state court—decision sustaining validity of Federal statute.*

The judgment of a state court sustaining the validity of the act of Congress of February 28, 1878 (20 Stat. at L. 25, chap. 20), making the silver dollar of 412.5 grains troy of standard silver a full legal tender, cannot be reviewed in the Supreme Court of the United States, since that court has jurisdiction, under U. S. Rev. Stat. § 709, to review the judgment of a state court upon the validity of a Federal statute, only when against its validity.

[No. 4.]

*Submitted October 14, 1902. Decided November 3, 1902.*

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a decree of the Circuit Court for Oakland County which granted the relief sought by a bill to compel the release of a mortgage. *Dismissed.*

See same case below, 121 Mich. 259, 80 N. W. 36.

The facts are stated in the opinion.

*Messrs.* **Albert B. Hall** and **Fred A. Baker** submitted the cause for plaintiff in error.

*Mr.* **Timothy E. Tarsney** submitted the cause for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a bill filed by Stephen Baldwin in the circuit court for the county of Oakland, Michigan, against Fred A. Baker, to compel the release of a mortgage given to secure payment of a promissory note for $330, dated January 12, 1894, and payable in three years thereafter.

Baldwin had purchased the land subject

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

to the mortgage, which had been assigned to Baker, and tendered the amount due thereon in silver dollars coined after 1878. This tender Baker declined to accept on the ground that the legal tender provisions of the act of Congress of February 28, 1878, entitled "An Act to Authorize the Coinage of the Standard Silver Dollar, and to Restore its Legal Tender Character" (20 Stat. at L. 25, chap. 20), were unconstitutional, and refused to discharge the mortgage as demanded by Baldwin.

The circuit court for Oakland county entered a decree in accordance with the prayer of the bill, and Baker carried the cause by appeal to the supreme court of Michigan, which affirmed the decree. *Baldwin* v. *Baker*, 121 Mich. 259, 80 N. W. 36. This writ of error was then allowed.

The supreme court of Michigan said: "The sole question presented is whether the act in question, making the silver dollar of 412.5 grains troy of standard silver a full legal tender for all debts and dues, public and private, is constitutional;" and held that it was. That decision is assigned for error, but it was not a decision against the validity of the statute, and, on the contrary, sustained its validity.

[63] *As our jurisdiction over the judgments and decrees of state courts in suits in which the validity of statutes of the United States is drawn in question can only be exercised, under § 709 of the Revised Statutes, when the decision is against their validity, the writ of error cannot be maintained. *Missouri* v. *Andriano*, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385; *Rae* v. *Homestead Loan & Guaranty Co.* 176 U. S. 121, 44 L. ed. 398, 20 Sup. Ct. Rep. 341.

*Writ of error dismissed.*

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KANSAS CITY SUBURBAN BELT RAILWAY COMPANY, *Plff. in Err.*,

*v.*

ANDREW HERMAN, a Minor, by His Next Friend, Martin Herman, and Union Terminal Railway Company.

(See S. C. Reporter's ed. 63-71.)

*Removal of causes—separable controversy—fraudulent joinder.*

A second application for removal to a Federal court raising the issue of fraudulent joinder of defendants, when made after a ruling sustaining, in favor of one of two defendants, a demurrer to the evidence, cannot be regarded as erroneously denied by a state court, where the evidence demurred to is not made part of the record, and this issue was first raised on the second application, without stating when the petitioner first learned of the fraud, and the averments of fraud were specifically denied, and, so far as the record discloses, the petitioner, who had the affirmative of the issue, failed to make out its case.

[No. 321.]

*Submitted October 20, 1902. Decided November 3, 1902.*

IN ERROR to the Supreme Court of the State of Kansas to review a judgment affirming a judgment of the Kansas Court of Appeals which had affirmed a judgment of the Court of Common Pleas of Wyandotte County in favor of plaintiff in a suit to recover damages for personal injuries.

On motion to dismiss or affirm. *Affirmed.*

See same case below, 68 Pac. 46.

Statement by Mr. Chief Justice **Fuller:**

This was an action brought by Andrew Herman, a minor, by his next friend, in the court of common pleas of Wyandotte county, Kansas, September 18, 1897, against the Union *Terminal Railway Company, a cor- [64] poration of Kansas, and the Kansas City Suburban Belt Railway Company, a corporation of Missouri, to recover damages for injuries inflicted through their joint or concurrent negligence.

The belt railway company, October 18, 1897, filed a verified petition and bond for removal, in proper form, on the ground of a separable controversy; which petition alleged the controversy between plaintiff and petitioner to be distinct and separable from that between plaintiff and the Union Terminal Railway Company, on these grounds:

"1. Defendant the Union Terminal Railway Company owns, repairs, and maintains the railroad mentioned in plaintiff's petition. Your petitioner has no interest therein, except that it has leased same and pays certain yearly rental for the use of said tracks. All of the locomotives, engines, and cars running over said railroad are the property of your petitioner, or subject to its control. Defendant terminal company has no control over the operation of trains, and has no employees in train service. Defendant the Union Terminal Railway Company is responsible for the condition of the track, and your petitioner, and none other, for the acts and doings of all persons operating trains.

"2. The plaintiff herein has declared upon two distinct causes of action: First, for maintaining a defective switch; and, second, for negligent operation of a train of cars; the first of which, if true, is negligence chargeable against defendant the Union Terminal Railway Company, and the second, if true, is negligence chargeable against your petitioner.

"3. The train of cars mentioned in the petition was operated by your petitioner as averred. All of the parties in charge thereof were in your petitioner's employ, and none other.

"4. By reason of the foregoing, your petitioner says that whatever cause of action

NOTE.—*As to removal of causes in cases of separable controversy*—see notes to Robbins v. Ellenbogen, 18 C. C. A. 86; Mecke v. Valleytown Mineral Co. 35 C. C. A. 155; Sloane v. Anderson, 29 L. ed. U. S. 899; and Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A. 38 L. ed. U. S. 195.

plaintiff has for negligent operation of said railroad train lies against your petitioner exclusively."

The application for removal was heard February 5, 1898, and, upon argument, denied. The belt company thereupon filed a transcript of the record in the circuit court of the United States for the district of [65]Kansas, and plaintiff made a *motion to remand, which was sustained by the circuit court and the cause remanded to the state court "on the —— day of May, 1898." Each of the two railroad companies defendant then filed its separate demurrer May 28, 1898, assigning as causes misjoinder of parties, and that plaintiff had not stated a cause of action, or facts sufficient to constitute a cause of action, against it. These demurrers were severally overruled, and the defendants severally answered. The cause came on for trial October 18, 1898, and on October 20, at the close of the evidence for plaintiff, each company filed its separate demurrer to the evidence on the ground that the same was not sufficient to establish a cause of action against it. The court sustained the demurrer of the terminal company, the Kansas corporation, and entered judgment in its favor, to which ruling of the court plaintiff at the time excepted; and the court overruled the demurrer of the belt company, the Missouri corporation, to which ruling the belt company excepted. Thereupon, the belt company filed a second verified petition for removal, which, after rehearsing the prior proceedings, thus continued:

"And the defendant further says that no evidence was offered or introduced by plaintiff, or attempt made, to show a cause of action against said Union Terminal Railway Company; that said Union Terminal Railway Company was joined with this defendant fraudulently, and for the sole purpose of preventing a removal of this cause to the circuit court of the United States, and with no purpose or intent of attempting to show any cause of action against it.

"This defendant now here shows to the court that there is a separable controversy, and that the plaintiff's cause of action exists against the defendant alone, and in nowise against the said defendant the Union Terminal Railway Company. That no cause of action ever existed against the defendant the Union Terminal Railway Company, as plaintiff at all times well knew."

In response to this petition plaintiff filed, without objection, an affidavit which stated, among other things, that it was not true "that plaintiff joined the Union Terminal [66]Railway Company *as defendant therein fraudulently, or for the purpose of giving this court jurisdiction of the petitioner, but, on the contrary, plaintiff avers that said action was brought in good faith against both defendants as joint tortfeasors, and that plaintiff believed in good faith that he has a joint cause of action against both defendants, and had subpœnas issued for witnesses to prove directly the responsibilities of the Union Terminal Railway Company for the injuries sustained by plaintiff; but that, on account of the removal of a witness from the state, plaintiff was, at the last moment, unable to obtain certain testimony which, if introduced, would have tended to prove the joint liability of said defendants. That plaintiff has excepted to the ruling of the court sustaining a demurrer to the evidence on the part of the Union Terminal Railway Company in the trial of this case, for the purpose of preserving his rights in this action against both of said defendants jointly." And it was further stated that counsel had relied on the production, on notice which had been given, of "writings showing the relations existing between the two defendant companies in the operation and maintenance of their lines of railroad where the injuries were received," and on an agreement with counsel for both of the defendants to admit the facts as to the relations between said companies, which, when it was too late to adduce other testimony, was not fulfilled.

The application for removal was overruled, and the belt company excepted, but took no bill of exceptions embodying the evidence to which the demurrers had been directed. The trial then proceeded, and resulted in a disagreement of the jury.

Plaintiff subsequently filed an amended petition reducing the damages claimed to less than $2,000, and the cause was again tried, and resulted in a verdict and judgment in favor of plaintiff for $1,500. The cause was carried to the Kansas court of appeals and the judgment affirmed, and thence to the supreme court of Kansas, with like result. *Kansas City Suburban Belt R. Co.* v. *Herman*, 68 Pac. 46.

A writ of error from this court was then allowed by the chief justice of Kansas, and citation issued to and acknowledged *on be-[67] half of Herman and the Union Terminal Railway Company. The case was submitted on motions to dismiss or affirm.

*Messrs.* **Gardiner Lathrop, Thomas R. Morrow,** and **Samuel W. Moore** submitted the cause for plaintiff in error. *Mr. John M. Fox* was with them on the brief.

The railway company was entitled to remove this suit from a state to the Federal court after plaintiff had rested his case, having failed to offer any evidence whatever against the resident defendant, and after the court had sustained the demurrer of that company and rendered final judgment in its favor and against the plaintiff. The state court refused the removal. Under these circumstances, this court has jurisdiction to determine whether there was error on the part of the state court in retaining the case.

*Missouri, K. & T. R. Co.* v. *Missouri R. & Warehouse Comrs.* 183 U. S. 53, *sub nom. Missouri, K. & T. R. Co.* v. *Hickman*, 46 L. ed. 78, 22 Sup. Ct. Rep. 18; *Removal Cases*, 100 U. S. 457, 25 L. ed. 593; *Stone* v. *South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

An application to remove may be made when the case first becomes removable, even though made during the trial, if the plaintiff increases the *ad damnum* so as to bring the case within the jurisdiction of the Federal court, or if the plaintiff voluntarily dismisses the action as to the resident defendant, leaving a controversy between citizens of different states.

*Powers* v. *Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Northern P. R. Co.* v. *Austin*, 135 U. S. 315, 34 L. ed. 218, 10 Sup. Ct. Rep. 758.

The court should be astute not to permit devices to become successful which are used for the very purpose of destroying the right of removal.

*Arapahoe County* v. *Kansas P. R. Co.* 4 Dill. 277, Fed. Cas. No. 502.

It is not important that the plaintiff afterwards reduced his demand to an amount below the jurisdiction of the Federal court, or that the state court retained the case and proceeded to trial, and that the plaintiff in error participated therein. These events, occurring after the application for removal, do not affect the question of jurisdiction.

*Powers* v. *Chesapeake & O. R. Co.* 169 U. S. 102, 42 L. ed. 676, 18 Sup. Ct. Rep. 264; Black's Dillon, Removal of Causes, § 192.

As, under the practice of this court, the motion cannot be passed upon without referring to the transcript, it should be denied without prejudice, or continued until this cause is heard in its regular assignment.

*Callan* v. *Bransford*, 139 U. S. 197, 35 L. ed. 144, 11 Sup. Ct. Rep. 519.

*Mr.* **Silas Porter** submitted the cause for defendant in error. *Mr. W. B. Sutton* was with him on the brief:

The ruling of the state court upon the demurrer to plaintiff's evidence, being *in invitum*, could not make the case removable during the progress of the trial.

*Whitcomb* v. *Smithson*, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248; *Chesapeake & O. R. Co.* v. *Dixon*, 179 U. S. 131, 45 L. ed. 121, 21 Sup. Ct. Rep. 67.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The question is whether the state court erred in denying the second application for removal, and in view of our previous rulings in respect of such applications we think there was color for the motion to dismiss. And reference to two recent decisions of this court will indicate the reasons for our conclusion that the motion to affirm must be sustained.

In *Powers* v. *Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264, the railroad company filed its petition for removal on the grounds of separable controversy, and that its codefendants were fraudulently and improperly joined in order to defeat the company's right of removal. The transcript of the record of the state court was filed in the circuit court of the United States, and a motion to remand was sustained for want of separable controversy. Thereafter, when the case was called for trial in the state court, plaintiff discontinued his action against the codefendants, and the company filed a second petition for removal, which was denied. The company then again filed a transcript of the record of the proceedings in the circuit court, and plaintiff again moved to remand, and the circuit court, being of opinion that plaintiff had fraudulently joined the codefendants in order to defeat the removal, and was estopped to deny that the second petition for removal was filed in time, denied the motion to remand. 65 Fed. 129. Final judgment was afterwards rendered in the company's favor, and a *writ [68] of error was sued out from this court on the sole ground that the cause had not been properly removed into the circuit court. The judgment was affirmed, and it was held that "when this plaintiff discontinued his action as against the individual defendants the case for the first time became such a one as, by the express terms of the statute, the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time." But we did not pass upon the questions of fraudulent joinder and estoppel, because the application was seasonably made and stated sufficient ground for removal apart from fraud.

In *Whitcomb* v. *Smithson*, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248, the action had been brought by Smithson, in a Minnesota court, against the Chicago Great Western Railway Company and H. F. Whitcomb and Howard Morris, receivers of the Wisconsin Central Railroad Company, to recover for personal injuries inflicted, while he was serving the Chicago company as a locomotive fireman, in the collision of the locomotive on which he was at work and another locomotive operated by Whitcomb and Morris as receivers. The Chicago company answered the complaint, and the receivers filed a petition for the removal of the cause into the circuit court of the United States for Minnesota, alleging diverse citizenship; that they were officers of the United States court; that the controversy was separable, and that the railway company was fraudulently made a party to prevent removal. Plaintiff answered the petition, and asserted that the company was made party defendant in good faith, and not for that purpose. An order of removal was entered, and the cause sent to the circuit court, which thereafter remanded it to the state court. Trial was had, and, after the testimony was closed, counsel for the Chicago company moved that the jury be instructed to return a verdict in behalf of that defendant, which motion was granted. The receivers then presented a petition for removal, but the court denied the application, and exception was taken. The court thereupon instructed the jury to return a verdict in favor of the Chicago company, which was done, and the cause went to the jury, which returned a verdict against *the [69] receivers and assessed plaintiff's damages. Judgment was entered on the verdict, and

subsequently affirmed by the supreme court of Minnesota on appeal, and a writ of error was sued out from this court. Motions to dismiss or affirm were submitted, and we held that there was color for the motion to dismiss, and affirmed the judgment. We there said: "The contention here is that when the trial court determined to direct a verdict in favor of the Chicago Great Western Railway Company the result was that the case stood as if the receivers had been sole defendants, and that they then acquired a right of removal, which was not concluded by the previous action of the circuit court. This might have been so if, when the cause was called for trial in the state court, plaintiff had discontinued his action against the railway company, and thereby elected to prosecute it against the receivers solely, instead of prosecuting it on the joint cause of action set up in the complaint against all the defendants. *Powers* v. *Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. But that is not this case. The joint liability was insisted on here to the close of the trial, and the nonliability of the railway company was ruled *in invitum*."

It was pointed out that the ruling of the trial court "was a ruling on the merits, and not a ruling on the question of jurisdiction. It was adverse to plaintiff, and without his assent, and the trial court rightly held that it did not operate to make the cause then removable, and thereby to enable the other defendants to prevent plaintiff from taking a verdict against them. The right to remove was not contingent on the aspect the case may have assumed on the facts developed on the merits of the issues tried." We held also that the judgment of the circuit court in remanding the cause, when removed on the first application, covered the question of fact as to good faith in the joinder, and added that, "assuming, without deciding, that that contention could have been properly renewed under the circumstances, it is sufficient to say that the record before us does not sustain it."

It will be perceived that, in *Powers* v. *Chesapeake & O. R. Co.*, two applications for removal were made; they were severally denied, and the record was filed in the cir-
[70] cuit court of the *United States in each instance. Remand was granted on the first removal, and denied as to the second. Plaintiff voluntarily discontinued his action against the company's codefendants before trial, thereby leaving the case pending between citizens of different states, and no necessity to dispose of the issue as to fraudulent joinder arose.

In *Smithson* v. *Whitcomb* two applications for removal were made, and they were severally denied, but the record was filed in the circuit court of the United States only on denial of the first application, and the case was only once remanded. Plaintiff did not discontinue his action against either of the defendants, and went to trial against both, and the trial court directed a verdict in favor of one of them. The ruling was on the merits and *in invitum*.

In the case at bar, two applications for removal were made, and they were severally denied, but the record was filed in the circuit court of the United States only on the denial of the first application, and the case was only once remanded. Plaintiff did not discontinue as to either of the defendants, and went to trial against both, and the trial court sustained, in favor of one of them, a demurrer to the evidence. Here again the ruling was on the merits and *in invitum*.

The first petition in terms raised no issue of fraudulent joinder, but the second petition did. Was that issue seasonably raised, and, if so, ought the case to have been removed? The second petition did not state when petitioner was first informed of the alleged fraud, but left it to inference that it was not until after plaintiff had introduced his evidence, notwithstanding the averments in the first petition.

But, apart from this, the averments of fraud were specifically denied, and, so far as this record discloses, the petitioner, who had the affirmative of the issue, failed to make out its case. *Plymouth Consol. Gold Min. Co.* v. *Amador & S. Canal Co.* 118 U. S. 270, 30 L. ed. 233, 6 Sup. Ct. Rep. 1034.

Doubtless the general rule is that issues of fact raised on petitions for removal should be tried in the circuit court of the United States, but petitioner did not file the record in the circuit court, and, as the issue was correctly disposed of, it would *be [71] absurd to send the case back to be removed for the purpose of being remanded, and we are obliged to deal with the record as it is. Nor was the evidence introduced on plaintiff's behalf, and demurred to, made part of the record, and the bare fact that the trial court held it insufficient to justify a verdict against the terminal company was not conclusive of bad faith. The trial court may have erred in its ruling, or there may have been evidence which, though insufficient to sustain a verdict, would have shown that plaintiff had reasonable ground for a bona fide belief in the liability of both defendants. In these circumstances, the case comes within *Smithson* v. *Whitcomb*, and *the judgment must be affirmed.*

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EDWARD S. DREYER, *Plff. in Err.*,
*v.*
PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 71-87.)

*Constitutional law—due process of law—failure to swear officers in charge of jury—Illinois indeterminate sentence act—judicial power conferred on nonjudicial officers—criminal law—former jeopardy.*

1. The refusal of a state court to review the question whether the officers in charge of

NOTE.—*As to what constitutes due process of law*—see Kuntz v. Sumption (Ind.) 2 L. R. A. 655, and note; *Re* Gannon (R. I.) 5 L. R. A. 359, and note; Ulman v. Baltimore (Md.) 11 L. R. A. 224, and note; and Gilman v. Tucker

the jury on a trial for a felony were sworn, as prescribed by statute, when the jury retired, because such question was first raised on a motion for a new trial, infringes no right secured to the accused by the 14th Amendment to the Federal Constitution, even if the swearing of such officers when the jury retire is essential to the due process of law prescribed by that amendment; but such a ruling is simply an adjudication of a question of criminal practice and local law.

2. The right to the due process of law guaranteed by the 14th Amendment to the Federal Constitution is not infringed by the decision of a state court sustaining the validity of the Illinois indeterminate sentence act of 1899, although such statute may confer judicial powers upon nonjudicial officers, and, in effect, invest them with the pardoning power of the Executive.

3. A plea of former jeopardy cannot be based upon the discharge of the jury for their inability to agree on a verdict after considering the cause from four o'clock in the afternoon until half past nine in the morning of the succeeding day.

[No. 37.]

*Argued and Submitted April 18, 1902. Decided November 10, 1902.*

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Criminal Court of Cook County convicting a former treasurer of the West Chicago park commissioners of the offense of having failed to turn over to his successor in office property that came into his hands as such treasurer. *Affirmed.*

See same case below, 188 Ill. 40, 58 N. E. 620, 59 N. E. 424.

Statement by Mr. Justice **Harlan:**

[73] *By an indictment returned in the criminal court of Cook county, Illinois, on the 4th day of February, 1899, the plaintiff in error, Dreyer, was charged with the offense of having failed to turn over to his successor in office, as treasurer of the West Chicago park commissioners, revenues, bonds, funds, warrants, and personal property that came to his hands as such treasurer, of the value of $316,013.40,—said commissioners constituting a board of public park commissioners appointed by the governor and confirmed by the senate of Illinois, and, as such, having the supervision of the public parks and boulevards in the town of West Chicago, and authority under the law to collect and disburse moneys, bonds, etc., for their maintenance.

The indictment was based on § 215 of the Criminal Code of Illinois, which is as follows:

"If any state, county, town, municipal, or other officer or person who now is or hereafter may be authorized by law to collect, receive, safely keep, or disburse any money, revenue, bonds, mortgages, coupons, bank bills, notes, warrants, or dues, or other funds or securities belonging to the state or any county, township, incorporated city, town, or village, or any state institution, or any canal, turnpike, railroad, school, or college fund, or the fund of any public improvement that now is or may hereafter be authorized by law to be made, or any other fund now in being or that may hereafter be established by law for public purposes, or belonging to any insurance or other company or person required or authorized by law to be placed in the keeping of any such officer or person, shall fail or refuse to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over, or his agent or attorney, authorized in writing, he shall be imprisoned in the penitentiary not less than one *nor more than ten years: Provided,* Such demand need not be made when, from the absence or fault of the offender, the same cannot conveniently be made: *And provided,* That no person shall be committed to the penitentiary under this section unless the money not paid over shall amount to $100, or if it appear that such failure or refusal is occasioned by unavoidable loss or accident. Every person convicted *under the provisions of this section shall forever thereafter be ineligible and disqualified from holding any office of honor or profit in this state." Hurd's Rev. Stat. 1901, § 215, p. 630. [74

A trial was commenced on the 29th day of August, 1899, and a jury was impaneled and evidence heard. The jury, not having agreed upon a verdict, were discharged.

A second trial was begun on the 19th day of February, 1900. The defendant filed a plea of once in jeopardy, which in substance averred that it was not true, as recited in the order of court at the previous trial, that the jury were unable to agree upon a verdict; also, that the discharge of the jury was without the defendant's assent, was against his objections made at the time, and was without any moral or physical necessity justifying such a course on the part of the trial court.

On motion of the state the plea of former jeopardy was stricken from the files, the defendant at the time excepting to the action of the court.

There was a second trial, which resulted in the defendant being found "guilty of failure to pay over money to his successor in office, in manner and form as charged in the indictment," the jury stating in the verdict the amount not paid over to be $316,000, and imposing the punishment of confinement in the penitentiary.

The defendant, upon written grounds filed, moved for a new trial, and also moved in arrest of judgment. Both motions were

(N. Y.) 13 L. R. A. 304, and note. And see notes to People v. O'Brien (N. Y.) 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina *ex rel.* Caldwell, 42 L. ed U. S. 865.

*On former jeopardy*—see notes to Com. v. Fitzpatrick (Pa.) 1 L. R. A. 451; Altenburg v. Com. (Pa.) 4 L. R. A. 543; *Ex parte* Lange, 21 L. ed. U. S. 872; and United States v. Perez, 6 L. ed. U. S. 165.

overruled, and it was ordered and adjudged that the defendant be sentenced to the penitentiary "for the crime of failure to pay over money to his successor in office, whereof he stands convicted."

The judgment of the trial court having been affirmed by the supreme court of Illinois, the case is here upon writ of error allowed by the chief justice of that court.

*Mr.* **Alfred S. Austrian** argued the cause, and, with *Messrs. T. A. Moran* and *Levy Mayer*, filed a brief for plaintiff in error.

*Mr. Levy Mayer* filed a separate brief for plaintiff in error:

The omission to swear the bailiffs in the manner prescribed by the common law and the statutes of the state of Illinois before the jury retired to consider of their verdict was reversible error.

*Jackson* v. *People*, 36 Ill. App. 88; *McIntyre* v. *People*, 38 Ill. 514; *Lewis* v. *People*, 44 Ill. 452; *Sanders* v. *People*, 124 Ill. 218, 16 N. E. 81; *Farley* v. *People*, 138 Ill. 97, 27 N. E. 927; *State* v. *McCormick*, 57 Kan. 440, 46 Pac. 777; *Buxton* v. *State*, 89 Tenn. 216, 14 S. W. 480.

This requirement is part of "due process of law."

*Den ex dem. Murray* v. *Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Thompson* v. *Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

Under the trial by jury at common law the same procedure with reference to the swearing of the bailiffs or officers to take charge of the jury was in force as is prescribed by the statute of the state of Illinois.

1 Chitty, Crim. Law, *632; Dalt. C. 185; 2 Hale, P. C. 296; Deck. Sess. 223.

A jury sworn and charged in case of life or member cannot be discharged by the court or any other, but they ought to give a verdict.

Co. Litt. p. 227, ¶ F.

When the evidence on both sides is closed, and, indeed, when any evidence hath been given, the jury cannot be discharged, unless in cases of evident necessity, till they have given in their verdict.

2 Sharswood's Bl. Com. bk. 4, p. 359.

The right of trial by jury, guaranteed by the Illinois Bill of Rights "as heretofore enjoyed," is the right of trial by jury as it existed in England under the common law.

*George* v. *People*, 167 Ill. 447, 47 N. E. 741.

This court has committed itself to the same general doctrine.

*Den ex dem. Murray* v. *Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Thompson* v. *Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

The court has no power to discharge a jury because they cannot agree upon a verdict, unless there be some physical or legal necessity for such discharge.

*Mahala* v. *State*, 10 Yerg. 532, 31 Am. Dec. 591; *McCauley* v. *State*, 26 Ala. 135; *Ex parte Vincent*, 43 Ala. 402; *Williams* v. *Com.* 2 Gratt. 570, 44 Am. Dec. 403; *State* v. *Ephraim*, 19 N. C. (2 Dev. & B. L.) 162; *State* v. *Alman*, 64 N. C. 364; *Whitten* v. *State*, 61 Miss. 717; *Helm* v. *State*, 66 Miss. 537, 6 So. 322; *Crookham* v. *State*, 5 W. Va. 510; *Conklin* v. *State*, 25 Neb. 784, 41 N. W. 788; *State* v. *Shuchardt*, 18 Neb. 454, 25 N. W. 722; *Com.* v. *Fitzpatrick*, 121 Pa. 109, 1 L. R. A. 451, 15 Atl. 466; *Hilands* v. *Com.* 111 Pa. 1, 56 Am. Rep. 235, 2 Atl. 70; *Com.* v. *Cook*, 6 Serg. & R. 577, 9 Am. Dec. 465; *Com.* v. *Clue*, 3 Rawle, 498; *O'Brian* v. *Com.* 9 Bush, 333; *Robinson* v. *Com.* 88 Ky. 386, 11 S. W. 210; *Ned* v. *State*, 7 Port. (Ala.) 187; *Powell* v. *State*, 17 Tex. App. 345; *Rudder* v. *State*, 29 Tex. App. 262, 15 S. W. 717; *State* v. *Leunig*, 42 Ind. 541.

Any law that grants judicial power to any person, persons, or body, other than the parties designated in the Constitution, is unconstitutional.

*People ex rel. Kern* v. *Chase*, 165 Ill. 527, 36 L. R. A. 105, 46 N. E. 454; *Hoagland* v. *Creed*, 81 Ill. 506; *People* v. *Cummings*, 88 Mich. 249, 14 L. R. A. 285, 50 N. W. 310.

The fixing of the period of the sentence and commitment of the prisoner is not a ministerial, but a judicial, act.

12 Am. & Eng. Enc. Law, p. 59. To the same effect see 3 Bl. Com. p. 395; *Blood* v. *Bates*, 31 Vt. 150; Co. Litt. 39a; *Davidson* v. *Smith*, 1 Biss. 351, Fed. Cas. No. 3,608; *Zeigler* v. *Vance*, 3 Iowa, 530; 21 Am. & Eng. Enc. Law, p. 1066; *Com.* v. *Lockwood*, 109 Mass. 323, 12 Am. Rep. 699; *Arcia* v. *State*, 26 Tex. App. 193, 9 S. W. 685; *Com. ex rel. Johnson* v. *Halloway*, 42 Pa. 446, 82 Am. Dec. 526; *People* v. *Allen*, 19 Chicago Legal News, 176.

*Messrs.* **H. J. Hamlin** and **Charles S. Deneen** submitted the cause for defendants in error. *Mr. A. C. Barnes* was with them on the brief:

The discharge of a jury without the consent of the defendant, because, after mature deliberation, they are unable to agree upon a verdict, is not an acquittal, and does not entitle the defendant to immunity from further prosecution. Whether they can agree is a question for the sound discretion of the court.

*United States* v. *Perez*, 9 Wheat. 579, 6 L. ed. 165; *Barrett* v. *State*, 35 Ala. 406; *Ex parte McLaughlin*, 41 Cal. 212, 10 Am. Rep. 272; *State* v. *Woodruff*, 2 Day, 504, 2 Am. Dec. 122; *State* v. *Updike*, 4 Harr. (Del.) 581; *Lester* v. *State*, 33 Ga. 329; *Williford* v. *State*, 23 Ga. 1; *Logg* v. *People*, 8 Ill. App. 106; *Dreyer* v. *People*, 188 Ill. 47, 58 L. R. A. 620, 58 N. E. 620, 59 N. E. 424; *State* v. *Nelson*, 26 Ind. 366; *State* v. *Walker*, 26 Ind. 346; *Shaffer* v. *State*, 27 Ind. 131; *State* v. *Wilson*, 50 Ind. 487, 19 Am. Rep. 719; *Hoffman* v. *State*, 20 Md. 425; *Com.* v. *Purchase*, 2 Pick. 521, 13 Am. Dec. 452; *Com.* v. *Bowden*, 9 Mass. 494; *People* v. *Schoeneth*, 44 Mich. 489, 7 N. W. 70; *People* v. *Harding*, 53 Mich. 487, 19 N. W. 155; *Price* v. *State*, 36 Miss. 533, 72 Am. Dec. 195; *Whitten* v. *State*, 61 Miss. 723;

*People* v. *Green*, 13 Wend. 57; *People* v. *Goodwin*, 18 Johns. 200, 9 Am. Dec. 203; *State* v. *Jefferson*, 66 N. C. 309; *Dobbins* v. *State*, 14 Ohio St. 493; *State* v. *Nelson*, 19 R. I. 467, 33 L. R. A. 560, 34 Atl. 990; *State* v. *M'Kee*, 1 Bail. L. 651, 21 Am. Dec. 499; *Smith* v. *State*, 22 Tex. App. 197, 2 S. W. 542; *Moseley* v. *State*, 33 Tex. 671; Proffatt, Jury Trial, §§ 484, 485; 1 Bishop, Crim. Law, 6th ed. § 1033; 1 Archbold, Crim. Pr. & Pl. p. 593; 2 Graham & W. New Trials, p. 118; 11 Am. & Eng. Enc. Law, p. 953, *Jeopardy*.

The indeterminate sentence acts, in providing for an indefinite period of imprisonment between the minimum and maximum term prescribed by statute, subject to powers of parole and discharge by the pardoning power, do not confer judicial power upon the pardon boards or boards of control, and infringe no constitutional rights of the prisoner.

*George* v. *People*, 167 Ill. 447, 47 N. E. 741; *People ex rel. Bradley* v. *Illinois State Reformatory*, 148 Ill. 413, 23 L. R. A. 139, 36 N. E. 76; *Conlon's Case*, 148 Mass. 168, 19 N. E. 164; *Com.* v. *Brown*, 167 Mass. 144, 45 N. E. 1; *Oliver* v. *Oliver*, 169 Mass. 592, 48 N. E. 843; *Com.* v. *Crowley*, 168 Mass. 121, 46 N. E. 415; *Murphy* v. *Com.* 172 Mass. 264, 43 L. R. A. 154, 52 N. E. 505; *Miller* v. *State*, 149 Ind. 607, 40 L. R. A. 109, 49 N. E. 894; *State ex rel. Atty. Gen.* v. *Peters*, 43 Ohio St. 629, 4 N. E. 81.

[75] *Mr. Justice **Harlan**, after stating the facts as above reported, delivered the opinion of the court:

It is contended that the judgment of the supreme court of Illinois, affirming the judgment, in the present case, of the criminal court of Cook county, in that state, denied to the plaintiff in error certain rights secured to him by the Constitution of the United States, particularly by the clause of the 14th Amendment forbidding a state to deprive any person of liberty without due process of law.

The defendant insists that three questions, involving rights secured by the Constitution of the United States, are presented by the assignments of error:

1. The first of those questions, as stated by his counsel, relates to the alleged "omission to swear the bailiffs in the manner prescribed by the common law and the statutes of the state of Illinois before the jury retired to consider of their verdict." This point will be first examined.

The Criminal Code of Illinois provides: "When the jury retire to consider of their verdict, in any criminal case, a constable or other officer shall be sworn or affirmed to attend the jury to some private and convenient place, and to the best of his ability keep them together without meat or drink (water excepted), unless by leave of court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict he will return them into court: *Provided*, In cases of misdemeanor only, if the prosecutor for the People and the person on trial, by himself or counsel, shall agree, which agreement shall be entered upon the minutes of the court, to dispense with the attendance of an officer upon the jury, or that the jury, when they have agreed upon their verdict, may write and seal the same, and after delivering the same to the clerk, may separate, it shall be lawful for the court to carry into effect any such agreement, and receive any such verdict so delivered to the clerk as the *lawful verdict of [76] such jury." Hurd's (Ill.) Rev. Stat. 1901, § 435.

Referring to this section the supreme court, in the present case, said that it was reversible error, in a trial for a felony, to allow the jury to retire for the purpose of considering their verdict without being placed in charge of a sworn officer, as required by the statute,—citing *McIntyre* v. *People*, 38 Ill. 514, 518; *Lewis* v. *People*, 44 Ill. 452, 454; *Sanders* v. *People*, 124 Ill. 218, 16 N. E. 81; and *Farley* v. *People*, 138 Ill. 97, 27 N. E. 927. In *Lewis* v. *People*, just cited, the court observed that the provisions of the above section "show the great care and solicitude of the general assembly to secure to every person a fair and impartial trial; and it is eminently proper, as in many cases the accused is imprisoned and it is not in his power to protect his rights from being prejudiced by undue influences. It should ever be the care of courts of justice to guard human life and liberty against being sacrificed by public prejudice or excitement. The jury should be entirely free from all outside influences from the time they are impaneled until they return their verdict and it is accepted and they discharged, and the legislature have determined that the provisions of this statute are necessary to accomplish the object. It is a provision easily complied with, and one member of the court, at least, has never, in practice, seen it dispensed with, except in cases of misdemeanor. The provisions of the statute are clear, explicit, and peremptory. We know of no power, short of its repeal, to dispense with this requirement."

But the court further said: "The point of controversy in the present case is not, however, whether it is reversible error to fail to comply with the statute, but whether the question is properly raised upon this record. No objection or exception was taken by the defendant, at the time of the retirement of the jury, that the officers in charge of it were not sworn, but the question was raised by him for the first time on his motion for new trial, one of the grounds of that motion being 'that when the jury retired to consider of their verdict in said case, no constable or other officer was sworn or affirmed to attend the jury, in manner and form as provided by the statute of the state of Illinois.' . . . Affidavits made by the bailiffs themselves, *and [77] by an assistant of the prosecuting attorney, who participated in the trial, tend to prove that the oath administered was in the statutory form, but these affidavits also show that the only oath administered to them was

on the 21st day of February, immediately after the impaneling and swearing of the jury. It is shown by the bill of exceptions that the trial was not concluded and the jury finally sent out, until February 28th, so that, even by the proof made on behalf of the people, the only oath taken by the bailiffs was some six days prior to their retirement with the jury, and prior to the introduction of evidence, and the subsequent steps of the trial. This cannot be held to be a compliance with the requirement of the statute that 'when the jury shall retire to consider of their verdict,' etc.; 'a constable or other officer shall be sworn,' etc. To swear the bailiffs immediately upon the jury being sworn, and prior to the introduction of the evidence, the arguments of counsel, and instructions of the court,—six or seven days prior to the retirement of the jury to consider of their verdict,—would be little less than farcical." [188 Ill. 40, 58 N. E. 620, 59 N. E. 424.]

It was, however, held that, under the principles established by former decisions in Illinois, the requirement of the statute could be waived by the accused, and that his failure to object at the time, that the officer having charge of the jury was not sworn when the jury retired, was equivalent to a waiver of compliance with its provisions. And it was adjudged "that the question whether or not, upon the retirement of the jury to consider of its verdict, it was placed in charge of a constable, or other officer, sworn to attend it, as prescribed by statute, is not properly raised by the record [of this case], and therefore [is] not available as error in this court."

It thus appears that while the state court expressly recognized the rights of the accused under the statute, it adjudged that he had not properly raised on the record the question, raised for the first time on motion for a new trial, as to noncompliance with its provisions. But, manifestly, this decision presents no question of a Federal nature. A ruling to the effect that the accused shall be deemed to have waived compliance with the statute if the record does [78] not show that he *objected at the time to the action of the court was an adjudication simply of a question of criminal practice and local law, was not in derogation of the substantial right recognized by the statute, and did not impair the constitutional guaranty that no state shall deprive any person of liberty without due process of law. We cannot perceive that such a decision by the highest court of the state brings the case upon this point within the 14th Amendment, even if it should be assumed that the due process of law prescribed by that amendment required that a jury in a felony case should be placed in charge of an officer especially sworn at the time to attend and keep them together until they returned their verdict or were discharged.

We adjudge that in holding that the record did not sufficiently present for consideration the question now raised, the state court, even if it erred in its decision, did not infringe any right secured to the defendant by the Constitution of the United States.

2. Another question which counsel for the defendant contends is raised by the assignments of error relates to the final judgment of the criminal court of Cook county. It was adjudged by the trial court that the defendant be taken to the penitentiary of the state, at Joliet, and delivered to its warden or keeper, who was required and commanded to "confine him in said penitentiary, in safe and secure custody, from and after the delivery thereof, *until discharged by the state board of pardons as authorized and directed by law, provided such term of imprisonment in said penitentiary shall not exceed the maximum term for the crime for which the said defendant was convicted and sentenced.*"

The judgment was in conformity with a statute of Illinois, approved April 21st, 1899, entitled "An Act to Revise the Law in Relation to the Sentence and Commitment of Persons Convicted of Crime, and Providing for a System of Parole," etc. The statute is sometimes referred to as the indeterminate sentence act of Illinois, and as its validity under the Constitution of the United States is assailed, its provisions must be examined.

That statute provides that every male person over twenty years of age, and every female person over eighteen years of *age, [79] convicted of a felony, or other crime punishable by imprisonment in the penitentiary, except treason, murder, rape, and kidnapping, shall be sentenced to the penitentiary, the court imposing the sentence to fix its limit or duration, the term of such imprisonment not to be less than one year, nor exceeding the maximum term provided by law for the crime of which the prisoner was convicted, making allowance for good time, as provided by law. § 1.

It was made the duty of each board of penitentiary commissioners to adopt such rules concerning prisoners committed to their custody as would prevent them from returning to criminal courses, best secure their self-support, and accomplish their reformation. To that end it provided that, whenever any prisoner was received into the penitentiary the warden should cause to be entered in a register the date of his admission, the name, nativity, nationality, with such other facts as could be ascertained, of parentage, education, occupation, and early social influences, as seemed to indicate the constitutional and acquired defects and tendencies of the prisoner, and, based upon these, an estimate of his then present condition, and the best probable plan of treatment. And the physician of the penitentiary was required to carefully examine each prisoner when received, and enter in a register the name, nationality or race, the weight, stature, and family history of each prisoner; also a statement of the condition of the heart, lungs, and other leading organs, the rate of the pulse and respiration, and the measurement of the chest and abdomen, and any existing disease or deformity, or other disability, acquired or inherited.

Upon the warden's register was to be entered from time to time, minutes of observed improvement or deterioration of character, and notes as to the method and treatment employed; also all alterations affecting the standing or situation of the prisoner, and any subsequent facts or personal history, brought officially to his knowledge, bearing upon the question of the parole or final release of the prisoner; and it was the duty of the warden, or, in his absence, the deputy warden, of each penitentiary to attend each meeting of the board of pardons held at the penitentiary of which he was warden, for the purpose of examin-
[80] ing prisoners as to *their fitness for parole. He shall advise with that board concerning each case, and furnish it with his opinion, in writing, as to the fitness of each prisoner for parole, whose case the board considered. And it was made the duty of every public officer to whom inquiry was addressed by the clerk of the board of pardons concerning any prisoner, to give the board all information possessed or accessible to him, which might throw light upon the question of the fitness of the prisoner to receive the benefits of parole. § 2.

It was made the duty of the judge before whom any prisoner was convicted, and also the state's attorney of the county in which he was convicted, to furnish the board of penitentiary commissioners an official statement of the facts and circumstances constituting the crime whereof the prisoner was convicted, together with all other information accessible to them in regard to the career of the prisoner prior to the time of the committal of the crime of which he was convicted, relative to his habits, associates, disposition, and reputation, and any other facts and circumstances tending to throw any light upon the question as to whether such prisoner was capable of again becoming a law-abiding citizen. § 3.

Other sections of the statute are as follows:

"4. The said board of pardons shall have power to establish rules and regulations under which prisoners in the penitentiary may be allowed to go upon parole outside of the penitentiary building and inclosure: *Provided*, That no prisoner shall be released from either penitentiary on parole until the state board of pardons or the warden of said penitentiary shall have made arrangements, or shall have satisfactory evidence that arrangements have been made, for his honorable and useful employment while upon parole, in some suitable occupation, and also for a proper and suitable home, free from criminal influences, and without expense to the state: *And provided further*, That all prisoners so released upon parole shall, at all times until the receipt of their final discharge, be considered in the legal custody of the warden of the penitentiary from which they were paroled, and shall, during the said time, be considered as remaining under conviction for the crime of which they were
[81] *convicted and sentenced, and subject at any time to be taken back within the inclosure of said penitentiary; and full power to enforce such rules and regulations, and to retake and reimprison any inmate so upon parole, is hereby conferred upon the warden of said penitentiary, whose order or writ, certified by the clerk of said penitentiary, with the seal of the institution attached, and directed to all sheriffs, coroners, constables, police officers, or to any particular person named in said order or writ, shall be sufficient warrant for the officer or other person named therein, to authorize said officer or person to arrest and deliver to the warden of said penitentiary the body of the conditionally released or paroled prisoner named in said writ, and it is hereby made the duty of all sheriffs, coroners, constables, police officers, or other persons named therein, to execute said order or writ the same as any other criminal process. In case any prisoner so conditionally released or paroled shall flee beyond the limit of the state, he may be returned, pursuant to the provisions of the law of this state relating to fugitives from justice. It shall be the duty of the warden, immediately upon the return of any conditionally released or paroled prisoner, to make report of the same to the state board of pardons, giving the reasons for the return of said paroled prisoner: *Provided further*, That the state board of pardons may, in its discretion, permit any prisoner to temporarily and conditionally depart from such penitentiary on parole and go to some county in the state named, and there remain within the limits of the county, and not to depart from the same without written authority from said board, for such length of time as the board may determine; and upon the further condition that such prisoner shall, during the time of his parole, be and continuously remain a law-abiding citizen of industrious and temperate habits, and report to the sheriff of the county on the first day of each month, giving a particular account of his conduct during the month; and it shall be the duty of such sheriff to investigate such report and ascertain what has been the habits and conduct of such prisoner during the time covered by such report, and to transmit such report, upon blanks furnished him by the warden of the penitentiary, to said warden. within five days after the receipt of *such [82] prisoner's report, adding to such report the sheriff's statement as to the truth of the report so made to him by the prisoner. It shall also be the duty of such sheriff to keep secret the fact that such prisoner is a paroled prisoner, and in no case divulge such fact to any person or persons, so long as said prisoner obeys the terms and conditions of his parole.

"5. Upon the granting of a parole to any prisoner the warden shall provide him with suitable clothing, $10 in money, which may be paid him in instalments at the discretion of the warden, and shall procure transportation for him to the place of his employment, or to the county seat of the county to which he is paroled.

"6. It shall be the duty of the warden to

keep in communication, as far as possible, with all prisoners who are on parole from the penitentiary of which he is the warden, also with their employers; and when, in his opinion, any prisoner, who has served not less than six months of his parole acceptably, has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, the warden shall make certificate to that effect to the state board of pardons; and whenever it shall be made to appear to the state board of pardons from the warden's report, or from other sources, that any prisoner has faithfully served the term of his parole, and the board shall be of the opinion that such prisoner can safely be trusted to be at liberty, and that his final release will not be incompatible with the welfare of society, *the state board of pardons shall have the power to cause to be entered of record in its office an order discharging such prisoner for, or on account of, his conviction, which said order, when approved by the governor, shall operate as a complete discharge of such prisoner, in the nature of a release or commutation of his sentence, to take effect immediately upon the delivery of a certified copy thereof to the prisoner; and the clerk of the court in which the prisoner was convicted shall, upon presentation of such certified copy, enter the judgment of such conviction satisfied and released, pursuant to said order.* It is hereby made the duty of [83] the clerk of the board of pardons to *send written notice of the fact to the warden of the penitentiary of the proper district, whenever any prisoner on parole is finally released by said board." Ill. Laws 1899, p. 142.

In this connection we are referred to article 3 of the Constitution of Illinois, dividing the powers of government into three distinct departments,—legislative, executive, judicial,—and providing that "no person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted;" to § 1 of article 6 of the same Constitution, providing that "the judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates, and in such courts as may be created by law in and for cities and incorporated towns;" and to § 13 of article 5, providing that the pardoning power shall be in the governor of the state.

If we do not misapprehend the position of counsel, it is that the indeterminate sentence act of 1899 is inconsistent with the above provisions of the state Constitution, in that it confers judicial powers upon a collection of persons who do not belong to the judicial department, and, in effect, invests them with the pardoning power, committed by the Constitution to the governor of the state.

We will not stop to consider whether the statute is in conflict with the provisions of the state Constitution to which reference is here made. We may, however, in passing, observe that a similar statute, previously enacted, was upheld by the supreme court of Illinois. *George* v. *People*, 167 Ill. 447, 47 N. E. 741. It is only necessary now to say that, even if the statute in question were obnoxious to the objection now urged by plaintiff in error, it would not follow that this court would review a judgment of the highest court of the state, which expressly or by necessary implication sustained it as constitutional. A local statute investing a collection of persons not of the judicial department, with powers that are judicial, and authorizing them to exercise the pardoning power which alone belongs to the governor of the state, presents no question under the Constitution of the *United States. The [84] right to the due process of law prescribed by the 14th Amendment would not be infringed by a local statute of that character. Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state. And its determination one way or the other cannot be an element in the inquiry, whether the due process of law prescribed by the 14th Amendment has been respected by the state or its representatives when dealing with matters involving life or liberty. "When we speak," said Story, "of a separation of the three great departments of government, and maintain that that separation is indispensable to public liberty, we are to understand this maxim in a limited sense. It is not meant to affirm that they must be kept wholly and entirely distinct, and have no common link of connection or dependence, the one upon the other, in the slightest degree. The true meaning is, that the whole power of one of these departments should not be exercised by the same hands which possess the whole power of either of the other departments; and that such exercise of the whole would subvert the principles of a free Constitution." Story, Const. 5th ed. 393. Again: "Indeed, there is not a single constitution of any state in the Union, which does not practically embrace some acknowledgment of the maxim, and at the same time some admixture of powers constituting an exception to it." Id. 395.

The objection that the act of 1899 confers upon executive or ministerial officers powers of a judicial nature does not, in our judgment, present any question under the due process clause of the 14th Amendment.

3. The remaining contention of the defendant is that, under the circumstances disclosed by the record, the second trial of the case placed him twice in jeopardy, and therefore the judgment should be reversed.

Under date of September 1st, 1899, the following order was made of record in the case: "This day come the said People, by

[85] *Charles S. Deneen, State's Attorney, and the said defendant, as well in his own proper person as by his counsel, also comes; and also come the jurors of the jury, aforesaid; and the aforesaid jury, hearing the arguments of counsel and instructions of the court, retire in charge of sworn officers to consider of their verdict." And under date of September 2d, this order appears: "This day come the said People, by Charles S. Deneen, State's Attorney, and the defendant, as well in his own proper person as by his counsel, also comes. And also come the jurors of the jury aforesaid, being now returned into court, and, *being unable to agree upon a verdict, are thereupon, by order of this court, discharged from further consideration of this cause.*"

It seems to be undisputed that the case was submitted to the jury at 4 o'clock in the afternoon, and that the jury, having retired to consider of their verdict, were kept together until 9 o'clock and thirty minutes in the morning of the succeeding day, when they were finally discharged from any further consideration of the case.

The contention is that, notwithstanding the recital in the record that the jury were discharged by the court because they were unable to agree upon a verdict, such discharge was without moral or physical necessity, and operated as an acquittal of the defendant.

Upon the face of the question under examination the inquiry might arise whether the due process of law required by the 14th Amendment protects one accused of crime from being put twice in jeopardy of life or limb. In other words, is the right not to be put twice in jeopardy of life or limb forbidden by the 14th Amendment; or, so far as the Constitution of the United States is concerned, is it forbidden only by the 5th Amendment, which, prior to the adoption of the 14th Amendment, had been held as restricting only the powers of the national government and its agencies?

We pass this important question without any consideration of it upon its merits, and content ourselves with referring to the decision of this court in *United States* v. *Perez*, 9 Wheat. 579, 6 L. ed. 165. That was a capital case, in which, without the consent of the prisoner or of the attorney of the [86] United States, the jury, *being unable to agree, were discharged by the court from giving any verdict. This court, speaking by Mr. Justice Story, said: "We are of opinion that the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests in this, as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial." If the due process of law required by the 14th Amendment embraces the guaranty that no person shall be put twice in jeopardy of life or limb,—upon which question we need not now express an opinion,—what was said in *United States* v. *Perez* is applicable to this case upon the present writ of error, and is adverse to the contention of the accused that he was put twice in jeopardy.

The principles settled in *United States* v. *Perez*, we may remark, were reaffirmed in *Ex parte Lange*, 18 Wall. 175, 21 L. ed. 878; *Simmons* v. *United States*, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171; *Logan* v. *United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Thompson* v. *United States*, 155 U. S. 274, 39 L. ed. 149, 15 Sup. Ct. Rep. 73.

*The conclusion is that *the judgment of* [87] *the Supreme Court of Illinois* did not deny to the plaintiff in error any right secured by the Constitution of the United States, and *is therefore affirmed.*

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STATE OF IOWA, *Plff. in Err.*,
*v.*
EDWIN O. ROOD *et al.*

(See S. C. Reporter's ed. 87-94.)

*Error to state court — Federal question.*

1. A decision of a state court adverse to the claim of title to land set up by a state by virtue of its right of sovereignty over the beds of lakes meandered by the United States government presents no Federal question which will sustain a writ of error from the Supreme Court of the United States, as such sovereignty rests upon no Federal statute or provision of the Federal Constitution, but upon general principles of the common law, which long antedated the Constitution.
2. The action of surveyors for the Federal

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

**government, in segregating and setting apart a lake by meander lines from the public land, and the approval of such survey by the Commissioner of the General Land Office, is not such an adjudication by the Federal government, by its authorized officers and agents, that such lake is the property of the state, and not a part of the public domain, that a denial by a state court of the state's claim of title to the bed of such lake can be reviewed in the Supreme Court of the United States.**

[No. 9.]

*Argued October 14, 15, 1902. Decided November 17, 1902.*

IN ERROR to the Supreme Court of the State of Iowa to review a judgment affirming a judgment of the District Court of Humboldt County which dismissed a petition of intervention on behalf of the state of Iowa setting up title to the bed of a lake meandered by the Federal government.

On motion to dismiss. *Dismissed.*

See same case below, 109 Iowa, 5, 79 N. W. 449.

Statement by Mr. Justice **Brown:**

[88] *This was a controversy over about 800 acres of land lying in the bed of what is known as Owl lake, in Humboldt county, Iowa. The original plaintiffs, the appellees in this case, claimed under the act of Congress of September 28, 1850, commonly known as the swamp land grant. Defendants' position was that the lands were unsurveyed lands belonging to the national government, subject to entry under the homestead and pre-emption laws, under which they had made entry. The state of Iowa intervened and claimed to own the land in virtue of its right of sovereignty over the beds of all lakes meandered by the general government.

The suit was originally instituted by a petition in equity filed in the district court of Humboldt county by Edwin O. Rood and others against George A. Wallace and others, founded upon allegations: (1) That the lands were conveyed to the state under the swamp land act of September 28, 1850, and thence by intermediate conveyances to the plaintiff; (2) that at the date of this act the lands were in fact swamp and overflowed lands, and continued to be, until Pearsons, plaintiffs' grantor, received the title, marshy and unfit for cultivation without artificial drainage. That in 1884 Pearsons began to reclaim the land by ditches, building fences around it, and for several years used and occupied it for pasturage, and spent a large amount of money in draining, reclaiming it, and making it fit for cultivation; (3) that defendants have taken possession, and built a cabin upon the land, and are interfering with the plaintiffs in their use and enjoyment of it.

Wherefore an injunction was prayed.

A demurrer to this bill was overruled and an answer filed in general denial of the petition.

Thereupon the state of Iowa filed a petition of intervention, alleging that the land in question was a part of the bed of Owl lake, and did not constitute any part of the land which the United States government was authorized or empowered to sell. *That[89] the state was duly admitted into the Union in 1846, and, as a sovereign state, became the owner of all the lakes within its borders, subject to the right of the public to use the same, and that the title to the soil was in the state. That in surveying the public lands adjoining the lake the same was meandered, and the land up to the meander lines sold by the United States to different persons, and after such survey and sale the United States had no right, title, or interest in any part of the lake bed, and that the same had passed to the state upon its admission to the Union.

The petition denied that the land described was within the swamp land grant, and averred that the act of the plaintiffs and their vendors in draining the said lake and drawing off the water was unlawful.

Wherefore the state prayed a decree against both plaintiffs and defendants, quieting its title to the land, and for a writ of possession removing both parties therefrom.

Defendants Wallace and others subsequently amended their answer to the effect that the lands were unsurveyed lands, subject to entry by settlers, and that defendants had entered the lands as homesteads, built houses thereon, and occupied the same as homes. That, at the date of the swamp land act, the lands were covered by water from 6 to 15 feet in depth, with well-defined shores and high banks upon the south and east sides, and navigable by ordinary steamboats. That the lands were never swampy, and never came within the meaning of the grant as swamp and overflowed lands. And that whatever rights plaintiffs might have in the land were junior and inferior to those of defendants.

Plaintiffs thereupon amended their petition by averring that since the commencement of the suit the lands had been patented to the state under the swamp land act of 1850; and answered the petition of the interveners, alleging that by the proper officer of the government the character, quality, and condition of said lands were duly adjudicated in the manner provided by law, and that the title of the United States passed through certain patents mentioned in amendments to plaintiffs' petition, and finally inured to the benefit of the plaintiffs, *and that said patents have never been set[90] aside nor canceled.

Testimony was taken by the plaintiffs, and a decree entered dismissing the interveners' petition, and quieting the title in this and several other cases involving the same facts, in the plaintiffs. On an appeal taken to the supreme court of Iowa, the judgment of the district court was confirmed. Whereupon the state sued out a writ of error from this court.

*Mr.* **Charles W. Mullan** argued the cause and filed a brief for plaintiff in error:

Under the deed of cession from Virginia, so far as Virginia had any claim to the territory now embraced within the boundaries of the state of Iowa, and under the treaty of 1803 between the United States and France, and under the act of Congress of 1846 admitting Iowa into the Union, that state when it became one of the states of the Union became possessed of every right, advantage, and immunity which had theretofore been possessed by the original thirteen states.

*Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565.

When the Revolution took place, the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government.

*Martin* v. *Waddell*, 16 Pet. 410, 10 L. ed. 1012; *Withers* v. *Buckley*, 20 How. 92, 15 L. ed. 819; *McCready* v. *Virginia*, 94 U. S. 394, 24 L. ed. 248; *Newport & C. Bridge Co.* v. *United States*, 105 U. S. 491, 26 L. ed. 1150; *Pennsylvania* v. *Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249; *Shively* v. *Bowlby*, 152 U. S. 31, 38 L. ed. 343, 14 Sup. Ct. Rep. 548; *Mann* v. *Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820; *Mumford* v. *Wardwell*, 6 Wall. 436, 18 L. ed. 761; *Knight* v. *United States Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

There was drawn in question in this cause a claim to a right and title under the Constitution and statutes of the United States, and under an authority exercised by the United States, the decision whereof by the state court is against the right and title claimed by the state of Iowa.

*The Banks* v. *New York*, 7 Wall. 16, *sub nom. New York ex rel. Bank of N. Y. Nat. Bkg. Asso.* v. *Connelly*, 19 L. ed. 57; *Trebilcock* v. *Wilson*, 12 Wall. 687, 20 L. ed. 460; *Lytle* v. *Arkansas*, 22 How. 193, 16 L. ed. 306; *Dooley* v. *Smith*, 13 Wall. 604, 20 L. ed. 547; *Pennywit* v. *Eaton*, 15 Wall. 380, *sub nom. Scott* v. *Eaton*, 21 L. ed. 72; *Murdock* v. *Memphis*, 20 Wall. 590, 22 L. ed. 429.

*Mr.* **Robert M. Wright** argued the cause and filed a brief for defendants in error:

The question of ownership of the beds of non-navigable, meandered lakes is a question for the determination of the states wherein the said lakes are situated. It is a question of state law, and is to be determined solely by such law.

*Eldridge* v. *Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 151; *Jersey City & B. R. Co.* v. *Morgan*, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; *Bartlett* v. *Lockwood*, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 193; *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Lowndes* v. *Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758.

The right of the state of Iowa to these lake beds is not claimed under the Constitution of the United States, nor under any treaty or statute of, or commission held or authority exercised under, the United States, but its right is claimed to be a part and parcel of the state's inherent sovereignty, and, as such, is an independent right.

*Shively* v. *Bowlby*, 152 U. S. 16, 38 L. ed. 337, 14 Sup. Ct. Rep. 548.

The new states since admitted into the Union have the same rights, sovereignty, and jurisdiction in that behalf as the original states possess within their respective borders.

*Shively* v. *Bowlby*, 152 U. S. 30, 38 L. ed. 342, 14 Sup. Ct. Rep. 548.

The decision of the supreme court of Iowa was not against, but in favor of, the authority exercised under the United States. This being so, this court has no jurisdiction to review it.

*Jersey City & B. R. Co.* v. *Morgan*, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; *Bartlett* v. *Lockwood*, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; *Whitten* v. *Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297; *Missouri* v. *Andriano*, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385; *Commonwealth Bank* v. *Griffith*, 14 Pet. 56, 10 L. ed. 352; *Fulton* v. *M'Affee*, 16 Pet. 149, 10 L. ed. 918; *Linton* v. *Stanton*, 12 How. 423, 13 L. ed. 1050; *Reddall* v. *Bryan*, 24 How. 420, 16 L. ed. 740; *Ryan* v. *Thomas*, 4 Wall. 603, 18 L. ed. 460.

The Federal question must have been decided against the authority exercised under the United States. The question may have been erroneously decided; it may be quite apparent that a wrong decision has been rendered; but, unless the decision is against the authority exercised, the court cannot entertain jurisdiction.

*Murdock* v. *Memphis*, 20 Wall. 590, 22 L. ed. 429.

This court is not required to re-examine the judgment of the state court simply because a Federal question may have been decided. To give this court jurisdiction, it must appear that such a question was necessarily involved in the decision.

*Moore* v. *Mississippi*, 21 Wall. 636, 22 L. ed. 653.

If the record shows upon its face that a Federal question was not necessarily involved, this court will not go outside of it, to the opinion of the court below, or elsewhere, to ascertain whether one was in fact decided.

*Ibid.*

In order to give this court jurisdiction of

a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision to the highest court of the state having jurisdiction, but that the decision of the Federal question was necessary to the determination of the case, and that it was actually decided, or that the judgment, as rendered, could not have been given without deciding it.

*De Saussure* v. *Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Johnson* v. *Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142.

The courts of the United States will adopt and follow the decisions of the highest court of the state, whether founded on statutes or not, when the same have become rules of property within the state.

*Lowndes* v. *Huntington*, 153 U. S. 19, 38 L. ed. 619, 14 Sup. Ct. Rep. 758; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 271, 35 L. ed. 1010, 12 Sup. Ct. Rep. 173; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Gormley* v. *Clark*, 134 U. S. 348, 33 L. ed. 913, 10 Sup. Ct. Rep. 554.

The decision of the state court, to be reviewable in this court must have been against the right, title, privilege, or immunity claimed to depend upon the treaty, statute, or authority exercised.

*Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 223, 32 L. ed. 913, 9 Sup. Ct. Rep. 503; *United States* v. *Lynch*, 137 U. S. 285, 34 L. ed. 702, 11 Sup. Ct. Rep. 114; *Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 653, 34 L. ed. 1116, 11 Sup. Ct. Rep. 435.

The decision of the state court was not against the validity of the authority exercised under the United States.

*Millingar* v. *Hartupee*, 6 Wall. 258, 18 L. ed. 829.

The decision was not against any title, right, privilege, or immunity specially set up or claimed by plaintiff in error under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States.

*Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565.

*Mr.* **John P. Dolliver** also argued the cause for defendants in error.

Mr. Justice **Brown** delivered the opinion of the court:

Motion is made to dismiss this case upon the ground that no Federal question is involved; or if there be such question, that there was another nonfederal question, the decision of which was sufficient to sustain the judgment, irrespective of what the decision of the supreme court may have been upon such Federal question.

1. From the foregoing abstract of the pleadings it will be seen that the title set up by the state rests solely upon the proposition that it became vested, upon its admission into the Union under the act of Congress of December 28, 1846 (9 Stat. at L. 117, chap. 1), with sovereignty over the beds of all lakes within its borders, by the act of the general government in meandering such lakes, and excluding from its survey of public lands all such as lay beneath their waters. This clearly does not involve the validity of any treaty or statute of the United States, or the constitutionality of any state statute or authority, so that, if jurisdiction exists in this court, it must be by reason of the claim of a title, right, privilege, or immunity under the Constitution, or an authority exercised under the United States, the decision of which was against [91] such title, right, privilege, or authority.

The real question, then, is whether the sovereignty of the state over the beds of its inland lakes rests upon some statute or provision of the Constitution, or upon general principles of the common law which long antedated the Constitution, and had their origin in rights conceded to the Crown centuries before the severance of our relations with the mother country. If the latter, then the state must look to the decisions of this court, recognizing and defining such rights and determining how far they are inherited, first, by the United States as the successor of the Crown, and, second, by the several states upon their admission into the Union. This would not involve a construction of the Constitution, nor of any title derived thereunder, but a determination of the title of the Crown to lands beneath the beds of inland lakes, and of the respective rights of the states and the general government as successors thereto.

In support of our jurisdiction the state relies (1) upon article 3 of the treaty with France for the cession of Louisiana (8 Stat. at L. 200), which merely provides that "the inhabitants of the ceded territory shall be incorporated in the Union of the United States and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States;" (2) the provision of the Constitution, art. 4, § 3, which merely declares, with certain immaterial qualifications, that "new states may be admitted by the Congress into this Union;" and (3) upon the act of Congress of 1846, admitting the state of Iowa into the Union, with the provision that it should be admitted on an equal footing with the original states in all respects whatsoever.

None of these provisions was questioned by the supreme court of Iowa in its opinion, but neither of them has even a remote bearing upon the question of the title of the state to the land beneath its lakes. Indeed, the argument now made by the attorney general, that the title of the state depends upon the construction given to this act of Congress, is quite inconsistent with his first assignment of error upon the merits, which [92] charges the court with error "in not holding that the beds of all the meandered lakes and streams in the state of Iowa belong to said state in trust for the public by virtue

of its sovereignty, and that this right *does not depend upon any act of Congress or any grant from the United States.*" In other words, the state is put in the dilemma of insisting, for the purpose of sustaining the jurisdiction of this court, that the title of the state is dependent upon the proper construction of these three instruments, and, for the purpose of sustaining its case upon the merits, denying that the title depends upon either of them. This is an attempt to blow hot and cold upon the same question.

The mere fact that the plaintiff in error asserts title under a clause of the Constitution or an act of Congress is not in itself sufficient, unless there be at least a plausible foundation for such claim. A party may assert a right, title, privilege, or immunity without even color for such assertion, and if that were alone sufficient to give this court jurisdiction, a vast number of cases might be brought here simply for delay or speculative advantage. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

It is equally clear that the mere fact that an act of Congress or a patent of the United States appears in a chain of title does not constitute such a right, title, or immunity as gives the Federal court jurisdiction, unless such title involves the construction of the act, or the determination of the rights of the party under it. *De Lamar's Nevada Gold Min. Co.* v. *Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

The case of *New Orleans* v. *De Armas*, 9 Pet. 224, 9 L. ed. 109, is directly in point. Plaintiffs claimed a parcel of land in the city of New Orleans by incomplete title from the Spanish government, which was, however, confirmed under the laws of the United States, and a patent issued therefor. The city claimed the land as a part of a quay dedicated to the city in the original plan of the town, and therefore not grantable by the King. The state court gave judgment for the plaintiffs, which was affirmed by the supreme court, and the city sued out a writ of error. The court held, through Chief Justice Marshall, that to sus-[93]tain *its jurisdiction it must be shown that the title set up by the city was protected by the treaty ceding Louisiana to the United States (the treaty involved in this case), or by some act of Congress applicable to that title. It was held that the 3d article of the treaty, above quoted, did not embrace the case, and that the act of Congress admitting Louisiana into the Union, which is identical in language with the act admitting Iowa, could not be construed to give appellate jurisdiction to this court over all questions of title between citizens of Louisiana; that the case involved no principle upon which this court could take jurisdiction, which would not apply to all the controversies respecting titles originating before the cession of Louisiana to the United States, and that "it would also comprehend all controversies concerning titles in any of the new states, since they are admitted into the Union by laws expressed in similar language." The writ of error was dismissed. This case is conclusive against the existence of a Federal question in the case under consideration.

2. We are also asked to sustain the jurisdiction of this court upon the ground that the action of the government surveyors in segregating and setting apart the lake in question by meander lines from the public land, and the approval of such survey by the Commissioner of the General Land Office, was an adjudication by the government of the United States, by its duly authorized officers and agents, that the lake so segregated and set apart was the property of the state of Iowa, and not a part of the public domain.

We do not so interpret the action of these officers. They undoubtedly did survey the lands adjoining this lake and meander the lake itself, but they determined nothing as to the title of the land beneath its waters,—a determination which would have been wholly beyond their powers; but simply omitted those lands from the survey, and left their title to be subsequently determined either by state or congressional action. It was obviously beyond the powers of a government surveyor, or of the Land Office, to determine the title to these lands, or to adjudicate anything whatever upon the subject.

Had the decision of the supreme court been adverse to the *plaintiffs, who claimed [94] title under the swamp land act, it is possible that a writ of error might have lain from this court, but we have frequently held that to sustain such writ, the decision must be adverse to a right claimed under an act of Congress, or to the exercise of an authority granted by the United States. *Baker* v. *Baldwin*, 187 U. S. 61, *ante*, 75, 23 Sup. Ct. Rep. p. 19.

*The writ of error must be dismissed.*

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AMERICAN SCHOOL OF MAGNETIC HEALING and J. H. Kelly, *Appts.*,

*v.*

J. M. McANNULTY.

(See S. C. Reporter's ed. 94-111.)

*Postal laws — exclusion from mails — fraudulent schemes — mind cure — conclusiveness of decision of Postmaster General.*

1. The Postmaster General is not justified in prohibiting the delivery of letters addressed to a corporation which assumes to heal disease through the influence of the mind, by the provisions of U. S. Rev. Stat. §§ 3929, 4041, and the act of Congress of March 2, 1895, § 4 (28 Stat. at L. 963, 964, chap. 191), which authorize the retention of letters directed to any person obtaining money through the mails by false pretenses or promises, as the effectiveness of such treatment is a mere matter of opinion, and the

NOTE.—*As to nonmailable matter*—see note to Timmons v. United States, 30 C. C. A. 79.

statutes are only intended to cover cases of actual fraud in fact.

2. The determination of the Postmaster General that letters addressed to a certain corporation should be refused delivery is not so conclusive on the Federal courts as to preclude them from granting injunctive relief to such corporation, where his action was not authorized by the statutes under which he assumed to act.

[No. 27.]

*Submitted January 29, 1902. Restored to docket for oral argument February 24, 1902. Argued October 15, 16, 1902. Decided November 17, 1902.*

APPEAL from the Circuit Court of the United States for the Western District of Missouri to review a decree dismissing a bill to enjoin a postmaster from carrying out an order of the Postmaster General directing the retention of letters addressed to a corporation. *Reversed.*

See same case on motion for temporary injunction, 102 Fed. 565.

Statement by Mr. Justice **Peckham:**

This is an appeal under § 5 of the circuit court of appeals act of 1891, to review directly the decree of the circuit court of the United States for the western district of Missouri, dismissing the bill of complainants (appellants) on the merits. The bill, as amended by leave of the court, averred in substance that the complainants are, the one a business corporation incorporated under the laws of and doing business in the state of Missouri, and the other a resident and citizen of the state of Missouri; that the defendant was, at the time of the filing of the bill and at the times therein stated, postmaster in charge of the United States postoffice in the city of Nevada, state of Missouri, and a resident and a citizen of that state; that as such postmaster he has the exclusive management of the postoffice in the city of Nevada, and of the receipt and distribution of mail received at that city through the United States mails.

It was further averred that the American School of Magnetic Healing is located and has its chief office and place of business at the city of Nevada, and the complainant Kelly was at the time of the filing of the [96] bill and at all the dates and times *mentioned therein secretary, treasurer, and general manager of the corporation. In November, 1897, he located at Nevada, and engaged in the business of healing diseases and ailments of the human family, and the business of teaching the science of healing of human ills, and that in April, 1898, he procured the incorporation of the business under the laws of the state of Missouri, * under the name of the American School of Magnetic Healing, and among the stockholders of the company the complainant Kelly was one; that large buildings were erected for such business, and large amounts expended in advertising the same. The bill further averred as follows:

"That in and about their business they carried on and conducted, not only the treating of people afflicted with ills at their establishment at said city, but also engaged in the business of teaching and educating others in the practical science of healing, and that a large amount of their business consists of treatment by letter and advice to people throughout the United States and foreign countries; and in the treatment under said circumstances, they have built up a large and extensive business in the way of receipts of such treatment, received through the United States mail, by letter, registered package, and otherwise, in the nature of checks, drafts, and United States moneys; that said business has grown to such an extent that, immediately and for a long time prior to the grievances hereinafter complained of, the receipts through the United States mails, in the manner aforesaid, for the treatment of persons throughout the United States and foreign countries, have reached and averaged about from $1,000 to $1,600 per day.

"And your orators state that said business is a legal and legitimate business, conducted according to business and legal methods, and is founded largely, and almost exclusively, on the physical and practical proposition that the mind of the human race is largely responsible for its ills, and is a perceptible factor in the treating, curing, benefiting, and remedying thereof.

"And that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, * and complainants discard [97] and eliminate from their treatment what is commonly known as divine healing and Christian science, and complainants are confined to practical scientific treatment, emanating from the source aforesaid.

"That for a long time previous and prior to the grievances hereinafter mentioned, said corporation has been sending out a large amount of advertising matter through the United States postoffice at said city of Nevada, and that all of its receipts, by checks, drafts, or money orders aforesaid, have been received by and delivered to them through the United States postoffice at the city of Nevada, of which the respondent herein has exclusive charge as postmaster aforesaid, and had, during the time aforesaid, been receiving a large number of letters addressed to said institution and to its office, regarding its treatment and manner of treatment, and business letters pertaining to, and inquiring into, the manner of treatment.

"That all such mail, letters, and communications are generally addressed and directed to the American School of Magnetic Healing at said city, and that in many cases said letters are and may be addressed to said J. H. Kelly, secretary or treasurer or manager, or to J. H. Kelly, individually, or to Prof. J. H. Kelly, or to J. H. Kelly or Prof. J. H. Kelly, secretary, treasurer, or manager of the American School of Magnetic Healing.

"That said Kelly is also receiving, and for a long time past has been receiving, letters addressed to him individually upon social matters from friends and acquaintances, and concerning business not pertaining to or connected with the business hereinafter stated.

"That prior to the grievances hereinafter mentioned, said institute was receiving in the way of letters addressed to it or to its officers in the manner aforesaid, an average of about the sum of 3,000 letters per day, and ever since the happening of the grievances hereinafter mentioned there have been accumulating in said postoffice letters belonging to your orator, addressed in the manner before stated, probably to the total number of 25,000 letters.

"That all of said letters, as your orators are informed and believe, are duly stamped [98] and ready for delivery to them but *for the action of the postmaster and Postal Department hereinafter mentioned."

It was then averred that persons who were prompted by assumed competitive interference with their business complained to the United States Postoffice Department at Washington that complainants were not engaged in legitimate business, and therefore, on May 15, 1890, the Postoffice Department made the following order:

Postoffice Department,
Washington, D. C., May 15, 1900.

It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that the American School of Magnetic Healing, S. A. Weltmer, president, J. H. Kelly, secretary, and J. A. Kelly, at Nevada, Missouri, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of the act of Congress entitled "An Act to Amend Certain Sections of the Revised Statutes Relating to Lotteries, and for Other Purposes, Approved September 19, 1900."

Now, therefore, by authority vested in him by said act and by the act of Congress entitled "An Act for the Suppression of Lottery Traffic through International and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States, Approved March 2, 1895," the Postmaster General hereby forbids you to pay any postal money order drawn to the order of said concern and persons, and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of a duplicate money order, applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern and persons, to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the word "fraudulent" plainly written or stamped upon the outside of such letters or *matter. [99] Provided, however, that where there is nothing to indicate who are the senders of letters not registered, or other matter, you are directed in that case to send such letters and matter to the dead letter office, with the word "fraudulent" plainly written or stamped thereon, to be disposed of as other dead matter, under the laws and regulations applicable thereto.

Ch. Emory Smith,
Postmaster General.

To the Postmaster, Nevada, Missouri.

Since such order the defendant has refused to deliver any mail whatever to the complainants, and there had, when the bill was filed, as complainants aver on information and belief, accumulated at the postoffice at Nevada letters addressed to them containing checks, drafts, money orders, or money to an aggregate of at least $10,000 in value; that these checks, drafts, etc., came from various customers and clients throughout the United States and foreign countries, who had all been treated and for whom the complainants had performed services, under contracts with such parties, and that the sums were so sent in the respective letters in payment for services performed and rendered to the senders respectively, all of the senders being willing, and at all times have been willing, that their letters containing the remittances should be turned over to the complainants, they making no objection or complaint thereto.

The complainants further averred that they had been informed by the defendant that on Monday, the 28th day of May, then coming, he intended to stamp on each and every one of the letters addressed to the complainants, under any of the designations theretofore mentioned in the bill, the word "fraudulent" across the face of each letter, without opening it and without knowing what such letter contained, or the nature or character of the contents, and that the defendant would then return the letter to the sender thereof in all cases where, from the outside of the letter or envelope, he was able to determine from whom the same was received, and as to all other letters addressed to the complainants, where he was unable to *determine from the outside from whom the [100] letters were sent, the defendant would stamp with the word "fraudulent," and send to the dead letter office of the United States Postoffice Department all such letters; and the defendant stated that he would refuse to deliver any further mail or letters to the complainants or either of them, that might be received at his said postoffice addressed to them or either of them.

Complainants then averred that if the respondent were permitted to do these things, and to return the letters, and refused in the future to deliver or allow complainants to receive any letters or mail matter at the postoffice at Nevada, it would work irreparable injury, loss, and damage to the complainants, and would result in eventually embarrassing, crippling, breaking up, and

destroying complainants' legitimate business; and that the complainants had no other legal or adequate remedy by which they could prevent the committing of the acts and grievances complained of than by writ of injunction.

The bill then averred that the action of the defendant was based upon the order of the Postmaster General, above set forth, who assumed to act under §§ 3929 and 4041 of the Revised Statutes of the United States, and § 4 of an act approved March 2, 1895. 28 Stat. at L. 963, 964, chap. 191.

Section 3929 of the Revised Statutes is set forth in the margin.†

Section 4041 is of the same purport as § [101] 3929, excepting *that instead of providing for the retention of registered letters, it forbids the payment by any postmaster to the person or company described of any postal money orders drawn to his or its order, or to his or its favor, or to any agent of any such person or company, and it provides for the return to the remitters of the sums of money named in those money orders. Section 4 of the act (Laws of 1895, chap. 191; 28 Stat. at L. 693, 694) amended § 3929 of the Revised Statutes so as to provide for the retention of all letters, instead of merely registered letters as in the original section.

Before the issuing of the written order by the Postmaster General prohibiting the delivery of mail matter to the complainants, and pursuant to notice from the Postmaster General, the complainants went before that official at Washington and had a hearing before him, and gave their reasons why what is termed a "fraud order" should not be issued, and that the Postmaster General, after hearing evidence such as in his judgment was contemplated by the sections of the statutes above mentioned, issued the order above referred to, and thereupon the defendant has refused to permit the delivery of the mail, and assigns as his only reason for so doing that it would be in violation of the order of the Postmaster General, founded upon the provisions of the statute already set forth.

The bill then averred that the statutes have no application whatever to the conduct or carrying on of complainants' business, which is a legitimate one, and that no fraud, deceit, deception, or misrepresentation of any kind has ever been practised by them, and that their customers or clients do not claim or assert that the complainants have in any manner practised any fraud, deceit, or misrepresentation at any time in procuring the business from them, or in curing their ills or diseases. Complainants further averred that the provisions of the statutes above mentioned are in violation of the 4th, 5th, and 14th Amendments to the Constitution of the United States, in that they undertake to deprive persons of their property and property rights without due process of law; and, if the statutes were enforced they would place in the power of the postmaster and the Postoffice Department of the United States the sole *and exclusive right to pass [102] upon the rights of the complainants, as between themselves and other parties with whom they deal and transact business through the mails, without a hearing; and that the provisions of the statute are void for the reason that they provide for no tribunal, court, or authority to hear or determine any violation of the statute or claimed violation of the statutes, but placed the same absolutely in the power and control of the postmasters and the Postoffice Department; and that the statutes vest an arbitrary discretion in the postmasters and the Postoffice Department or the Postmaster General to determine as he may see fit, whether right or wrong, the question as to who shall or who shall not have and receive mail from the United States Postoffice Department, and who shall and who shall not use the United States mails, and vest in the Department or the Postmaster General if enforced, the power to interdict and absolutely prohibit the carrying on of all commercial and business transactions of the country done through the mailing system, if they see fit to do so, and make the postmasters and the Postoffice Department the sole judges in their own case.

The complainants then asked for an injunction to restrain the postmaster from carrying out the order of the Postmaster General, and that a decree might be entered perpetually enjoining the defendant as prayed for.

The defendant demurred to the complainants' amended bill (1) on the ground that the complainants had not stated any such case as entitled them to any relief; (2) because the complainants had not stated any ground for equitable relief against the defendant, and had not shown any reason why an injunction should be granted.

The court sustained the demurrer, and, the complainants declining to plead further, it was decreed by the court that the amended bill of the complainants was insufficient in law and equity, and it was thereupon dismissed at complainants' cost.

*Mr.* **James H. Harkless** for appellants

†Sec. 3929. The Postmaster General may, upon evidence satisfactory to him that any person is engaged in conducting any fraudulent lottery, gift enterprise, or scheme for the distribution of money, or of any real or personal property, by lot, chance, or drawing of any kind, or in conducting any other scheme or device for obtaining money through the mails by means of false or fraudulent pretenses, representations, or promises, instruct postmasters at any postoffices at which registered letters arrive directed to any such person, to return all such registered letters to the postmasters at the offices at which they were originally mailed, with the word "fraudulent" plainly written or stamped upon the outside of such letters; and all such letters so returned to such postmasters shall be by them returned to the writers thereof, under such regulations as the Postmaster General may prescribe. But nothing contained in this title shall be so construed as to authorize any postmaster or other person to open any letter not addressed to himself.

on original submission. *Messrs. John O'Grady* and *Charles S. Crysler* were with him on his brief.

*Solicitor General* **Richards** and *Mr.* **Robert A. Howard** for appellee on original submission:

In the exercise of his discretion, the Postmaster General cannot be supervised or controlled by the courts.

*Enterprise Sav. Asso.* v. *Zumstein*, 64 Fed. 837.

The finding of the Postmaster General on the issue of fact is an act involving the exercise of judgment and discretion.

*Enterprise Sav. Asso.* v. *Zumstein*, 64 Fed. 840.

Courts will not interfere to control an executive officer in the discharge of a duty involving the exercise of judgment and discretion.

*Decatur* v. *Paulding*, 14 Pet. 515, 10 L. ed. 568; *Gaines* v. *Thompson*, 7 Wall. 347, 19 L. ed. 62.

*Mr.* **James H. Harkless** for appellants on oral argument.

*Mr.* **Robert A. Howard** for appellee on on oral argument.

[103] *Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The bill of the complainants as amended raises some grave questions of constitutional law which, in the view the court takes of the case, it is unnecessary to decide. We may assume, without deciding or expressing any opinion thereon, the constitutionality in all particulars of the statutes above referred to, and therefore the questions arising in the case will be limited (1) to the inquiry as to whether the action of the Postmaster General under the circumstances set forth in the complainants' bill is justified by the statutes; and (2), if not, whether the complainants have any remedy in the courts.

First. As the case arises on demurrer, all material facts averred in the bill are, of course, admitted. It is therefore admitted that the business of the complainants is founded "almost exclusively on the physical and practical proposition that the mind of the human race is largely responsible for its ills; and is a perceptible factor in the treating, curing, benefiting, and remedying thereof, and that the human race does possess the innate power, through proper exercise of the faculty of the brain and mind, to largely control and remedy the ills that humanity is heir to, and (complainants) discard and eliminate from their treatment what is commonly known as divine healing and Christian science, and they are confined to practical scientific treatment, emanating from the source aforesaid."

These allegations are not conclusions of law, but are statements of fact upon which, as averred, the business of the complainants is based, and the question is whether the complainants, who are conducting the business upon the basis stated, thereby obtain money and property through the mails by means of false or fraudulent pretenses, representations, or promises. Can such a business be properly pronounced a fraud within the statutes of the United States?

There can be no doubt that the influence of the mind upon the *physical condition of [104] the body is very powerful, and that a hopeful mental state goes far, in many cases, not only to alleviate, but even to aid very largely in the cure of an illness from which the body may suffer. And it is said that nature may itself, frequently, if not generally, heal the ills of the body without recourse to medicine, and that it cannot be doubted that in numerous cases nature, when left to itself, does succeed in curing many bodily ills. How far these claims are borne out by actual experience may be matter of opinion. Just exactly to what extent the mental condition affects the body, no one can accurately and definitely say. One person may believe it of far greater efficacy than another, but surely it cannot be said that it is a fraud for one person to contend that the mind has an effect upon the body and its physical condition greater that even a vast majority of intelligent people might be willing to admit or believe. Even intelligent people may and indeed do differ among themselves as to the extent of this mental effect. Because the complainants might or did claim to be able to effect cures by reason of working upon and affecting the mental powers of the individual, and directing them towards the accomplishment of a cure of the disease under which he might be suffering, who can say that it is a fraud, or a false pretense or promise within the meaning of these statutes? How can anyone lay down the limit and say beyond that there are fraud and false pretenses? The claim of the ability to cure may be vastly greater than most men would be ready to admit, and yet those who might deny the existence or virtue of the remedy would only differ in opinion from those who assert it. There is no exact standard of absolute truth by which to prove the assertion false and a fraud. We mean by that to say that the claim of complainants cannot be the subject of proof as of an ordinary fact; it cannot be proved as a fact to be a fraud, or false pretense or promise, nor can it properly be said that those who assume to heal bodily ills or infirmities by a resort to this method of cure are guilty of obtaining money under false pretenses, such as are intended in the statutes, which evidently do not assume to deal with mere matters of opinion upon subjects which are not capable of proof as to their falsity. We may not *believe in the efficacy [105] of the treatment to the extent claimed by complainants, and we may have no sympathy with them in such claims, and yet their effectiveness is but matter of opinion in any court. The bill in this case avers that those who have business with complainants are satisfied with their method of treatment, and are entirely willing that the money they sent should be delivered to the complainants. In other words, they seem to have faith in the efficacy of the complainants' treatment, and in their ability to heal as claimed by them.

If they fail, the answer might be that all human means of treatment are also liable to fail, and will necessarily fail when the appointed time arrives. There is no claim that the treatment by the complainants will always succeed.

Suppose a person should assert that, by the use of electricity alone, he could treat diseases as efficaciously and successfully as the same have heretofore been treated by "regular" physicians. Would these statutes justify the Postmaster General, upon evidence satisfactory to him, to adjudge such claim to be without foundation, and then to pronounce the person so claiming, to be guilty of procuring, by false or fraudulent pretenses, the moneys of people sending him money through the mails, and then to prohibit the delivery of any letters to him? The moderate application of electricity, it is strongly maintained, has great effect upon the human system, and just how far it may cure or mitigate diseases no one can tell with certainty. It is still in an empirical stage, and enthusiastic believers in it may regard it as entitled to a very high position in therapeutics, while many others may think it absolutely without value or potency in the cure of disease. Was this kind of question intended to be submitted for decision to a Postmaster General, and was it intended that he might decide the claim to be a fraud and enjoin the delivery of letters through the mail addressed to the person practising such treatment of disease? As the effectiveness of almost any particular method of treatment of disease is, to a more or less extent, a fruitful source of difference of opinion, even though the great majority may be of one way of thinking, the efficacy of any special method is certainly not a matter for the decision of the Postmaster General within these statutes relative to [106] fraud. *Unless the question may be reduced to one of fact, as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter.

Vaccination is believed by many to be a preventive of smallpox, while others regard it as unavailing for that purpose. Under these statutes could the Postmaster General, upon evidence satisfactory to him, decide that it was not a preventive, and exclude from the mails all letters to one who practised it and advertised it as a method of prevention, on the ground that the moneys he received through the mails were procured by false pretenses?

Again, there are many persons who do not believe in the homeopathic school of medicine, and who think that such doctrine, if practised precisely upon the lines set forth by its originator, is absolutely inefficacious in the treatment of diseases. Are homeopathic physicians subject to be proceeded against under these statutes, and liable, at the discretion of the Postmaster General, upon evidence satisfactory to him, to be found guilty of obtaining money under false pretenses, and their letters stamped as fraudulent and the money contained therein as payment for their professional services sent back to the writers of the letters? And, turning the question around, can physicians of what is called the "old school" be thus proceeded against? Both of these different schools of medicine have their followers, and many who believe in the one will pronounce the other wholly devoid of merit. But there is no precise standard by which to measure the claims of either, for people do recover who are treated according to the one or the other school. And so, it is said, do people recover who are treated under this mental theory. By reason of it? That cannot be averred as matter of fact. Many think they do. Others are of the contrary opinion. Is the Postmaster General to decide the question under these statutes?

Other instances might be adduced to illustrate the proposition that these statutes were not intended to cover any case of what the Postmaster General might think to be false opinions, but only cases of actual fraud in fact, in regard to which opinion formed no basis.

*It may, perhaps, be urged that the in- [107] stances above cited by way of illustration do not fairly represent the case now before us, but the difference is one of degree only. It is a question of opinion in all the cases, and although we may think the opinion may be better founded and based upon a more intelligent and a longer experience in some cases than in others, yet after all, it is, in each case, opinion only, and not existing facts with which these cases deal. There are, as the bill herein shows, many believers in the truth of the claims set forth by complainants, and it is not possible to determine as a fact that those claims are so far unfounded as to justify a determination that those who maintain them and practise upon that basis obtain their money by false pretenses within the meaning of these statutes. The opinions entertained cannot, like allegations of fact, be proved to be false, and therefore it cannot be proved, as matter of fact, that those who maintain them obtain their money by false pretenses or promises, as that phrase is generally understood, and as, in our opinion, it is used in these statutes.

That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case. The allegation in the bill as to the nature of the claim of complainants and upon what it is founded is admitted by the demurrer, and we therefore have undisputed and admitted facts, which show upon what basis the treatment by complainants rests, and what is the nature and character of their business. From these admitted facts, it is obvious that complainants, in conducting their business, so far as this record shows, do not violate the laws of Congress. The statutes do not, as matter of law, cover the facts herein.

Second. Conceding, for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, and that its action is not subject to review by the courts, and also conceding

the conclusive character of the determination by the Postmaster General of any material and relevant questions of fact arising in the administration of the statutes of Congress relating to his department, the question still remains as to the power of the court to grant relief where the Postmaster General [108] has assumed *and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter, when the statutes have not granted him power so to order. Has Congress intrusted the administration of these statutes wholly to the discretion of the Postmaster General, and to such an extent that his determination is conclusive upon all questions arising under those statutes, even though the evidence which is adduced before him is wholly uncontradicted, and shows, beyond any room for dispute or doubt, that the case, in any view, is beyond the statutes, and not covered or provided for by them?

That the conduct of the postoffice is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head, or one of the subordinate officials, of that Department, which is unauthorized by the statute under which he assumes to act. The acts of all its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief.

The Land Department of the United States is administrative in its character, and it has been frequently held by this court that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the Land Department, and its judgment thereon is final. *Burfenning* v. *Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018; *Johnson* v. *Drew*, 171 U. S. 93, 99, 43 L. ed. 88, 91, 18 Sup. Ct. Rep. 800; *Gardner* v. *Bonestell*, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399.

While the analogy between the above-cited cases and the one now before us is not perfect, yet, even in them it is held that the decisions of the officers of the Department upon questions of law do not conclude the courts, and they have power to grant relief to an individual aggrieved by an erroneous decision of a legal question by Department officers.

Thus in the *Burfenning Case*, 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018, a tract of land had been reserved from homestead and pre-emption, and had been included within the limits of an incorporated town, notwithstanding which the Land Department had decided that the land was open to entry, and had granted a patent under the statute [109] *relating to homesteads. The court said that "when, by act of Congress, a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law. In other words, the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof."

Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. Conceding, *arguendo*, that when a question of fact arises, which, if found in one way, would show a violation of the statutes in question in some particular, the decision of the Postmaster General that such violation had occurred, based upon some evidence to that effect, would be conclusive and final, and not the subject of review by any court, yet to that assumption must be added the statement that, if the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part, because the facts, being conceded, whether they amounted to a violation of the statutes would be a legal question, and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. To authorize the interference of the Postmaster General, the facts stated must, in some aspect, be sufficient to permit him, under the statutes, to make the order.

The facts, which are here admitted of record, show that the case is not one which, by any construction of those facts, is covered or provided for by the statutes under which the Postmaster *General has assumed to act, [110] and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law, and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized, he thereby violates the property rights of the person whose letters are withheld.

In our view of these statutes the complainants had the legal right, under the general acts of Congress relating to the mails, to have their letters delivered at the postoffice as directed. They had violated no law which Congress had passed, and their letters contained checks, drafts, money orders, and money itself, all of which were their prop-

erty as soon as they were deposited in the various postoffices for transmission by mail. They allege, and it is not difficult to see that the allegation is true, that, if such action be persisted in, these complainants will be entirely cut off from all mail facilities, and their business will necessarily be greatly injured, if not wholly destroyed, such business being, so far as the laws of Congress are concerned, legitimate and lawful. In other words, irreparable injury will be done to these complainants by the mistaken act of the Postmaster General in directing the defendant to retain and refuse to deliver letters addressed to them. The Postmaster General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, though it might justify his obedience thereto until some action of the court. In such a case as the one before us there is no adequate remedy at law, the injunction to prohibit the further withholding of the mail from complainants being the only remedy at all adequate to the full relief to which the complainants are entitled. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was [111] *within the statute, yet such decision, being a legal error, does not bind the courts.

Without deciding, therefore, or expressing any opinion upon the various constitutional objections set out in the bill of complainants, but simply holding that the admitted facts show no violation of the statutes cited above, but an erroneous order given by the Postmaster General to defendant, which the courts have the power to grant relief against, we are constrained to reverse the judgment of the circuit court, with instructions to overrule the defendant's demurrer to the amended bill, with leave to answer, and to grant a temporary injunction as applied for by complainants, and to take such further proceedings as may be proper, and not inconsistent with this opinion. In overruling the demurrer, we do not mean to preclude the defendant from showing on the trial, if he can, that the business of complainants, as in fact conducted, amounts to a violation of the statutes as herein construed.

*Judgment reversed.*

Mr. Justice **White** and Mr. Justice **McKenna**, believing the judgment should be affirmed, dissented from the foregoing opinion.

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JOHN ROMIG and Daniel W. Harding, *Appts.*,
*v.*
MYRTLE GILLETT.

(See S. C. Reporter's ed. 111-117.)

***Mortgages — foreclosure — insufficient affidavit for service by publication — rights of grantee of mortgagor.***

1. The grantee of a purchaser at a foreclosure sale cannot, because of the insufficiency of the affidavit for service by publication, be dispossessed or the judgment set aside by a court of equity at the instance of one claiming under the mortgagor by a deed subsequent to the mortgage, which remains unpaid; but the latter is only entitled to be let in to make any equitable defense which he may have.

[No. 52.]

*Argued October 20, 21, 1902. Decided November 17, 1902.*

APPEAL from the Supreme Court of the Territory of Oklahoma to review a judgment affirming a judgment of the trial court which had set aside a judgment of foreclosure and all subsequent proceedings, and directed that the grantee of the mortgagor be put in immediate possession of the mortgaged premises. *Reversed.*

See same case below, 10 Okla. 186, 62 Pac. 805.

Statement by Mr. Justice **Brewer**:

*On February 2, 1895, Don A. Gillett made [112] and delivered to John Romig a note for $700, secured by a mortgage on 80 acres in Garfield county, Oklahoma. On February 6, 1895, the mortgagor sold and conveyed the real estate to Myrtle Gillett. On March 11, 1896, the mortgagee, Romig, commenced an action of foreclosure in the district court of that county against Don A. Gillett and Myrtle Gillett. In the petition, Myrtle Gillett was alleged to have some interest in the real estate, but junior and subsequent to plaintiff's mortgage. A summons was issued and returned not served, the sheriff certifying that the defendants were not found in Garfield county. On June 2, plaintiff filed an affidavit for publication, which affidavit disclosed fully the nature of the action and the relief sought, and added:

"Affiant further says that he is unable, and that the plaintiff is unable by using due diligence, to obtain service of summons on the said defendants within the territory of Oklahoma.

"Affiant further states that on the — day of March, 1896, he caused a summons to be issued in said cause for said defendants, directed to the sheriff of Garfield county, Oklahoma territory. Sheriff made return, 'Defendants not found in my county.'

"Affiant further states upon information and belief that the said defendants Don A. Gillett and Myrtle Gillett are nonresidents of the territory of Oklahoma, and that service of summons cannot be made on the said defendants Don A. Gillett and Myrtle Gillett within the said territory of Oklahoma, and that said plaintiff wishes to obtain service upon said defendants by publication; and further, affiant sayeth not."

*Publication was made and proof thereof [113] filed as required by the statutes. On December 18, 1896, a judgment of foreclosure was entered against both defendants, and a sale of the real estate ordered. An order of sale was issued on January 20, 1897. A sale was made to the plaintiff and confirmed

by the court March 1, 1897, and an order entered directing the sheriff to execute a deed to the purchaser and put him in possession. A deed was accordingly made and the plaintiff put in possession on March 9, 1897. Thereafter Daniel W. Harding purchased the property from the plaintiff Romig, received a deed therefor and entered into possession on March 10, 1897. He improved the property, which up to that time was unimproved prairie land, by the erection of three residences and other permanent structures of the value of $2,000, paid taxes to the amount of $200, and has ever since resided thereon.

On May 11, 1898, Myrtle Gillett filed a motion to set aside the judgment, and all proceedings had thereunder, on the ground that the court had never acquired any jurisdiction; that she was, at all times during the pendency of the action, a resident of the territory of Oklahoma, living in an adjoining county and within 20 miles of the mortgaged real estate, and that she had no knowledge of the institution or prosecution of the cause until long after the sale of the land by the sheriff. Upon the hearing of this motion the court entered an order setting aside the judgment and all subsequent proceedings, and directing that she be put in immediate possession of the premises. This order and judgment of the trial court was affirmed by the supreme court of the territory on June 30, 1900 (10 Okla. 186, 62 Pac. 805), whereupon the case was brought here on appeal.

The statutes of Oklahoma of 1893, which were in force at the time of these proceedings, required that actions for the foreclosure of a mortgage be brought in the county in which the real estate is situated. Section 3950 authorized service by publication in such cases "where any or all of the defendants reside out of the territory, or where the plaintiff, with due diligence, is unable to make service of summons upon such de-[114] fendant *or defendants within the territory." Sections 3951, 3955, and 4498 read as follows:

"Sec. 3951. Before service can be made by publication an affidavit must be filed stating that the plaintiff, with due diligence, is unable to make service of the summons upon the defendant or defendants to be served by publication, and showing that the case is one of those mentioned in the preceding section. When such affidavit is filed, the party may proceed to make service by publication."

"Sec. 3955. A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may, at any time within three years after the date of the judgment or order, have the same opened, and be let in to defend. Before the judgment or order shall be opened, the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense; but the title to any property, the subject of the judgment or order sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section."

"Sec. 4498. In all cases, any occupying claimant being in quiet possession of any lands or tenements for which such person can show a plain and connected title in law or equity, . . . or being in quiet possession of and holding the same by deed . . . from and under any person claiming title as aforesaid, . . . or being in quiet possession of and holding the same under sale on execution or order of sale against any person claiming title as aforesaid, . . . or any person in quiet possession of any land, claiming title thereto and holding the same under a sale and conveyance made . . . in pursuance of any order of court or decree in chancery, where lands are or have been directed to be sold, and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion on his, her, or their part, shall not be evicted or *thrown out of possession by any person[115] or persons who shall set up and prove an adverse and better title to said lands, until said occupying claimant, his, her, or their heirs, shall be paid the full value of all lasting and valuable improvements made on said lands by such occupying claimant, or by the person or persons under whom he, she, or they may hold the same, previous to receiving actual notice by the commencement of suit on such adverse claim by which eviction may be effected."

*Mr.* **A. A. Hoehling, Jr.,** argued the cause, and, with *Mr. Charles S. Wilson,* filed a brief for appellants:

An application to open a judgment obtained by default, made under a statute, must substantially comply with all of its provisions.

*Durham* v. *Moore,* 48 Kan. 135, 29 Pac. 472.

The court erred in vacating the title of appellant Harding notwithstanding the express statutory provisions that the title of a bona fide purchaser for value, acquired under or in consequence of a judgment thereafter opened or vacated, shall not thereby be defeated or affected.

*Howard* v. *Entreken,* 24 Kan. 428. See also *Guiteau* v. *Wisely,* 47 Ill. 433; *Taylor* v. *Boyd,* 3 Ohio, 338, 17 Am. Dec. 603.

To hold that the appellant Harding can be so summarily deprived of his money and property, without redress of any kind, is not only in direct conflict with the laws of Oklahoma, but is subversive of every legal and equitable consideration, even without the aid of statutory enactment.

2 Freeman, Judgm. § 509; *Reeve* v. *Kennedy,* 43 Cal. 649; *Hammond* v. *Davenport,* 16 Ohio St. 177; *Hahn* v. *Kelly,* 34 Cal. 391, 94 Am. Dec. 742; *Ogden* v. *Walters,* 12 Kan. 282; *Callen* v. *Ellison,* 13 Ohio St.

446, 82 Am. Dec. 448; *Payne* v. *Lott*, 90 Mo. 676, 3 S. W. 402; *Jones* v. *Driskill*, 94 Mo. 190, 7 S. W. 111; *Schmidt* v. *Niemeyer*, 100 Mo. 207, 13 S. W. 405; *Evans* v. *Pike*, 118 U. S. 241, 30 L. ed. 234, 6 Sup. Ct. Rep. 1090; *Donaldson* v. *Rouzan*, 8 Mart. N. S. 162; *Stockton* v. *Downey*, 6 La. Ann. 581; *Taylor* v. *Huey*, 11 La. Ann. 614; *Brobst* v. *Brock*, 10 Wall. 519, *sub nom. Doe ex dem. Brobst* v. *Roe*, 19 L. ed. 1002; *Bryan* v. *Kales*, 162 U. S. 411, 40 L. ed. 1020, 16 Sup. Ct. Rep. 802; *Bryan* v. *Brasius*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803; *Bryan* v. *Pinney*, 162 U. S. 419, 40 L. ed. 1023, 16 Sup. Ct. Rep. 804.

The right to reimbursement of a purchaser in good faith and for a valuable consideration, who has made improvements upon the property, can be supported upon general principles of equity, without regard to statutory provisions.

*Bright* v. *Boyd*, 1 Story, 478, Fed. Cas. No. 1,875.

A purchaser at a foreclosure sale who has made valuable improvements in the belief that he has a clear and absolute title is entitled to be paid for them in case the premises are redeemed.

*Canal Bank* v. *Hudson*, 111 U. S. 66, 28 L. ed. 354, 4 Sup. Ct. Rep. 303; 2 Jones, Mortg. §§ 1128, 1129.

The attempted ouster, without due process of law, of a bona fide purchaser for value under said foreclosure proceedings, without reimbursement of purchase money or of amounts expended, in good faith and without notice, for improvements, is contrary to the express provisions of the statutes of Oklahoma.

Similar statutory provisions have frequently been passed upon by the courts, and the constitutionality of such legislation upheld, and its provisions construed and applied in accordance with the manifest purpose of such statutes "to secure and give to each one, as near as may be, his own."

*Hentig* v. *Redden*, 1 Kan. App. 163, 41 Pac. 1054; *Deitzler* v. *Wilhite*, 55 Kan. 200, 40 Pac. 272; *Stephens* v. *Ballou*, 25 Kan. 618; *Stebbins* v. *Guthrie*, 4 Kan. 353; *Glick* v. *Gregg*, 19 Ohio, 57; *Beardsley* v. *Chapman*, 1 Ohio St. 119.

*Mr. Jeremiah M. Wilson* filed a brief on behalf of appellants in opposition to motions to quash supersedeas and to dismiss appeal.

*Mr.* **William M. Springer** argued the cause, and, with *Mr. George P. Rush*, filed a brief for appellee:

A void judgment may be vacated and set aside at any time on motion of the defendant, without advising the court that the defendant has a valid defense to the action in which the pretended judgment is rendered.

*Hanson* v. *Wolcott*, 19 Kan. 207; *Bond* v. *Wilson*, 8 Kan. 228, 12 Am. Rep. 466; *Gapen* v. *Stephenson*, 17 Kan. 616; *Mastin* v. *Gray*, 19 Kan. 468, 27 Am. Rep. 149; *Kirkwood* v. *Reedy*, 10 Kan. 453; *Green* v. *McMurtry*, 20 Kan. 193; *Pierce* v. *Butters*, 21 Kan. 124; *McNeill* v. *Edie*, 24 Kan. 110; *Valley Bank & Sav. Inst.* v. *Ladies' Cong. Sewing Soc.* 28 Kan. 424; *Tracy* v. *Gunn*, 29 Kan. 510; *Reynolds* v. *Fleming*, 30 Kan. 106, 46 Am. Rep. 86, 1 Pac. 61; *Williams* v. *Moorehead*, 33 Kan. 618, 7 Pac. 226.

When a judgment is sought to be set aside because of some defect in the affidavit of publication, the constant practice in Kansas is to do so by motion filed in the original case.

*Harrison* v. *Beard*, 30 Kan. 532, 2 Pac. 632; *Hanson* v. *Wolcott*, 19 Kan. 207; *Washburn* v. *Buchanan*, 52 Kan. 417, 34 Pac. 1049; *Grouch* v. *Martin*, 47 Kan. 313, 27 Pac. 985; *Long* v. *Fife*, 45 Kan. 271, 25 Pac. 594.

Under the Kansas practice such a judgment as this can be impeached and set aside, even in an action in ejectment, upon proof *aliunde* to show that the court did not have jurisdiction.

*Mastin* v. *Gray*, 19 Kan. 458, 27 Am. Rep. 149; *McNeill* v. *Edie*, 24 Kan. 110; *Kay* v. *Walter*, 28 Kan. 115; *Perry* v. *St. Joseph & W. R. Co.* 29 Kan. 424; *Brinkman* v. *Shaffer*, 23 Kan. 531.

The doctrine of estoppel or limitation does not apply to a void judgment.

Okla. Stat. 1893, § 4471; Freeman, Judgm. § 117.

A mortgagee in possession may be ousted before his debt is paid.

Jones, Mortg. § 717; *Humphrey* v. *Hurd*, 29 Mich. 44; *Caruthers* v. *Humphrey*, 12 Mich. 270; *Whetstone* v. *Coffey*, 48 Tex. 270; *Mills* v. *Heaton*, 52 Iowa, 215, 2 N. W. 1112; *Newton* v. *McKay*, 30 Mich. 380; *Parker* v. *Dacres*, 2 Wash. Terr. 439, 7 Pac. 893; Jones, Mortg. § 1678; *Payne* v. *Long-Bell Lumber Co.* 9 Okla. 683, 60 Pac. 235.

Mr. Justice **Brewer** delivered the opinion of the court:

The supreme court of Oklahoma was of opinion that the affidavit for service by publication was wholly insufficient in that it alleged the nonresidence of defendants simply upon information and belief, and not positively; that being so insufficient the defendant Myrtle Gillett was not brought into court, and the judgment and all subsequent proceedings were, as to her, absolutely void. On the other hand, it is contended by the appellants that a separate ground for service by publication is "where the plaintiff, with due diligence, is unable to make service of summons . . . within the territory;" that the affidavit for publication stated positively such inability; that, therefore, it was strictly within the statute, and authorized the publication of notice; that the publication was duly made, the defendants were thereby brought into court, and the judgment and all subsequent proceedings were regular and valid. It may well be doubted whether this contention of appellants can be sustained, at least in cases like this of direct, and not collateral, attack, even if the inability to obtain personal service by the exercise of due diligence is a distinctive ground for service by publication. It would seem that the facts tending to *show such diligence should be [116

disclosed, and that an affidavit merely alleging inability was one of a conclusion of law, and not of facts. *McDonald* v. *Cooper*, 32 Fed. 745; *Carleton* v. *Carleton*, 85 N. Y. 313; *McCracken* v. *Flanagan*, 127 N. Y. 493, 28 N. E. 385; *Ricketson* v. *Richardson*, 26 Cal. 149; *Braly* v. *Seaman*, 30 Cal. 610; *Kahn* v. *Matthai*, 115 Cal. 689, 47 Pac. 698; *Little* v. *Chambers*, 27 Iowa, 522; *Thompson* v. *Shiawassee County Circuit Judge*, 54 Mich. 236, 19 N. W. 967; *Alderson* v. *Marshall*, 7 Mont. 288, 16 Pac. 576. Nor is this inability shown by the mere fact that a summons issued to the sheriff of the county in which the land is situated is returned not served, for in cases of this kind, by § 3934, a summons can be issued to and served in any county of the territory.

But while the affidavit for publication may have been insufficient, we are unable to concur with the supreme court of Oklahoma in its conclusions. A publication of notice was in fact made, and a publication based upon an affidavit which, however defective it may have been, was intended to be in compliance with the statute. It was approved by the court, which upon it rendered a decree of foreclosure, which was executed by the proper officers in the proper way. By virtue of the proceedings the mortgagee was put into possession,—a possession which he transferred to the appellant Harding. Under those circumstances, what right has the appellee, a grantee from the mortgagor? The foreclosure was a proceeding in equity, although its various steps were prescribed by statute. Equitable principles must control the measure of relief. Even if the publication had been founded upon an affidavit perfect in form, and the decree and all proceedings had been in strict conformity to the statute, yet, by § 3955, the defendant would be let in to defend, upon compliance with certain conditions.

Assuming that that section is not fully applicable because of the defect in the affidavit, yet the appellee comes into a court of equity seeking relief against the foreclosure of a mortgage. In such a case there are almost always certain conditions of relief. If the mortgage be valid the rights of the mortgagee and those claiming under him are to be protected. Generally, such rights are protected by requiring payment [117] of the mortgage debt, *and granting a right of redemption. It is true that this right of redemption is a favored right. *Russell* v. *Southard*, 12 How. 139, 13 L. ed. 927; *Villa* v. *Rodriguez*, 12 Wall. 323, 20 L. ed. 406; *Bigler* v. *Waller*, 14 Wall. 297, 20 L. ed. 891; *Noyes* v. *Hall*, 97 U. S. 34, 24 L. ed. 909; *Shillaber* v. *Robinson*, 97 U. S. 68. 24 L. ed. 967. But it is only a right of redemption which in this case and under the facts disclosed the appellee is entitled to. She does not pretend in her affidavit that the mortgage was invalid, or that it had been paid. She claims by a deed subsequent to the mortgage, and simply insists that she has not had her day in court, and therefore her rights, which, so far as appears, are only the rights of redemption, have not been cut off. Harding, as the grantee of the purchaser at the foreclosure sale, stands in the shoes of the mortgagee. *Bryan* v. *Brasius*, 162 U. S. 415, 40 L. ed. 1022, 16 Sup. Ct. Rep. 803. As shown by the opinion in that case and cases cited therein, a mortgagee who enters into possession, not forcibly, but peacefully and under the authority of a foreclosure proceeding, cannot be dispossessed by the mortgagor, or one claiming under him, so long as the mortgage remains unpaid.

Under § 4498 the appellant Harding has all the rights of an occupying claimant, for he was "in quiet possession, claiming title and holding under a sale and conveyance made in pursuance of a decree in chancery, where lands have been directed to be sold, and the purchasers thereof have obtained title to and possession of the same without any fraud or collusion." Of course, this section applies to proceedings which are defective, for, if not defective, by § 3955 a purchaser in good faith has title, and cannot be evicted upon any terms.

*The decree of the Supreme Court of Oklahoma will be reversed* and the case remanded to that court, with instructions to set aside the order of the trial court, and to direct the entry of one which, without disturbing the possession of Harding, will give to the appellee the right to appear, plead, and make such defense as, under the facts of the case and the principles of equity, she is entitled to.

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## *HOMER BIRD, *Plff. in Err.*, [118]
*v.*
## UNITED STATES.

(See S. C. Reporter's ed. 118-133.)

*Courts — jurisdiction — district court of Alaska — preservation of pending criminal cases — witnesses — murder — instructions — accomplices.*

1. A prosecution for murder, pending at the time of the passage of the act of March 3, 1899, establishing a criminal code and code of criminal procedure for Alaska, must, in view of the provision therein for the preservation of pending causes, be regarded as within the "general jurisdiction" in criminal cases conferred upon the district court for the district of Alaska by the act of June 6, 1900 (31 Stat. at L. 321, chap. 786), whether that court be one newly created by that act, which contains no provision for a transfer of pending causes, or be an existing tribunal continued thereby.
2. A woman who has been married and divorced is not incompetent as a witness in a capital cause because she is designated on the list of witnesses furnished to the defendant in compliance with U. S. Rev. Stat.

NOTE.—*As to right of self-defense*—see notes to Drysdale v. State (Ga.) 6 L. R. A. 424; Gourko v. United States, 38 L. ed. U. S. 680; Thompson v. United States, 39 L. ed. U. S. 146.

*That requested instructions need not be given when jury is fully and fairly instructed*—see note to International & G. N. R. Co. v. Keenan (Tex.) 9 L. R. A. 703.

§ 1033, by her maiden name, under which she has gone since her divorce some ten or twelve years ago.

3. An instruction that, in determining the issue of self-defense, the jury must, under the evidence, consider the situation of the parties and the surrounding circumstances, "together with the testimony of witnesses for the prosecution as well as the evidence of the defendant," is not open to the objection that it authorized the consideration of the testimony of the witnesses for the prosecution even if untrue, and withdrew from the jury in passing on that issue all of the evidence for the defendant except his own testimony, when considered with other instructions giving the rule as to the credibility of witnesses, and enjoining the jury to consider the whole evidence and render a verdict in accordance with the facts proved, and to determine from the evidence the respective situations of the several parties.

4. The refusal of a requested instruction which singles out certain testimony as determinative of a reasonable doubt of guilt is not error, even if such instruction be a correct one, where the whole case is submitted to the jury.

5. An instruction that an attempt to escape, made after many months of confinement, and comparatively without danger, tended, though only slightly, to prove guilt, was as favorable to the accused as he could demand where the only testimony on that subject related to an escape made in October following an arrest in June, and was objected to solely on the ground that the escape was too remote from the commission of the offense and the arrest and imprisonment to be entitled to go to the jury.

6. A requested instruction, though expressing the law correctly, is properly refused where there are no facts in the case to justify it.

7. A person does not become an accomplice by not disclosing the fact that a homicide has been committed, until some time afterward.

[No. 306.]

*Argued October 14, 1902. Decided November 17, 1902.*

IN ERROR to the District Court of the United States for the District of Alaska to review a conviction for murder. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **L. T. Michener** argued the cause, and, with *Messrs. W. W. Dudley* and *Malony & Cobb*, filed a brief for plaintiff in error:

The act of May 17, 1884, ceased to have any force or effect after the passage of the act of June 6, 1900, which expressly repeals all acts and parts of acts in conflict with it, and does not purport to be an amendment of the act of 1884, but covers the whole field of legislation embraced in the act of 1884.

*United States* v. *Tynen*, 11 Wall. 88, 20 L. ed. 153; *Murphy* v. *Utter*, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. Rep. 776.

The district court of the United States for the district of Alaska was abolished by the act of June 6, 1900.

*Tornanses* v. *Melsing*, 45 C. C. A. 615, 106 Fed. 779.

When new states have been admitted into the Union, the territorial courts abolished, and new state and Federal courts organized, it has always been held that, unless a provision was made for the transfer of pending causes to the new courts, the jurisdiction failed.

*McNulty* v. *Batty*, 10 How. 72, 13 L. ed. 333; *Baltimore & P. R. Co.* v. *Grant*, 98 U. S. 398, 25 L. ed. 231; *Ames* v. *Colorado C. R. Co.* 4 Dill. 251, Fed. Cas. 324; *Moore* v. *United States*, 29 C. C. A. 269, 56 U. S. App. 471, 85 Fed. 465.

A list of the names of the witnesses, with their residences, must be served upon the defendant two days before the trial. If this is not done, and objection be made to a witness, whose name is not furnished, such witness cannot testify.

Rev. Stat. § 1033 (U. S. Comp. Stat. 1901, p. 722); *Logan* v. *United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

*Assistant Attorney General* **Beck** and *Mr.* **Charles H. Robb** argued the cause and filed a brief for defendant in error:

The implication that a statute is repealed by a subsequent act revising the whole matter of the first cannot arise when the revisory statute itself prescribed its operation upon the previous act.

*Patterson* v. *Tatum*, 3 Sawy. 164, Fed. Cas. No. 10,830.

The language employed by the court upon the subject of the escape of the defendant, considered in connection with the evidence of the escape and the remarks of the court when that evidence was offered, is not open to objection.

*Allen* v. *United States*, 164 U. S. 498, 41 L. ed. 529, 17 Sup. Ct. Rep. 154.

One who is merely present at the commission of a crime, but in no way aids or participates therein, is not an accomplice.

1 Am. & Eng. Enc. Law, 2d ed. p. 391; *Allen* v. *State*, 74 Ga. 769; *Lowery* v. *State*, 72 Ga. 649; *State* v. *Reader*, 60 Iowa, 527, 15 N. W. 423; *State* v. *Cox*, 65 Mo. 29.

Concealment of the fact that a felony has been committed does not render one an accomplice.

*Noftsinger* v. *State*, 7 Tex. App. 301; *Rucker* v. *State*, 7 Tex. App. 549.

*Mr. Justice **McKenna** delivered the [120] opinion of the court:

Homer Bird was found guilty of the crime of murder, and was sentenced to death. On appeal to this court the judgment and sentence were reversed, and the case remanded for a new trial. 180 U. S. 356, 45 L. ed. 570, 21 Sup. Ct. Rep. 403.

A new trial was had, resulting again in the conviction of Bird for murder, and a sentence of death by hanging was pronounced against him. To this judgment and sentence this writ of error is directed.

After the first trial and while the case was pending in this court, that is, on March 3, 1899, Congress passed a criminal code and code of civil procedure for Alaska, entitled "An Act to Define and Punish Crimes in the District of Alaska, and to Provide a Code

of Criminal Procedure for Said District." [30 Stat. at L. 1253, chap. 429.] It went into effect July 1, 1899.

On June 6, 1900, Congress passed another act for Alaska, entitled "An Act Making Further Provision for a Civil Government for Alaska, and for Other Purposes." 31 Stat. at L. 321, chap. 786.

Plaintiff in error, contending that these acts deprived the court of jurisdiction, when the case was called for trial, moved the court to strike the cause from the docket and order him discharged: (1) Because the court had no jurisdiction of the crime charged; (2) because the court had no jurisdiction of the case. The motion was denied. It was renewed again in arrest of judgment, and the grounds of it specifically alleged as follows:

"I. Because there has never been any plea entered in this court by the defendant, the only plea ever made by him being in the district court for Alaska, established by the act of Congress of May 17, 1884, which was abolished by the act of Congress of June 6, 1900.

"II. Because the court has no jurisdiction of this cause, the indictment herein having been returned into the district court for Alaska, established by the act of Congress [121] of May 17, 1884, *and not into this court, and there is no law conferring upon this court jurisdiction over indictments returned into said court.

"III. Because this court has no jurisdiction of the offense charged in the indictment herein, in this: The said indictment charges an offense under § 5339 of the Revised Statutes of the United States, while this court has no jurisdiction of crimes, except as defined in the Criminal Code for Alaska."

The motion was denied and an exception was taken. This ruling constitutes the first assignment of error.

1. The act of 1884 provided a civil government for Alaska, and by § 3 it was enacted as follows:

"That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States, exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law; and a district judge shall be appointed for said district, who shall, during his term of office, reside therein, and hold at least two terms of said court therein in each year, one at Sitka, beginning on the 1st Monday in May, and the other at Wrangel, beginning on the 1st Monday in November."

By § 7 it was provided:

"That the general laws of the state of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States." [23 Stat. at L. 24, chap. 53.]

It was under this law that plaintiff in error was indicted and tried the first time.

The act of March 3, 1899, defined the crime of homicide, and divided it into murder in the first and second degrees, and manslaughter. The act contained a clause, it is conceded, saving the jurisdiction of the court over prior cases and crimes. And it is also conceded that the act is still in force, but it is urged that it has no bearing on the questions presented. It is contended that the act of 1884 was entirely repealed and superseded by the act of June 6, 1900, "both by express enactment and by necessary implication;" that "the district court for Alaska created *by the act of May 17, 1884, [122] was abolished by the act of June 6, 1900, and an entirely new court created;" and it is hence asserted "that, in the absence of a provision in the latter act, transferring criminal causes pending in the old court to the new, the latter had no jurisdiction of indictments returned into the old court;" that "a statute conferring upon a court 'general' jurisdiction in criminal matters must be construed to refer to and to be limited by the code of criminal law enacted for the territory, and does not include jurisdiction of any offense not embodied in the code."

The act of 1884, we have seen, established the district court for Alaska "with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts." It also provided for the appointment of a district judge, a governor, and other officers. It made provision, as declared in its title, for a civil government in Alaska.

The act of June 6, 1900, is entitled "An Act Making Further Provision for a Civil Government for Alaska, and for Other Purposes." It provides for a governor and other officers, and its provisions for a court are as follows:

"There is hereby established a district court for the district, which shall be a court of general jurisdiction in civil, criminal, equity, and admiralty causes; and three district judges shall be appointed for the district, who shall, during their terms of office, reside in the divisions of the district to which they may be respectively assigned by the President.

"The court shall consist of three divisions. The judge designated to preside over division numbered one shall, during his term of office, reside at Juneau, and shall hold at least four terms of court in the district each year, two at Juneau and two at Skagway, and the judge shall, as near January 1 as practicable, designate the time of holding the terms during the current year.

"The judge designated to preside over division numbered two shall reside at St. Michaels during his term of office, and shall *hold at least one term of court each year at [123] St. Michaels, in the district, beginning the 3d Monday in June.

"The judge designated to preside over division numbered three shall reside at Eagle

City during his term of office, and shall hold at least one term of court each year at Eagle City, in the district, beginning on the 1st Monday in July." [31 Stat. at L. 321, chap. 786, § 4.]

Section 5 declares the jurisdiction of each division of the court to extend over the whole district, and provides for a change of venue from one division or place to another. The act further empowers the judges to appoint their own clerks, commissioners, etc.

Section 10 provides that the "judges . . . [and other officers] provided for in this act shall be appointed by the President, by and with the advice and consent of the Senate," etc., and a salary of $5,000 is provided, instead of $3,000, as under the old law.

Section 25 provides that "the officers properly qualified and actually discharging official duties in the district at the time of the approval of this act may continue to act in their respective official capacities until the expiration of the terms for which they were respectively appointed unless sooner removed." And it is provided in § 368 as follows:

"No person shall be deprived of any existing legal right or remedy by reason of the passage of this act, and all civil actions or proceedings commenced in the courts of the district before or within sixty days after the approval of this act may be prosecuted to final judgment under the law now in force in the district, or under this act. All acts and parts of acts in conflict with the provisions of this act are hereby repealed." [p. 552.]

It is upon these provisions that counsel for plaintiff in error rest the contentions which we have quoted. The principal contention is that the district court for Alaska, created by the act of May 17, 1884, was abolished by the act of June 6, 1900, and an entirely new court created. The contention is supported with ability, but we do not think that it is necessary to decide it on this record. That Congress did not intend, by the act of June, 1900, to affect the prosecution of prior offenses is manifest from the act of March 3, 1899, *supra*. 30 Stat. at L. 1285, chap 429. This act, though passed prior to the act of June, 1900, constituted. [124]*with the latter act, a part of the scheme of government for Alaska. By the act of March 3, 1899, it is provided "that nothing herein contained shall apply to, or in any way affect, any proceeding or indictment now found or pending, or that may be found, for any offense committed before the passage of this act." Section 219. The act was in force at the time of the passage of the act of June, 1900. It constituted then and constitutes now the code of criminal law enacted for the territory, and the crimes there defined constitute the criminal causes of which the district court, by the act of June, 1900, is given "general" jurisdiction. Necessarily therefore, not only the criminal causes subsequent to the act of 1899, but the criminal causes saved by it, are covered by its provisions. In other words, the tribunal provided by the act of 1900, whether it is newly created or an existing one continued, has jurisdiction of all the criminal causes embraced by the provisions of the act of March 3, 1899. And it makes no difference that the records and files "of the old court" are not made records and files "of the new court." They must be considered as made, as the means of exercising the jurisdiction conferred. It being the intent of Congress to save "any proceeding or indictment" found or pending "for any offense committed before the passage" of the act of 1899, in construing the act of 1900, "some degree of implication may be called in to aid that intent." 6 Cranch, 314, 3 L. ed. 234. There is a presumption against a construction which would render a statute ineffective or inefficient, or which would cause grave public injury or even inconvenience.

We find nothing in the cases cited by plaintiff in error to defeat our conclusion. In *McNulty* v. *Batty*, 10 How. 72, 13 L. ed. 333, there was a transfer of sovereignty; a territory became a state, and it was held "the territorial government ceased to exist and all the authority under it, including the laws organizing its courts of justice, and providing for a revision of their judgments in this court [Supreme Court of the United States] by appeals or writs of error." All that is material in *Freeborn* v. *Smith*, 2 Wall. 160, 17 L. ed. 922, depends upon the same consideration. In *Merchants' Ins. Co.* v. *Ritchie*, 5 Wall. 541, 18 L. ed. 540, it was decided that the act of 1833, which gave the citizens of a state the *right to sue citizens [125] of the same state in the courts of the United States, for causes arising under the revenue laws, was repealed by a subsequent statute, and that therefore the national courts had no longer jurisdiction of such causes. In other words, it was held that, as the jurisdiction depended upon the statute, it was taken away by the repeal of the statute. *Ex parte McCardle*, 7 Wall. 506, 19 L. ed. 264; *The Assessor* v. *Osborne*, 9 Wall. 567, *sub nom. Gates* v. *Osborne*, 19 L. ed. 748; *Baltimore & P. R. Co.* v. *Grant*, 98 U. S. 398, 25 L. ed. 231, and *United States* v. *Tynen*, 11 Wall. 88, 20 L. ed. 153, were to the same effect. In the latter case there was not an express repeal of the prior statute, but it was decided that the latter act effected such repeal upon the principle that if two acts are "repugnant in any of their provisions, the latter act, without any repealing clause, operates, to the extent of the repugnancy, as a repeal of the first; and even where two acts are not in express terms repugnant, yet, if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." This principle plaintiff in error relies on, and urges that it was recently asserted and applied in *Murphy* v. *Utter*, 186 U. S. 95, 46 L. ed. 1070, 22 Sup. Ct. Rep. 776. The principle is not pertinent in the view we take of the statutes.

2. One of the witnesses for the prosecution was a woman. She was designated on the indictment by the name of Naomi

Strong. It was contended that Naomi Strong was not her name, and plaintiff in error objected to her testimony on the ground that her true name had not been furnished on the list of witnesses given. The objection was overruled, and the ruling is assigned as error. At the request of the plaintiff in error the jury was withdrawn and the witness examined before the court as to her name, and she testified that her maiden name was Naomi Strong, but she had been married and divorced. She refused to give the name of her husband. She also testified that she had been divorced ten or twelve years, and upon her divorce she went by her maiden name. Subsequently she went by the name of Byers, when living with a man by that name, and, after meeting plaintiff in error, she went by his name. She tes-[126]tified that she met the plaintiff in *error in 1893 or 1894, and left New Orleans with him the 1st of May, 1898, to join the expedition to Alaska, during which the homicide was committed. She and plaintiff in error traveled as husband and wife under the name of Mr. and Mrs. Bundick.

The ruling of the court was right. Section 1033 of the Revised Statutes of the United States requires that in a capital case the list of the witnesses and jurors shall be delivered to the defendant at least two entire days before the trial. By list of the witnesses means a list containing the names of the witnesses, and, necessarily, this means the names which they then bear, and which identify them. The purpose of the statute is to point out to the defendant the person who may testify against him, and that is best accomplished by the name the witness bears at the time, and not some name that such witness may have had at some prior time. The present case demonstrates the sense of this. It does not appear how long the witness had been married, and to have designated her by her married name might have conveyed no information about her. A question could be raised whether the objection to the witness was made in time. *Logan* v. *United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617.

3. There are errors assigned on the instructions given or refused, and for their understanding an outline of the facts is necessary.

In the spring of 1898 the plaintiff in error, Hurlin, the deceased, Charles Scheffler, R. S. Patterson, and Naomi Strong organized a party to prospect in Alaska for gold. Each of the men was to contribute $500 for purchasing an outfit. Scheffler failed with his contribution, and plaintiff in error furnished something over $1,000. At San Francisco, California, a small steam launch and a scow 32 feet long by 6 feet beam were bought, together with the usual supply of food, clothing, etc.

The party sailed from San Francisco, and reached St. Michael July 4. Shortly after, they started up the Yukon river, reaching a point in September about 600 miles above its mouth, and there determined to go into winter quarters, and for that purpose began the construction of a cabin. *Dissentions [127] arose in the party, and the plaintiff in error and the rest of the party do not agree in their testimony as to who was in fault. A resolution to separate was formed, but its execution was postponed, at the request of the plaintiff in error, until the cabin should be finished. The cabin was finished on September 26. In the meantime there had been disagreements as to the division of supplies. The homicide occurred on the morning of the 27th of September. The witnesses for the prosecution substantially agree that the party collected for breakfast on that morning,—Patterson, Hurlin, and Scheffler going first, the plaintiff in error subsequently joining them, he seating himself on his bunk back of the others, and they sat as follows: Patterson on the right, Scheffler in the center, and Hurlin on the left.

We may quote from the testimony of the woman. Her statement was substantially corroborated by the others; their statements only varied in some details or differences which arose from their different positions.

Scheffler and I were talking about a trap I had set to catch some grouse, and——— . . . *A.*———we were talking about it, and all at once I heard Mr. Bird's gun click, —shotgun,—when he broke it, it clicked, of course, and I looked up, and he had the gun to his shoulder, and in the meantime Mr. Scheffler looked around; I think he fired at Mr. Hurlin, and then Scheffler looked around and held up his hands and told him for God's sake not to shoot him, and I jumped up after he fired at Hurlin, and Mr. Patterson kind of jumped back of me,—jumped behind me like, and I asked Bird not to shoot; he had the gun to his shoulder all the time, and I jumped and run; put my head over Patterson's shoulder and run through the boat, and just as I passed him in the boat he fired at Mr. Patterson, and Patterson jumped overboard; whether the shot struck him when he jumped overboard I don't know; and in the meantime I jumps out on the beach, and Mr. Patterson jumps overboard, and Mr. Bird comes running out, climbs over the bow of the boat with two guns in his hand—his own and Mr. Scheffler's — and heads Patterson off; the boat was in the water just kind of half on the beach *and half in the water, and so Mr. [128] Patterson wades around on the side of the boat to get out, and Bird heads him off and tells him not to come near him, and Patterson kept begging him not to shoot him, and Bird up with his gun again and says, "Bob, you dirty son of a bitch, you're the cause of this," and shot at him the second time, and Patterson came to the beach.

*Q.* Well, compose yourself, Mrs. Strong, if you can, and go on and state what occurred there. What happened when Mr. Patterson got to the beach? — *A.* They were all on the beach then, and he begged Bird not to shoot him.

*Q.* What did he say to him? — *A.* He held out his hands and told him for God's sake to think of his poor family.

*Q.* What did Bird say? — *A.* I don't remember any more what he did say; I think he says, "Bob, I have thought of our families," or something like that.

*Q.* At the time he fired at Hurlin, did you see what Mr. Hurlin did? Immediately after, as far as Hurlin was concerned? Immediately after the shooting of Hurlin, what followed [witness sobs]; what did he do, Mrs. Strong? — *A.* Mr. Hurlin?

*Q.* Yes. — *A.* He never moved at all; he sat in the same position when he was shot.

*Q.* Did his body change position at all? — *A.* No; just remained that way for quite a while.

*Q.* Did you see any evidence of a wound on Mr. Hurlin.—anything? — *A.* I saw where there was a hole in his head right here, the left side.

The plaintiff in error claimed to have acted in self-defense. His testimony will be given hereafter, in connection with an instruction to which it is more particularly pertinent.

In view of the testimony, error is based upon the following instruction given by the trial court:

"In this connection you may consider whether the gun of the defendant was placed at a point near his bed, as stated by the witnesses for the prosecution, and whether the defendant took his gun from the point where it was described to have been placed, by the witnesses for the prosecution, and whether, without any act on the part of the deceased [129] or either of those *sitting near him, he maliciously, from behind the backs of these men, when no attack was made against him in any way, wilfully and maliciously shot the deceased, Hurlin, in the back and side of the head, thereby taking his life; or whether the statement of the defendant is true, that a quarrel ensued between himself and Patterson while discussing their accounts; that blows passed between them, and that, after hearing the witness Naomi Strong say, 'They are getting their guns,'—if he did hear any such thing, and if you so find, —whether he sprang down to a point near the water barrel and there seized his gun, and immediately raising the same shot Hurlin while he, the said Hurlin, was in the act of attempting to draw a gun from his sleeping bag; and, if all of that was true, as the defendant states, whether he was under the necessity of immediately shooting and killing the said Hurlin in order to protect his own life, or if, as the situation then appeared to him, such necessity of immediately shooting Hurlin in order to save his own life existed.

"If you find from the evidence that the statements of defendant Bird in these respects are true, and that the statement of the witnesses of the prosecution are not true. and that the defendant Bird shot and killed the said Hurlin under circumstances, as they then appeared to him, necessary for the protection of his own life, then you should find him not guilty. But if you should further find that the statement of the defendant Bird is true as to the acts of the said Hurlin as to obtaining his own gun in the manner he described, and yet the apparent danger was not such as to make it necessary or apparently necessary for him to kill the deceased, Hurlin, without giving him any warning,—if you find he gave him no warning,—and without calling upon him, the said Hurlin, to desist in his efforts to obtain his gun, and that the defendant, under such circumstances, shot and killed the deceased, Hurlin, without apparent necessity therefor in order to preserve his own life, then you should find the defendant guilty of manslaughter at least.

"But in determining this matter, under the evidence before you, you must consider the situation of the parties at the time and *all the surrounding circumstances, to- [130] gether with the testimony of the witnesses for the prosecution, as well as the evidence of the defendant."

The contention of the plaintiff in error is that the last paragraph "qualified the whole instruction, and permeated it with two errors;" because it was in effect declared that, even if the testimony of the witnesses for the government were untrue, it was to be considered in determining the verdict; and because all of the evidence for the defendant (plaintiff in error) except his own was withdrawn from the jury in passing on the issue of self-defense. The instruction is not open to this criticism when considered in connection with other instructions. The rule as to the credibility of witnesses was given in other instructions, and did not have to accompany every ruling, and the jury were instructed that it was their duty "to consider the whole evidence, and render a verdict in accordance with the facts proved upon the trial." The injunction was not limited by the paragraph complained of by plaintiff in error. That was preceded by the following:

"In considering whether the killing in this case was justifiable or excusable on the ground of self-defense, the jury should consider all the circumstances attending the killing, the conduct of the parties at the time and shortly prior thereto, and their respective situations at the time. *You should determine from the evidence in this case whether the several parties were situated, at the time of the killing, as described by the witness for the prosecution or described by the defendant himself.*"

The italics are ours, and manifestly the injunction was to determine from the whole evidence "the respective situations" of the "several parties." And the same injunction was expressed in the concluding paragraph of the instruction. This view makes it unnecessary to consider at length the instruction requested by plaintiff in error, the refusal of which constitutes the 8th assignment of error. It selected and gave certain testimony prominence, and attempted to make it determinative of a reasonable doubt of the guilt of the plaintiff in error. If we could concede the correctness of such an instruction the refusal *cannot be claimed as [131] error, if the whole case was submitted to the jury; and we think it was.

4. The 7th assignment of error is based upon the following instructions:

"Evidence has been offered of the escape of the defendant, or attempted escape, after arrest on the charge on which the defendant is now being tried. This evidence is admitted on the theory that the defendant is in fear of the consequences of his crime and is attempting to escape therefrom; in other words, that guilt may be inferred from the fact of escape from custody. The court instructs you that the inference that may be drawn from an escape is strong or slight according to the facts surrounding the party at the time. If a party is caught in the act of crime and speedily makes an attempt for liberty under desperate circumstances, the inference of guilt would be strong; but if the attempt was made after many months of confinement and escapes comparatively without danger, then the inference of guilt to be drawn from an escape is slight; but whether the inference of guilt is strong or slight depends upon the conditions and circumstances surrounding the accused person at the time."

There was no error in the instruction. It submitted to the jury the attempt to escape as a fact to be considered, not as determinative of guilt, and *Allen* v. *United States*, 164 U. S. 492, 41 L. ed. 528, 17 Sup. Ct. Rep. 154, applies, and not *Starr* v. *United States*, 164 U. S. 627, 41 L. ed. 577, 17 Sup. Ct. Rep. 223. Indeed, when the state of the record is considered the charge given was as favorable to the accused as the law warranted. The only testimony on the subject of flight related to an escape made by the prisoner in October, following his arrest in June. This testimony was objected to, not because proof of flight was *per se* inadmissible, but solely on the ground that the escape in question was too remote from the commission of the offense charged and the arrest and imprisonment of the accused, to be entitled to go to the jury. The court overruled the objection on the ground that it went to the force of the evidence, and not to its admissibility. When, therefore, the court charged the jury that an attempt to escape, "made after many months of confinement" and "comparatively without dan-[132]ger," tended *only slightly to prove guilt, we think the instruction was not amenable to the criticism made of it. In view of the instruction which the court gave, as just stated, we think the court committed no error in not giving a more elaborate instruction on the subject of flight, which was asked by the accused. Everything in the charge asked, as applied to the case, was embraced in the charge given.

5. The plaintiff in error requested the court to give an instruction which defined principal and accessory, expressed the legal value of the testimony of an accomplice and the necessity of its corroboration to justify a conviction, and submitted to the jury to determine whether Charles Scheffler and Naomi Strong were or were not the accomplices of plaintiff in error in the killing of Hurlin. Assuming, without deciding, that the instruction requested expressed the law correctly, it was nevertheless rightly refused, because there were no facts in the case to justify it. The plaintiff in error testified, and claimed to have killed Hurlin in self-defense. His version of the controversy which preceded the homicide was as follows:

I says to him [Patterson], "You fellows are nothing but a pack of thieves; you made 10 per cent on them bills in Fresco;" and Patterson says, "You're a liar;" I says, "You're another," and with that we dug into each other.

*Q.* And what happened? — *A.* He struck me and I struck him.

*Q.* Where did you strike him?—*A.* In the eye, and I knocked him off the sacks and he fell down, and with that Naomi hollers, "Look out, Homer, they're getting their guns." Hurlin was coming up with his gun under his sleeping bag, one end of it this way. I shot Hurlin, and Patterson ran to the bow of the boat; he had to stoop like that, and he jumped for his gun, and, as he did so, I shot him.

*Q.* Come to this map and point out just where you were when you shot at Hurlin.—*A.* I was in here; I jumped down here and got the gun and stood right about here; Scheffler and the woman was here.

*Q.* Where was Hurlin?—*A.* Hurlin was here reaching for *his gun under the sleep-[133]ing bags, and had it under his knee like this way.

*Q.* And where was Patterson?—*A.* He was jumping from here over against the edge like,—you see the rifle was right in here. I had seen that gun there before, for Scheffler had it out, and brought in and set it down there. He was going for that.

It is hardly necessary to point out that this testimony shows the woman to have been an innocent spectator of the fray, and if Scheffler had any guilty connection with what transpired, it was not as the accomplice of plaintiff in error. Nor did he become an accomplice by not disclosing the homicide until some time afterward.

We find no error in the other rulings, objected to, nor do they require particular review.

*Judgment affirmed.*

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SANFORD JACOBI, *Plff. in Err.*,
*v.*
STATE OF ALABAMA.

(See S. C. Reporter's ed. 133-136.)

*Error to state court — Federal question.*

A claim that the admission in evidence of the

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

previous testimony of an absent witness was in violation of the 14th Amendment to the Federal Constitution was not specially set up at the proper time and in the proper way to confer jurisdiction on the Supreme Court of the United States to review the judgment of the highest court of a state, by an assignment of error in that court, which was not considered by it presumably because no such question had been raised in the trial court.

[No. 341.]

*Argued November 7, 1902. Decided November 17, 1902.*

IN ERROR to the Supreme Court of the State of Alabama to review a judgment affirming a conviction in the City Court of Montgomery for criminal assault. *Dismissed.*

See same case below, 32 So. 158.

The facts are stated in the opinion.

*Mr.* **Henry L. Lazarus** argued the cause, and, with *Messrs. Lionel Adams, J. N. Luce,* and *H. Michel,* filed a brief for plaintiff in error.

*Mr.* **Charles G. Brown** argued the cause and filed a brief for defendant in error:

The Federal question, being first presented on the assignments of error in an appellate court, comes too late.

*Eastern Bldg. & L. Asso.* v. *Welling,* 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531. See also *F. G. Oxley Stave Co.* v. *Butler County,* 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Capital City Dairy Co.* v. *Ohio,* 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Turner* v. *Richardson,* 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Spies* v. *Illinois,* 123 U. S. 181, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Baldwin* v. *Kansas,* 129 U. S. 56, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Banholzer* v. *New York L. Ins. Co.* 178 U. S. 405, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972.

A writ of error to review the judgment of the highest tribunal of a state stands on a far different ground from a direct appeal from the supreme court of a territory, and cannot be maintained in the absence of a Federal question giving jurisdiction.

*Davis* v. *Texas,* 139 U. S. 657, 35 L. ed. 303, 11 Sup. Ct. Rep. 675.

The question properly before the Alabama courts was the admissibility of the testimony under a valid, unquestioned constitutional provision of the state Constitution, and the validity of the constitutional provision was not denied, but upheld, and the testimony was held admissible under such provisions. No statute or provision of the Constitution of the United States was specially drawn in question, nor any law of the state held to be valid which was in conflict with the Constitution of the United States.

*Central Land Co.* v. *Laidley,* 159 U. S. 109, 40 L. ed. 93, 16 Sup. Ct. Rep. 80.

*Mr. Chief Justice **Fuller** delivered the [134] opinion of the court:

Jacobi was convicted in the city court of Montgomery, Montgomery county, Alabama, on an indictment for criminal assault, and the judgment against him was affirmed by the supreme court of that state. 32 So. 158. To revise that judgment this writ of error was brought.

The conviction was the result of a second trial of the case, and the alleged victim of the assault, who had testified at the first trial, was not present at the second. But evidence of her previous testimony was admitted against defendant's objection, and it is contended that thereby defendant was deprived of rights secured by the Federal Constitution, and denied due process of law. The question for us to decide at the outset is whether such a claim was specially set up at the proper time and in the proper way.

The rule is firmly established by the decisions of the highest court of Alabama, that when a witness is beyond the jurisdiction of the court, whether he has removed from the state permanently *or for an in [135] definite time, his testimony on a former trial for the same offense may be given in evidence against defendant on a subsequent trial. *Lowe* v. *State,* 86 Ala. 47, 5 So. 435; *Perry* v. *State,* 87 Ala. 30, 6 So. 425; *Pruitt* v. *State,* 92 Ala. 41, 9 So. 406; *Matthews* v. *State,* 96 Ala. 62, 11 So. 203; *Burton* v. *State,* 115 Ala. 1, 22 So. 585.

In this case, evidence was introduced before the trial judge that the witness was not in the state at the time of the trial, and that her absence was of a permanent or indefinite nature. There was no pretense of absence by procurement, and there was evidence of diligence in attempting to serve process upon her. It was held that sufficient foundation for the admission of evidence of her former testimony had been laid, and the supreme court concurred in that conclusion. Defendant objected to this preliminary proof, and moved to exclude it on several grounds, one of which was "that the defendant has the constitutional right to be confronted by" the witness. These objections having been overruled, evidence was introduced of the testimony given by the absent witness on direct and cross examination on the former trial, to which defendant objected on the ground, among others, "that the defendant, Jacobi, has the constitutional right to be confronted by the witnesses against him." The trial judge overruled defendant's objections, and each ground thereof, and admitted the evidence, and defendant duly excepted. No reference to the Constitution of the United States was made in the objections. The Constitution of Alabama provided that [art. 1, § 7] "in all criminal prosecutions the accused has a right . . . to be confronted by the witnesses against him;" and it is plain that the constitutional right asserted was under the state Constitution. *Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup.

Ct. Rep. 34; *Endowment & Benev. Asso.* v. *Kansas*, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499.

After the case reached the state supreme court, error was assigned to the admission of the evidence, as being in violation of the 14th Amendment. The supreme court did not refer to that contention, presumably because of the settled rule in Alabama in criminal cases, that when specific grounds of objection to the admission of evidence are [136 [assigned, all others *are waived (*McDaniel* v. *State*, 97 Ala. 14, 12 So. 241); and that the supreme court will not decide a question relating to the admission of evidence, not made and acted on in the trial court (*Freeman* v. *Swan*, 22 Ala. 106; *Robertson* v. *Robinson*, 65 Ala. 610, 39 Am. Rep. 17). The supreme court was therefore not called upon to revise the judgment of the city court for error not committed, and we cannot interfere with its action in adhering to the usual course of its judgments. If the court, however, had passed upon the question, our jurisdiction might have been maintained. *Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Dreyer* v. *Illinois*, 187 U. S. 71, *ante*, 79, 23 Sup. Ct. Rep. 28.

In *Spies* v. *Illinois*, 123 U. S. 131, *sub nom. Ex parte Spies*, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, where objection to the admission of a certain letter, because obtained in violation of the Constitution of the United States, was made in the supreme court of the state for the first time, and that court declined to consider the constitutional question supposed to be involved, on the ground that it was not raised in the trial court, Mr. Chief Justice Waite said: "To give us jurisdiction under § 709 of the Revised Statutes, because of the denial by a state court of any title, right, privilege, or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here, the decision must be against the right so *set up or claimed*. As the supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of a waiver of a right under the Constitution, laws, or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned." And see *Brooks* v. *Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Baldwin* v. *Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193.

The result is that *the writ of error must be dismissed, and it is so ordered.*

*ED. H. REID, *Plff. in Err.*, [137]
*v.*
PEOPLE OF THE STATE OF COLORADO.

(See S. C. Reporter's ed. 137-153.)

*Interstate commerce—state regulation—prior legislation by Congress—live-stock quarantine—privileges and immunities.*

1. The subject of transportation of cattle from one state to another is not so far covered by the provisions of the animal industry act of May 29, 1884 (23 Stat. at L. 31, chap. 60; U. S. Comp. Stat. 1901, p. 299), for the investigation and suppression of diseases of cattle, or those relating to the exportation of diseased cattle to ports in foreign countries, and the transportation between the states of live stock known to be diseased, as to preclude the enactment of Colo. Sess. Laws 1885, p. 335, prohibiting the importation of cattle from south of the 36th parallel of north latitude between April 1st and November 1st, unless first kept for ninety days at some place north of that parallel, or unless a certificate of freedom from contagious or infectious disease has been obtained from the state veterinary sanitary board.

NOTE.—*As to constitutional equality of privileges, immunities, and protection*—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, and note.

*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. (Va.) 13 L. R. A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; and Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

*Constitutionality of state legislation regulating the importation of infected animals.*

Proper quarantine regulations restricting the importation of cattle from another state on account of the danger from disease do not make unconstitutional regulations of commerce. Smith v. St. Louis & S. W. R. Co. 181 U. S. 248, 45 L. ed. 847, 21 Sup. Ct. Rep. 808.

A statute making persons having in their possession Texas cattle which have not been wintered north, liable for any damages which may accrue from permitting them to run at large and thereby spread the Texas fever, is not unconstitutional. Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277.

And the provisions of 2 Kan. Gen. Stat. 1897, chap. 139, p. 761, making any person who brings into the state cattle capable of imparting Texas, splenic, or Spanish fever, liable for damages sustained by the communication of such fever to other cattle, and providing that cattle brought from south of the 37th parallel of north latitude shall be prima facie deemed capable of communicating the disease, are not void as a regulation of commerce. Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

In Grimes v. Eddy, 126 Mo. 168, 26 L. R. A. 638, 28 S. W. 756, the court upheld as a police regulation so much of Mo. Rev. Stat. 1889, § 853, as prohibited the importation into the state of Texas, Mexican, Cherokee, and Indian cattle which, though not themselves diseased, were infected with microbes or parasites by which Texas fever might be communicated to other cattle, although the court conceded that the

2. No unconstitutional burden on interstate commerce is made by the provisions of Colo. Sess. Laws 1885, p. 335, prohibiting the importing of cattle from south of the 36th parallel of north latitude between April 1st and November 1st, unless first kept for ninety days at some place north of that parallel, or unless a certificate of freedom from contagious or infectious disease has been obtained from the state veterinary sanitary board.

3. The privileges and immunities of citizens in the several states are not denied by the provisions of Colo. Sess. Laws 1885, p. 335, for the protection of domestic cattle against the communication of disease by cattle from other states, where the statute is equally applicable to citizens of all states.

[No. 269.]

*Argued October 24, 1902. Decided December 1, 1902.*

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which affirmed a conviction in the District Court of Arapahoe County for a violation of a statute of that state for the protection of domestic cattle from the communication of disease by cattle from other states. *Affirmed.*

See same case below, 68 Pac. 228.

The facts are stated in the opinion.

*Messrs.* **John H. Denison** and **William M. Springer** argued the cause, and, with *Messrs. Ralph Talbot* and *W. H. Wadley* and *Assistant Attorney General Beck*, filed a brief for plaintiff in error:

The transportation of live stock by rail or by watercourse from state to state is a branch of interstate commerce.

*Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527.

The fact that Congress has acted precludes the state of Colorado from enacting this statute, if the same be unreasonable, unnecessary, or cumulative, or imposes grievous and unnecessary burdens upon the shipper engaged in interstate commerce, in excess of congressional requirements.

*Smith* v. *Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Hinson* v. *Lott*, 8 Wall. 148, 19 L. ed. 387.

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practical effect of such provision was the absolute inhibition of shipment into the state of all cattle coming from the south.

The importation of Texas cattle into the state between March 1st and December 1st in each year cannot be absolutely prohibited. Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527.

Such cases as, prior to the decision in Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527, had sustained efforts absolutely to prohibit the importation of Texas cattle (Yeazel v. Alexander, 58 Ill. 254; Stevens v. Brown, 58 Ill. 289; Wilson v. Kansas City, St. J. & C. B. R. Co. 60 Mo. 184; Husen v. Hannibal & St. J. R. Co. 60 Mo. 226; Kenney v. Hannibal & St. J. R. Co. 62 Mo. 476) have since been overruled. Gilmore v. Hannibal & St. J. R. Co. 67 Mo. 323; McAlister v. Chicago, R. I. & P. R. Co. 74 Mo. 358; Urton v. Sherlock, 75 Mo. 247; Salzenstein v. Mavis, 91 Ill. 391.

The right to carry freight and property, given to railroads by U. S. Rev. Stat. § 5258 (U. S. Comp. Stat. 1901, p. 3564), does not give them the right to carry into a state, in violation of state laws, cattle known, or which by due diligence may be known, to be capable of communicating disease. Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

The provisions for the investigation of the diseases of cattle, and the suppression thereof, made by the animal industry act of Congress of March 29, 1884, with the later appropriation of money to carry them out, do not preclude legislation by states to protect domestic cattle against the communication of diseases by cattle from other states. *Ibid.*

A distinction has been drawn in Missouri between the transportation of infected cattle through the state, and the importation of such cattle into the state. And the Missouri statute has therefore been declared unconstitutional so far as it would impose a liability on a railroad company engaged in transporting through the state cattle infected with Texas or Spanish fever, without any intention of unloading within the state, for the injury to domestic cattle by reason of the wrecking of the train and the consequent exposure to the disease. Grimes v. Eddy, 126 Mo. 168, 26 L. R. A. 638, 28 S. W. 756; Selvege v. St. Louis & S. F. R. Co. 135 Mo. 168, 36 S. W. 652.

But in Kansas a similar statute was applied to an almost identical state of facts, against an objection that such statute was an embargo upon interstate commerce. Missouri P. R. Co. v. Finley, 38 Kan. 550, 16 Pac. 951.

A state cannot make a carrier who shall, between March 1st and December 1st, transport Texas cattle through the state without unloading them, liable for all contagion spread by them. Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527.

But where such cattle are unloaded within the state, a statute under which the carrier may be held liable for all consequent injury to domestic cattle does not violate the commerce clause of the Federal Constitution. Rouse v. Youard, 1 Kan. App. 270, 41 Pac. 426.

The Idaho sheep quarantine act of March 13, 1899, authorizing the governor, when he has reason to believe that there is an epidemic infectious disease of sheep in localities outside the state, to investigate the matter, and, if he finds the disease exists, to make a proclamation declaring such localities infected and prohibiting the introduction therefrom of sheep into the state, except under such restrictions as after consultation with the state sheep inspector he may deem proper,—is within the police power of the state. Rasmussen v. Idaho, 181 U. S. 198, 45 L. ed. 820, 21 Sup. Ct. Rep. 594.

Quarantine regulations established by the governor of the state on recommendation of a live-stock sanitary commission in pursuance of Tex. Rev. Stat. 1895, art. 5043c, whereby the importation of all cattle from the state of Louisiana from June 5th until the 15th day of the following November is prohibited because the live-stock commission had reason to believe that the anthrax had broken out, or was liable to break out, in that state, are a proper exercise of the police power of the state. Smith v. St. Louis & S. W. R. Co. 181 U. S. 248, 45 L. ed. 847, 21 Sup. Ct. Rep. 803.

For other cases on the validity and construction of statutory regulations as to infected animals, see note to Grimes v. Eddy (Mo.) 26 L. R. A. 638.

All state legislation adjudged invalid by this court either imposed a tax upon some subject of commerce, or exacted a license fee from the parties engaged in commercial pursuits interstate in their nature, or created an impediment to the free navigation of public waters, or prescribed conditions in accordance with which commerce in particular articles or between particular places was required to be conducted.

*Sherlock* v. *Alling*, 93 U. S. 99, 23 L. ed. 819.

Congress has full control over interstate commerce, and is the only authority by which that commerce can be regulated.

*Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Grimes* v. *Eddy*, 126 Mo. 168, 26 L. R. A. 638, 28 S. W. 756; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. See also *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23.

The Missouri statute was held to be unconstitutional, solely because it went beyond the necessities of the case.

*Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527.

Transportation is essential to commerce, or, rather, it is commerce itself; and every obstacle to it, or burden laid upon it by legislative authority, is regulation.

*Ibid.*

The state may not, under cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce.

*Ibid.*; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The power conferred by the Constitution upon Congress to regulate commerce is exclusive, and permits no action or interference by the states in any case where the subject of the power is national or admits one uniform system of regulation.

*Cooley* v. *Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996; *Gibbons* v. *Ogden*, 9 Wheat. 16, 6 L. ed. 27; *Henderson* v. *New York*, 92 U. S. 259, *sub nom. Henderson* v. *Wickham*, 23 L. ed. 543; *Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 99, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

The state requirement is hostile both to the letter and the spirit of the constitutional provision.

*Gulf, C. & S. F. R. Co.* v. *Hefley*, 158 U. S. 99, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

A state cannot regulate commerce under the guise of an inspection law.

*Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862: *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

*Mr.* **Frederic D. McKenney** argued the cause for defendant in error. *Mr. Charles C. Post* filed a brief for defendant in error:

The Colorado act was intended as supplementary to and along the line of the Federal act.

*Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488.

It is a matter of general information or knowledge that Texas cattle are not, in fact, diseased themselves, so as to render them unhealthy for food, but that all Texas cattle are infected in their systems with a parasite or germ which is harmless to them, but which when taken into the stomach by native cattle produces what is known as Texas fever.

*Grimes* v. *Eddy*, 126 Mo. 168, 26 L. R. A. 638, 28 S. W. 756.

The regulations prescribed by the Agricultural Department as incidental to carrying the act into effect could not relieve even from civil liability.

*Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 624, 42 L. ed. 882, 18 Sup. Ct. Rep. 488.

Neither corporations nor individuals are entitled, by force alone of the Constitution of the United States, and without liability for injuries resulting therefrom to others, to bring into one state from another state, cattle liable to impart or capable of communicating disease to domestic cattle.

*Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 628, 42 L. ed. 883, 18 Sup. Ct. Rep. 488.

The fee of 1.5 cents per head is not unreasonable.

*Patapsco Guano Co.* v. *North Carolina Bd. of Agri.* 171 U. S. 345, 43 L. ed. 191, 18 Sup. Ct. Rep. 862.

*Mr. Justice **Harlan** delivered the opin- [138] ion of the court:

The plaintiff in error was convicted in the district court of Arapahoe county, Colorado, and sentenced to confinement for six months in the county jail for a violation of the 2d section of a statute enacted March 21st, 1885, to prevent the introduction of infectious or contagious diseases among the cattle and horses of that state. Colo. Sess. Laws 1885, p. 335.

The judgment was affirmed by the supreme court of the state, and, the case having been brought here, it is insisted that by the final judgment the accused has been denied a right specially claimed by him under the Constitution of the United States.

This position depends upon the inquiry whether a certain act of Congress, to be presently referred to, has the scope and effect attributed to it by the accused, and, that contention failing, whether the statute under which he was convicted is repugnant to that instrument.

After reciting that certain infectious and contagious diseases, known as the Texas or splenetic fever, Spanish itch, and other diseases of a dangerous and contagious nature, were prevalent among cattle and horse stock in the states and territories south of the 36th parallel of north latitude, and that it was essential for the protection of the cattle and horses of Colorado to prevent the introduction and spread of all such diseases within that state, the above statute provided:

"§ 1. It shall be unlawful for any person, association, or corporation to bring or drive, or cause to be brought or driven, into this state any cattle or horses having an infectious or *contagious disease, or which have [139]

been herded, or brought into contact, with any other cattle or horses laboring under such disease, at any time within ninety days prior to their importation into this state.

"§ 2. It shall be unlawful for any person, association, or corporation to bring or drive, or cause to be brought or driven, into this state, between the first day of April and the first day of November, any cattle or horses from a state, territory, or county, south of the 36th parallel of north latitude, unless said cattle or horses have been held at some place north of the said parallel of latitude for a period of at least ninety days prior to their importation into this state, or unless the person, association, or corporation owning or having charge of such cattle or horses shall procure from the state veterinary sanitary board a certificate, or bill of health, to the effect that said cattle or horses are free from all infectious or contagious diseases, and have not been exposed, at any time within ninety days prior thereto, to any of said diseases. The expense of any inspection connected herewith to be paid by the owner or owners of such cattle or horses.

"§ 3. Any person violating the provision of this act shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine of not less than five hundred (500) dollars, nor more than five thousand (5,000) dollars, or by imprisonment in the county jail for a term of not less than six months, and not exceeding three years, or by both such fine and imprisonment.

"§ 4. If any person, association, or corporation shall bring, or cause to be brought, into this state, any cattle or horses, in violation of the provisions of sections 1 or 2 of this act, or shall, by false representation, procure a certificate of health, as provided for in section 2 of this act, he or they shall be liable, in all cases, for all damages sustained on account of disease communicated by or from said cattle or horses; judgment for damages in any such case, together with the costs of action, shall be a lien upon all such cattle and horses, and a writ of attachment may issue in the first instance without the giving of a bond, and the court rendering such judgment may order the sale of said cattle or horses, or so many thereof [140] as *may be necessary to satisfy said judgments and costs. Such sale shall be conducted as other sales under execution." Colo. Sess. Laws 1885, p. 335.

There was no proof in the case that the particular cattle in question had any dangerous, infectious, or contagious disease. But it did appear that after being kept a long while in Lubbock and Cochran counties, Texas, south of the 36th parallel of north latitude, these cattle were shipped on the 20th day of June, 1901, to Denver, Colorado, on their way to their ultimate destination in Wyoming, without being first inspected as required by the statute of the former state. The provisions of the Colorado statute were ignored altogether as invalid legislation. Being asked by one of the witnesses whether he had or not allowed the state board of sanitary inspection to inspect the cattle or whether or not he had procured from the state veterinary sanitary board a certificate or bill of health to the effect that the cattle were free from all infectious or contagious diseases, the defendant said "that the state board of sanitary inspection, through one of their inspectors, had inspected the cattle against his will and desire, but that he had not obtained from the board any certificate or bill of health whatsoever. But he said that he immediately theretofore had had the cattle inspected by a duly authorized inspector of the Bureau of Animal Industry of the United States, at Hereford, in the state of Texas, and had obtained a certificate from him to the effect that the same were free from any infectious or contagious disease; that the reason he could not get a certificate or bill of health from the state board of Colorado was because he would not pay the expense of such inspection, and because he had opposed such inspection as unnecessary and without any warrant in law."

When refusing his assent to the state inspection, Reid showed to the state authorities what he called a "United States certificate."

The certificate was signed by "Arthur C. Hart, Ass't Inspector, Bureau of Animal Industry." That officer certified that he had carefully inspected the cattle in question at Hereford, Texas, and found them "free from Texas or splenetic fever infection (*boophilus bovis*), or any other infec- [141] tious or contagious disease," and that "no Texas fever infection is known to exist where they have been kept or on the trail over which they have passed." Below the signature of the assistant inspector was the following unsigned printed memorandum: "Animals which have been inspected and certified by an inspector of the U. S. Bureau of Animal Industry, and are free from disease, have the right to go into any state and be sold for any purpose, without further inspection or the exaction of fees."

The above, together with certain published regulations prepared and issued by the Bureau of Animal Industry, was all the evidence in the case.

The defendant asked the court to instruct the jury:

That it was unnecessary for the defendant to procure from the Colorado veterinary sanitary board a certificate or bill of health to the effect that his cattle were free from infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto, to any of said diseases, for the reason that the cattle had previously been inspected, "according to the statute of the United States in such case made and provided, and according to the rules and regulations pursuant to said statute, promulgated by the Department of Agriculture, by a duly authorized inspector of the Bureau of Animal Industry of the United States, stationed at Hereford, in the state of Texas, and had been duly certified by such United States inspector to be free from any infectious or contagious disease; and

for the further reason that he, the said defendant, then and there exhibited and showed to the said state inspector of Colorado the said inspection certificate of the United States to said cattle;" and,

That the Colorado statute, approved March 21st, 1885, and under which defendant was prosecuted, was repugnant to the provision of the Constitution of the United States giving Congress power to regulate commerce among the states, as well as to the provision declaring that the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states, and was null and void, as imposing unnecessary and unlawful burdens and restrictions upon interstate commerce.

[142] *The court refused to so instruct the jury, but instructed them that if they believed from the evidence, beyond a reasonable doubt, that the defendant did, on or about the 20th day of June, 1901, that is, between the 1st day of April and the 1st day of November of that year, "unlawfully bring or drive, or cause to be brought or driven, into the state of Colorado, and into the county of Arapahoe, the cattle as mentioned in the information or any part thereof, from certain counties south of the 36th parallel, north latitude; and that said cattle had not been held theretofore at some place north of said parallel of latitude for a period of at least ninety days prior to the importation of said cattle into said state of Colorado; and that the said defendant had not procured from the state veterinary sanitary board of Colorado a certificate or bill of health, to the effect that said cattle were free from infectious or contagious diseases, and to the effect that the same had not been exposed at any time within ninety days prior thereto to any of said diseases; and that then and there the said defendant did refuse and decline to procure, or permit anyone for him to procure, such certificate or bill of health, and did refuse and decline to pay or allow, or suffer or permit anyone for him to pay, the expense of any inspection so as by the act prescribed,—then and in that event it is your duty to find the defendant guilty as charged in this information."

The contention here of the defendant is substantially that the subject of the transportation of cattle from one state to another has been so far covered by the act of Congress known as the animal industry act of May 29th, 1884 (23 Stat. at L. 31, chap. 60, U. S. Comp. Stat. 1901, p. 299), that, after its passage, no enactment by the state upon the same subject was permissible; and that, even in the absence of legislation by Congress, the Colorado statute is invalid, in that, by its natural or necessary operation, it unreasonably obstructs that freedom of commerce among the states which the Constitution established. These questions are recognized by the court as of great importance, and have received its most careful consideration.

Taking up the first branch of the defendant's contention, let us look at the controlling provisions of the above act of Congress, *and ascertain whether that statute has the [143] scope and effect claimed for it.

The statute is entitled "An Act for the Establishment of a Bureau of Animal Industry, to Prevent the Exportation of Diseased Cattle, and to Provide Means for the Suppression and Extirpation of Pleuro-pneumonia and Other Contagious Diseases among Domestic Animals."

By the 1st section the Commissioner of Agriculture is directed to organize in his department a Bureau of Animal Industry, to appoint a chief thereof, who shall be a competent veterinary surgeon, and whose duty it shall be "to investigate and report upon the condition of the domestic animals of the United States, their protection and use, and also inquire into and report the causes of contagious, infectious, and communicable diseases among them, and the means for the prevention and cure of the same, and to collect such information on these subjects as shall be valuable to the agricultural and commercial interests of the country." § 1 [U. S. Comp. Stat. 1901, p. 299].

By the 2d section the Commissioner is authorized to appoint two competent agents, practical stock raisers or experienced business men familiar with questions pertaining to commercial transactions in live stock, whose duty it shall be, under the instructions of the Commissioner, "to examine and report upon the best methods of treating, transporting, and caring for animals, and the means to be adopted for the suppression and extirpation of contagious pleuro-pneumonia, and to provide against the spread of other dangerous contagious, infectious, and communicable diseases." § 2 [U. S. Comp. Stat. 1901, p. 300].

The 3d section makes it "the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each state and territory, and invite said authorities to co-operate in the execution and enforcement of this act." And "whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any state or territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, *or such state or territory [144] shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a state or other properly constituted authorities signify their readiness to co-operate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one state or territory into another." § 3 [U. S. Comp. Stat. 1901, p. 300].

In order "to promote the exportation of live stock from the United States," the Commissioner was directed to "make special investigation as to the existence of pleuro-pneumonia, or any contagious, infectious, or communicable disease, along the dividing lines between the United States and foreign countries, and along the lines of transportation from all parts of the United States to ports from which live stock are exported, and make report of the results of such investigation to the Secretary of the Treasury, who shall, from time to time, establish such regulations concerning the exportation and transportation of live stock as the results of said investigations may require" (§ 4 [U. S. Comp. Stat. 1901, p. 3183]); and that "to prevent the exportation from any port of the United States to any port in a foreign country of live stock affected with any contagious, infectious, or communicable disease, and especially pleuro-pneumonia," the Secretary of the Treasury was authorized to take such steps and adopt such measures, not inconsistent with the provisions of the act, as he might deem necessary. § 5 [U. S. Comp. Stat. 1901, p. 3183].

By another section of the act all railroad companies within the United States, or the owners or masters of any steam or sailing vessel or other vessel or boat, were forbidden to receive for transportation or transport from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, "any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-[145]pneumonia; nor shall *any person, company, or corporation deliver for such transportation to any railroad company, or master or owner of any boat or vessel, any live stock, *knowing* them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock, *knowing* them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia: *Provided*, That the so-called splenetic or Texas fever shall not be considered a contagious, infectious, or communicable disease within the meaning of sections 4, 5, 6, and 7 of this act, as to cattle being transported by rail to market for slaughter, when the same are unloaded only to be fed and watered in lots on the way thereto." § 6 [U. S. Comp. Stat. 1901, p. 3184].

Other provisions of the act are as follows:

"§ 7. That it shall be the duty of the Commissioner of Agriculture to notify, in writing, the proper officials or agents of any railroad, steamboat, or other transportation company doing business in or through any infected locality, and by publication in such newspapers as he may select, of the existence of said contagion; and any person or persons operating any such railroad, or master or owner of any boat or vessel, or owner or custodian of or person having control over such cattle or other live stock within such infected district, who shall knowingly violate the provisions of section 6 of this act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than one hundred nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment. [U. S. Comp. Stat. 1901, p. 3184.]

"§ 8. That whenever any contagious, infectious, or communicable disease affecting domestic animals, and especially the disease known as pleuro-pneumonia, shall be brought into or shall break out in the District of Columbia, it shall be the duty of the commissioners of said District to take measures to suppress the same promptly and to prevent the same from spreading; and for this purpose the said commissioners are *hereby empowered to order and re-[146]quire that any premises, farm, or farms where such disease exists or has existed, be put in quarantine; to order all or any animals coming into the District to be detained at any place or places for the purpose of inspection and examination; to prescribe regulations for and to require the destruction of animals affected with contagious, infectious, or communicable disease, and for the proper disposition of their hides and carcasses; to prescribe regulations for disinfection, and such other regulations as they may deem necessary to prevent infection or contagion being communicated, and shall report to the Commissioner of Agriculture whatever they may do in pursuance of the provisions of this section. [U. S. Comp. Stat. 1901, p. 3184.]

"§ 9. That it shall be the duty of the several United States district attorneys to prosecute all violations of this act which shall be brought to their notice or knowledge by any person making the complaint under oath; and the same shall be heard before any district or circuit court of the United States or territorial court holden within the district in which the violation of this act has been committed." [U. S. Comp. Stat. 1901, p. 3185.] 23 Stat. at L. 31, chap. 60 (U. S. Comp. Stat. 1901, p. 299).

It may be here stated that by the act of February 9th, 1889, the Department of Agriculture was made one of the Executive Departments of the government, and placed under the supervision and control of a Secretary of Agriculture (25 Stat. at L. 659, chap. 122, U. S. Comp. Stat. 1901, p. 285), and that by the act of July 14th, 1890, the Secretary was vested with all the authority which by the above act of May 29th, 1884, was conferred upon the Commissioner of Agriculture. 26 Stat. at L. 282, chap. 707.

It is quite true, as urged on behalf of the defendant, that the transportation of live stock from state to state is a branch of interstate commerce, and that any specified rule or regulation in respect of such transportation, which Congress may lawfully prescribe or authorize, and which may prop-

erly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one state to another is taken under direct national supervision, and a system devised by which diseased stock may be excluded from inter-[147]state commerce, all *local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as Congress may lawfully prescribe or authorize will alone control. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455, 464, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114; *Hennington* v. *Georgia*, 163 U. S. 299, 317, 41 L. ed. 166, 173, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co.* v. *New York*; 165 U. S. 628, 631, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488; *Rasmussen* v. *Idaho*, 181 U. S. 198, 200, 45 L. ed. 820, 821, 21 Sup. Ct. Rep. 594. The power which the states might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the states.

But the difficulty with the defendant's case is that Congress has not by any statute covered the whole subject of the transportation of live stock among the several states, and, except in certain particulars not involving the present issue, has left a wide field for the exercise by the states of their power, by appropriate regulations, to protect their domestic animals against contagious, infectious, and communicable diseases.

An examination of the animal industry act will make this entirely clear. Three distinct subjects are embraced by that act. One is the ascertainment through the Agricultural Department of the condition of the domestic animals of the United States, the causes of contagious, infectious, or communicable diseases affecting them, the best methods for treating, transporting, and caring for animals, the means to be adopted for the suppression and extirpation of such diseases, particularly that of contagious pleuro-pneumonia, and to collect such information on those subjects as will be valuable to the agricultural and commercial interests of the country. Congress did not assume to declare that "the rules and regulations" which that Department might adopt as necessary "for the speedy and effectual suppression and extirpation of said diseases" should have in themselves, or apart from the action of a state, any binding force upon the states. They were to be certified to the executive authority of each state, and the co-operation of such authorities in executing the act of Congress invited. If the authorities of any state [148]*adopted the plans and methods devised by the Department, or if the state authorities adopted measures of their own which the Department approved, then the money appropriated by Congress could be used in conducting the required investigations, and in such disinfection and quarantine measures as might be necessary to prevent the spread of the diseases in question from one state or territory into another. Congress did not intend to override the power of the states to care for the safety of the property of their peoples by such legislation as they deemed appropriate. It did not undertake to invest any officer or agent of the Department with authority to go into a state and without its assent take charge of the work of suppressing or extirpating contagious, infectious, or communicable diseases there prevailing, and which endangered the health of domestic animals. Nor did Congress give the Department authority by its officers or agents to inspect cattle within the limits of a state, and give a certificate that should be of superior authority in that or other states, or which should entitle the owner to carry his cattle into or through another state without reference to the reasonable and valid regulations which the latter state may have adopted for the protection of its own domestic animals. It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that "in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnott* v. *Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247. The certificate given to the defendant by Assistant Inspector Hart of the Bureau of Animal Industry was in itself without legal weight in Colorado. As said in *Missouri, K. & T. R. Co.* v. *Haber*, above cited: "While the states were invited to co-operate with the general government in the execution and enforcement of the act, whatever power they had to protect their domestic cattle against such diseases was left untouched and unimpaired *by [149] the act of Congress." Hence, it was decided in that case that the animal industry act did not stand in the way of the state of Kansas enacting a statute declaring that any person driving, shipping, or transporting, or causing to be shipped, driven, or transported into or through that state, any cattle liable or capable of communicating Texas or splenetic fever to domestic cattle should be liable to the person injured thereby for all damages sustained by reason of the communication of said disease or fever, to be recovered in a civil action. We there held that the Kansas statute did nothing more than establish a rule of civil liability, in that state, affected no regulation of interstate commerce that Congress had prescribed or authorized, and impaired no right secured by the national Constitution.

Another subject embraced by the act of Congress related to the exportation from

ports of the United States to ports in foreign countries of live stock affected with contagious, infectious, or communicable diseases, especially pleuro-pneumonia; and in relation to that matter the Secretary of the Treasury was authorized to take such steps and adopt such measures, not inconsistent with the act of Congress, as he deemed necessary. As the present case is not one of the exportation of live stock to a foreign country, it is unnecessary to consider what power, if any, remained with the states, after the passage of the animal industry act, to suppress or extirpate diseases that in fact affected live stock, which it was the purpose of the owners to export.

Still another subject covered by the act is the driving on foot or transporting from one state or territory into another state or territory, or from any state into the District of Columbia, or from the District into any state, of any live stock *known* to be affected with any contagious, infectious, or communicable disease. But this provision does not cover the entire subject of the transporting or shipping of diseased live stock from one state to another. The owner of such stock, when bringing them into another state, may not know them to be diseased; but they may, in fact, be diseased, or the circumstances may be such as fairly to [150] authorize the state into which *they are about to be brought to take such precautionary measures as will reasonably guard its own domestic animals against danger from contagious, infectious, or communicable diseases. The act of Congress left the state free to cover that field by such regulations as it deemed appropriate, and which only incidentally affected the freedom of interstate commerce. Congress went no farther than to make it an offense against the United States for any one *knowingly* to take or send from one state or territory to another state or territory, or into the District of Columbia, or from the District into any state, live stock affected with infectious or communicable disease. The animal industry act did not make it an offense against the United States to send from one state into another live stock which the shipper did not know were diseased. The offense charged upon the defendant in the state court was not the introduction into Colorado of cattle that he knew to be diseased. He was charged with having brought his cattle into Colorado from certain counties in Texas, south of the 36th parallel of north latitude, without said cattle having been held at some place north of said parallel of latitude for at least the time required prior to their being brought into Colorado, and without having procured from the state veterinary sanitary board a certificate or bill of health to the effect that his cattle, in fact, were free from all infectious or contagious diseases, and had not been exposed at any time within ninety days prior thereto to any such diseases, but had declined to procure such certificate or have the inspection required by the statute. His knowledge as to the actual condition of the cattle was of no consequence under the state enactment, or under the charge made.

Our conclusion is that the statute of Colorado as here involved does not cover the same ground as the act of Congress, and therefore is not inconsistent with that act; and its constitutionality is not to be questioned unless it be in violation of the Constitution of the United States, independently of any legislation by Congress. The latter question we now proceed to examine.

Certain principles are well settled by the former decisions of this court. One is that the purpose of a statute, in whatever language it may be framed, must be determined by its natural *and reasonable effect. *Hen-* [151] *derson* v. *New York*, 92 U. S. 259, 268, *sub nom. Henderson* v. *Wickham*, 23 L. ed. 543, 548. Another is, that a state may not, by its police regulations, whatever their object, unnecessarily burden foreign or interstate commerce. *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 472, 24 L. ed. 527, 531. Again, the acknowledged police powers of a state cannot legitimately be exerted so as to defeat or impair a right secured by the national Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it. *Gibbons* v. *Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 625, 626, 42 L. ed. 878, 882, 18 Sup. Ct. Rep. 488, and authorities cited.

Now, it is said that the defendant has a right under the Constitution of the United States to ship live stock from one state to another state. This will be conceded on all hands. But the defendant is not given by that instrument the *right* to introduce into a state, against its will, live stock affected by a contagious, infectious, or communicable disease, and whose presence in the state will or may be injurious to its domestic animals. The state—Congress not having assumed charge of the matter as involved in interstate commerce—may protect its people and their property against such dangers, taking care always that the means employed to that end do not go beyond the necessities of the case or unreasonably burden the exercise of privileges secured by the Constitution of the United States.

Is the statute of Colorado liable to the objection just stated? Can the courts hold that upon its face it unreasonably obstructs the exercise of the general right secured by the Constitution to ship or send recognized articles of commerce from one state to another without interference by local authority? Those questions must be answered in the negative. The Colorado statute, in effect, declares that live stock coming between the dates and from the territory specified are ordinarily in such condition that their presence in the state may be dangerous to its domestic animals; and hence the requirement that before being brought or sent into the state they shall either be kept at some place north of the 36th parallel of north latitude for at least ninety days prior to their importation into the state, *or* the

owner must procure from the state veteri-
[152] nary sanitary board *a certificate or bill of health that the cattle are free from all infectious or contagious diseases, and have not been exposed to any of said diseases at any time within ninety days prior thereto. As there is no evidence in the case as to the practical operation of this regulation upon shippers of cattle, as it does not appear otherwise than that the statute can be obeyed without serious embarrassment or unreasonable cost, the court cannot assume arbitrarily that the state acted wholly without authority or that it unduly burdened the exercise of the privilege of engaging in interstate commerce. The accused seems to have been content to rest his defense upon such grounds as arose upon the face of the local statute, without reference to any evidence bearing upon the reasonableness or unreasonableness of the particular methods adopted by the state to protect its domestic animals. He seems to have been willing to risk the case upon the simple proposition—based upon the words of the state enactment and upon the act of Congress, reinforced by certain regulations made by the Agricultural Department—that the local statute was inconsistent with that act, and with the general power of Congress to regulate interstate commerce.

As, therefore, the statute does not forbid the introduction into the state of *all* live stock coming from the defined territory,—that diseased as well as that not diseased,—but only prescribes certain methods to protect the domestic animals of Colorado from contact with live stock coming from that territory between certain dates, and as those methods have been devised by the state under the power to protect the property of its people from injury, and do not appear upon their face to be unreasonable, we must, in the absence of evidence showing the contrary, assume that they are appropriate to the object which the state is entitled to accomplish.

One other objection to the Colorado statute must be noticed, namely, that it is inconsistent with the clause of the Constitution declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. This position is untenable. The statute is equally applicable to citizens of all the states. No discrimination is shown. No privileges are granted to citizens of Colorado that are
[153] denied *to citizens of other states. *Kimmish* v. *Ball*, 129 U. S. 217, 222, 32 L. ed. 695, 697, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277.

The principle is universal that legislation, whether by Congress or by a state, must be taken to be valid, unless the contrary is made clearly to appear; and as the contrary does not so appear, the statute of Colorado is to be taken as a constitutional exercise of the power of the state.

Perceiving no error in the judgment to the prejudice of the plaintiff under the Constitution of the United States, *the judgment is affirmed.*

Mr. Justice **Brewer** dissented from the opinion and judgment of the court.

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ED. H. REID, *Appt.*,
*v.*
ROBERT J. JONES, Sheriff of the County of Arapahoe, State of Colorado.

(See S. C. Reporter's ed. 153, 154.)

*Habeas corpus—in Federal courts—remedy in state courts.*

Habeas corpus in favor of a person who has been convicted and sentenced in a state court for an alleged violation of the criminal statutes of the state will not be granted by a Federal court on the ground that he is held in violation of the Federal Constitution, where the case presents no exceptional facts which will take it out of the rule that he must ordinarily first take his case to the highest court of the state in which the judgment can be reviewed, and if unsuccessful therein, bring it to the Supreme Court of the United States by writ of error.

[No. 147.]

*Argued October 24, 1902. Decided December 1, 1902.*

APPEAL from the Circuit Court of the United States for the District of Colorado to review a judgment dismissing an application for a writ of habeas corpus. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **John H. Denison** and **William M. Springer** argued the cause, and, with *Messrs. Ralph Talbot* and *W. H. Wadley* and *Assistant Attorney General Beck*, filed a brief for appellant.

*Mr.* **Frederic D. McKenney** argued the cause for appellee. *Mr. Charles C. Post* filed a brief for appellee.

For contentions of counsel see their briefs as reported in *Reid* v. *Colorado*, *ante*, 108.

*Mr. Justice **Harlan** delivered the opin-[154]
ion of the court:

After the appellant Reid had been convicted and sentenced, as shown in the case just decided, he was arrested upon a mittimus sued out by the state. He immediately obtained a writ of habeas corpus from the circuit court of the United States for the district of Colorado. But that court, upon hearing, remanded the prisoner to the custody of the state authorities, and dismissed his application to be discharged.

NOTE.—*On the jurisdiction of the United States courts on habeas corpus*—see *Re* Reinits (C. C. S. D. N. Y.) 4 L. R. A. 236, and note. See also notes to State *ex rel.* Cochran v. Winters (Kan.) 10 L. R. A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

He thereupon prayed and was allowed an appeal to this court.

The merits of this case have been fully considered in case No. 269 [*Reid* v. *Colorado*, 187 U. S. 137, *ante*, 108, 23 Sup. Ct. Rep. 92]. But if this had not been, we should dismiss the present appeal; for one convicted in a state court for an alleged violation of the criminal statutes of the state, and who contends that he is held in violation of the Constitution of the United States, must ordinarily first take his case to the highest court of the state in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a circuit court of the United States, or this court upon appeal from a circuit court, intervene by writ of habeas corpus in advance of the final action by the highest court of the state. *Ex parte Royall*, 117 U. S. 241, 251, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734; *New York* v. *Eno*, 155 U. S. 89, 39 L. ed. 80, 15 Sup. Ct. Rep. 30; *Minnesota* v. *Brundage*, 180 U. S. 499, 502, 45 L. ed. 639, 640, 21 Sup. Ct. Rep. 455, and authorities cited.

*The judgment is affirmed.*

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[155]*HOME FOR INCURABLES, *Plff. in Err.*,
*v.*
CITY OF NEW YORK.

(See S. C. Reporter's ed. 155-158.)

*Error to state court—Federal question—certificate of judge of state court.*

1. A judgment of a state court cannot be reviewed in the Supreme Court of the United States on the ground that it denied a right, title, privilege, or immunity secured by the Federal Constitution, where it does not appear on the face of the record that such right, title, privilege, or immunity was specially set up or claimed in the state court.
2. A certificate of the chief judge of the highest state court that a Federal question was involved is not properly a part of the record, and is insufficient in itself to confer jurisdiction on the Supreme Court of the United States to review a judgment of the state court or to determine Federal questions which do not appear from the record to have been brought to the attention of that court.

[No. 86.]

*Argued and Submitted November 12, 1902. Decided December 1, 1902.*

IN ERROR to the Supreme Court of the State of New York to review a judgment of that court affirmed by the Appellate Division of the Supreme Court and by the Court of Appeals. *Dismissed* for want of jurisdiction.

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

See same case below in Appellate Division, 56 App. Div. 625, 68 N. Y. Supp. 1140, and in Court of Appeals, 166 N. Y. 602, 59 N. E. 1123.

Statement by Mr. Justice **Harlan:**

The plaintiff in error, the Home for Incurables, filed its petition in the supreme court for the city and county of New York, alleging that at the date of the confirmation of a certain assessment for a sewer in East 184th street from Vanderbilt avenue west to Washington avenue, etc., it was the owner of certain lots affected thereby in ward number 1, block number 3,064, the 24th ward of the city of New York;

That on the 22d of January, 1900, that assessment was confirmed by operation of law and the title thereof duly entered, with date of entry and of confirmation, in the record of titles of assessments confirmed, whereby such assessment became a lien upon such lots; and,

That the assessment, together with an interest certificate certified by the comptroller of the city of New York to the board of assessors, was irregular, excessive, and voidable, for reasons set forth in the petition.

*The petition alleged, among other things, [156] that "so much of the act of the legislature of the state of New York, known as § 868 of the New York city consolidation act of 1882, as purports to authorize and direct the making of such interest certificate and the assessment of the amount thereof herein, is in violation of the Constitution of the state of New York in that said portion of said act authorizes the taking of private property without just compensation, and said portion of said act purports to authorize an unlawful exercise of the power of taxation."

The petitioner prayed that the assessment be vacated or reduced, and that the lien or liens created thereby or by any subsequent proceeding be canceled and discharged or reduced so far as the same affected the above lots.

The case was heard upon the stipulation of facts in the supreme court and the relief asked by the petitioner was denied. Upon appeal to the appellate division of the supreme court the action of the court of original jurisdiction was confirmed. The case was then carried to the court of appeals of the state, and the judgment of the lower court was affirmed.

Upon writ of error to this court, it has been assigned for error that the judgment of the state court was in violation of the provisions of the 14th Amendment of the Constitution of the United States; also, that the judgment deprived the home of the equal protection of the law and of its property without due process of law.

The record contains a certificate by the chief judge of the court of appeals of New York to the effect that in this proceeding the Home for Incurables claimed in the courts of the state that "the imposition of all or a part of the assessment on its land as set forth in the record herein was in vio-

lation of the statutes and Constitution of the state of New York and of the provisions of the 14th Amendment of the Constitution of the United States, and constituted a taking of property without due process of law that the respondent in this proceeding contended that the said assessment was neither in whole nor in part in violation of the statutes and Constitution of the state of New York or of the Constitution of the [157] United States, and also *that the said Home for Incurables had no remedy by petition to correct any errors in the said assessment; that this court decided that the said Home for Incurables did have a remedy by petition in the manner and form of the proceeding adopted by it to correct any errors in the said assessment, but that the assessment complained of was valid and without error as to each and every part thereof."

*Mr.* **John M. Perry** submitted the cause for plaintiff in error:

The practice prescribed by the state statute rendered it proper to raise the Federal question by allegations at the hearing. If an opinion had been rendered, this court could have examined that.

*Gross* v. *United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; N. Y. Ct. App. Rule IV.

The Federal question having, under the state practice, been properly raised on the argument, the certificate of the judge to that effect did not originate that question, but reduced to record form that which had been at the foundation of the case from its first presentation to the lowest state court.

*Johnson* v. *Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Parmelee* v. *Lawrence*, 11 Wall. 36, 20 L. ed. 48; *Meyer* v. *Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *Columbia Water Power Co.* v. *Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

The Federal question was necessarily involved in the disposition of this case by the state courts.

*Columbia Water Power Co.* v. *Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

*Mr.* **George L. Sterling** argued the cause, and, with *Messrs. George L. Rives* and *Theodore Connoly*, filed a brief for defendant in error:

The court will be governed by the record itself, and not by the assignments of error or the certificate of the presiding justice of the state court, in determining what questions were before that court.

*Parmelee* v. *Lawrence*, 11 Wall. 36, 20 L. ed. 48; *Klinger* v. *Missouri*, 13 Wall. 257, 20 L. ed. 635; *Murdock* v. *Memphis*, 20 Wall. 590, 22 L. ed. 429; *Miller* v. *Cornwall R. Co.* 168 U. S. 134, 42 L. ed. 410, 18 Sup. Ct. Rep. 34; *Johnson* v. *Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Roby* v. *Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Powell* v. *Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939; *Zadig* v. *Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639; *F. G. Oxley Stove Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256; *Michigan Sugar Co.* v. *Michigan*, 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; *New York C. & H. R. R. Co.* v. *New York*, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

Mr. Justice **Harlan** delivered the opinion of the court:

The plaintiff insists here that the state court, by its final judgment, refused to recognize certain rights belonging to it under the Constitution of the United States. But it does not appear on the face of the record that it set up or claimed any such right until the case reached this court. In *Parmelee* v. *Lawrence*, 11 Wall. 36, 38, 20 L. ed. 48, 49, this court—following the previous cases of *Lawler* v. *Walker*, 14 How. 152, 14 L. ed. 365, and *Mississippi & M. R. Co.* v. *Rock*, 4 Wall. 177, 18 L. ed. 381,—said it was essential to our jurisdiction in re-examining the judgment of the state court that the alleged conflict between the state law and the Constitution of the United States "appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court," or "it must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it." Later cases in this court have expressed the additional thought that if the highest court of the state assumes that the record sufficiently presents a question of Federal right and decides against the party claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in itself *to sustain the judgment, independently [158] of any question of Federal right.

In the case before us, the Home for Incurables has not brought upon the record the fact that it asserted, in the state court, any Federal right whatever. It is entirely consistent with the record that the home did not, at any time pending the case in the state court, set up or claim any such right. If our jurisdiction is invoked on the ground that the judgment of the state court has denied a right, title, privilege, or immunity secured by the Constitution of the United States, it is essential, under existing statutes, that such right, title, privilege, or immunity shall have been specially set up or claimed in the state court. Rev. Stat. 709 [U. S. Comp. Stat. 1901, p. 575]; *Arm-*

*strong* v. *Athens County Treasurer*, 16 Pet. 281, 285, 10 L. ed. 965, 966; *Mississippi & M. R. Co.* v. *Rock*, 4 Wall. 177, 180, 18 L. ed. 381, 382; *Powell* v. *Brunswick County*, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; *Roby* v. *Colehour*, 146 U. S. 153, 159, 36 L. ed. 922, 924, 13 Sup. Ct. Rep. 47; *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 654, 41 L. ed. 1140, 1151, 17 Sup. Ct. Rep. 709; *Levy* v. *San Francisco City & County Super. Ct.* 167 U. S. 175, 177, 42 L. ed. 126, 127, 17 Sup. Ct. Rep. 769.

It is true that the transcript contains the certificate of the chief judge of the court of appeals of New York, not appearing to have been by order of that court while the case was before it or under its control, which states that the home did make, in that court, the Federal questions now pressed upon our consideration. But that certificate is not properly a part of the record. While we have said in some cases that such a certificate is entitled to great respect, and, in other cases, that its office is to make that more certain and specific which is too general and indefinite in the record, it is insufficient in itself to give us jurisdiction, or to authorize us to determine Federal questions that do not appear, in any form, from the record, to have been brought to the attention of the state court. *Powell* v. *Brunswick County*, 150 U. S. 433, 439, 37 L. ed. 1134, 1136, 14 Sup. Ct. Rep. 166; *Newport Light Co.* v. *Newport*, 151 U. S. 527, 537, 38 L. ed. 259, 262, 14 Sup. Ct. Rep. 429; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 41, 47, 45 L. ed. 418, 21 Sup. Ct. Rep. 256; *Felix* v. *Scharnweber*, 125 U. S. 54, 59, 31 L. ed. 687, 8 Sup. Ct. Rep. 759.

Having no jurisdiction to re-examine the judgment below, *the writ of error must be dismissed.*

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[159] *HELEN C. RAUB, Charles D. Collins, Lewis E. Collins, *et al.*, *Plffs. in Err.*,

*v.*

HELEN C. CARPENTER, Helen K. Bremerman, Edmund H. Brown, *et al.*

(See S. C. Reporter's ed. 159–164.)

*Witnesses—expert testimony — undisclosed facts—judgments—motion to vacate for incompetency of juror.*

1. An expert witness cannot base his opinion as to the mental capacity of a testator upon his personal knowledge of any undisclosed facts concerning the testator's condition.
2. The refusal of the trial court to vacate a decree because of the incompetency of a juror, first discovered after verdict and judgment, is not an abuse of its discretion in the premises, where the verdict rendered was the only one which could be rendered consistently with the facts.

NOTE.—*On expert opinion as to sanity or insanity*—see note to Burt v. State (Tex.) 39 L. R. A. 305.

[No. 64.]

*Argued November 3, 4, 1902. Decided December 1, 1902.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a decree of the Supreme Court of the District admitting a will to probate, and an order denying a motion to vacate such decree. *Affirmed.*

See same case below, 17 App. D. C. 505.

The facts are stated in the opinion.

*Messrs.* **Victor H. Wallace** and **Charles Poe** argued the cause and filed a brief for plaintiffs in error:

The divisions existing at common law *propter defectum, propter affectum, propter delictum*—are inherent and still exist.

5 Bacon, Abr. *Juries* (E); 1 Coke Inst. 156; 3 Bl. Com. 364; *Presbury* v. *Com.* 9 Dana, 204; *State* v. *Brockhaus*, 72 Conn. 109, 43 Atl. 850; *Garrett* v. *Weinberg*, 54 S. C. 128, 31 S. E. 341; *Kohl* v. *Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Herndon* v. *Bradshaw*, 4 Bibb, 45; *Shane* v. *Clarke*, 3 Harr. & M'H. 101; *State* v. *Babcock*, 1 Conn. 401; *King* v. *Tremearne*, 5 Barn. & C. 254; *Sellers* v. *People*, 4 Ill. 412; *Essex* v. *McPherson*, 64 Ill. 349; *Mylock* v. *Saladine*, 1 W. Bl. 481; *Hardy* v. *Sprowle*, 32 Me. 310; *United States* v. *Angney*, 6 Mackey, 66; *Jeffries* v. *Randall*, 14 Mass. 205; *Wassum* v. *Feeney*, 121 Mass. 93, 23 Am. Rep. 258; *Johns* v. *Hodges*, 60 Md. 215, 45 Am. Rep. 722; 1 Thompson, New Trials, § 116; *Avirett* v. *State*, 76 Md. 532, 25 Atl. 676, 987.

The degree of diligence required of parties to ascertain the competency or qualifications of a juror should find its limit within the boundary of common sense.

*Knights of Pythias* v. *Steele*, 107 Tenn. 1, 63 S. W. 1126; *State* v. *Groome*, 10 Iowa, 308; *Hill* v. *People*, 16 Mich. 351.

It will not do to say that no harm has been done because the court would have rendered the same verdict the eleven competent jurors and one incompetent one brought in, or even that, if twelve competent jurors had brought in a different verdict, the court would have set it aside. The appellants had the constitutional right to a jury of good and lawful men,—a common-law jury.

*Capital Traction Co.* v. *Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580; *Briggs* v. *Georgia*, 15 Vt. 61; *Mann* v. *Fairlee*, 44 Vt. 672; *Quinn* v. *Halbert*, 52 Vt. 353; *Georgia R. Co.* v. *Cole*, 73 Ga. 713; *Knights of Phythias* v. *Steele*, 107 Tenn. 14, 63 S. W. 1126.

Promptly and within the term the motion to vacate the order was made; its denial is a final judgment against us; its grant would have been but a trial of the issues by a forum insured to us by the Constitution.

*Capital Traction Co.* v. *Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

The refusal to grant a motion to strike

out a judgment, made within the term, is subject to review on appeal.

*Spalding* v. *Crawford*, 3 App. D. C. 361; *Green* v. *Hamilton*, 16 Md. 317, 77 Am. Dec. 295; *Hall* v. *Holmes*, 30 Md. 558; 2 Poe, Pl. & Pr. § 388.

*Messrs.* **J. J. Darlington** and **Joseph A. Burkhart** argued the cause and filed a brief for defendants in error:

Disqualifications *propter delictum*, although not known until after the verdict, are not fundamental as affecting the substantial rights of a party, even in criminal cases, and the verdict is not void for want of power to render it.

1 Thompson, New Trials, § 116; *Johns* v. *Hodges*, 60 Md. 215, 45 Am. Rep. 722; *Young* v. *State*, 90 Md. 579, 45 Atl. 531; *Presbury* v. *Com.* 9 Dana, 203; *Selleck* v. *Sugar Hollow Turnp. Co.* 13 Conn. 453; *State* v. *Brockhaus*, 72 Conn. 109, 43 Atl. 850; *Wassum* v. *Feeney*, 121 Mass. 93, 23 Am. Rep. 258; *King* v. *Sutton*, 8 Barn. & C. 417; *Hill* v. *Yates*, 12 East, 229; *State* v. *Davis*, 80 N. C. 412; *Wilder* v. *State*, 25 Ohio St. 555; *Greenup* v. *Stoker*, 8 Ill. 202; *Chase* v. *People*, 40 Ill. 352; *M'Cluro* v. *State*, 1 Yerg. 296; *Brewer* v. *Jacobs*, 22 Fed. 235; *United States* v. *Folsom*, 7 N. M. 532, 38 Pac. 70; *Amherst* v. *Hadley*, 1 Pick. 38.

In any event, the application for a new trial, even had it been made in time, was addressed to the discretion of the court, admitting of no appeal.

*Presbury* v. *Com.* 9 Dana, 203; *Kohl* v. *Lehlback*, 160 U. S. 301, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *King* v. *Tremearne*, 5 Barn. & C. 254; *Johns* v. *Hodges*, 60 Md. 215, 45 Am. Rep. 722; *Young* v. *State*, 90 Md. 579, 45 Atl. 531; 1 Thompson, New Trials, § 116.

A new trial will not be granted because of disqualification of a juror, not discovered until after trial, unless it be made to appear that there was no want of due diligence on the part of the party complaining of the verdict; and it must also be made to appear that injury resulted to him by reason thereof.

*Trueblood* v. *State*, 1 Tex. App. 651; *Roseborough* v. *State*, 43 Tex. 574.

[160] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is a writ of error to a judgment of the court of appeals of the District of Columbia, affirming certain orders of the supreme court of the District, holding a special term for orphans' court business, admitting a will and codicil to probate and granting letters testamentary thereon; and denying a motion to vacate that decree.

Plaintiffs in error filed a caveat to the probate and record of the writings purporting to be the will and codicil, and issues, addressed to both, as to mental capacity, fraud or coercion, and undue influence, were framed for trial by jury.

Trial was had, and on the conclusion of the evidence the court, at the request of the caveatees, instructed the jury that there was no evidence tending to show fraud, undue influence, or coercion, and that on these issues the jury should render its verdict for the caveatees. To which the caveators made no objection, and preserved no exception. Three instructions in respect of the mental capacity of the deceased to make a valid will or codicil were given on behalf of the caveators as requested by them.

The jury returned a verdict June 15, 1900, in favor of the caveatees. No motion for a new trial was made within four days as required by rule 53 of the court, or prior to June 26, when the court entered an order and decree admitting the will and codicil to probate, and granting letters testamentary thereon, from which an appeal was taken to the court of appeals.

Several exceptions were reserved to the rulings of the court in the progress of the trial, which were disposed of by the court of appeals satisfactorily, as we think. But one of them has been pressed on our attention.

Dr. George B. Heinecke, a practising physician in Washington, and a grandnephew of deceased, testified that he had known deceased ever since he could recollect, and was accustomed to seeing him frequently; that he had seen him when recovering from attacks of epilepsy subsequently to the execution of the will and codicil; "that testator had stated to him that he was a *sufferer [161] from urethral calculus; that on the 13th of March 1896, he had seen the testator have a fainting spell;" "that he had on one occasion seen testator laughing to himself; that on or about the 13th of February, 1899, during the blizzard, the testator acted peculiarly about the snow in his yard; did not know how it got in there, all of it, and went out there and tried to get it removed;" and witness stated the result of the autopsy and the cause of death. He was then asked the following question: "Doctor, have you formed any opinion, from your uncle's general condition of health and the conditions disclosed by his brain at this investigation, *and from all you know about him yourself*, what his condition of mind was?"

To that portion of the question which called for an opinion from the witness from "all that you know about him yourself," the caveatees objected on the ground that no sufficient basis had been laid for that portion of the question, and that the facts relied upon in this particular should be first adduced. The court sustained the objection and caveators preserved an exception.

We agree with the court of appeals that the trial court did not err in holding that portion of the question objectionable, and, if so, the question as framed could not properly have been allowed to be propounded, though caveators were left free to put it with the objectionable words omitted. Clearly, the opinion of the witness from facts he did not disclose was inadmissible. If he knew anything about the deceased other than what he had stated, which aided him in arriving at a conclusion, that knowledge should have been developed. In that particular the question assumed the exist-

ence of facts for which there was no foundation in the evidence.

So far as the conduct of the trial was concerned, we find no reversible error.

On July 16, 1900, twenty days after the decree was entered, caveators moved that that decree be vacated on the ground that one of the jurors was disqualified for service on the jury by the fact that he was under the age of twenty-one years, and by the fact that he had several times been convicted of the crime of petit larceny in the police [162] court of the District. The motion *was supported by transcripts from the records of the police court, and by affidavits, sustaining both disqualifications, the affidavits also showing that at the beginning of the trial term of the court at which they had been summoned, the jurors had all been examined on their *voir dire* by the presiding justice as to their qualifications to serve on the jury; that the juror now charged to be disqualified had then and there falsely answered that he was over the age of twenty-one years, and had never been convicted of crime; that one of the counsel for the caveators was present in court at the time of such examination; and that the falsehood of the statements of the juror in question was not known to the caveators or their counsel until after the entry of the order now sought to be vacated. The motion to vacate was denied, the record stating, "the court further being of opinion that at the trial there was no evidence of mental incompetency, fraud, or undue influence."

From this order the caveators took their second appeal.

Viewed as an ordinary motion for a new trial, the motion was not seasonably made under the rules, nor is it contended that the judgment came within the Maryland act of 1787, chap. 9, § 6, 2 Kilty (*Spalding* v. *Crawford*, 3 App. D. C. 361), as having been obtained by fraud, deceit, surprise, or irregularity in the sense of that statute. But it rests on the power of the court to set aside a judgment at the term at which it is rendered under circumstances calling for the exercise of its discretion in that regard, or on the assumption that the trial and verdict were absolutely void because of the incompetency of the juror.

By § 872 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 666), relating to the District of Columbia, as amended by the act of March 1, 1889 (25 Stat. at L. 749, chap. 308), it is provided: "No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, and a good and lawful man, who has never been convicted of a felony or misdemeanor involving moral turpitude."

Treating the application as open to consideration by reason of the discovery of the [163] existence of the alleged objection after *verdict and judgment, but as amounting to no more than a motion for new trial made in apt time, it was within the discretion of the trial court to grant or deny it, and the court of appeals held that the order denying it was not appealable. But the court also held that the discretion of the trial court was properly exercised; that there was not only no evidence in support of the charges of "fraud, undue influence, circumvention, or coercion," which was conceded, but that "the charge of mental unsoundness is wholly unsustained and without any support whatever in the testimony;" and that the trial court would have been fully justified in peremptorily directing a verdict on this issue as well as on the others, as that court in the order appealed from intimated it would have done if requested. In short, the two courts agreed that the facts were with the caveatees, and, unless clearly erroneous, which does not appear, we should accept their finding. *Towson* v. *Moore*, 173 U. S. 17, 25, 43 L. ed. 597, 601, 19 Sup. Ct. Rep. 332.

And as the verdict was the only verdict that could be rendered consistently with the facts, the presence of this juror in the box could not have operated to the prejudice of plaintiffs in error.

In *Wassum* v. *Feeney*, 121 Mass. 93, 23 Am. Rep. 258, the rule that "when a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict," was applied, and it was held that "a verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and empaneled, though the losing party did not know of the infancy until after the verdict." And Mr. Justice Gray, then Chief Justice of Massachusetts, delivering the opinion, cited, among other cases, *Hill* v. *Yates*, 12 East, 229, where the son of a juryman unlawfully served in his father's place, and pointed out that Lord Ellenborough there "said that he had mentioned the case to all the judges, and they were all of opinion that it was a matter within their discretion to grant or refuse a new trial on such a ground; that if no injustice had been done, they would not interfere in this mode."

*Wassum* v. *Feeney* was cited with approval and quoted from in *Kohl* v. *Lehlback*, 160 U. S. 293, 301, 40 L. ed. 432, 435, 16 Sup. Ct. Rep. 304, as in accordance with the great weight of authority. This case involved the disqualification *of alienage, [164] but did not require the determination of the question, "whether, where the defendant is without fault and may have been prejudiced, a new trial may not be granted on such a ground," though it was referred to.

*Garrett* v. *Weinberg*, 54 S. C. 127, 31 S. E. 341, is relied on by plaintiffs in error as ruling in a civil case that a new trial should be granted when a disqualified juror sat, the parties or their attorneys not knowing of the disqualification until after verdict. But that was a case of a motion for new trial made in the ordinary way, and the juror was held disqualified under the express provisions of the Constitution of the state, which in that respect were held to be mandatory, so that the jury was not a "constitutional jury," but the court did not inti-

mate that the incompetency rendered the verdict and judgment void, and, on the contrary, treated ignorance of the fact until after trial as material.

In *Kohl* v. *Lehlback* we held that "the disqualification of alienage is cause of challenge *propter defectum*, on account of personal objection, and if voluntarily, or through negligence, or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it." *Hollingsworth* v. *Duane*, Wall, C. C. 147, Fed. Cas. No. 6,618, was referred to, where the court placed alienage, infancy, infamy, and affinity, in the same category. See *Goad* v. *State*, 106 Tenn. 175, 61 S. W. 79; *State* v. *Powers*, 10 Or. 145, 45 Am. Rep. 138,—where disqualification *propter delictum* was held not to be in itself fatal after verdict.

No reason is perceived why this particular objection could not be waived by the parties, and even where a party by reason of excusable want of knowledge might be entitled to claim that he had not waived it, that would go to the merits on application for new trial, and not to the want of power. The verdict and judgment not being absolutely void, it is unnecessary to pursue the subject further, as there is nothing to show that injustice was done to caveators, and the trial court did not abuse its discretion in the premises.

*Judgment affirmed.*

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[165] *METCALF BROTHERS & COMPANY, *Petitioners,*

*v.*

BENJAMIN BARKER, JR., Trustee in Bankruptcy of Lesser Brothers.

(See S. C. Reporter's ed. 165-177.)

*Bankruptcy act — four months' clause— judgment enforcing pre-existing lien— jurisdiction of court of bankruptcy—interference with state court.*

1. Judgment creditors of a bankrupt by commencing a judgment creditors' action more than four months before the petition in bankruptcy is filed acquire a lien on the property of the bankrupt, of which they are not deprived by the bankruptcy act of July 1, 1898, § 67*f*, because the judgment enforcing the lien is recovered less than four months prior to the filing of such petition, although by that section all judgments obtained against a bankrupt within that period are avoided, as this provision must be regarded as referring only to judgments creating liens, and not to judgments which enforce an otherwise valid pre-existing lien.

2. A court of bankruptcy is without jurisdiction to enjoin further proceedings under the judgment of a state court in a judgment creditors' action commenced before the passage of the bankruptcy act, which set aside as fraudulent certain transfers of property made by the bankrupt, and directed the payment of the amount of the judgments out of the proceeds of a sale of the judgment debtor's property under an order of the state court.

NOTE.—*As to the right of a court of bankruptcy to enjoin proceedings in a state court*—see note to Garner v. Second Nat. Bank, 16 C. C. A. 96.

[No. 57.]

*Argued October 30, 1902. Decided December 1, 1902.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question whether a judgment enforcing a pre-existing lien was valid, though rendered within four months prior to bankruptcy proceedings against the judgment debtor, and the question whether the court in bankruptcy had jurisdiction to interfere with pending proceedings in the state court. *Answered respectively in the affirmative and negative.*

Statement by Mr. Chief Justice **Fuller:**

The certificate in this case is as follows:

"This matter came before this court upon a petition of Metcalf Brothers & Co. to superintend and revise in matter of law certain proceedings of the district court of the United States for the southern district of New York, wherein an order was made by said district court enjoining the petitioners, Metcalf Brothers & Co., from taking any further proceedings under any judgment obtained by them in the supreme court of the state of New York in a judgment creditors' action, wherein certain transfers made by the bankrupts had been set aside as to them *as fraudulent and void, and wherein receiv- [166] ers of the property of the bankrupts appointed by the said supreme court had been directed to pay to them the amount of their judgments at law upon which their said judgment creditors' action was founded.

"For its proper decision of the matter this court desires the instruction of the Supreme Court upon the questions of law hereinafter stated, and hereby certifies the same to the Supreme Court of the United States for that purpose.

"Statement of Facts.

"On the 2d of October, 1896, Lesser Brothers, subsequently adjudged bankrupts, who were copartners, being then insolvent, transferred all their property, copartnership and individual, to certain favored creditors. All their outstanding accounts, being copartnership property, they transferred by instruments of assignment to Marcus A. Adler and others. They confessed various judgments in the supreme court of the state of New York in favor of Bernhard Moses and others, upon which executions were at once issued to the sheriff of the county of New York, who levied thereunder on all their tangible personal property, consisting of clothing material and stock in trade. This also was copartnership property, and, with the book accounts, comprised all their property except a piece of real estate owned

by Israel Lesser individually and a ground lease of another piece of real estate owned by Tobias Lesser individually. These two pieces of real estate the individuals owning them conveyed to Joseph Lilianthal.

"After making these transfers, and after the levy by the sheriff under the executions issued upon the confessed judgments, and on the same day, by a fraud upon the court, in a collusive action in the supreme court of New York to dissolve the partnership, they procured the appointment of a receiver of the partnership property, Morris Moses, who was nominated by and in collusion with them. Subsequently a receiver nominated by certain creditors, James T. Franklin, was associated with Mr. Moses by the same court.

"Various creditors of the bankrupts im-[167]mediately commenced *actions of replevin to recover portions of the goods in the hands of the sheriff. Their claims were conflicting with each other and with those of the confessed judgment creditors, and in an action brought in the supreme court of New York by the receivers an order was made restraining the sale by the sheriff under the executions, directing a sale by receivers (Mr. Moses and Mr. Franklin being also appointed such receivers in that action), and that the latter should hold the proceeds of the sale subject to the claims of all parties, such claims to be determined in that action. Pursuant to this order, the goods were sold, and the receivers so appointed now hold the proceeds thereof. This order was made November 23, 1896. The action is still pending, undetermined.

"On the 22d day of October, 1896, and the 29th day of October, 1896, Metcalf Brothers & Co. procured judgments in the supreme court of the state of New York against the Lessers for $930.21 and $2,547.80 respectively, upon which executions were issued and returned unsatisfied.

"On the 17th day of December, 1896, Metcalf Brothers & Co. commenced a judgment creditors' action in the supreme court of the state of New York, which came to trial on the 17th day of December, 1897, and as a result of which the transfers to which reference has been made and the proceedings for the appointment of the receivers were adjudged fraudulent and void as to them. The court, however, set aside the transfers of the copartnership property, not only in favor of Metcalf Brothers & Co., but also in favor of the receivers. It set aside the transfer of the real estate in favor of Metcalf Brothers & Co. alone. Judgment was entered on this decision April 6, 1898.

"This judgment determined that the proceeds of the sale of the tangible property then in the hands of the receivers and the outstanding accounts or their proceeds in the hands of the transferees (to be accounted for under the judgment to the receivers) were to be administered by the receivers for the benefit of all the creditors of the copartnership equally, including Metcalf Brothers & Co., while the real estate trans-[168]ferred *became subject to the lien of the judgments of Metcalf Brothers & Co. on October 22d and 29th, 1896.

"All parties except the receivers appealed from this judgment to the appellate division of the supreme court of New York; that court affirmed the judgment of the trial court as to the fraud, but reversed it in so far as it granted relief in favor of the receivers. It directed the payment by the receivers to Metcalf Brothers & Co. of the amount of their judgments out of the money in the receivers' hands, and, since Metcalf Brothers & Co. were to be so paid, it reversed the judgments in their favor against Adler, one of the transferees of the accounts. Upon the ground that there was no proof of fraud, it also reversed it against the transferee of the real estate.

"This decision was embodied in an instrument made the 30th day of December, 1898, entitled an 'order,' but which, after reciting the necessary facts, 'ordered and adjudged' that the judgment of the trial term be modified as stated, and also 'ordered and adjudged' that the transfers in question, except the transfer of the real estate, were fraudulent and void as to Metcalf Brothers & Co.; that the receivers be, and they were thereby, directed to pay to Metcalf Brothers & Co. the amount of their judgments, with costs, and that final judgment should be entered in accordance therewith. This instrument was filed in the office of the clerk of the appellate division of the supreme court of New York, and was the only paper signed by that court or kept in its records. A certified copy of it was transmitted to the clerk of the supreme court, upon which, after the costs had been taxed, a final judgment was entered by the latter clerk on the 31st day of January, 1899, following in all essential respects its verbiage. The delay in the entry of final judgment was caused by various motions before the appellate division for reargument.

"On the 12th day of May, 1899, Lesser Brothers filed in the district court of the United States for the southern district of New York a petition to be adjudged bankrupts, and they were adjudicated bankrupts on that day. Subsequently, and *on the 7th[169] day of June, 1899, Benjamin Barker, Esq., was appointed their trustee in bankruptcy.

"From the judgment of the appellate division in the action brought by Metcalf Brothers & Co. all parties except Lilianthal, the transferee of the real estate, appealed to the court of appeals of the state of New York. That court affirmed the judgment of the appellate division in favor of Metcalf Brothers & Co., and also restored to them the rights awarded them by the judgment of the trial court, of which they had been deprived by the appellate division. The final result of the litigation was that the transfers in question were declared fraudulent and set aside in favor of Metcalf Brothers & Co. only; that as to all other persons they were (until impeached in a proper action) valid; that the receivers were directed to pay out of the funds in their hands to Metcalf Brothers & Co. the amount of their judgments, and that those

creditors could also proceed for the collection of their judgments, if necessary, against the transferees of the accounts and real estate.

"The decision of the court of appeals was made on the 6th of February, 1900. The remittitur from that court to the supreme court was received and filed on the 12th day of March, 1900. On the 8th day of March, 1900, the bankrupts' trustee, upon affidavits of himself and his counsel, procured from the district court of the United States for the southern district of New York an order, entitled in the bankruptcy proceeding, requiring Metcalf Brothers & Co. to show cause on the 13th day of March, 1900, why a writ of injunction should not issue enjoining them from taking any further proceedings under any judgment in their creditors' action, and so enjoining them in the interim. This order provided for its service upon the members of the firm of Metcalf Brothers & Co., but it was not in fact served upon anyone but their attorneys in their judgment creditors' action. Metcalf Brothers & Co. appeared specially upon the return day of the order to show cause, and filed a written objection that the district court was without jurisdiction, power, or authority over them in the premises; that no action or other proceeding was pending or had ever been begun against them in any way relating to the subject-matter of the [170]*proposed injunction; that they had not appeared in or been made a party to any proceeding founded upon the petition of Lesser Brothers to be adjudged bankrupts, and that they had not been brought into court on any process, or been given any notice of the order to show cause, except that their attorneys in their creditors' action had received a copy thereof, and especially that no statute conferred upon the district court jurisdiction, power, or authority to issue any writ of injunction in the premises.

"Their objection was overruled, and after an argument of the merits of the application the injunction was continued.

"Subsequently Metcalf Brothers & Co. presented a petition to this court to superintend and revise in matter of law the said proceedings of the district court.

"Questions Certified.

"Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court for its proper decision are:

"1. Had the district court of the United States for the southern district of New York jurisdiction to make the injunction order in question?

"2. If said court had jurisdiction to restrain Metcalf Brothers & Co. from receiving the fund in question, could such jurisdiction be exercised by summary proceedings?

"3. Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?

"4. If the lien acquired by the commencement of the creditors' action was inchoate merely, was it perfected by a judgment obtained more than four months prior to the filing of the petition of the Lessers in bankruptcy, within the meaning of the provisions of the act of Congress of July 1, 1898, known as the bankruptcy act?

"5. If the lien acquired by the commencement of the creditors' action was inchoate merely, was the judgment in the creditors' action, whenever obtained, one which is avoided by *any of the provisions of the act [171] of Congress of July 1, 1898, known as the bankruptcy act?"

*Mr.* **Nelson S. Spencer** argued the cause and filed a brief for petitioners:

The district court was wholly without jurisdiction to make the injunction order.

*Bardes* v. *First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293.

The petitioners are entitled to have their rights adjudged in a plenary action to which all persons interested are made parties.

*Ibid.*; *Smith* v. *Mason*, 14 Wall. 419, 20 L. ed. 748; *Marshall* v. *Knox*, 16 Wall. 551, 21 L. ed. 481.

Irrespective of the statutory want of jurisdiction of the district court and of the petitioner's right to be sued in a plenary suit, the court had no jurisdiction because the litigation is in and under the control of the state court.

*Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841; *Rouse* v. *Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266; *Taylor* v. *Carryl*, 20 How. 583, 15 L. ed. 1028; *Freeman* v. *Howe*, 24 How. 450, 16 L. ed. 749; *Covell* v. *Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355.

The courts maintained this position on the specific point here involved, under the act of 1841.

*Clarke* v. *Rist*, 3 McLean, 494, Fed. Cas. No. 2,861; *Ex parte Waddell*, 1 N. Y. Legal Obs. 53, Fed. Cas. No. 17,027; *Re Bennett*, 8 Ben. 561, Fed. Cas. No. 1,312.

And under the act of 1867.

*Johnson* v. *Bishop*, Woolw. 324, Fed. Cas. No. 7,373; *Goodrich* v. *Remington*, 6 Blatchf. 515, Fed. Cas. No. 5,546; *Re Clark*, 4 Ben. 88, 3 Nat. Bankr. Reg. 491, Fed. Cas. No. 2,798; *Alden* v. *Boston, H. & E. R. Co.* 5 Nat. Bankr. Reg. 230, Fed. Cas. No. 152; *Sedgwick* v. *Menck*, 6 Blatchf. 156, 1 Nat. Bankr. Reg. 675, Fed. Cas. No. 12,616.

Similar decisions have been made under the act of 1898.

*Re Gerdes*, 102 Fed. 318; *Re Kavanaugh*, 99 Fed. 928; *Re Russell*, 41 C. C. A. 323, 101 Fed. 248; *Frazier* v. *Southern Loan & T. Co.* 40 C. C. A. 76, 99 Fed. 707; *Pickens* v. *Dent*, 45 C. C. A. 522, 106 Fed. 653.

The lien is acquired by the commencement of the suit, and is an absolute charge on the property transferred by the bankrupts.

*Miller* v. *Sherry*, 2 Wall. 237, 17 L. ed. 827; *Storm* v. *Waddell*, 2 Sandf. Ch. 494; *Freedman's Sav. & T. Co.* v. *Earle*, 110 U. S. 710, 28 L. ed. 301, 4 Sup. Ct. Rep. 226.

The Federal courts have announced the

same doctrine under the former bankrupt acts.

*Ex parte General Assignee*, 1 N. Y. Legal Obs. 131, Fed. Cas. No. 5,305; *Clarke* v. *Rist*, 3 McLean, 494, Fed. Cas. No. 2,861; *Johnson* v. *Rogers*, 15 Nat. Bankr. Reg. 1, Fed. Cas. No. 7,408; *Kimberling* v. *Hartly*, 1 McCrary, 136, 1 Fed. 571; *Sedgwick* v. *Menck*, 6 Blatchf. 156, 1 Nat. Bankr. Reg. 675, Fed. Cas. No. 12,616.

Various state courts have passed upon the question of the superior lien of a creditors' bill, and have uniformly followed the rule as it has been heretofore established.

*Doyle* v. *Health*, 22 R. I. 213, 47 Atl. 213; *Taylor* v. *Taylor*, 59 N. J. Eq. 86, 45 Atl. 440; *Iselin* v. *Goldstein*, 35 Misc. 489, 71 N. Y. Supp. 1069.

The decisions of the courts of New York have been uniformly in support of the petitioners' position.

*Storm* v. *Waddell*, 2 Sandf. Ch. 494; *Lynch* v. *Johnson*, 48 N. Y. 27; *First Nat. Bank* v. *Shuler*, 153 N. Y. 163, 47 N. E. 262; *Roberts* v. *Albany & W. S. R. Co.* 25 Barb. 662; *Jeffres* v. *Cochrane*, 47 Barb. 557; *Utica Ins. Co.* v. *Power*, 3 Paige, 365; *Macy* v. *Jordan*, 2 Denio, 570; *M'Dermutt* v. *Strong*, 4 Johns. Ch. 687; *Smith* v.———, 4 Edw. Ch. 653; *Mandeville* v. *Campbell*, 45 App. Div. 512, 61 N. Y. Supp. 443.

The lien is property, and its existence does not depend upon a subsequent judgment.

*Haebler* v. *Myers*, 132 N. Y. 363, 15 L. R. A. 588, 30 N. E. 963; *Kittredge* v. *Warren*, 14 N. H. 509; *Haughton* v. *Eustis*, 5 Law Rep. 505, Fed. Cas. No. 6, 224.

The trustee represents simply the bankrupts, and can take no rights which they did not have.

*Yeatman* v. *New Orleans Sav. Inst.* 95 U. S. 765, 24 L. ed. 589; *Stewart* v. *Platt*, 101 U. S. 731, 25 L. ed. 816.

The lien on equitable assets, acquired by the commencement of a judgment creditors' action, is not extinguished by the death of the judgment debtor, but survives against his equitable assets in the hands of his administrator.

*Brown* v. *Nichols*, 42 N. Y. 26; *First Nat. Bank* v. *Shuler*, 153 N. Y. 163, 47 N. E. 262; *Reynolds* v. *Ætna L. Ins. Co.* 160 N. Y. 635, 55 N. E. 305.

A receivership in a creditors' action affecting equitable assets is unnecessary; it is a convenience merely, and adds nothing to the creditors' security.

*Kitchen* v. *Lowery*, 127 N. Y. 53, 27 N. E. 357; *Re Clover*, 8 App. Div. 556, 40 N. Y. Supp. 886, Affirmed in 154 N. Y. 443, 48 N. E. 892.

*Messrs.* **Otto T. Hess** and **M'Cready Sykes** argued the cause and filed a brief for respondent:

The only lien against equitable assets, acquired by a judgment creditor by the mere filing of a bill in equity, is a right to priority of payment in case he obtains his judgment in equity.

A creditors' bill is strikingly like the judgment note in use in some jurisdictions. And yet a judgment entered on such a note within four months of bankruptcy has been held to be void under the bankruptcy act.

*Re Richards*, 37 C. C. A. 634, 96 Fed. 935.

In a judgment creditors' action, the creditor can in no possible way complete his lien except by a judgment, and such a judgment is nullified and rendered unavailable by the bankruptcy act.

*Ex parte Waddell*, 1 N. Y. Legal Obs. 53, Fed. Cas. No. 17,027.

The judgment creditor's rights obtained by filing his bill are nothing more, at the most, than a *lis pendens* as to the property sought to be reached. This *lis pendens* operates only on the choses in action and the equitable assets of the debtor; it does not attach to property which is in its nature subject to execution. And this is true, although it may not be, as a matter of fact, possible to reach it by execution.

*First Nat. Bank* v. *Shuler*, 153 N. Y. 163, 47 N. E. 262.

The court had jurisdiction to make the order.

*Re Wallace*, Deady, 433, 2 Nat. Bankr. Reg. 134, Fed. Cas. No. 17,094; *White* v. *Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; *Bryan* v. *Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; *Re McCartney*, 109 Fed. 621.

Even the New York state courts, whose decisions are relied upon to maintain the theory that filing a creditors' bill gives a plenary lien, have intimated that it might be better to confine the rule to cases of a receivership.

*Stewart* v. *Isidor*, 5 Abb. Pr. N. S. 68.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Metcalf Brothers & Company, judgment creditors of Lesser Brothers, commenced their creditors' suit in the supreme court of New York December 17, 1896. The case came to trial December 17, 1897, and decree was rendered April 6, 1898. 22 Misc. 664, 50 N. Y. Supp. 1060. On appeal the appellate division affirmed the judgment of the trial court in part, and reversed it in part, and directed the payment by the receivers to Metcalf Brothers & Company of the amount of their judgments out of the money in the receivers' hands. 35 App. Div. 596, 55 N. Y. Supp. 179. This decree or judgment was embodied in an order dated December 30, 1898, but the clerk of the supreme court appears not to have entered it until January 31, 1899. The decision of the court of appeals (161 N. Y. 587, 56 N. E. 67) was made February 6, 1900, and the remittitur was received and filed in the court below March 12, 1900.

The bankruptcy law was approved July 1, 1898. May 12, 1899, Lesser Brothers filed their petition in bankruptcy and were adjudicated bankrupts, and Barker was appointed trustee June 7, 1899. March 8, 1900, the bankrupts' trustee procured from the district court an order entitled in the bankruptcy proceedings requiring Metcalf Brothers & Company to show cause on March 13 why a writ of injunction should not issue enjoining them from taking any

further proceedings under any judgment in their creditors' action, and so enjoining them in the interim, which injunction, after argument on the merits, was continued. No question arises here in respect of real estate, and on the case stated in the certificate the property affected was equitable assets. There had been tangible personal [172] property, *subject to levy and sale under execution, but this had been previously sold by an order of the supreme court of New York, and the proceeds were held by receivers.

The general rule is that the filing of a judgment creditors' bill and service of process creates a lien in equity on the judgment debtor's equitable assets. *Miller* v. *Sherry*, 2 Wall. 237, 17 L. ed. 827; *Freedman's Sav. & T. Co.* v. *Earle*, 110 U. S. 710, 28 L. ed. 301, 4 Sup. Ct. Rep. 226. And such is the rule in New York. *Storm* v. *Waddell*, 2 Sandf. Ch. 494; *Lynch* v. *Johnson*, 48 N. Y. 27; *First Nat. Bank* v. *Shuler*, 153 N. Y. 163, 47 N. E. 262. This was conceded by the district court, but the court held that the lien so created was "contingent upon the recovery of a valid judgment, and liable to be defeated by anything that defeats the judgment, or the right of the complainants to appropriate the fund;" that "such a contingent or equitable lien, it is evident, cannot be superior to the judgment on which it depends to make it effectual, but must stand or fall with the judgment itself;" and "§ 67*f*, therefore, in declaring that a judgment recovered within four months 'shall be deemed null and void,' etc., necessarily prevents the complainants from acquiring any benefit from the lien, or the fund attached, except through the trustee in bankruptcy *pro rata* with other creditors," it being also held that, although the judgment at special term was rendered more than four months before the filing of the petition, yet that the judgment of the appellate division, as affirmed by the court of appeals, was within the four months. 100 Fed. 433.

Assuming that the judgment at special term is to be disregarded, and that the judgment of the appellate division was entered within the four months, it will be perceived that if the views of the district court were correct, the third question propounded should be answered in the negative, while if incorrect, that question should be answered in the affirmative.

Doubtless the lien created by a judgment creditor's bill is contingent in the sense that it might possibly be defeated by the event of the suit, but in itself, and so long as it exists, it is a charge, a specific lien, on the assets, not subject to being devested save by payment of the judgment sought to be collected.

[173] *The subject was fully discussed, and the effect of bankruptcy proceedings considered, by Vice Chancellor Sandford in *Storm* v. *Waddell*, which has been so repeatedly recognized with approval as to have become a leading case.

As Mr. Justice Swayne remarked, in *Miller* v. *Sherry*, the commencement of the suit amounts to an equitable levy (2 Wall. 249, 17 L. ed. 830), or, in the language of Mr. Justice Matthews, in *Freedman's Sav. & T. Co.* v. *Earle*: "It is the execution first begun to be executed, unless otherwise regulated by statute, which is entitled to priority. . . . The filing of the bill, in cases of equitable execution, is the beginning of executing it." 110 U. S. 717, 28 L. ed. 304, 4 Sup. Ct. Rep. 230. And the right to payment out of the fund so vested cannot be affected by a subsequent transfer by the debtor (*M'Dermutt* v. *Strong*, 4 Johns. Ch. 687), or taken away by a subsequent discharge in bankruptcy. *Hill* v. *Harding*, 130 U. S. 699, 32 L. ed. 1083, 9 Sup. Ct. Rep. 725; *Doe* v. *Childress*, 21 Wall. 642, 22 L. ed. 549; *Eyster* v. *Gaff*, 91 U. S. 521, 23 L. ed. 403; *Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841.

*Kittredge* v. *Warren*, 14 N. H. 509, was relied on as to the effect of attachments on mesne process in New Hampshire, in *Peck* v. *Jenness*. And it may be remarked that Chief Justice Parker's vigorous discussion in that case of the point that the attachment lien was not contingent on a subsequent judgment is *a fortiori* applicable in cases where the prior establishment of the creditor's claim is the foundation of the creditor's suit.

Granting that possession of the power "to establish uniform laws on the subject of bankruptcies" enables Congress to displace these well-settled principles and to devest rights so acquired, we do not think that Congress has attempted to do so.

Section 67*f* provides: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien *shall be pre- [174] served for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect." [30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3418.]

In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment, or an attachment, or otherwise, that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void on adjudication, but its validity is recognized. When it is obtained within four months the property is discharged therefrom, but not otherwise. A judgment or decree in enforcement of an otherwise

valid pre-existing lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial.

Moreover, other provisions of the act render it unreasonable to impute the intention to annul all judgments recovered within four months.

By § 63*a*, fixed liabilities evidenced by judgments absolutely owing at the time of the filing of the petition, or founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of application for discharge, may be proved and allowed, while under § 17 judgments in actions of fraud are not released by a discharge, and other parts of the act would be wholly unnecessary if § 67*f* must be taken literally.

Many of the district courts have reached and announced a similar conclusion (*Re Blair*, 108 Fed. 529; *Re Beaver Coal Co.* 110 Fed. 630; *Re Kavanaugh*, 99 Fed. 928; *Re Pease*, 4 Am. Bankr. Rep. 547); as have also the supreme court of Rhode Island and the chancery court of New Jersey in well-considered decisions. *Doyle* v. *Heath*, 22 R. I. 213, 47 Atl. 213; *Taylor* v. *Taylor*, 59 N. J. Eq. 86, 45 Atl. 440. And see *Wakeman* v. *Throckmorton*, 74 Conn. 616, 51 Atl. 554.

As under §§ 70*a*, *e*, and § 67*e*, the trustee is vested with the bankrupt's title as of the [175]date of the adjudication, and *subrogated to the rights of creditors, the foregoing considerations require an affirmative answer to the third question, but in answering the first question some further observations must be made. This creditors' action was commenced December 17, 1896, more than eighteen months before the passage of the bankruptcy act, and was prosecuted with exemplary diligence to final and complete success in the judgment of the court of appeals. At this point the bankruptcy court intervened and on summary proceedings enjoined Metcalf Brothers & Company from receiving the fruits of their victory. The state courts had jurisdiction over the parties and the subject-matter, and possession of the property. And it is well settled that where property is in the actual possession of the court this draws to it the right to decide upon conflicting claims to its ultimate possession and control.

In *Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841, the district court had decided that the lien of an attachment issued out of a court of New Hampshire was defeasible and invalid as against an assignee in bankruptcy. But this court held that this was not so, and that the district court had no supervisory power over the state courts, and Mr. Justice Grier said: "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other. . . . The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." The rule indicated was applied under the act of 1841 in *Clarke* v. *Rist*, 3 *McLean,[176] 494, Fed. Cas. No. 2,861; under the act of 1867, by Mr. Justice Miller in *Johnson* v. *Bishop*, Woolw. 324, Fed. Cas. No. 7,373, and by Mr. Justice Nelson in *Sedgwick* v. *Menck*, 6 Blatchf. 156, Fed. Cas. No. 12,616, and under the act of 1898, among other cases, by the circuit court of appeals for the fourth circuit in *Frazier* v. *Southern Loan & T. Co.* 40 C. C. A. 76, 99 Fed. 707, and *Pickens* v. *Dent*, 45 C. C. A. 522, 106 Fed. 653. [Affirmed *sub nom. Pickens* v. *Roy*, 187 U. S. 177, *post*, 128, 23 Sup. Ct. Rep. 78.]

*White* v. *Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007, proceeded on the familiar doctrine that property in the custody of a court of the United States cannot be taken out of that custody by any process from a state court, and the jurisdiction of the district court sitting in bankruptcy by summary proceedings to maintain such custody was upheld. Mr. Justice Gray, speaking for the court, said: "By § 720 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 581, 'the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy.' Among the powers specifically conferred upon the court of bankruptcy by § 2 of the bankrupt act of 1898 are to '(15) make such orders, issue such process, and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this act.' 30 Stat. at L. 546, chap. 541, U. S. Comp. Stat. 1901, p. 3418. And by clause 3 of the twelfth general order in bankruptcy, applications to the court of bankruptcy 'for an injunction to stay proceedings of a court or officer of the United States, or of a state, shall be heard and decided by the judge; but he may refer such an application, or any specified issue arising thereon, to the referee to ascertain and report the facts.' 172 U. S. 657, 43 L. ed. 1191, 18 Sup. Ct. Rep. VI. Not going beyond what the decision of the case before us requires, we are of opinion that the judge of the court of bankruptcy was authorized to compel persons, who had forcibly and unlawfully seized and taken out of the judicial custody of that court property which had lawfully come into its possession as part of the bank-

rupt's property, to restore that property to its custody."

This cautious utterance—and courts must be cautious when dealing with a conflict of [177]jurisdiction—sustains as far as it goes *the converse of the proposition when presented by a different state of facts.

We are of opinion that the jurisdiction of the district court to make the injunction order in question cannot be maintained. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 26, 46 L. ed. 413, 416, 22 Sup. Ct. Rep. 293.

*The first question will be answered in the negative, and the third question in the affirmative*, and it is unnecessary to answer the other questions.

Certificate accordingly.

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DEVER PICKENS, *Appt.*,
*v.*
SUSAN C. DENT ROY *et al.*

(See S. C. Reporter's ed. 177-180.)

*Courts—jurisdiction of court of bankruptcy —enjoining proceedings in state court.*

1. A suit to enjoin the further prosecution in a state court of a long pending suit by a judgment creditor to have a deed set aside as fraudulent, and the property described therein sold and the proceeds applied to the payment of the judgment and the satisfaction of the liens existing against the property, is not within the jurisdiction of a court of bankruptcy,—especially where instituted by the bankrupt himself.
2. The jurisdiction of a state court over a suit by a judgment creditor to set aside a deed as fraudulent is not lost by the action of the complainant in proving up her judgment as a preferred debt before the referee in bankruptcy proceedings; nor does such action amount to her consent to the exercise by a court of bankruptcy of jurisdiction to enjoin further proceedings in the state court.

[No. 78.]

*Submitted November 10, 1902. Decided December 1, 1902.*

APPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the District Court for the District of West Virginia dissolving an injunction and dismissing a bill to enjoin further proceedings in a pending suit in a state court. *Affirmed.*

See same case below, 45 C. C. A. 522, 106 Fed. 653.

The facts are stated in the opinion.

NOTE.—*On the right of a court of bankruptcy to enjoin proceedings in a state court*—see note to Garner v. Second Nat Bank, 16 C. C. A. 96.

*As to conflict of jurisdiction between Federal and state courts*—see note to Louisville Trust Co. v. Cincinnati, 22 C. C. A. 356. And see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 50.

*Mr.* **John W. Davis** submitted the cause for appellant. *Messrs. Davis & Davis* were with him on the brief:

When the appellee chose to prove her claim in the bankruptcy court, she made an election preventing her from seeking a remedy in any other tribunal, and giving the district court jurisdiction by consent.

Bankruptcy act of 1898, § 23, C; *Dinges* v. *Becker*, 9 Nat. Bankr. Reg. 508, Fed. Cas. No. 3,919.

*Mr.* **Edwin Maxwell** submitted the cause for appellees. *Mr. J. Hop Woods* was with him on the brief:

The appellant's trustee could not have sued the defendants below, in the court of bankruptcy, concerning the property of the bankrupt he represented, except with the consent of said defendants; and it is quite clear that the bankrupt had no standing in that court.

*Bardes* v. *First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

An injunction by a Federal court, against a state court, is void under the United States statutes, and might be disregarded without subjecting the defendant to proceedings for contempt.

*Laidley* v. *Jasper*, 49 W. Va. 526, 39 S. E. 169; *Huntington* v. *Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526.

Conceding jurisdiction to the court of bankruptcy, it could not in a cause like this, under the spirit of the bankruptcy act and the decisions of this court thereunder, devest a court of the state where the bankrupt resided and where his property was, of jurisdiction acquired of both, years before.

*Taylor* v. *Carryl*, 20 How. 583, 15 L. ed. 1028; *Eyster* v. *Gaff*, 91 U. S. 521, 23 L. ed. 403; *Frazier* v. *Southern Loan & T. Co.* 40 C. C. A. 76, 99 Fed. 707.

Such state court had not only acquired jurisdiction of appellant's person and property years before the adjudication of bankruptcy, but in the chancery cause, the decree whereof was enjoined in the district court by appellant, had, under the prayers of the bills therein and the opinion of the highest state court, actual custody of his property.

*Dent* v. *Pickens*, 46 W. Va. 379, 33 S. E. 303.

The custody of his property was in the state courts, if not in fact, in equity and by operation of law, and actual seizure was not necessary.

High, Receivers, § 4; *Beverley* v. *Brooke*, 4 Gratt. 187; *Kimberling* v. *Hartly*, 1 McCrary, 136, 1 Fed. 571; *Taylor* v. *Carryl*, 20 How. 583, 15 L. ed. 1028; *Covell* v. *Heyman*, 111 U. S. 182, 28 L. ed. 392, 4 Sup. Ct. Rep. 355.

A lien was credited from the date of the institution of the suit in the state court.

*Sweeny* v. *Wheeling Grape Sugar & Ref. Co.* 30 W. Va. 443, 4 S. E. 431; *Clark* v. *Figgins*, 31 W. Va. 156, 5 S. E. 643; *Guggenheimer* v. *Lockridge*, 39 W. Va. 457, 19 S. E. 874.

And resort need not be had for satisfaction, in the first instance, to execution upon

personal property, but may be had at once against the property assailed as fraudulently conveyed.

*Hoffman* v. *Fleming*, 43 W. Va. 762, 28 S. E. 790.

A claim having priority must be proved in bankruptcy proceedings, whether to be enforced in that court or not.

*Re Falls City Shirt Mfg. Co.* 98 Fed. 592; 16 Am. & Eng. Enc. Law, 2d ed. p. 683.

[178] *Mr. Chief Justice **Fuller** delivered the opinion of the court:

This is an appeal from a decree of the United States circuit court of appeals for the fourth circuit affirming the decree of the district court for the district of West Virginia dissolving an injunction and dismissing a bill filed in that court by Dever Pickens against Susan C. Dent and others. 45 C. C. A. 522, 106 Fed. 653.

The facts necessary to be considered in disposing of the case were stated by the circuit court of appeals in substance as follows: January 24, 1889, Susan C. Dent exhibited her bill in the circuit court of Barbour county, West Virginia, against Dever Pickens and others, to set aside as fraudulent a certain deed made by Pickens to trustees, bearing date January 14, 1889, and assailing as fraudulent certain indebtedness thereby secured. At the succeeding September rules an amended bill was filed alleging that complainant Dent on July 23, 1889, recovered a judgment at law against Pickens for the sum of $10,000, with interest and costs. Complainant prayed that the real estate mentioned in the bill as the property of Pickens, and described in the trust deed, might be sold, and the proceeds applied to the payment of her judgment and in satisfaction of the liens existing on the land. The judgment was subsequently reversed, and a retrial resulted on February 27, 1892, in a judgment for $9,000, with interest and costs, and a second amended bill was filed so alleging.

The circuit court of appeals did not deem it essential to give a history of the many years of "hard-fought and well-contested litigation," which followed, but stated that the case was pending and undisposed of by the circuit court of Barbour county, October 30, 1899, when Pickens was adjudicated a bankrupt by the district court of the United States for the district of West Virginia on a petition filed October 27. After the adjudication, and on November 2, 1899, Pickens filed an answer in the chancery cause, in which he set up the proceedings in [179] *bankruptcy, asked that all further action in the state court might be suspended until the district court had disposed of those proceedings, and contended that all his estate, rights, and interests of every kind and description had passed from the control of the circuit court of Barbour county and into the jurisdiction of the district court. On November 18, 1899, a trustee in bankruptcy was appointed for Pickens's estate, who in February, 1900, presented to the circuit court of Barbour county his petition in the chancery cause, asking that he be made a party, that his petition stand as an answer, and that the circuit court proceed to the enforcement of the liens against the bankrupt's estate; and, thereafter, on February 23, 1900, that court rendered a decree by which, among other things, it was ordered that the deed of trust referred to in the bill be set aside as fraudulent, and that a special commissioner and receiver therein named should rent the land described until a certain day and then sell the same, the proceeds thereof to be applied to the payment of the debts due by Pickens. November 20, 1899, complainant Dent, "without waiving her preference," tendered her proof of debt before the referee in bankruptcy, it being the judgment in question, which was allowed as a preferred claim against the bankrupt's estate.

The receiver and commissioner appointed in the chancery court was proceeding to execute the decree therein when Pickens filed his bill in the district court March 31, 1900, against Dent and others, rehearsing the facts relating to the suit and to the proceedings in bankruptcy, charging that the trustee was not authorized to intervene in the chancery cause, and asserting that the state court on the filing of Pickens's answer setting up his adjudication should have taken no further action, and that, therefore, the decree appointing the commissioner and receiver to rent and sell the real estate was without authority of law and void.

The prayer was that defendants be restrained from all further proceedings in the suit so pending in the circuit court of Barbour county until the termination of the bankruptcy proceedings; that the receiver and commissioner be enjoined from executing the decree during their pendency; and that the possession *and control of the prop- [180] erty be turned over to the trustee to be administered under the direction of the court in bankruptcy.

A preliminary injunction was granted by the district judge, which was dissolved July 26, 1900, and Pickens's bill dismissed with costs. From that decree this appeal was taken.

Such being the state of facts, the circuit court of appeals held that the district court had no jurisdiction of the suit, even if it had been brought in the name of the trustee, who could not have sued defendants below in that court in respect of the bankrupt's property, unless by consent, while the bankrupt himself had no standing in that court after adjudication (*Bardes* v. *First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000); and further, that as the circuit court of Barbour county had at the time of the adjudication, and had had for years, complete jurisdiction and control over the bankrupt and his property, that jurisdiction was not devested by the proceedings in bankruptcy, and it was the right and duty of that court to proceed to final decree notwithstanding adjudication, the rule being applicable that the court which first obtains rightful jurisdiction over the subject-matter should not be interfered with. *Frasier* v. *Southern Loan &*

*T. Co.* 40 C. C. A. 76, 99 Fed. 707. And Goff, J., speaking for the court, said: "The bankrupt act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its details, provided the suit pending in the state court was instituted more than four months before the district court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy."

The court also ruled that the mere fact that complainant Dent proved up her judgment as a preferred debt in bankruptcy, when and as she did, did not operate to deprive the state court of jurisdiction, nor amount to a consent to the exercise of jurisdiction by the district court as invoked.

We are of opinion that the circuit court of appeals was right in its rulings. The case in the one aspect came within *Bardes* v. *First Nat. Bank*, and in the other within the rule applied. *Metcalf* v. *Barker*, 187 U. S. 165, *ante*, 122, 23 Sup. Ct. Rep. 67.

*Decree affirmed.*

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[181] *SIMEON I. GRIN, *Appt.*,
*v.*
JOHN H. SHINE.

(See S. C. Reporter's ed. 181-197.)

*Extradition—jurisdiction of United States commissioner — special designation — warrant of arrest—embezzlement—sufficiency of complaint—evidence—preliminary requisition.*

1. A United States commissioner was not without jurisdiction over extradition proceedings because at the time the warrant of arrest was issued he had not been specially designated to act in such proceedings, as required by U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), where he did not assume to act therein until after he was so specially designated.
2. A complaint in extradition proceedings, sworn to before a United States commissioner authorized generally to take affidavits, but not specially designated to act in extradition proceedings, is sufficient under U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), which only requires that the warrant of arrest in such proceedings shall issue upon complaint made under oath.
3. The objection that the judge issuing the warrant of arrest in extradition proceedings made the warrant returnable before a United States commissioner specially designated, as required by U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), to act in such cases, is not available when first made on habeas corpus, even though such section seems techuically to require the warrant to be made returnable before the magistrate issuing it.
4. A complaint in extradition proceedings does not insufficiently charge the crime of embezzlement, as defined in Cal. Pen. Code, § 508, because it alleges that the money embezzled was intrusted to and received by the accused "in his capacity as clerk," instead of charging, in the language of that section, that such money came into his control or care "by virtue of his employment as such clerk."
5. The omission of the word "fraudulently" from a complaint in extradition proceedings charging embezzlement does not render such complaint defective, where it alleges that the accused "wrongfully, unlawfully, and feloniously" appropriated the property.
6. The production of a certified copy of an order purporting to be signed and sealed by a Russian examining magistrate, which, though not in the form of a warrant of arrest as used in the United States, was evidently designed to secure the apprehension of the accused and his production before an examining magistrate, satisfies the requirement of the extradition treaty with Russia of June 5, 1893 (28 Stat. at L. 1071), that applications for extradition shall be accompanied by an authenticated copy of the warrant of arrest, or of some other equivalent judicial document issued by a judge or magistrate duly authorized to do so.
7. Congress has dispensed with the requirement of the extradition treaty with Russia of June 5, 1893 (28 Stat. at L. 1071) with respect to the production of a copy of a warrant of arrest, or other equivalent document issued by a magistrate of the Russian Empire, by U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), which is applicable to all foreign governments with which extradition treaties have been considered, and simply requires a complaint under oath, a warrant of arrest, evidence of criminality sufficient to sustain the charge under the provisions of the proper treaty, and a certificate by the magistrate of such evidence and his conclusions thereon, to the Secretary of State.
8. Whether the depositions and other documents offered under the act of August 3, 1882, § 5 (22 Stat. at L. 216, chap. 378, U. S. Comp. Stat. 1901, p. 3595), governing evidence in extradition cases, sufficiently establish the criminality of the accused for the purposes of extradition, cannot be reviewed upon habeas corpus.
9. The certificate of the ambassador to Russia that the depositions and other documents offered in evidence in an extradition case "are properly and legally authenticated so as to entitle them to be received and admitted as evidence for similar purposes by the tribunals of Russia," which, except for the introduction of the words "as evidence," is in the language of the act of August 3, 1882, § 5 (22 Stat. at L. 216, chap. 378, U. S. Comp. Stat. 1901, p. 3595), by which the proceeding is governed, is not defective because of the addition of these words.
10. No evidence is required in extradition proceedings, that the consul of the foreign government who made the complaint had authority to do so, since all that is required by U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), is that such complaint be made under oath.
11. No preliminary requisition from the demanding government is essential to the jurisdiction of a United States commissioner, under U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), over extradition proceedings.

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NOTE.—*As to foreign extradition*—see notes to *Re* Huse, 25 C. C. A. 23; *Ex parte* Kentucky v. Dennison, 16 L. ed. U. S. 717; and State v. Jackson (D. C. W. D. Tenn.) 1 L. R. A. 370.

*As to what papers are necessary to obtain the surrender of the fugitive in extradition proceedings*—see note to *Ex parte* Hart (C. C. App. 4th C.) 28 L. R. A. 801.

12. A sufficient showing that one accused, in extradition proceedings, of the crime of embezzlement, had the care and control of the property within the meaning of Cal. Pen. Code, § 508, defining that crime, is made by a complaint which charges him with having converted to his own use the proceeds of a check after having cashed it at a bank to which he had taken it in accordance with his employer's instructions to draw the money and take it to a railroad station, to be forwarded to another city.

[No. 303.]

*Submitted November 3, 1902. Decided December 1, 1902.*

APPEAL from the Circuit Court of the United States for the Northern District of California to review a judgment dismissing a writ of habeas corpus. *Affirmed.*

See same case below, 112 Fed. 790.

Statement by Mr. Justice **Brown**:

This was an appeal from a judgment of the circuit court for the northern district of California, dismissing a writ of habeas corpus sued out by Grin, and remanding him to the custody of the defendant, marshal for the northern district of California, who held him under a mittimus issued by a commissioner in certain proceedings under a treaty with the Emperor of Russia for the extradition of criminals, proclaimed June 5, 1893. 28 Stat. at L. 1071.

These proceedings were begun by a complaint of Paul Kosakevitch, Russian consul at the city of San Francisco, stating, in substance, that on March 6, 1901, Grin, a [183] Cossack of the Don and a Russian subject, in the employment of the firm of E. L. Zeefo & Co., doing business in the city of Rostov, on the river Don, in the Empire of Russia, embezzled the sum of 25,000 roubles, "intrusted to and received by" him in his capacity as "clerk" of such firm, and that he had subsequently absconded and taken refuge in San Francisco; that he had been indicted in Russia for the embezzlement of the money, and that a mandate had been issued by the Department of State in Washington directing the necessary proceedings to be had in pursuance of the laws of the United States, in order that the evidence of his criminality might be heard and considered. The complaint was sworn to before George E. Morse, United States commissioner, with the usual power to take affidavits, but not specially authorized by any court of the United States to take proceedings in extradition; that upon such complaint the judge of the district court for the northern district of California issued a warrant of arrest, and directed that petitioner, when arrested, should be brought before E. H. Heacock, Esquire, United States commissioner, for examination and further proceedings; that, at the time such warrant was issued, Heacock was not authorized to take jurisdiction of extradition proceedings, and that the evidence before him failed to show that the petitioner had committed the crime of embezzlement.

Several other defects in the extradition proceedings are set forth in the petition, and so far as they are deemed material, appear hereafter in the opinion.

Upon a hearing upon this petition the circuit court made an order remanding the petitioner to the custody of the marshal, and an appeal was thereupon taken to this court. *Re Grin*, 112 Fed. 790.

*Mr.* **George D. Collins** submitted the cause for appellant:

Jurisdiction in respect to the hearing and determination of the case is confined to the officer or judge to whom the complaint is presented and who issues the warrant of arrest.

*Re Henrich*, 5 Blatchf. 425, Fed. Cas. No. 6,369; *Re Fares*, 7 Blatchf. 45, Fed. Cas. No. 4,644.

No power or authority in respect to a special jurisdiction can be taken by intendment, construction, or implication.

*Re Fares*, 7 Blatchf. 45, Fed. Cas. No. 4,644; *Long* v. *San Francisco City & County Super. Ct.* 102 Cal. 452, 36 Pac. 807; *Winter* v. *Fitzpatrick*, 35 Cal. 269; *Chollar Min. Co.* v. *Wilson*, 66 Cal. 376, 5 Pac. 670.

The exclusive jurisdiction vested in the district judge, and he could not devest himself of that jurisdiction by assigning or transferring the case to the commissioner. On the other hand, if the jurisdiction vested in the commissioner, then the district judge had no power subsequently to issue the warrant of arrest.

1 Moore, Extradition, § 301.

Where a warrant of arrest is returnable before a commissioner for hearing, it should be one who has been previously appointed by the circuit court under which he holds his commission to act under the statutes relating to extradition.

*Ibid.*

The sufficiency of the complaint must be determined according to the law of the state of California.

*Re Eseta*, 62 Fed. 972; 1 Moore, Extradition, § 344.

It is necessary that the complaint show that the accused had the possession of the property—in this case the money—by virtue of his employment, and that he fraudulently appropriated it.

*State* v. *Johnson*, 21 Tex. 775; *Moore* v. *United States*, 160 U. S. 272, 40 L. ed. 424, 16 Sup. Ct. Rep. 294.

The allegation that the accused "wrongfully, unlawfully, and feloniously appropriated said money" is not the equivalent of an allegation that he did so fraudulently, and does not supply the defect.

Bishop, Statutory Crimes, § 458; 1 Bishop, New Crim. Proc. § 613.

The pleading must show that the appropriation was fraudulent.

*People* v. *Mitchell*, 92 Cal. 590, 28 Pac. 597.

Every essential constituting the offense charged must be averred in the complaint, or it is fatally defective.

*United States* v. *Hess*, 124 U. S. 486, 31

L. ed. 517, 8 Sup. Ct. Rep. 571; *People* v. *Howard*, 111 Cal. 656, 44 Pac. 342.

The rule applies to extradition cases.

*Re Farez*, 7 Blatchf. 35, Fed. Cas. No. 4,644.

The oath to the complaint was taken before one who is not shown to have been specially authorized, as required by U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591). The absence of such authority, or, which is the same thing, the omission to make it affirmatively appear, is fatal, and renders the oath a nullity.

1 Moore, Extradition, §§ 284, 296; *Re Farez*, 7 Blatchf. 34, Fed. Cas. No. 4,644; *Re Kelley*, 25 Fed. 268.

Under the law of the state of California, a person imprisoned on a criminal charge is entitled to his liberty on habeas corpus, if the complaint does not state facts sufficient to constitute a crime or public offense.

*Ex parte Maier*, 103 Cal. 479, 37 Pac. 402.

To charge that a person "embezzled" certain property is nothing but a naked conclusion of law, and is clearly insufficient.

*Moore* v. *United States*, 160 U. S. 270, 40 L. ed. 424, 16 Sup. Ct. Rep. 294; *Com.* v. *Moore*, 11 Cush. 603; *People* v. *Neil*, 91 Cal. 468, 27 Pac. 760; *People* v. *McKenna*, 81 Cal. 158, 22 Pac. 488; *United States* v. *Watkins*, 3 Cranch C. C. 441, Fed. Cas. No. 16,649; *United States* v. *Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571; *United States* v. *Carll*, 105 U. S. 611, 26 L. ed. 1135.

Even if a warrant of arrest, or an equivalent judicial document, were in the record, it would be void, as it does not set forth the offense charged.

*Re Farez*, 7 Blatchf. 50, Fed. Cas. No. 4,644; 1 Bishop, New Crim. Proc. § 228.

A warrant of arrest, or an equivalent judicial document, must be addressed to some executive officer, and command him to seize the body of the accused and bring him before the magistrate.

1 Bishop, New Crim. Proc. § 187.

If there is an indictment, no other evidence of the charge or of the fact that the accused has been charged in Russia is admissible.

Hawley, Extradition, 47, 48; 1 Moore, Extradition, § 226.

The phrase in the act of 1882, "if they (the papers) shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped," does not relate to extradition purposes as asserted by the certificate, but has reference entirely to evidence of criminality.

*Re Oteiza y Cortes*, 136 U. S. 337, *sub nom. Oteiza y Cortes* v. *Jacobus*, 34 L. ed. 467, 10 Sup. Ct. Rep. 1031.

The certificate is fatally defective.

*Re McPhun*, 24 Blatchf. 254, 30 Fed. 57; *Re Oteiza y Cortes*, 136 U. S. 330, *sub nom. Oteiza y Cortes* v. *Jacobus*, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031.

The certificate should either specify the papers in detail, or should be separately attached to each.

*Re Henrich*, 5 Blatchf. 414, Fed. Cas. No. 6,369; *Re McPhun*, 24 Blatchf. 254, 30 Fed. 60; *Re Oteiza y Cortes*, 136 U. S. 337, *sub nom. Oteiza y Cortes* v. *Jacobus*, 34 L. ed. 467, 10 Sup. Ct. Rep. 1031.

There is no evidence that the Russian consul had authority to make the complaint. The requisite authority must affirmatively appear to have been specially conferred by the Russian government.

*Re Herris*, 32 Fed. 583, Reversed in 33 Fed. 165; *Re Ferrelle*, 28 Fed. 878; 1 Moore, Extradition, §§ 219, 220; Hawley, International Extradition, p. 35.

The offense, if any, was larceny.

*United States* v. *Clew*, 4 Wash. C. C. 700, Fed. Cas. No. 14, 819; *Rex* v. *Bass*, 1 Leach C. L. 251; *Rex* v. *Chipchase*, 2 Leach C. L. 699; *Rex* v. *Low*, 10 Cox C. C. 168; *Phelps* v. *People*, 72 N. Y. 360; *Com.* v. *Berry*, 99 Mass. 428, 96 Am. Dec. 767; *Johnson* v. *People*, 113 Ill. 99; 2 East P. C. 566; 1 Wharton, Crim. Law, §§ 957, 960; 18 Am. & Eng. Enc. Law, 2d ed. p. 473; 10 Am. & Eng. Enc. Law, 2d ed. p. 988; *People* v. *Raschke*, 73 Cal. 381, 15 Pac. 13; *People* v. *Belden*, 37 Cal. 52; *People* v. *Abbott*, 53 Cal. 284, 31 Am. Rep. 59; *Cobletz* v. *State*, 36 Tex. 353.

Evidence of larceny will not sustain a charge of embezzlement.

*People* v. *Johnson*, 91 Cal. 265, 27 Pac. 663; 28 Stat. at L. pp. 1072, 1073, treaty, art. 2.

A charge of embezzlement or larceny of money is not proved by evidence that the property taken was bank bills.

*Block* v. *State*, 44 Tex. 620; Bishop, Statutory Crimes, 3d ed. § 346; *Hamilton* v. *State*, 60 Ind. 193, 28 Am. Rep. 653; *State* v. *Jim*, 7 N. C. (3 Murph.) 3; *Rex* v. *Hill*, Russ. & R. C. C. 190; *Com.* v. *Swinney*, 1 Va. Cas. 151; *M'Auly* v. *State*, 7 Yerg. 526; *Johnston* v. *State*, Mart. & Y. 129; *Johnson* v. *State*, 11 Ohio St. 324; *Carr* v. *State*, 104 Ala. 43, 16 So. 155; *State* v. *Collins*, 72 N. C. 144.

If the evidence tends to show anything criminal, it is that the defendant, at the time of receiving the check and also the bank bills, intended to steal and carry away the same. That circumstance makes the offense larceny, and not embezzlement.

10 Am. & Eng. Enc. Law, 2d ed. p. 987; *Moore* v. *United States*, 160 U. S. 269, 40 L. ed. 422, 16 Sup. Ct. Rep. 294.

The burden of proving that defendant did receive the property by virtue of his employment as clerk of Zeefo is upon the prosecution. The evidence wholly fails to prove the fact. The omission is fatal.

10 Am. & Eng. Enc. Law, 2d ed. p. 990.

The evidence is also wholly insufficient to show that defendant appropriated the money. The mere fact that he received the money and had not accounted for it, but had taken his departure from Russia, is no evidence of crime, according to the laws of California.

*People* v. *Page*, 116 Cal. 396, 48 Pac. 326;

*People* v. *Royce*, 106 Cal. 178, 37 Pac. 630, 39 Pac. 524; *People* v. *Wyman*, 102 Cal. 552, 36 Pac. 932; *People* v. *Tomlinson*, 66 Cal. 344. 5 Pac. 509; *People* v. *Gale*, 77 Cal. 121, 19 Pac. 231.

Such has always been the law governing the accusation of embezzlement.

*Reg.* v. *Wolstenholme*, 11 Cox C. C. 314; *Reg.* v. *Chapman*, 1 Car. & K. 119; *Rex* v. *Smith*, Russ. & R. C. C. 267; *Bork* v. *People*, 16 Hun, 480; *Robinson* v. *State*, 109 Ga. 564, 35 S. E. 57; 1 Wharton, Crim. L. 10th ed. note 1, p. 879.

The flight of the accused is no evidence of the *corpus delicti*. Wharton, Crim. Ev. § 750.

Nor would his confession be any evidence thereof.

*People* v. *Jones*, 31 Cal. 565; *People* v. *Thrall*, 50 Cal. 415; *Ex parte Becker*, 86 Cal. 402, 25 Pac. 9; *People* v. *Elliott*, 90 Cal. 587, 27 Pac. 433; *People* v. *Simonsen*, 107 Cal. 346, 40 Pac. 440.

The absence of competent evidence is a point always available upon the writ in extradition cases.

*Re Oteiza y Cortes*, 136 U. S. 330, *sub nom. Oteiza y Cortes* v. *Jacobus*, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031; *Terlinden* v. *Ames*, 184 U. S. 278, 46 L. ed. 541, 22 Sup. Ct. Rep. 484; 28 Stat. at L. p. 1072, treaty, art. 1.

There are certain material facts alleged in the petition for habeas corpus that are not traversed in the return; they are, therefore, to be taken as the facts of the case.

*Whitten* v. *Tomlinson*, 160 U. S. 242, 40 L. ed. 412, 16 Sup. Ct. Rep. 297; *Kohl* v. *Lehlback*, 160 U. S. 296, 40 L. ed. 433, 16 Sup. Ct. Rep. 304.

The executive mandate is void because it does not refer on its face to an extradictable offense.

1 Moore, Extradition, § 223.

*Messrs.* **H. G. Platt** and **Richard Bayne** submitted the cause for the Russian government:

The Federal courts look with disfavor upon technical defenses in extradition proceedings.

*Re Neely*, 103 Fed. 629; *Ex parte Sternaman*, 77 Fed. 595; *Re Herres*, 33 Fed. 167.

The complaint need not have the accuracy of an indictment or information, but is sufficient if it informs the prisoner of the nature of the charge he is compelled to answer.

*Ex parte Sternaman*, 77 Fed. 595; *San Francisco* v. *Randall*, 54 Cal. 408.

Anybody can make the complaint, only it must appear in the proceedings somewhere that the proceedings are carried on at the instigation of the foreign government.

*Re Herres*, 33 Fed. 166.

A party can proceed either under the treaty, or under the Revised Statutes.

*Castro* v. *De Uriarte*, 16 Fed. 97.

If the tribunal attempting to exercise jurisdiction has jurisdiction under any source, that is sufficient on a habeas corpus proceeding.

*Ibid.*

The authentication is in the language of the statute,—of the act of 1882,—and is therefore good.

*Re Herres*, 33 Fed. 165; 1 Moore, Extradition, pp. 486, 490, 495, 496, 499, §§ 321, 323, 326, 327, 329.

There is no distinction, under the California statute, between "custody" and "possession," or "care" and "possession."

10 Am. & Eng. Enc. Law, 2d ed. p. 988; 18 Am. & Eng. Enc. Law, 2d ed. p. 473; *People* v. *Beldon*, 37 Cal. 51; *Ex parte Hedley*, 31 Cal. 109; *Calkins* v. *State*, 18 Ohio St. 366, 98 Am. Dec. 130; *New Mexico* v. *Maxwell*, 2 N. M. 250.

If property is under an agent's control or care, the appropriation thereof is embezzlement, because it has been intrusted to him.

*State* v. *Wingo*, 89 Ind. 204; *People* v. *Dalton*, 15 Wend. 581; *People* v. *Gallagher*, 100 Cal. 466, 35 Pac. 80.

If a servant steals his master's goods before they come into his master's possession, he is guilty of embezzlement, and not larceny.

*Calkins* v. *State*, 18 Ohio St. 366, 98 Am. Dec. 126; 10 Am. & Eng. Enc. Law, 2d ed. p. 988.

Where one honestly receives the possession of goods upon a trust, and, after receiving them, fraudulently converts them to his own use, it is a case of embezzlement. But when the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny.

*People* v. *Tomlinson*, 102 Cal. 23, 36 Pac. 506.

There is nothing to prevent a district judge from authorizing a warrant to be returned before a commissioner.

*Re Henrich*, 5 Blatchf. 414, Fed. Cas. No. 6,369.

The complaint charges that the defendant received the money from his employers in the capacity of clerk; that he was at the time the clerk of his employers; that while so employed it was intrusted to him in his capacity as said clerk. There is no necessity of saying that he received it by virtue of his employment as clerk.

*Moore* v. *United States*, 160 U. S. 272, 40 L. ed. 424, 16 Sup. Ct. Rep. 294.

It is not necessary that the certificate should either specify the papers in detail, or should be separately attached to each paper.

1 Moore, Extradition, 481.

Mr. Justice **Brown** delivered the opinion of the court:

*We shall only notice such alleged defects [184] in the extradition proceedings as are pressed upon our attention in the briefs of counsel. While these defects are of a technical character, they are certainly entitled to respectful and deliberate consideration. Good faith toward foreign powers, with which we have entered into treaties of extradition, does not require us to surrender persons charged with crime in violation of

those well-settled principles of criminal procedure which from time immemorial have characterized Anglo-Saxon jurisprudence. Persons charged with crime in foreign countries, who have taken refuge here, are entitled to the same defenses as others accused of crime within our own jurisdiction.

We are not prepared, however, to yield our assent to the suggestion that treaties of extradition are invasions of the right of political habitation within our territory, or that every intendment in proceedings to carry out these treaties shall be in favor of the party accused. Such treaties are rather exceptions to the general right of political asylum, and an extension of our immigration laws prohibiting the introduction of persons convicted of crimes (18 Stat. at L. 477 [chap. 141, U. S. Comp. Stat. 1901, p. 1285]), by providing for their deportation and return to their own country, even before conviction, when their surrender is demanded in the interests of public justice. There is such a general acknowledgment of the necessity of such treaties that of late, and since the facilities for the escape of criminals have so greatly increased, most civilized powers have entered into conventions for the mutual surrender of persons charged with the most serious nonpolitical crimes. These treaties should be faithfully observed, and interpreted with a view to fulfil our just obligations to other powers, without sacrificing the legal or constitutional rights of the accused.

In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required, and ought to be willing to *do, *viz.*, submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice, or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical noncompliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations. Presumably at least, no injustice is contemplated, and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community is rather to be welcomed than discouraged. [185]

1. The first assignment of error is that the commissioner had no jurisdiction over the case, inasmuch as at the time the warrant of arrest was issued he had not been authorized to act in extradition proceedings by any of the courts of the United States under Rev. Stat. § 5270 [U. S. Comp. Stat. 1901, p. 3591], which reads as follows:

"Sec. 5270. Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; *and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made." [186]

Under this section it is plain, first, that the commissioner must be specially authorized to act in extradition cases; second, that a complaint must be made under oath charging the crime; third, that a warrant must issue for the apprehension of the person; fourth, that he must be brought before such justice, judge, or commissioner to the end that the evidence of criminality may be heard and considered; fifth, that the commissioner shall certify the evidence to the Secretary of State, that a warrant may issue for the surrender. There is certainly no requirement here that the commissioner shall be authorized to act before he assumes to act, and in this case there is no evidence that he assumed to act until after October 17, 1901, when he was specially appointed for that purpose. The day upon which the petitioner was brought before the commissioner, Heacock, does not appear, but his commitment is dated November 19, 1901. The warrant upon which he was arrested was issued October 17, the day upon which the commissioner was specially authorized to act.

It is true that a warrant of arrest can only issue under § 5270 [U. S. Comp. Stat. 1901, p. 3591], upon a complaint made under oath; but there is no requirement that the oath shall be taken before a commissioner authorized to act in extradition proceedings, or even before the judge or commissioner who issues the warrant of arrest. While we are bound to give the person accused the benefit of every statutory provision, we are not bound to import words into the statute which are not found there, or to say that the judge issuing the warrant may not receive an oath taken before a commissioner authorized generally to take affida-

vits. There is no evidence that Mr. Morse, who took this complaint, was not a United States commissioner appointed under the act of May 28, 1896 (29 Stat. at L. 184 [chap. 252, U. S. Comp. Stat. 1901, p. 499]), and the fact that he signs his name as such, and that he was recognized as such by the circuit court in this proceeding, is sufficient evidence of his authority. It is true the district judge, who issued this warrant of arrest, might himself have administered the oath, but he was equally at liberty to [187] *act upon a complaint sworn to before a United States commissioner.

2. Nor did the district judge, who issued the warrant, exceed his powers in making it returnable before a commissioner, who upon the same day was specially designated to act in extradition proceedings. It is true that the statute provides (§ 5270 [U. S. Comp. Stat. 1901, p. 3591]), that the person before whom the complaint is made may "issue his warrant for the apprehension of the person so charged, that he may be brought before *such* justice, judge, or commissioner to the end that the evidence of criminality may be heard and considered;" but the practice in this as in other proceedings of a criminal or quasi criminal nature has been to make the warrant returnable before the magistrate issuing the warrant, or some other magistrate competent to take jurisdiction of the proceedings. In the *Heinrich Case*, 5 Blatchf. 414, Fed. Cas. No. 6,369, the complaint was made before Commissioner White, was laid before Mr. Justice Nelson of this court, who issued his warrant returnable before himself *or* Commissioner White. No objection was made to the proceedings for this reason, though the case was vigorously contested upon other grounds, notably because the warrant was executed without the limits of the district, and within the state of Wisconsin. The fact that the point was not made in the case certainly indicates that it was not considered by counsel to be even a plausible ground for quashing the proceedings.

The commissioner is in fact an adjunct of the court, possessing independent, though subordinate, judicial powers of his own. If the district judge, acting under § 5270 [U. S. Comp. Stat. 1901, p. 3591], had made the warrant returnable before himself, there could be no doubt of its legality; and in such case, upon the return of the warrant with the prisoner in custody, he might refer the case to the commissioner to examine the witnesses, hear the case, and report his conclusions to the court for its approval. If he could do that, we see no objection to his referring the case directly to the commissioner by making the warrant returnable before him, inasmuch as the latter possesses the same power with respect to the extradition of criminals as the district judge himself. It may be said that technically the [188] warrant should be made returnable *before the magistrate issuing it, but where it is made returnable before another officer, having the same power and jurisdiction to act, we do not think it is fairly open to criticism.

This practice is by no means unknown under the criminal laws of the several states. Thus, in *Com.* v. *O'Connell*, 8 Gray, 464, it was held that a mere grant of "exclusive jurisdiction" to a police court over certain offenses did not exclude the authority of justices of the peace to receive complaints and issue warrants returnable before that court. To the same effect are *Com.* v. *Pindar*, 11 Met. 539; *Com.* v. *Roark*, 8 Cush. 210; *Com.* v. *Wolcott*, 110 Mass. 67; *Hendee* v. *Taylor*, 29 Conn. 448.

No objection seems to have been taken to the proceedings before the commissioner upon the ground that he did not issue the warrant, and as he was fully vested with authority to act in extradition cases we do not think the fact that the judge, for the convenient despatch of business, made his warrant returnable before such commissioner can be made available upon a writ of habeas corpus.

3. The eighth assignment of error turns upon the sufficiency of the charge of embezzlement. The first article of the extradition treaty with Russia of June 5, 1893 (28 Stat. at L. 1071), after providing for the mutual surrender of fugitive criminals from one country to another, declares that "this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial, if the crime or offense had been there committed." We do not deem it necessary to inquire whether the words "evidence of criminality" include a definition of the crime charged, or to determine by what law the elements of the crime of embezzlement are fixed. Moore, Extradition, § 344. As the petitioner has sought to apply the definition of embezzlement given in the law of California as likely to be most favorable to himself, and the prosecution has assented to this view, we assume for the purposes of this case that this is the definition contemplated by the treaty.

Section 508 of the Penal Code of California is as follows:

*"Every clerk, agent, or servant of any [189] person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

Objection is made to the complaint upon the ground that there is no allegation that the money embezzled came into his control or care "by virtue of his employment" as such clerk, the allegation being that Grin was employed as clerk; that while so employed the money was intrusted to and received by him "in his capacity as clerk," as aforesaid. Whatever might be the force of an objection to an indictment that it does not set out in the exact language of the statute the fact that the money came into his possession by virtue of his employment,

we think that the complaint in this particular is clearly sufficient. It is a general principle of criminal law that the complaint need not set forth the crime with the particularity of an indictment, and that it is sufficient, if it fairly apprises the party of the crime of which he is charged. If there be any distinction at all between an allegation that money came into the possession of a person by virtue of his employment as clerk, and in his capacity as clerk, it is too shadowy to be made a matter of exception to the complaint.

4. Equally unfounded is it that the complaint is defective because it does not use the word "fraudulently," the allegation being "that the accused wrongfully, unlawfully, and feloniously appropriated said money." As the word "embezzled" itself implies fraudulent conduct on the part of the person receiving the money, the addition of the word "fraudulent" would not enlarge or restrict its signification. Indeed, it is impossible for a person to embezzle the money of another without committing a fraud upon him. The definition of the word "embezzlement" is given by Bouvier as "the fraudulent appropriation to one's own use of the money or goods intrusted to one's care by another." In *San Francisco* v. *Randall*, 54 Cal. 408, a complaint that defendant did "wilfully, unlawfully, and feloniously embezzle and convert" certain se-[190]curities to his *own use, was held to be a sufficient compliance with § 1426 of the Penal Code, requiring the offense charged to be set forth "with such particulars of time, place, person, and property as to enable the defendant to understand distinctly the character of the offense complained of, and to answer the complaint." The complaint in this case differs from that only in the substitution of the word "wrongfully" for the word "wilfully," and we think it is clearly sufficient. As the word "embezzle" implies a fraudulent intent, the addition of the word "fraudulently" is mere surplusage. *Reeves* v. *State*, 95 Ala. 31, 11 So. 158; *United States* v. *Lancaster*, 2 McLean, 431, Fed. Cas. No. 15,556; *State* v. *Wolff*, 34 La. Ann. 1153; *State* v. *Trolson*, 21 Nev. 419, 32 Pac. 930; *State* v. *Combs*, 47 Kan. 136, 27 Pac. 818. We express no opinion as to whether it would be necessary in an indictment.

5. It is further insisted that the treaty requires an authenticated copy of the warrant of arrest or of some other equivalent judicial document, issued by a judge or magistrate of the foreign government duly authorized so to do, and that there is no such process in the record as a warrant of arrest or its equivalent. It is true that art. 6 of the treaty provides that "when the person whose surrender is asked shall be merely charged with the commission of an extraditable crime or offense, the application for extradition shall be accompanied by an authenticated copy of the warrant of arrest or of some other equivalent judicial document, issued by a judge or a magistrate duly authorized to do so." But it can hardly be expected of us that we should become conversant with the criminal laws of Russia, or with the forms of warrants of arrest used for the apprehension of criminals. The clause is satisfied by the production of an equivalent document. On examination of the record we find a certified copy of an order by one purporting to act as an examining magistrate, and reciting that "having investigated the preliminary examination concerning the accusation of the Cossack, Simeon Grin," and that "as he is hiding under a false name, and, as is seen from his letters, is looking out for means to prevent his arrest and the finding out of his address by the authorities, his temporal place of residence being known at present," pursuant to art. 389 of the Criminal *Code[191] of Procedure, "he is ordered to be brought to the city of Rostov on the Don, in order to be placed at the disposition of the examining magistrate of the Taganrog circuit court." This order purports, not only to be signed, but sealed, by the examining magistrate Okladnykh, and while it is not in the form of a warrant of arrest as used in this country, it is evidently designed to secure the apprehension of the accused, and his production before an examining magistrate. This seems to us a sufficient compliance with the treaty. If not a warrant of arrest it is an equivalent judicial document, issued by a judge or magistrate authorized to do so.

But there is another consideration in this connection which should not be overlooked. While the treaty contemplates the production of a copy of a warrant of arrest or other equivalent document, issued by a magistrate of the Russian Empire, it is within the power of Congress to dispense with this requirement, and we think it has done so by Rev. Stat. § 5270 [U. S. Comp. Stat. 1901, p. 3591], hereinbefore cited. The treaty is undoubtedly obligatory upon both powers, and, if Congress should prescribe additional formalities than those required by the treaty, it might become the subject of complaint by the Russian government and of further negotiations. But notwithstanding such treaty, Congress has a perfect right to provide for the extradition of criminals in its own way, with or without a treaty to that effect, and to declare that foreign criminals shall be surrendered upon such proofs of criminality as it may judge sufficient. *Castro* v. *De Uriarte*, 16 Fed. 93. This appears to have been the object of § 5270 [U. S. Comp. Stat. 1901, p. 3591], which is applicable to all foreign governments with which we have treaties of extradition. The requirements of that section, as already observed, are simply a complaint under oath, a warrant of arrest, evidence of criminality sufficient to sustain the charge under the provisions of the proper treaty or convention, a certificate by the magistrate of such evidence and his conclusions thereon, to the Secretary of State. As no mention is here made of a warrant of arrest, or other equivalent document, issued by a foreign magistrate, we do not see the necessity of its production. This is one of the requirements of *the treaty[192]

which Congress has intentionally waived. Moore, Extradition, § 70.

6. Again, it is alleged that although the complaint sets forth that criminal proceedings have been instituted in Russia, and that Grin had been therein "indicted" for embezzlement, no indictment has ever been found, and that no other evidence of criminality can be received. It is obvious that the word "indictment," as it appears in this complaint, was used in the general sense of charged or accused by legal proceedings, and not in the technical sense of an indictment as here understood. An indictment is a technical word peculiar to Anglo-Saxon jurisprudence, and implies the finding of a grand jury. To give it the construction contended for would require us to know what an indictment was under the laws of Russia and to inspect it, at least so far as to ascertain the charge for which the conviction of the accused is sought. No indictment was necessary to be produced under this complaint, the proceeding being governed by § 5 of the act of August 3, 1882 (22 Stat. at L. 216 [chap. 378, U. S. Comp. Stat. 1901, p. 3595]):

"That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States [§§ 5270 and 5271, U. S. Comp. Stat. 1901, pp. 3591, 3593], such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so far as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country, shall be proof that any deposition, warrant, or other paper, or copies thereof, so offered, are authenticated in the manner required by this act."

The sufficiency of such evidence to establish the criminality of the accused for the purposes of extradition cannot be reviewed upon habeas corpus. *Re Oteiza y Cortes*, 136 U. S. 330, *sub nom. Oteiza y Cortes* v. *Jacobus*, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031.

7. It is further insisted that the depositions and other documents [193]*which appear in the record have not been properly and legally authenticated. The certificate of the ambassador in that connection is that these papers "are properly and legally authenticated so as to entitle them to be received and admitted as evidence for similar purposes by the tribunals of Russia." As this is a literal conformation to the above statute, adding only the words, "as evidence," it is difficult to see in what respect it is deficient. If we were to hold that a certificate in the language of the statute was insufficient, the certifying officer would be at once embarked upon a sea of speculation as to the proper form of such certificate, and would be utterly without a guide in endeavoring to ascertain what the requirements of the law were in that particular. All that was decided in the case of *Re Oteiza y Cortes*, 136 U. S. 330, *sub nom. Oteiza y Cortes* v. *Jacobus*, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031, in this connection was that depositions and other papers authenticated and certified as required by the act, were not admissible on the part of the accused. The introduction of the words "as evidence" does not vitiate the certificate. We find it difficult to conceive any other purpose for which such depositions could be used except as evidence of criminality.

8. No evidence was required that the Russian consul had authority to make the complaint. All that is required by § 5270 [U. S. Comp. Stat. 1901, p. 3591] is that a complaint shall be made under oath. It may be made by any person acting under the authority of the foreign government having knowledge of the facts, or, in the absence of such person, by the official representative of the foreign government, based upon depositions in his possession, although under the first article of the treaty the accused can only be *surrendered* upon a "requisition" of the foreign government, and by art. 6 such requisition must be made by the "diplomatic agent of the demanding government," and in case of his absence from the seat of government, by the "superior consular officer." It is true that art. 7 of the treaty provides that it "shall be lawful for any competent judicial authority of the United States, upon production of a certificate issued by the Secretary of State, stating that request has been made by the Imperial Government of Russia for the provisional arrest of a person convicted or accused of the commission therein [194]*of a crime or offense extraditable under this convention, and upon complaint, duly made, that such crime or offense has been so committed, to issue his warrant for the apprehension of such person;" and in this case it appears by the certificate of the acting Secretary of State that application was made in due form by the chargé d' affaires of Russia accredited to this government, for the arrest of Grin, alleged to be a fugitive from the justice of Russia. This, however, was entirely independent of the proceedings before the magistrate, which might have been instituted by any person making a complaint under oath and acting by the permission or authority of the Russian government. While art. 7 undoubtedly contemplates a prior certificate of the Secretary of State, the language of the article is merely permissive, and does not compel the production of such certificate before the warrant can be issued.

It might readily happen that the foreign representative might have no knowledge of the facts necessary to be embodied in a complaint, and have no documentary evidence then at hand to prove them. In such case if a complaint could not be made by a private person, having knowledge of the facts, the surrender might easily be defeated by the flight of the accused.

It was formerly held that a requisition from the demanding government was necessary to be produced before the commissioner could act (*Re Herris*, 32 Fed. 583), but the opinion in this case was reversed by Mr. Justice Brewer on appeal to the circuit court, who held that no preliminary requisition was necessary, as extradition could not be consummated without action by the executive in the last instance, and that the authority of the foreign government to act need not appear in the complaint, if it were made to appear in the examination before the commissioner, or elsewhere in the proceedings. Bearing in mind the frequent necessity for immediate action in case the whereabouts of the accused is ascertained, the delay necessary to procure a preliminary requisition might often result in the defeat of justice.

In *Kaine's Case*, 14 How. 129, 14 L. ed. 355, this court was nearly equally divided upon the question whether a preliminary mandate from the executive was necessary. [195] So long as Mr. Justice *Nelson, who thought such mandate necessary, remained upon the bench his opinion was followed in the second circuit (*Re Henrich*, 5 Blatchf. 414, Fed. Cas. No. 6,369; *Re Farez*, 7 Blatchf. 34, 345, Fed. Cas. Nos. 4644, 4645); but since that time a different view has been taken of the question. *Re Macdonnell*, 11 Blatchf. 79, Fed. Cas. No. 8,771; *Re Thomas*, 12 Blatchf. 370, Fed. Cas. No. 13,887. Judge Lowell's opinion accorded with the later, and, as we think, sounder views (*Re Kelley*, 2 Low. Dec. 339, Fed. Cas. No. 7,655). See also *Benson* v. *McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.

9. It is again objected that the facts set forth in the record show that defendant, if guilty at all, is guilty of larceny, and not of embezzlement, and that, as the laws of California make a clear distinction between embezzlement and larceny, he cannot be held for one crime upon proof of his guilt of the other. The charge set forth in the complaint is that Zeefo, one of the members of the firm of E. L. Zeefo & Co., intrusted and delivered a check for the money to Grin, who subsequently received the money from the bank to take it to the Vladikavkaz Railway Company, by which it was to be taken to Novorosseesk, and upon the same day absconded. Upon these facts it is insisted that the defendant had nothing more than the bare custody, as distinguished from the possession of the money, and therefore could not and did not embezzle it, but stole it.

By § 503 of the Code of California "embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted," and by § 508, "every clerk, agent, or servant of any person who fraudulently appropriates to his own use . . . any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement." As Grin was clerk of the firm, and as the money was delivered to him in his capacity as clerk for a special purpose, it certainly came into his control or care. We do not care to inquire into the soundness of the distinction made in some of the older cases between the custody and possession of property, because under the section above quoted nothing more is necessary to constitute embezzlement than that the party charged should have the control or care of the money.

The cases in California upon this subject are decisive. Thus, *in *Ex parte Hedley*, 31 [196] Cal. 108, where the agent of an express company, authorized to draw telegraphic checks on his principal for money to be used in the principal's business, but not to draw individual checks, drew certain checks as agent for money to be used in his private business, and the principal paid the money to the drawee, it was held to amount to a receipt of the money of the principal by the agent "in the course of his employment." It was further held that, in order to convict one of embezzling money of his principal, it was necessary to establish four propositions: First, that the accused was an agent; second, that he received money belonging to his principal; third, that he received it in the course of his employment; fourth, that he converted it to his own use with intent to steal the same. In *People* v. *Tomlinson*, 102 Cal. 19, 36 Pac. 506, a recent case upon the same subject, the law of California was summed up as follows: "Where one honestly receives the possession of goods upon a trust, and after receiving them fraudulently converts them to his own use, it is a case of embezzlement; . . . but where the possession has been obtained through a trick or device, with the intent, at the time the party receives it, to convert the same to his own use, and the owner of the property parts merely with the possession, and not with the title, the offense is larceny."

These cases are strictly in line with that of *Moore* v. *United States*, 160 U. S. 268, 40 L. ed. 422, 16 Sup. Ct. Rep. 294, in which we held that "embezzlement is the fraudulent appropriation of property by a person to whom it has been intrusted, or into whose hands it has lawfully come; and it differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of taking."

The cases relied upon by the petitioner are of the latter description. Thus, in *People* v. *Abbott*, 53 Cal. 284, 31 Am. Rep. 59, defendant was instructed by a bank to purchase silver for its account; and, to provide him with funds, the bank certified and delivered him a check drawn by him on the bank. He did not purchase the silver, but used the check for his own purposes. It was held that, if he took the custody of the certified check with *the intention of steal- [197] ing it, he was guilty of larceny. The question was treated as one for the jury. In *People* v. *Raschko*, 73 Cal. 378, 15 Pac. 12 it was held that if one, through false representations, obtains the possession of personal property with the consent of the owner, but without a change of the general

title, he is guilty of larceny, upon subsequently converting the same to his own use, if he had the felonious intent to steal the property at the time the possession was obtained. The authority of these cases is not questioned. In the case under consideration, a check was delivered to the petitioner with instructions to draw the money from the bank, take it to the railway station, to be forwarded to another city. The facts show that he obtained possession of both the check and the money, honestly, and with the consent of his principal, and subsequently converted it to his own use. Prima facie, at least, this makes a case of embezzlement, and if there were in fact an original intent to steal, that is a question for a jury in a Russian court to pass upon. It is sufficient for the purposes of this proceeding that a prima facie case of embezzlement is made out.

This disposes of all the questions made in the brief, and *the judgment of the Circuit Court is affirmed.*

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## KNIGHTS TEMPLARS' & MASONS' LIFE INDEMNITY COMPANY, *Petitioner,*
*v.*
## ROSA B. JARMAN.

(See S. C. Reporter's ed. 197-210.)

*Insurance—suicide as defense—Missouri suicide act—application to assessment insurance—construction by state courts—prospective operation—repealing act—subject expressed in title—impairment of obligation of contract—consent to changes in constitution.*

1. Self-destruction while insane is as much within the provisions of Mo. Rev. Stat. 1879, § 5982, that it shall be no defense to a suit on a policy of life insurance that the insured "committed suicide," unless the same was contemplated at the time application was made for the policy, as is the taking of one's own life voluntarily while sane and in the full possession of one's mental faculties, —especially in view of Mo. Rev. Stat. 1889, § 6570, declaring that words and phrases shall be taken in their plain, ordinary, and usual sense.
2. The decisions of the Missouri supreme court that a repeal of Mo. Rev. Stat. 1879, § 5982, declaring that suicide shall be no defense to a suit on a policy of insurance, was effected as to all policies issued upon the assessment plan after the insurance company had obtained its certificate of authority to do business as an assessment insurance company under Mo. Laws 1887, p. 199, by the provision of § 10 of that act, that corporations doing business thereunder shall not be subject to any provisions of the general insurance law of the state, "except as herein distinctly set forth,"—are binding on the Supreme Court of the United States.
3. Only policies of insurance issued on the assessment plan after the insurance company obtained its certificate of authority to do business as an assessment insurance company under Mo. Laws 1887, p. 199, are relieved from the provisions of Mo. Rev. Stat. 1879, § 5982, declaring that suicide shall be no defense to a suit on a policy of insurance, by the proviso of § 10 of the later act, that corporations doing business thereunder shall not be subject to any provisions of the general insurance law of the state, "except as herein distinctly set forth."
4. A provision of a statute amending Mo. Rev. Stat. 1889, § 5869, which had exempted insurance companies doing business on the assessment plan from any provisions of the general insurance laws of the state except as therein distinctly set forth, by specially applying to such corporations the provisions of § 5855, that suicide shall be no defense to a suit upon a policy of insurance, is within the title, "An Act to Repeal" Mo. Rev. Stat. 1889, § 5869, and "to Enact a New Section in Lieu Thereof."
5. An amendatory state statute will not be declared invalid by the Supreme Court of the United States on the ground that some of its provisions are not within the scope of its title, where such title contains a reference to the statute amended, which, under the decisions of the state courts, is sufficient to sustain its validity.
6. Conceding that by the repeal, as to insurance companies doing business on the assessment plan, of the provisions of Mo. Rev. Stat. 1879, § 5982, that suicide shall be no defense to a suit on a policy of insurance, a provision in a policy issued prior to such repeal, relieving the company from liability in case of suicide, became effective, no impairment of the obligation of such contract was made by a subsequent enactment specially applying the provisions of the former statute to such companies, since all that the later act purported to do was to reinstate the parties in their original rights prior to the repealing act, which rights had not been affected by anything done during the period which had elapsed between the two statutes.
7. An agreement in an application for a policy of insurance issued on the assessment plan, to abide by the constitution, rules, and regulations of the company as they then were or might be constitutionally changed thereafter, did not amount to a consent to such changes which on their face indicated that they applied only to policies thereafter to be issued.

[No. 48.]

*Argued October 17, 1902. Decided December 8, 1902.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Missouri in favor of plaintiff in an action upon a policy of life insurance. *Affirmed.*

See same case below, 44 C. C. A. 93, 104 Fed. 638.

Statement by Mr. Justice **Brown:**

This was a writ of certiorari to review a

NOTE.—*As to insanity as affecting condition as to suicide in life insurance policy*—see notes to Mutual L. Ins. Co. v. Wiswell (Kan.) 35 L. R. A. 258; and Billings v. Accident Ins. Co. (Vt.) 17 L. R. A. 89.

*As to conflict between by-law and certificate or policy of a mutual benefit society or insurance company*—see note to McCoy v. Northwestern Mut. Relief Asso. (Wis.) 47 L. R. A. 481.

judgment of the circuit court of appeals affirming a judgment of the circuit court for the western district of Missouri, overruling the defense of suicide to an action upon a policy of life insurance, and awarding plaintiff judgment for the amount of the policy and assessments thereon.

An agreed statement of facts shows defendant to be an Illinois corporation, organized "for the purpose of furnishing life indemnity or pecuniary benefits to widows," etc.; and that on October 19, 1885, it issued to John P. Jarman, plaintiff's husband, and a citizen of Missouri, a policy of insurance or certificate of membership, subject to the constitution and by-laws of the company and certain conditions in the policy, one of which provided for its avoidance in case of self-destruction, "whether voluntary or involuntary, sane or insane." The seventh stipulation was that "John P. Jarman, while insane to such an extent as to be incapable of understanding the nature or consequences of his act, took his own life, and came to his death on the 12th day of September, 1898, by a gunshot wound, inflicted by himself. It is not contended, however, by plaintiff that such self-destruction was the result of accident." The further material facts are set forth in the opinion.

[199] *Defendant having refused to pay the amount of the policy on account of the suicide of the insured, Rosa B. Jarman, his widow and beneficiary, brought an action January 19, 1899, in the circuit court of Grundy county to recover the amount of the policy, $5,000, and assessments, which action was subsequently removed to the circuit court of the United States for the western district of Missouri, upon the ground of diversity of citizenship. The case was submitted to the court without the intervention of a jury, and resulted in a judgment in favor of the plaintiff in the sum of $6,006.30, which was affirmed by the circuit court of appeals. Whereupon petitioner sued out a writ of certiorari from this court.

*Messrs.* **S. S. Gregory** and **Hervey Bryan Hicks** argued the cause and filed a brief for petitioner:

The obligation of a contract is not impaired by legislation which relieves it from some illegality fastened upon it by prior legislation, thus permitting the contract to take effect as it was originally made.

Cooley, Const. Lim. p. 374; 3 Story, Const. § 1392; *White Water Valley Canal Co.* v. *Vallette*, 21 How. 414, 16 L. ed. 154; *Little Rock* v. *Merchants Nat. Bank*, 98 U. S. 308, 25 L. ed. 108; *Ewell* v. *Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408; *Satterlee* v. *Matthewson*, 2 Pet. 380, 7 L. ed. 458; *Watson* v. *Mercer*, 8 Pet. 88, 8 L. ed. 876; *Gross* v. *United States Mortg. Co.* 108 U. S. 479, 27 L. ed. 795, 2 Sup. Ct. Rep. 940, 93 Ill. 483; *Rosenplanter* v. *Provident Sav. Life Assur. Soc.* 46 L. R. A. 473, 37 C. C. A. 566, 96 Fed. 721; *Phenix Ins. Co.* v. *Pollard*, 63 Miss. 641; *Butler* v. *United States Bldg. & Loan Asso.* 97 Tenn. 679, 37 S. W. 385.

However law may act upon contracts, it does not enter into them and become a part of the agreement.

3 Story, Const. §§ 1377, 1378; *Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. ed. 606.

It is true the Constitution of Missouri prohibits retrospective legislation. But this statute is not, in that sense, retrospective.

*Shields* v. *Clifton Hill Land Co.* 94 Tenn. 123, 26 L. R. A. 509, 28 S. W. 668.

It is not enough that the act embrace but a single subject or object, and that all its parts are germane; the title must express that subject, and comprehensively enough to include all the provisions in the body of the act.

Sutherland Stat. Constr. 887; *Kansas* v. *Payne*, 71 Mo. 159; *Mewherter* v. *Price*, 11 Ind. 201; *Ryerson* v. *Utley*, 16 Mich. 269; *Dorsey's Appeal*, 72 Pa. 192; *Knoxville* v. *Lewis*, 12 Lea, 180; *Stiefel* v. *Maryland Inst. for Instruction of the Blind*, 61 Md. 144; *Fishkill* v. *Fishkill & B. Pl. Road Co.* 22 Barb. 634; *Grover* v. *Ocean-Grove Camp Meeting Asso.* 45 N. J. L. 399; *State, Shivers, Prosecutor*, v. *Newton*, 45 N. J. L. 469; Cooley, Const. L. 6th ed. 179; *Greaton* v. *Griffin*, 4 Abb. Pr. N. S. 310.

The whole act can be valid, only when the subject stated includes all the provisions in the body of the act.

*Montgomery Mut. Bldg. & Loan Asso.* v. *Robinson*, 69 Ala. 413; *Ex parte Pollard*, 40 Ala. 99; *Grover* v. *Ocean Grove Camp-Meeting Asso.* 45 N. J. L. 399; *State, Shivers, Prosecutor*, v. *Newton*, 45 N. J. L. 469; *Ryerson* v. *Utley*, 16 Mich. 269.

When the title of the act is specific, the act must not include matters not specified, though they be of the same general character.

*Taylor* v. *Kirby*, 31 Ill. App. 658; *North Chicago City R. Co.* v. *Lake View*, 105 Ill. 207, 44 Am. Rep. 788; *People ex rel. Chittenden* v. *Mellen*, 32 Ill. 181.

The measure of retrospective legislation is to ascertain whether or not it takes away any vested right which existed before the new law became operative.

*Leete* v. *State Bank*, 115 Mo. 184, 21 S. W. 788; *Hope Mut. Ins. Co.* v. *Flynn*, 38 Mo. 483, 90 Am. Dec. 438; *Fisher* v. *Patton*, 134 Mo. 52, 33 S. W. 451, 34 S. W. 1096.

Jarman had no vested right to commit suicide at common law, even if there was no provision in the contract respecting suicide.

*Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300.

Jarman's beneficiary could not acquire anything but an expectancy during his lifetime, because the right was reserved to him to change his beneficiary at any time without her consent.

*Martin* v. *Stubbings*, 126 Ill. 387, 18 N. E. 657; *Hopkins* v. *Northwestern Life Assur. Co.* 40 C. C. A. 1, 99 Fed. 199; *Wist* v. *Grand Lodge A. O. U. W.* 22 Or. 271, 29 Pac. 610; *Masonic Mut. Ben. Soc.* v. *Burkhart*, 110 Ind. 192, 10 N. E. 79, 11 N. E. 449; *Sabin* v. *Phinney*, 134 N. Y. 423, 31 N. E. 1087; *Chambers* v. *Supreme Tent, K. of M.* (1901) 200 Pa. 244, 49 Atl. 784; *Carpenter* v. *Knapp* (1897) 101 Iowa, 712, 38 L. R. A.

128, 70 N. W. 765; *Supreme Council C. K. of A.* v. *Morrison*, 16 R. I. 468, 17 Atl. 57; *Peterson* v. *Gibson*, 191 Ill. 365, 54 L. R. A. 836, 61 N. E. 127.

A prohibitive statute cutting off a defense provided for in a contract, to be effective in a stated contingency, was not intended to be within the constitutional limitation as to retrospective laws.

*Campbell* v. *Holt*, 115 U. S. 620, 29 L. ed. 483, 6 Sup. Ct. Rep. 209; *Curtis* v. *Leavitt*, 15 N. Y. 9; *Berry* v. *Clary*, 77 Me. 482, 1 Atl. 360; *Medical College* v. *Muldoon*, 46 Ala. 603; *Connecticut Mut. L. Ins. Co.* v. *Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236; *Hartford F. Ins. Co.* v. *Chicago, M. & St. P. R. Co.* 62 Fed. 904; *Loveren* v. *Lamprey*, 22 N. H. 434; *Kring* v. *Missouri*, 107 U. S. 221, 27 L. ed. 506, 2 Sup. Ct. Rep. 443; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

By a long line of judicial decisions previous to the enactment of the suicide statute, the words "commit suicide" had been held to include only the "act of a person in the possession of his ordinary reasoning faculties,"—a sane man.

*Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236; *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623; *American L. Ins. Co.* v. *Isett*, 74 Pa. 176; *Phillips* v. *Louisiana Equitable L. Ins. Co.* 26 La. Ann. 404, 21 Am. Rep. 549; *Pierce* v. *Travelers' L. Ins. Co.* 34 Wis. 389; *Moore* v. *Connecticut Mut. L. Ins. Co.* 1 Flipp. 363, Fed. Cas. No. 9,755; *Merritt* v. *Cotton States L. Ins. Co.* 55 Ga. 103; *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918; *Life Asso. of America* v. *Waller*, 57 Ga. 533; *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 235, 24 L. ed. 433; *Connecticut Mut. L. Ins. Co.* v. *Groom*, 86 Pa. 96, 27 Am. Rep. 689; *Newton* v. *Mutual Ben. L. Ins. Co.* 76 N. Y. 426, 32 Am. Rep. 335; *Scheffer* v. *National L. Ins. Co.* 25 Minn. 534.

When a member of a mutual benefit association agrees in his contract with such association to be bound by the laws, rules, and regulations of the association then existing, and by those which may thereafter be properly adopted, he is, by the force of this agreement, bound by all the subsequent amendments to such laws, rules, and regulations.

*Korn* v. *Mutual Assur. Soc.* 6 Cranch, 192, 3 L. ed. 195; *Mutual Reserve Fund Life Asso.* v. *Hamlin*, 139 U. S. 297, 35 L. ed. 167, 11 Sup. Ct. Rep. 614; *Supreme Lodge K. of P.* v. *Withers*, 177 U. S. 260, 44 L. ed. 762, 20 Sup. Ct. Rep. 611; *Haydel* v. *Mutual Reserve Fund Life Asso.* 44 C. C. A. 169, 104 Fed. 718, 98 Fed. 200; *Lloyd* v. *Supreme Lodge K. of P.* 38 C. C. A. 654, 98 Fed. 66; *Supreme Commandery, K. of G. R.* v. *Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Stohr* v. *San Francisco Musical Fund Soc.* 82 Cal. 557, 22 Pac. 1125; *Bowie* v. *Grand Lodge, L. of W.* 99 Cal. 392, 34 Pac. 103; *Masonic Mut. Ben. Asso.* v. *Severson*, 71 Conn. 719, 43 Atl. 192; *Supreme Lodge K. of P.* v. *Kutscher*, 179 Ill. 340, 53 N. E. 620; *Supreme Lodge K. of P.* v. *Trebbe*, 179 Ill. 348, 53 N. E. 730; *Fullenwider* v. *Supreme Council, R. L.* 180 Ill. 621, 54 N. E. 485; *Baldwin* v. *Begley*, 185 Ill. 180, 56 N. E. 1065; *Covenant Mut. Life Asso.* v. *Kentner*, 188 Ill. 431, 58 N. E. 966; *Moerschbaecher* v. *Supreme Council, R. L.* 188 Ill. 9, 52 L. R. A. 281, 59 N. E. 17; *Peterson* v. *Gibson*, 191 Ill. 365, 54 L. R. A. 836, 61 N. E. 127; *Supreme Lodge, K. of P.* v. *Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 480; *Daughtry* v. *Knights of Pythias*, 48 La. Ann. 1203, 20 So. 712; *Sargent* v. *Supreme Lodge, K. of H.* 158 Mass. 557, 33 N. E. 650; *Pain* v. *Société St. Jean Baptiste*, 172 Mass. 319, 52 N. E. 502; *Messer* v. *Ancient Order, U. W.* 180 Mass. 321, 62 N. E. 252; *Borgards* v. *Farmers' Mut. Ins. Co.* 79 Mich. 440, 44 N. W. 856; *Dornes* v. *Supreme Lodge K. of P.* 75 Miss. 466, 23 So. 191; *Ellerbe* v. *Faust*, 119 Mo. 653, 25 L. R. A. 149, 25 S. W. 390; *Chadwick* v. *Order of Triple Alliance*, 56 Mo. App. 463; *State ex rel. Schrempp* v. *Grand Lodge, A. O. U. W.* 70 Mo. App. 456; *Brower* v. *Supreme Lodge Nat. Reserve Asso.* 74 Mo. App. 490; *Supreme Council, A. L. of H.* v. *Adams*, 68 N. H. 236, 44 Atl. 380; *Chambers* v. *Supreme Tent, K. of M.* 200 Pa. 244, 49 Atl. 784; *Supreme Council C. K. of A.* v. *Morrison*, 16 R. I. 468, 17 Atl. 57; *Supreme Lodge, K. of P.* v. *La Malta*, 95 Tenn. 157, 30 L. R. A. 838, 31 S. W. 493; *West* v. *Grand Lodge A. O. U. W.* 14 Tex. Civ. App. 471, 37 S. W. 966; *Duer* v. *Supreme Council O. of C. F.* 21 Tex. Civ. App. 493, 52 S. W. 109; *Fugure* v. *Mutual Society of St. Joseph*, 46 Vt. 369; *Mutual Reserve Fund Life Asso.* v. *Taylor*, 99 Va. 208, 37 S. E. 854; *Schmidt* v. *Supreme Tent, K. of M.* 97 Wis. 528, 73 N. W. 22; *Hughes* v. *Wisconsin Odd Fellows' Mut. L. Ins. Co.* 98 Wis. 292, 73 N. W. 1015; *Loeffler* v. *Modern Woodmen*, 100 Wis. 79, 75 N. W. 1012; *Smith* v. *Galloway* [1898] 1 Q. B. 71.

Persons may contract with the state in such a way that the state may thereafter alter, modify, or repeal the contract, notwithstanding the provision of the Federal Constitution that no state may by legislation impair the obligation of a contract; and the language of the reservation will be construed liberally to accomplish the purpose intended. Legislative enactments refer to existing contracts from their enactment, because of the agreement of the parties.

*Re Oliver Lee & Co's. Bank*, 21 N. Y. 9; *Re Reciprocity Bank*, 22 N. Y. 9; *Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 27 S. C. 385, 4 S. E. 49.

*Mr.* **Frederick H. Bacon** argued the cause, and, with *Messrs. E. M. Harber* and *A. G. Knight*, filed a brief for respondent:

The policy sued on was issued subject to the laws of the state of Missouri in force at the time of its issue, which entered into and formed a part of the contract; and hence the provision that the policy should be void in case of the suicide of the member was itself void.

*State ex rel. Atty. Gen.* v. *Merchant's Exch. Mut. Benev. Asso.* 72 Mo. 146; *National Union* v. *Marlow*, 21 C. C. A. 89, 4 U. S. App. 95, 74 Fed. 775; *Toomey* v. *Supreme Lodge K. of P.* 147 Mo. 129, 48 S. W. 936; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; *Equitable Life Assur. Soc.* v. *Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc.* v. *Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *White* v. *Connecticut Mut. L. Ins. Co.* 4 Dill. 177, Fed. Cas. No. 17,545; *Havens* v. *Germania F. Ins. Co.* 123 Mo. 403, 26 L. R. A. 107, 27 S. W. 718; *Christian* v. *Connecticut Mut. L. Ins. Co.* 143 Mo. 460, 45 S. W. 268; *Horton* v. *New York L. Ins. Co.* 151 Mo. 604, 52 S. W. 356; *Knights Templar & M. Life Indemnity Co.* v. *Berry*, 1 C. C. A. 561, 4 U. S. App. 353, 50 Fed. 511; *Toomey* v. *Supreme Lodge K. of P.* 147 Mo. 129, 48 S. W. 936; *Kern* v. *Supreme Council, A. L. of H.* 167 Mo. 471, 67 S. W. 252.

"Self-destruction" and "suicide" are synonymous terms.

*Connecticut Mut. L. Ins. Co.* v. *Akens*, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. Rep. 155; *Haynie* v. *Knights Templars & M. Life Indemnity Co.* 139 Mo. 431, 41 S. W. 461.

There can be no suicide nor self-destruction without an intent.

*Breasted* v. *Farmers' Loan & T. Co.* 4 Hill, 73; *Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99; *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918; *Adkins* v. *Columbia L. Ins. Co.* 70 Mo. 27, 35 Am. Rep. 410.

The intent of the statute was to prohibit the defense of suicide unless suicide was contemplated when the policy was taken out.

*Keller* v. *Travelers' Ins. Co.* 58 Mo. App. 557; *McDonald* v. *Bankers Life Asso.* 154 Mo. 627, 55 S. W. 999; *Logan* v. *Fidelity & C. Co.* 146 Mo. 114, 47 S. W. 948; *Christian* v. *Connecticut Mut. L. Ins. Co.* 143 Mo. 460, 45 S. W. 268; *Ætna L. Ins. Co.* v. *Florida*, 30 L. R. A. 87, 16 C. C. A. 618, 32 U. S. App. 753, 69 Fed. 932; *John Hancock Mut. L. Ins. Co.* v. *Moore*, 34 Mich. 42.

The suicide of a sane person avoids the policy, whether so stipulated therein or not.

*Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300.

The statute of 1887 had no retrospective operation, because the state Constitution forbade it.

*Hope Mut. Ins. Co.* v. *Flynn*, 38 Mo. 483, 90 Am. Dec. 438; *Barton County* v. *Walser*, 47 Mo. 189.

Statutes are construed to operate prospectively only, even in the absence of such a constitutional prohibition.

*City R. Co.* v. *Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Voigt* v. *Kersten*, 164 Ill. 314, 45 N. E. 543. See also *Moore* v. *Chicago Guaranty Fund Life Soc.* 178 Ill. 202, 52 N. E. 882.

The suicide statute of Missouri has never been repealed.

*Knights Templar & M. Life Indemnity Co.* v. *Berry*, 1 C. C. A. 561, 4 U. S. App. 353, 50 Fed. 511.

If the suicide clause in the policy was void, and the effect of the statute of 1887 was to validate it, it would be injecting into the contract a provision which did not before exist,— which could not be done.

*Satterlee* v. *Matthewson*, 2 Pet. 380, 7 L. ed. 458.

As to policies subsequently issued by assessment companies after the law of 1887, there would be an exemption from the suicide law.

*Haynie* v. *Knights Templars & M. Life Indemnity Co.* 139 Mo. 416, 41 S. W. 461.

The title of the act of 1897 fully expresses its object.

*State* v. *Miller*, 45 Mo. 495; *State ex rel. Wolfe* v. *Bronson*, 115 Mo. 271, 21 S. W. 1125; *State ex rel. Kirkwood* v. *Heege*, 135 Mo. 112, 36 S. W. 614; *State ex rel. Dickason* v. *Marion County Ct.* 128 Mo. 440, 31 S. W. 23.

Mere matters of detail need not be stated in the title.

*State ex rel. Wolfe* v. *Bronson*, 115 Mo. 271, 21 S. W. 1125.

The supreme court of Missouri has held the act in question valid.

*Toomey* v. *Supreme Lodge K. of P.* 147 Mo. 129, 48 S. W. 936; *Logan* v. *Fidelity & C. Co.* 146 Mo. 114, 47 S. W. 948.

Jarman had no intent to take his own life, nor did he know what he was doing. The gist of the defense of suicide or self-destruction is the intent, and if there was no intent Jarman did not, in a legal sense, take his own life.

*Leman* v. *Manhattan L. Ins. Co.* 46 La. Ann. 1189, 24 L. R. A. 589, 15 So. 388; *Connecticut Mut. L. Ins. Co.* v. *McWhirter*, 19 C. C. A. 519, 44 U. S. App. 492, 73 Fed. 444; *Travelers' Ins. Co.* v. *Nitterhouse*, 11 Ind. App. 155, 38 N. E. 1110; *Hale* v. *Life Indemnity & Invest. Co.* 61 Minn. 516, 63 N. W. 1108; *Edwards* v. *Travelers' L. Ins. Co.* 20 Fed. 661.

There can be no such thing in law as insane or involuntary suicide.

*Haynie* v. *Knights Templars & M. Life Indemnity Co.* 139 Mo. 416, 41 S. W. 461; *Adkins* v. *Columbia L. Ins. Co.* 70 Mo. 27, 35 Am. Rep. 410.

It is conceded that Jarman did not know either the nature, moral or physical, or the consequences, moral or physical, of what he was doing. Therefore it follows that the condition of the policy in regard to self-destruction, voluntary or involuntary, sane or insane, does not apply.

*Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918; *John Hancock Mut. L. Ins. Co.* v. *Moore*, 34 Mich. 42; *Blackstone* v. *Standard Life & Acci. Ins. Co.* 74 Mich. 592, 3 L. R. A. 486, 42 N. W. 156.

It is not suicide if the insured did not have the intent to do the act, or did not realize the physical consequences of his act.

*Pierce* v. *Travelers' L. Ins. Co.* 34 Wis. 389; *Grand Lodge I. O. of M. A.* v. *Wieting*, 168 Ill. 408, 48 N. E. 59; *Eastabrook* v. *Union Mut. L. Ins. Co.* 54 Me. 224, 89 Am.

Dec. 743; *Streeter* v. *Western Union Mut. Life & Acci. Soc.* 65 Mich. 199, 31 N. W. 779.

The contract is one of life insurance, and cannot be modified except by the consent of both parties.

*Com.* v. *Wetherbee*, 105 Mass. 149; *National Union* v. *Marlow*, 21 C. C. A. 89, 40 U. S. App. 95, 74 Fed. 775.

What is here called the constitution is not the charter, but is simply a code of by-laws under an inappropriate name.

*Supreme Lodge, K. of P.* v. *Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 483; *Mulroy* v. *Supreme Lodge, K. of H.* 28 Mo. App. 463.

The amendments to the by-laws did not affect this policy, because they do not purport to have any retrospective operation.

*Carnes* v. *Iowa State Traveling Men's Asso.* 106 Iowa, 281, 76 N. W. 683; *Spencer* v. *Grand Lodge, A. O. U. W.* 22 Misc. 147, 48 N. Y. Supp. 590, Affirmed in 53 App. Div. 627, 65 N. Y. Supp. 1146; *Grand Lodge, A. O. U. W.* v. *Stumpf*, 24 Tex. Civ. App. 309, 58 S. W. 840; *Hobbs* v. *Iowa Mut. Ben. Asso.* 82 Iowa, 107, 11 L. R. A. 299, 47 N. W. 983; *Sieverts* v. *National Benev. Asso.* 95 Iowa, 710, 64 N. W. 671; *Benton* v. *Brotherhood of Railroad Brakemen*, 146 Ill. 570, 34 N. E. 939.

The company had no power to alter the contract by amendments to its constitution or by-laws.

*Hobbs* v. *Iowa Mut. Ben. Asso.* 82 Iowa, 107, 11 L. R. A. 299, 47 N. W. 983; *Pokrefky* v. *Detroit Firemen's Fund Asso.* 121 Mich. 453, 80 N. W. 240; *Voigt* v. *Kersten*, 164 Ill. 314, 45 N. E. 543; *Starling* v. *Supreme Council R. T. of T.* 108 Mich. 440, 66 N. W. 340; *Hale* v. *Equitable Aid Union*, 168 Pa. 377, 31 Atl. 1066; *Weiler* v. *Equitable Aid Union*, 92 Hun, 277, 36 N. Y. Supp. 734; *Hysinger* v. *Supreme Lodge, K. & L. of H.* 42 Mo. App. 635; *Morrison* v. *Wisconsin Odd Fellows Mut. L. Ins. Co.* 59 Wis. 162, 18 N. W. 13; *Grand Lodge, A. O. U. W.* v. *Sater*, 44 Mo. App. 452; *Smith* v. *Supreme Lodge K. of P.* 83 Mo. App. 512; *Langan* v. *American Legion of Honor*, 34 Misc. 629, 70 N. Y. Supp. 663; *Newhall* v. *Supreme Council, A. L. of H.* 181 Mass. 111, 63 N. E. 1; *Supreme Council, A. L. of H.* v. *Getz*, 50 C. C. A. 153, 112 Fed. 119; *Gaut* v. *American Legion of Honor*, 107 Tenn. 603, 55 L. R. A. 465, 64 S. W. 1070; *Peterson* v. *Gibson*, 191 Ill. 365, 54 L. R. A. 836, 61 N. E. 127; *Bragaw* v. *Supreme Lodge, K. & L. of H.* 128 N. C. 354, 54 L. R. A. 602, 38 S. E. 905; *Strauss* v. *Mutual Reserve Fund Life Asso.* 128 N. C. 465, 54 L. R. A. 605, 39 S. E. 55; *Wist* v. *Grand Lodge, A. O. U. W.* 22 Or. 271, 29 Pac. 610; *Double* v. *Grand Lodge, A. O. U. W.* 66 App. Div. 323, 72 N. Y. Supp. 755.

The question as to the reasonableness of the change is immaterial.

*Gaut* v. *American Legion of Honor*, 107 Tenn. 603, 55 L. R. A. 465, 64 S. W. 1070.

Mr. Justice **Brown** delivered the opinion of the court:

This case turns principally upon the applicability to the policy in question of § 5982 of the Revised Statutes of Missouri of 1879, afterwards Rev. Stat. 1889, § 5855 (hereinafter termed the suicide statute), which was in force in 1885, when this policy was written. The section is as follows:

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

1. The first defense in order of time is that Jarman did not commit suicide within the meaning of this act, since the stipulated fact was that he shot himself while insane to such an extent as to be incapable of understanding the nature or consequences *of [200] his act. The position of the company in this connection is that the enactment above quoted, that "it shall be no defense that the insured committed suicide," relates only to cases where the insured takes his own life voluntarily, while sane, and in full possession of his mental faculties; and hence, the provision of the policy, that "in case of the self-destruction of the holder of this policy, whether voluntary or involuntary, sane *or insane*, . . . this policy shall become null and void," applies, and exonerates the company from all liability beyond that provided in the policy, "that in the case of the suicide of the holder of this policy, then this company will pay to his widow and heirs or devisees such an amount of his policy as the member shall have paid to this company on the policy in assessments on the same without interest."

This contention is founded upon the ruling of this court in *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236, and cognate cases, to the effect that a similar provision avoiding a policy in case the insured should "die by his own hand" applied only where the insured intentionally takes his own life, while in possession of his ordinary reasoning faculties, and does not apply when he is unable to understand the moral character, the general nature, consequences and effects of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist.

But we are of opinion that the word "suicide" is not used in this statute in its technical and legal sense of self-destruction by a sane person, but according to its popular meaning of death by one's own hand, irrespective of the mental condition of the person committing the act. The result of the construction urged by the defendant would be that, if a perfectly sane man voluntarily and from anger, pride, or jealousy, or a mere desire to escape from the ills of life, puts an end to his life, and thereby becomes guilty of the crime of self-murder, and of a fraud upon the insurance company, the company would still be responsible, unless it could be shown that the insured con-

templated suicide at the time he made his application for the policy; while, if he committed the same act while *insane*, and therefore irresponsible, the statute would [201] not apply, and the company would not *be liable under the terms of the policy, which provided that it should become void "in case of the self-destruction of the holder . . . whether voluntary or involuntary, sane or *insane*." In the one case, as we held in *Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300, that is, of self-destruction by a sane man, not only would the policy be void, whether there were a provision to that effect or not, but even a contract that it should be valid under such circumstances was thought to be against public policy and subversive of sound morality (p. 154, L. ed. p. 698, Sup. Ct. Rep. p. 505), while in the other case of a suicide by an insane person, the insured is guilty of no wrong to the company if he be incapable of understanding the moral consequences of his own act, and there is no reason in law or morals why the company should not pay. It is impossible to suppose that the legislature could have contemplated such a contingency, and a construction that would lead to this result should be deemed inadmissible, unless the language of the statute were too plain to be misunderstood.

The statute was manifestly intended to apply to all cases of self-destruction or suicide, unless the same were contemplated at the time application was made for the policy, and the fact that we may have given a different construction to the same words when used in a policy of insurance does not militate against this theory. The same words may require a different construction when used in different documents, as, for instance, in a contract, and a statute; and identity of words is not decisive of identity of meaning where they are used in different connections and for different purposes. In a contract, the technical rights of the parties only are involved; in a statute, an important question of public policy. If this statute were read alone and disembarrassed by the construction given to these words in policies of insurance, not a doubt would arise as to its application to all cases of self-destruction; and when we examine the theory of the defendant, and find that it leads to the conclusion that the company would be liable if the insured had committed a fraud upon it, and would not be liable if he had taken his life, though guilty of no fraud, the theory must be rejected without hesitation. The construction we have given to the words "committed suicide" in this [202] act is fortified by *reference to § 6570, Mo. Rev. Stat. 1889, referring to the construction of statutes, which provides that "words and phrases shall be taken in their plain, or ordinary and usual, sense; but technical words and phrases, having a peculiar and appropriate meaning in law, shall be understood according to their technical import." Undoubtedly the word "suicide" in its usual sense includes all cases of self-destruction.

2. We are next brought to the consideration of the applicability of the suicide statute (§ 5982) to policies of this company issued at this time. This act, upon its face, applies to all insurance companies "doing business in this state," and to all policies issued by such companies after the date of the act. It undoubtedly governs the rights of the parties in this case, except so far as the same may have been modified by an act passed in 1887, authorizing the incorporation of insurance companies on the assessment plan. Section 10 of this act (Laws 1887, pp. 199, 204) is now known as § 5869 of the Revised Statutes of Missouri of 1889, and provides that corporations "doing business under this article" shall make certain annual statements, which, as well as other requirements, are also made applicable to foreign companies, with the following proviso: "*Provided, always*, That nothing herein contained shall subject any corporation *doing business under this article* to any other provisions or requirements of the general insurance laws of this state, except as distinctly herein set forth." It appears that the defendant in this case, which is a citizen of Illinois, elected to take advantage of this law, and on June 18, 1888, received from the insurance department of the state authority to do business thereunder upon the assessment plan. As to policies issued upon the assessment plan subsequent to this date and prior to 1897, the supreme court of Missouri held that the suicide statute, above quoted, does not apply. *Haynie* v. *Knights Templars & Masonic Life Indemnity Co.* 139 Mo. 416, 41 S. W. 461. To the same effect are *Hanford* v. *Massachusetts Ben. Asso.* 122 Mo. 50, 26 S. W. 680; *Jacobs* v. *Omaha Life Asso.* 142 Mo. 49, 43 S. W. 375, and *Aloe* v. *Mutual Reserve Life Asso.* 147 Mo. 561, 49 S. W. 553. It is true the authority of these cases was somewhat shaken by the recent case of *Aloe* v. *Fidelity Mut. Life Asso.* 164 Mo. 675, 55 S. W. 993, which *did not involve the repeal of the [203] suicide statute, but of another statute, providing that no misrepresentation should be deemed material, unless the matter misrepresented should have contributed to the death of the insured. The case, however, turned, as did the cases above cited, upon the scope of the proviso of § 5869, and a persuasive opinion was delivered by Judge Valliant in favor of the theory that the proviso was intended to relate only to the organization of the corporations, and the extent to which they should be subject to the supervision of the department of insurance, and under the superintendent's control. This opinion was delivered in the first department of the supreme court, and, there being a dissent, the cause was transferred to the court *in banc*, wherein a majority of the court apparently differed from the views expressed by Judge Valliant, and reaffirmed the cases above cited. These cases, including the *Haynie Case*, must therefore be regarded as representing the views of the supreme court that the suicide statute was actually repealed by the act of 1887 as to

policies thereafter issued, and that view is, of course, binding upon this court.

But we are of the opinion that this statute was intended to be prospective in its operation, and that the rights of the defendant as an assessment company under the act of 1887 began in June, 1888, with its certificate of authority to do business under that act, and with respect to policies anterior to that date the rights of the parties are to be determined by the suicide statute, § 5855, Rev. Stat. 1889. It must be borne in mind that the repealing act of 1887, now known as Rev. Stat. 1889, § 5869, was not passed as an independent statute, but as § 10 of a new statute of fourteen sections, entitled "An Act to Provide for the Incorporation and Regulation of Associations, Societies, or Companies, Doing a Life or Casualty Insurance Business on the Assessment Plan." The prior sections define what shall be deemed a contract of insurance upon the assessment plan, how the corporations are formed, what the policies should specify, giving general details with regard to the management of the business, and then providing, in § 10, for annual statements made by "every corporation doing business under this act," with the provision that [204] "nothing herein contained *shall subject any corporation doing business under this act to any provisions or requirements of the general insurance laws of this state, except as distinctly herein set forth." This whole act, slightly amended in language, was carried into the Revised Statutes of 1889 as chapter 89, article 3. It seems to us quite clear that the declaration of the proviso that corporations "doing business under this act" shall not be subject to the general insurance laws of the state, applies only to corporations which took out a certificate of authority from the insurance department to do business on the assessment plan, and to policies thereafter issued by such companies, notwithstanding the fact that such companies may have issued policies under the general insurance laws of the state prior to the act of 1887. The words "doing business" evidently refer to issuing policies, and not to paying them. A man does business when he contracts obligations; he ceases to do business when he discharges them.

This is not only the natural construction of the act, but to hold that the proviso applies to policies antecedently issued might open it to the imputation of impairing the obligation of contracts previously entered into between these companies and their insured, since these policies amounted to a special agreement on the part of the companies that they would be liable in case of suicide,—an agreement upon which the insured and his beneficiary were entitled to rely. The provision of the suicide statute, that it shall be no defense that the insured committed suicide, and that any stipulation in the policy to the contrary shall be void, must be considered as imposing a condition upon every policy thereafter issued, notwithstanding any stipulation in the policy to the contrary. It must be treated as an independent and binding obligation, and as overriding and nullifying any stipulation of the parties. As Mr. Justice Gray observed in *Equitable Life Assur. Soc.* v. *Clements*, 140 U. S. 226, *sub nom. Equitable Life Assur. Soc.* v. *Pettus*, 35 L. ed. 497, 11 Sup. Ct. Rep. 822: "The statute . . . is mandatory, and controls the nature and terms of the contract into which the company may induce the assured to enter."

But we do not find it necessary to express an opinion whether, if the act of 1887 were plainly applicable upon its face to antecedent policies, it would be objectionable as impairing the obligation *of contracts en- [205] tered into between the insurance company and insured, inasmuch as we are clearly of opinion that it should not be held to apply to such unless its language imperatively demand it. *City R. Co.* v. *Citizens' Street R. Co.* 166 U. S. 557, 565, 41 L. ed. 1114, 1117, 17 Sup. Ct. Rep. 653.

Were the act of 1887 more ambiguous than it is as to its application to past transactions, we should still be disposed to apply the cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with the provisions of the Constitution is to be preferred. Endlich, Interpretation of Statutes, § 178. This rule was applied by this court in *Granada County* v. *Brogden*, 112 U. S. 261, *sub nom. Granada County* v. *Brown*, 28 L. ed. 704, 5 Sup. Ct. Rep. 125; *Presser* v. *Illinois*, 116 U. S. 252, 269, 29 L. ed. 615, 620, 6 Sup. Ct. Rep. 580, and *Hooper* v. *California*, 155 U. S. 648, 657, 39 L. ed. 297, 301, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

We do not wish to be understood, however, as expressing an opinion upon the constitutionality of the act of 1887, if it were applied to prior policies, but simply as holding that, in view of the language of the act, and the doubtfulness of its constitutionality as applied to prior policies, it should only be given effect in cases of policies thereafter issued.

But there is another argument in this connection which ought not to be overlooked, and which is, in our opinion, decisive that the suicide statute is applicable to this policy. In 1897 a law was passed by the legislature of Missouri, specially applying the suicide statute to insurance companies doing business upon the assessment plan. This was done by an amendment to § 5869, which will hereafter be considered. Two objections to the applicability of this statute are deserving of consideration. First, that it is in conflict with art. 4, § 28, of the Constitution of Missouri, declaring "that no bill . . . shall contain more than one subject, which shall be clearly expressed in its title;" and also art. 4, § 25, that "no law shall be passed except by bill, and no bill shall be so amended in its passage through either house as to change its original purpose."

The act was entitled "An Act to Repeal Section 5869 of Art. 3, Chap. 89, of the Revised Statutes of Missouri of 1889, entitled

'Insurance Companies on the Assessment Plan,' and to Enact a New Section in Lieu [206]Thereof, and Designated *as Section 5869" of the same chapter, "Relating to Statement of Affairs of Assessment Insurance Companies and Misrepresentations Made in Securing a Policy of Insurance and Defense Thereon, for Such Misrepresentations," and as first introduced contained the section as herein printed in the margin.† Subsequently the bill was amended by inserting between the word "sections" and the figures "5912" the figures "5855" (the suicide statute). This was not strictly germane to the other sections cited, which related to the purposes set forth in the title to the act, and it is argued that the legislature exceeded its constitutional powers in inserting these figures.

In the absence of an express adjudication of the supreme court of the state upon this question, we are forced to rely upon other decisions concerning the construction given to this provision of the state Constitution. In *State* v. *Miller*, 45 Mo. 495, it was held that the object of this provision was to prevent logrolling, and surprise and fraud on members; and in *State ex rel. Wolfe* v. *Bronson*, 115 Mo. 271, 276, 21 S. W. 1125, 1126, it is said that "these and other cases show that this section of the Constitution is to be reasonably and liberally construed and applied, due regard being had to its object and purpose. It was designed to prevent the insertion of disconnected matters in the same bill. The section asserts only two propositions. The first is that no bill shall contain more than one subject, and the second is that this single subject must be [207]clearly expressed in the title. If all *the provisions of the bill have a natural relation and connection, then the subject is single, and this, too, though the bill contains many provisions. As to the second proposition, namely, that the single subject must be clearly expressed in the title, it is sufficient to say that the legislature may select its own language, and may use few or many words. It is sufficient that the title fairly embraces the subject-matter covered by the act: mere matters of detail need not be stated in the title." And in *State ex rel. Kirkwood* v. *Heege*, 135 Mo. 112, 118, 36 S. W. 614, it is said: "A mere reference to the section to be amended, without other description of the subject-matter of the amendatory law, is under the rulings of this court a sufficient title to an act which deals exclusively with the subject of the section amended." It was also said in *State ex rel. Dickason* v. *Marion County Ct.* 128 Mo. 440, 30 S. W. 105: "The practice of legislation by reference to sections of the authorized version of the statutes (without other description of the subject of the amending act) has been followed quite generally in this state on the faith of early rulings of the supreme court approving such methods of lawmaking. So much has been done, and so many rights have been acquired, on the basis of those rulings, that we hold that the question of their correctness ought not to be reopened at this day. We adhere to them and follow them as an expression of the settled law of Missouri."

As the new act was simply an amendment of § 5869, these two last cases would seem to be decisive of the opinion of the supreme court upon the statute in question, upon which its decision is, of course, obligatory upon this court.

Section 5869 of the Revised Statutes of 1889 deals with four questions relating to the law of insurance by companies doing business on the assessment plan. First, providing for an annual statement; second, a visitation and examination into the affairs of the corporation; third, a general statement that foreign companies are subject to certain provisions; and, fourth, a recital as to what, among the general insurance laws of the state, shall be applicable to these companies.

While, as already stated, the supreme court has not decided as to the constitutional power of the legislature to incorporate the suicide statute into this amended § 5869, the decisions *above cited, that a [208] mere reference to the section amended is sufficient to sustain the validity of the law, would seem to cover the case, and for this reason the suicide statute, though not strictly germane to the other sections mentioned, is germane to the business of insurance on the assessment plan. Bearing in mind that the suicide statute was originally repealed, as to these policies, by § 5869, as enacted in 1887, it would seem that an amendment introduced into the same section restoring its application to these same policies would not be unconstitutional.

A second objection to the application of this statute is that if the petitioner be right in his contention that, by the repeal of the suicide statute, the contract between the assured and the company relieving the latter from liability in case of suicide, became effective, the legislature could not thereafter, by re-enacting the statute or attempting to subject assessment companies to its provisions, impair the contract subsisting between the assured and this petitioner.

The answer to this argument is not difficult. No new contract was made, and no

†Sec. 5869. Every corporation doing business under this article shall annually, on or before the first day of February, return to the superintendent of the insurance department, in such manner and form as he shall prescribe, a statement of its affairs, for the year ending on the preceding 31st day of December, and the said superintendent, in person or by deputy, shall have the power of visitation of and examination into the affairs of such corporation, which are conferred upon him in the case of life insurance companies by the laws of this state; and all such foreign companies are hereby declared to be subject to, and required to conform to, the provisions of sections 5912, and 5849, and 5850 of the Revised Statutes of Missouri of 1889, and governed and controlled by all the provisions in said section contained: *Provided, always,* That nothing herein contained shall subject any corporation doing business under this article to any other provisions or requirements of the general insurance laws of this state, except as distinctly herein set forth and provided.

new rights were vested, between the act of 1887, repealing the suicide statute, and the act of 1897 restoring it. All that the latter act purported to do was to reinstate the parties in their original rights prior to the act of 1887, which rights had not been affected by anything done during the ten years between the two acts. Upon defendant's theory, if the act of 1887 had been in existence but a single day the same result would have followed.

Our conclusion, then, is that the court below was correct in holding that the suicide statute, as originally applied to this policy, had not been repealed at the death of Jarman in 1898, when the cause of action arose.

3. It is also assigned as error in this case that the court permitted a recovery, not only of the amount of the policy, but of all the money paid by assured in assessments upon such policy.

The promise of the company was to pay the plaintiff "the sum of $5,000, and *all the money paid on the policy in assessments*, subject to the limitation as to the amount [209] of such payment *as is provided in § 1 of art. 7 of the constitution on the back of this policy, which section reads as follows:

"Sec. 1. Upon due notice and satisfactory proof of the death of a member of this company, the board of directors shall within sixty (60) days pay the widow, children, or heirs of the deceased member (and in the order named unless otherwise ordered by the member during his lifetime or in his will), the amount set forth in the deceased member's policy of membership: Provided, that a policy of membership for $5,000 shall be good for all the money in the death fund arising from one assessment; provided, it shall not exceed $5,000 and *all the money paid on the policy in assessments:* and a certificate for $4,000 shall be good for four fifths of all the money in the death fund arising from one assessment, provided it shall not exceed $4,000 and all the money paid on the policy in assessments; and so on in the same proportion as to all certificates."

The assessments paid upon the policy amounted to $811.83, and the right of the plaintiff to recover this amount in addition to the principal sum of $5,000 would be beyond question, were it not for certain changes thereafter made in the constitution, which it is insisted were binding upon the plaintiff under the following clause, found in the application of Jarman for membership: "I further agree, if accepted, to abide by the constitution, rules, and regulations of the company, as they now are, or may be constitutionally changed hereafter."

The application further stated that the application was made a part of the policy by reference thereto.

In virtue of the privilege thus given to amend its constitution, the company, on January 8, 1889, amended art. 4, § 3, of the constitution so as to read as follows:

"Sec. 3. Policies of membership may be issued upon a basis of benefits ranging in amounts to $5,000, and all the money paid in assessments upon the policy *for the first five years.*"

The proviso of art. 7, § 1, was also amended at the same time to correspond with the above amendment and to read as follows:

"*Provided*, That a policy of membership for $5,000 shall be good for all the money in the death fund arising from one *assess- [210] ment; provided, that it shall not exceed $5,000 and all the money paid on the policy in assessments *for the first five years.*"

On February 20, 1894, this section was again amended by striking out the proviso altogether.

It seems that these sections thus changed from an agreement to repay all assessments upon policies to an agreement to pay all assessments for the first five years, was found, or deemed to be, too liberal; and in January, 1898, the company made an important additional amendment by striking out entirely the proviso for the repayment of assessments, under which it now claims to be relieved altogether from paying more than the principal sum of the policy. The article as finally amended reads as follows:

"Sec. 3. Policies of membership may be issued upon a basis of benefits ranging in amounts to $5,000, but no member shall hold more than one policy at the same time, except one additional policy on the term plan," etc.

In view of the fact that both of these amendments imply a prospective operation upon policies which *may be issued*, it would seem to be unnecessary to consider the question discussed with much detail in briefs of counsel, whether the amendments were intended to operate upon policies already issued. In our opinion it is clear that they were not, and conceding the proposition that Jarman had agreed to abide by the constitution, rules, and regulations of the company, as they then were, or might be constitutionally changed thereafter, this agreement could have no operation upon changes which, upon their face, indicated that they applied only to policies thereafter to be issued. To cover this case he should have promised to abide by amendments thereafter made, though they were intended to apply only to future policies.

*The judgment of the court below* awarding the plaintiff the full amount agreed upon in the policy, without damages, *is accordingly affirmed.*

Mr. Justice **Harlan** took no part in the decision of this case.

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*SECURITY TRUST COMPANY, as Admin- [211] istrator of the Estate of Sumner W. Matteson, Deceased, *Petitioner*,

*v.*

BLACK RIVER NATIONAL BANK OF LOWVILLE.

(See S. C. Reporter's ed. 211-237.)

*Federal courts—state laws as rules of decision—suit against administrator—limitation.*

A nonresident owner of a claim against a de-

NOTE.—*As to state decisions and laws as rules of decision in Federal courts*—see notes

cedent's estate cannot maintain a suit against the administrator in a Federal court, where the suit, if brought in the state courts, would have been barred by the statutes of the state as construed by its courts because instituted after the expiration of the period limited by the order of the probate court for the presentation of claims against the estate, and after the administrator's final account had been allowed and the final distribution of the estate decreed.

[No. 39.]

*Argued April 21, 22, 1902. Decided December 1, 1902.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court of the United States for the District of Minnesota in favor of plaintiff in a suit against an administrator upon a claim against decedent's estate. *Reversed and remanded.*

See same case below, 43 C. C. A. 683, 104 Fed. 1006.

Statement by Mr. Justice **Shiras:**

In January, 1897, the Black River National Bank of Lowville brought an action in the circuit court of the United States for the district of Minnesota against the Se-[212]curity Trust Company *of St. Paul, as administrator of the estate of Sumner W. Matteson, deceased. The complaint alleged that the plaintiff was a corporation duly organized under the national banking laws of the United States, having its place of business at Lowville, Lewis county, and state of New York; that the defendant was a corporation created by the laws of the state of Minnesota, having its place of business at the city of St. Paul and state of Minnesota, and had been duly appointed administrator of the estate of Sumner W. Matteson, deceased, by the proper probate court of Ramsey county, Minnesota, on or about the 3d day of September, 1895; that the said Matteson had been during his lifetime a resident and citizen of the state of Minnesota.

For a cause of action the complaint averred that on the 27th day of February, 1894, the said Matteson had executed his two promissory notes, wherein for value received he promised to pay to the order of James H. Easton & Company, at the First National Bank of Decorah, Iowa, the sum of $2,500, four months after date, with interest thereon at the rate of 8 per cent per annum from date until paid; that thereafter, on March 22, 1894, and before the maturity of said notes, the said James H. Easton & Company, for value received, sold and assigned the same to the plaintiff; that said James H. Easton & Company was a copartnership doing business at Decorah, and that all the members thereof were residents and citizens of the state of Iowa; that no part of said notes has ever been paid except the interest thereon to the 24th day of November, 1894.

The complaint further alleged that the defendant, as administrator of the estate of Sumner W. Matteson, had in its hand and under its control property, money, and effects which belonged in his lifetime to said Matteson, more than sufficient to pay the amount due the plaintiff; that the estate of said Matteson was in process of settlement in the probate court of Ramsey county, state of Minnesota, and had not been fully and finally settled and probated, and that said administrator had never been discharged and was still the administrator of the estate of said Matteson, deceased; and plaintiff demanded judgment *against the defend-[213]ant in the sum of $5,000 and interest thereon from the 24th day of November, 1894.

On February 12, 1897, the defendant appeared and answered, admitting those allegations of the complaint which alleged the making and transfer of said notes, and that the same remained unpaid in the hands of the plaintiff, but denying that the defendant had in its hands as administrator of said Matteson any money or property applicable to the payment of said notes. The answer also alleged that the estate of said Matteson had been fully settled, probated, and administered upon and discharged from the probate court long prior to the commencement of plaintiff's action, and that the defendant had long before the commencement of this action turned over all property, money, and effects of said estate remaining in its hands, to the persons entitled thereto, and that defendant long before the commencement of this action had been discharged as such administrator, and was not when said action was brought, and is not now, administrator of the estate of said decedent.

On March 20, 1897, the plaintiff filed a reply, traversing the allegations of the answer. Thereafter and on the 18th day of January, 1899, a stipulation of facts and waiver of jury trial were filed. In the stipulation of facts it appeared that the estate of Matteson had been settled, administered upon, and discharged from the probate court prior to the commencement of plaintiff's action in the circuit court of the United States.

On April 17, 1899, the cause came on to be heard, on the pleadings and stipulation of facts, and judgment was entered in favor of the plaintiff in the sum of $6,782.89, to be paid and enforced out of the property and effects of the intestate, Sumner W. Matteson, deceased; and it was ordered further that this judgment be duly certified by this court to the probate court of Ramsey county as a claim duly approved, established, and allowed against the estate of Sumner W. Matteson, deceased.

to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson *ex dem.* St. John v. Chew, 6 L. ed. U. S. 583; United States *ex rel.* Buts v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; and Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

Subsequently the cause was taken to the United States circuit court of appeals for the eighth circuit, where, on October 17, 1900, the judgment of the circuit court was affirmed, on authority of the case of *Security Trust Co.* v. *Dent*, reported in 43 C. C. A. 594, 104 Fed. 380.

[214] Whereupon a writ of certiorari was prayed for and allowed, and the cause was brought to this court.

*Mr.* **Edmund S. Durment** argued the cause, and, with *Mr. Albert R. Moore*, filed a brief for petitioner:

The defendant when sued was not administrator.

*State ex rel. Lindekugel* v. *Sibley County Probate Ct.* 33 Minn. 94, 22 N. W. 10; *State ex rel. Dana* v. *Ramsey County Probate Ct.* 40 Minn. 296, 41 N. W. 1033; *Stackhouse* v. *Berryhill*, 47 Minn. 22, 49 N. W. 392; *Schmidt* v. *Stark*, 61 Minn. 91, 63 N. W. 255; *Ganser* v. *Ganser*, 83 Minn. 199, 86 N. W. 18; *State ex rel. Matteson* v. *Ramsey County Probate Ct.* 84 Minn. 289, 87 N. W. 783.

The final decree operates to change every liability of the administrator from an official liability to a personal one.

2 Woerner, Am. Law of Administration, 2d ed. § 569, *1248; *Melone* v. *Davis*, 67 Cal. 279, 7 Pac. 703.

The failure to present the claim to the probate court, according to the law of Minnesota barred the claim, so that the plaintiff has no right which he could enforce in any court of Minnesota.

Minn. Gen. Stat. 1894, § 4511; *Fern* v. *Leuthold*, 39 Minn. 212, 39 N. W. 399; *Hill* v. *Nichols*, 47 Minn. 382, 50 N. W. 367; *Hantzch* v. *Massolt*, 61 Minn. 366, 63 N. W. 1069; *State ex rel. Thompson* v. *Rock County Probate Ct.* 66 Minn. 246, 68 N. W. 1063; *Fitzhugh* v. *Harrison*, 75 Minn. 481, 78 N. W. 95.

The mere fact that plaintiff is a nonresident and sues in a Federal court does not render the Minnesota statute nugatory.

*Jones* v. *Drewry*, 72 Ala. 314; *Pulliam* v. *Pulliam*, 10 Fed. 53; *Dodd* v. *Ghiselin*, 27 Fed. 405; *Pratt* v. *Northam*, 5 Mason, 95, Fed. Cas. No. 11,376; *Walker* v. *Brown*, 11 C. C. A. 135, 27 U. S. App. 291, 63 Fed. 208; *Smith* v. *Union Bank*, 5 Pet. 523, 8 L. ed. 214; *Aspden* v. *Nixon*, 4 How. 498, 11 L. ed. 1074; *Walker* v. *Walker*, 9 Wall. 754, *sub nom. Walker* v. *Beal*, 19 L. ed. 819; *Yonley* v. *Lavender*, 21 Wall. 280, 22 L. ed. 538; *Morgan* v. *Hamlet*, 113 U. S. 449, 28 L. ed. 1043, 5 Sup. Ct. Rep. 583; *Rio Grande R. Co.* v. *Gomila*, 132 U. S. 484, *sub nom. Rio Grande R. Co.* v. *Vinet*, 33 L. ed. 402, 10 Sup. Ct. Rep. 155; *Missouri, K. & T. Trust Co.* v. *Krumseig*, 172 U. S. 358, 43 L. ed. 476, 19 Sup. Ct. Rep. 179; *Ewing* v. *St. Louis*, 5 Wall. 419, 18 L. ed. 659; *Ex parte McNiel*, 13 Wall. 243, 20 L. ed. 627; *Ouachita County* v. *Wolcott*, 103 U. S. 559, 26 L. ed. 505; *Goshorn* v. *Alexander*, 2 Bond, 158, Fed. Cas. No. 5,630; *Chicago & N. W. R. Co.* v. *Whitton*, 13 Wall. 285, 20 L. ed. 576.

In the matter of the presentation of claims to the probate court, and their allowance, that court is simply "auditor of claims," performing no "judicial function" in any proper sense of the term. Such allowance of claims is not the "establishment of claims" which this court has held a state cannot limit to its own courts.

*Ouachita County* v. *Wolcott*, 103 U. S. 559, 26 L. ed. 505; *Delaware County* v. *Diebold Safe & Lock Co.* 133 U. S. 473, 33 L. ed. 674, 10 Sup. Ct. Rep. 399; *Upshur County* v. *Rich*, 135 U. S. 467, 34 L. ed. 196, 10 Sup. Ct. Rep. 651; *Mississippi & R. River Boom Co.* v. *Patterson*, 98 U. S. 406, 25 L. ed. 208.

*Mr.* **Edward C. Stringer** argued the cause, and, with *Mr. McNeil V. Seymour*, filed a brief for defendant in error:

Specific and positive legislation is necessary to clothe the probate court with power to enter a decree discharging an administrator.

2 Woerner, Am. Law of Administration, §§ 251–253, pp. 1255–1257.

The mere allowance of the final decree is not the legal equivalent of a decree discharging the administrator.

*McCrea* v. *Haraszthy*, 51 Cal. 146; *Dohs* v. *Dohs*, 60 Cal. 255.

Until a decree is entered by the probate court discharging the administrator from further liability, in pursuance of a statute authorizing such decree, the trust continues in contemplation of law, and he remains clothed with the duties and authority of his office.

Woerner, Am. Law of Administration, p. 1256; *Sitzman* v. *Pacquette*, 13 Wis. 292.

The administrator is not discharged by an order of distribution.

*Davis* v. *Weed*, 44 Conn. 569, Fed. Cas. No. 3,658.

An administrator cannot be said to have been discharged by a formal order or decree, unless it appears with certainty, beyond mere conjecture, that such result was intended by the court.

*Re Scheffer*, 58 Minn. 29, 59 N. W. 956.

The enforcement of the rule that the court which first takes jurisdiction must retain and exercise it to the exclusion of all proceedings in other courts until its jurisdiction is exhausted by the final judgment or decree, and by its effective execution, is indispensable to prevent unseemly conflicts between courts and their officers, and "confusion worse confounded."

*Starr* v. *Chicago, R. I. & P. R. Co.* 110 Fed. 3. See also *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Carroll County* v. *Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539.

The limitation of time within which a claim must be presented to the probate court is not binding upon the Federal courts.

*Suydam* v. *Broadnax*, 14 Pet. 67, 10 L. ed. 357; *Hartman* v. *Fishbeck*, 18 Fed. 291; *Union Bank* v. *Vaiden*, 18 How. 503, 15 L. ed. 472; *Chewett* v. *Moran*, 17 Fed. 820; *Hess* v. *Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377.

The jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the state which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power.

*Borer* v. *Chapman*, 119 U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 348; *Williams* v. *Benedict*, 8 How. 107, 12 L. ed. 1007; *Yonley* v. *Lavender*, 21 Wall. 276, 22 L. ed. 536; *Freeman* v. *Howe*, 24 How. 450, 16 L. ed. 149; *Rio Grande R. Co.* v. *Gomila*, 132 U. S. 484, *sub nom. Rio Grande R. Co.* v. *Vinet*, 33 L. ed. 402, 10 Sup. Ct. Rep. 155.

The probate court does not possess exclusive jurisdiction of the estates of deceased persons. The jurisdiction of the Federal court is concurrent, so far as establishing the debt is concerned.

*Chapman* v. *Borer*, 1 McCrary, 49, 1 Fed. 274; *Hess* v. *Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 378.

Mr. Justice **Shiras** delivered the opinion of the court:

This was a suit brought in January, 1897, in the circuit court of the United States for the district of Minnesota, by the Black River National Bank of Lowville, incorporated under the national banking laws of the United States, and doing business in the county of Lewis and state of New York, against the Security Trust Company of St. Paul, Minnesota, as administrator of the estate of Sumner W. Matteson, deceased, seeking to recover the sum of $5,000 and interest thereon, due on certain promissory notes made by said Matteson in his lifetime, and which were alleged to be the property of the said national bank.

No defense was interposed as respected the execution of the notes or the ownership of the same by the bank. It was admitted that the Security Trust Company had been, on September 3, 1895, duly appointed by the probate court of Ramsey county, Minnesota, administrator of the estate of said Matteson. The defendant, however, alleged in its answer that, as the action was not brought until after the time limited by the order of the probate court for the filing, examination, and allowance of claims against Matteson's estate, nor until after the examination and allowance of the administrator's final account, under the laws of the state of Minnesota, the official existence of the defendant company as administrator had ceased, and therefore no action could be maintained [215] against it, and also *that the right to a judgment on the notes in suit was, by the laws of Minnesota, forever barred, although they were owned by a nonresident of the state, and a recovery was sought in a Federal court.

Two inquiries are presented to us: First, whether, by virtue of the state statutes, the estate of Matteson had been so fully settled and administered, before the present action was brought, as to operate as a discharge of the administration, and as a bar to a right of the plaintiff to recover against the estate in the state courts; and, second, if the first question must be affirmatively answered, whether, notwithstanding such a condition of the statutory law of the state, an action can be successfully maintained by a citizen of another state in the circuit court of the United States on a cause of action not barred by the general statute of limitations of the state.

It is scarcely necessary to say that, as respects the first of these inquiries, we must find an answer in the provisions of the Constitution and statutes of Minnesota as interpreted and construed by the supreme court of that state.

The state Constitution and statutory provisions bearing upon the question involved are the following:

Const. art. 6, "§ 7. There shall be established in each organized county in the state a probate court, which shall be a court of record, and be held at such time and places as may be prescribed by law. . . . . A probate court shall have jurisdiction over the estates of deceased persons and persons under guardianship, but no other jurisdiction, except as prescribed by this Constitution."

Gen. Stat. 1894:

"Sec. 4523. The probate court at the time of granting letters testamentary or of administration shall make an order allowing to the executor or administrator a reasonable time, not exceeding one year and six months, for the settlement of the estate.

"Sec. 4524. The probate court may, upon good cause shown by the executor or administrator, extend the time for the settlement of the estate not exceeding one year at a time, unless in the judgment of the court a longer time be necessary."

"Sec. 4527. When there is not sufficient personal estate in *the hands of the executor [216] or administrator to pay all the debts and legacies and the allowance to the widow and minor children, the probate court may, on petition of the executor or administrator, order the sale of the real estate, or so much thereof as may be necessary to pay the same."

Section 4471 provides that real estate shall descend subject to the debts of the intestate.

"Sec. 4638. Every executor or administrator shall render his account of his administration within the time allowed him for the settlement of the estate, and at such other time as he is required by the court, until the estate is wholly settled.

"Sec. 4639. When the estate is fully administered the executor or administrator shall petition the probate court for an order fixing a time and place in which it will examine, settle, and allow the final account of the executor or administrator, and for the assignment of the residue of the estate to the persons entitled thereto by law. The final account shall be filed in the probate court at the time of filing said petition.

"Sec. 4640. Upon the filing of said petition the court shall make an order fixing a time and place for hearing of the same. Said order shall be published according to law.

"Sec. 4641. On hearing such petition, the probate court shall examine every executor and administrator upon oath as to the truth and correctness of his account before the same is allowed; but such examination may be omitted when no objection is made to the allowance of the account and there is no reason to doubt the justness and correctness thereof; and the heirs, legatees, and devisees may be examined on oath upon any matter relating to the account of any executor or administrator whenever the correctness thereof is called in question. If from such examination the account is found just and correct the probate court shall allow and settle the same, and upon satisfactory evidence shall determine the rights of the persons to the residue of said estate, and, unless partition is asked for and directed as hereinafter provided, make a decree accordingly, and assigning said residue to the persons thereto entitled by law.

"Sec. 4642. In such decree the court shall name the persons and the proportion of [217] parts to which each is entitled, and if *real estate, give a description as near as may be of the land to which each is entitled; and such persons may demand and recover their respective shares from the executor or administrator, or any other person having the same; and a certified copy of any decree of distribution of real estate may be recorded in the office of the register of deeds in every county in this state in which are situated any of the lands described in such decree; and such register of deeds shall enter in his reception book the name of the deceased as grantor, and the names of the heirs, legatees, or devisees, as grantees, and shall make in such reception book so many separate grantor and grantee entries for such decree as there are persons taking real estate in such county under said decree."

"Sec. 4509. At the time of granting letters testamentary or of administration, the court shall make an order limiting the time in which creditors may present claims against the deceased for examination and allowance, which shall not be less than six months nor more than one year from the date of such order; said order shall fix the time or times and place in which the court will examine and adjust claims and demands of all persons against deceased. No claim or demand shall be received after expiration of the time so limited, unless for good cause shown, the court may, in its discretion, receive, hear, and allow such claim upon notice to the executor or administrator, but no claim shall be received or allowed unless presented within one year and six months from the time when notice of the order is given, as provided in the next section, and before final settlement, and the allowance or disallowance of any claim shall have the same force and effect as a judgment for or against the estate.

"Sec. 4510. The order prescribed in section one hundred and two shall be published according to law, and shall be notice to all creditors and persons interested.

"Sec. 4511. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to the probate court within the time limited in said order, and any claim not so presented is barred forever; such claim or demand may be pleaded as an offset or counterclaim to an action brought *by the executor or admin- [218] istrator. All claims shall be itemized, and verified by the claimant, his agent or attorney, stating the amount due, that the same is just and true, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of affiant. If the claim be not due, or be contingent, when presented, the particulars of such claim must be stated. The probate court may require satisfactory vouchers or proofs to be produced in support of any claim."

"Sec. 4514. No action at law for the recovery of money only shall be brought in any of the courts of this state against any executor, administrator, or guardian upon any claim or demand which may be presented to the probate court, except as provided in this Code. No claim against a decedent shall be a charge against or lien upon his estate unless presented to the probate court as herein provided within five years after the death of such decedent: *Provided*, That this provision shall not be construed as affecting any lien existing at the date of such death: *Provided, further*, That said provision shall not be construed as affecting the right of a creditor to recover from the next of kin, legatee, or devisee to the extent of assets received. This provision shall be applicable to the estate of persons who died prior as well as to those who may die after adoption of this Code."

"Sec. 4517. Upon the allowance or disallowance of any claim the court shall make its order allowing or disallowing the same. The order shall contain the date of allowance and the amount allowed, the amount disallowed, and be attached to the claim with the offsets, if any."

"Sec. 4522. In case of appeal from the allowance or disallowance of any claim in whole or in part, the district court shall certify to the probate court the decision or judgment rendered therein."

Section 4665 provides for an appeal to the district court.

Section 4668 provides for serving notice of appeal.

Section 4672 provides that the district court shall try the case as if originally commenced in that court.

Section 4673 provides that pleadings shall be made up as in civil actions, and the issues of fact tried as in other actions.

*Section 4676. In case of a reversal or [219] modification of the order appealed from the district court makes such order as the probate court should have made, and certifies its judgment to the probate court.

"Sec. 4730. The probate court may, at any time, correct, modify, or amend its records to conform with the facts in the same manner as a district court."

*State ex rel. Lindekugel* v. *Sibley County Probate Ct.* 33 Minn. 94, 22 N. W. 10, was

an application to the district court for a writ of prohibition to the probate court, the latter court having granted a petition to set aside a sale of real estate confirmed by the probate court, and it was held by the supreme court of the state that there was no jurisdiction in the probate court, saying:

"The want of jurisdiction in this case is still further emphasized by the fact that the administration has been closed by the allowance of the administrator's accounts and his discharge, and there is no attempt to reopen it. So long as it remains closed the probate court has no more jurisdiction over the estate, or the property belonging to it, or which once belonged to it, than if there had never been any administration, and there was no attempt to institute one. The jurisdiction of the court has been fully exhausted, and it can do nothing further unless it is restored in the manner pointed out by the statute."

In *State ex rel. Dana* v. *Ramsey County Probate Ct.* 40 Minn. 296, 41 N. W. 1033, where, upon an application for the final settlement of his accounts by the administrator of an estate and for a final discharge, the probate court made an order allowing the account and discharging the administrator, such order was held by the supreme court to be a final order discharging the administration of the estate, and that, as a final decree discharging the administration, it operated to discharge the lien of creditors upon real estate which might have been previously sold to pay debts. The opinion of the court was thus expressed:

"The object of the application on the part of the acting administrator was to submit his final account and close the administration. The order made was evidently so in-[220] tended, and must *be construed as a final order discharging the administration of the estate. The parties had their remedy by appeal, but the order could not be attacked collaterally or treated as void, so as to warrant subsequent proceedings to reach the real estate, as if the administration was still in progress and the estate still unsettled.

"The omission of the land from the inventory, and the subsequent discovery of the real estate of the deceased which was not reduced to assets by the administrator or distributed to the heirs, do not operate to revive the administration and open the judgment or warrant further proceedings. The land descended to the heirs, subject to the claims of administration upon it. The effect of a decree assigning the real estate to the heirs is simply to discharge it from the administration, and, of course, the final discharge of the administration must discharge the lien of the creditors."

In *Schmidt* v. *Stark*, 61 Minn. 91, 63 N. W. 255, it was held that where the estate of a deceased person has been fully administered, and a decree of distribution has been made, assigning the residue of the estate in the hands of the personal representative to the parties entitled thereto, the jurisdiction of the probate court is ended; and, if the personal representative does not deliver the property to the distributees, they may bring an action against him in the district court. It was said, per Mitchell, J.:

"The Probate Code neither authorizes nor provides for an assignment of any part of the estate of a deceased person until after the estate is fully administered. It contemplates but one decree of distribution, by which the entire residue of the estate shall be assigned to those entitled to it, specifying the proportion or part to which each is entitled. Gen. Stat. §§ 4639–4642. Read in the light of the statute, and of the admissions of the answer, we think the complaint would fairly admit of being construed as alleging that all this had been duly done, and that the proportion of the estate assigned to plaintiff was an undivided fifth. If this was the state of facts, the jurisdiction of the probate court over the property had ended. The effect of a decree of distribution is to transfer the title to the personalty and the right of possession of the realty from the *personal rep-[221] resentative to the distributees, devisees, or heirs. The property then ceases to be the estate of the deceased person, and becomes the individual property of the distributees, with the full right of control and possession, and with the right of action for it against the personal representative, if he does not deliver it to them. If such an action is necessary, resort must be had to some other forum, for the probate court has no further jurisdiction. *Hurley* v. *Hamilton*, 37 Minn. 160, 33 N. W. 912."

*State ex rel. Matteson* v. *Ramsey County Probate Ct.* 84 Minn. 289, 87 N. W. 783, is the last expression of the supreme court of Minnesota on this subject to which we have been referred. The syllabus, prepared by the court, is as follows:

"1. The Probate Code of this state makes no provision for the formal discharge of an administrator, but the necessary legal effect of an order of the probate court allowing the final account of the administrator and its final decree of distribution, assigning the whole of the estate to the heirs and distributees, is to remove the estate of the deceased from the jurisdiction of the court, and to render the office of administrator, which depends upon such jurisdiction, *functus officio*. 2. After the estate has been so settled and assigned, and while the final decree of distribution remains unreversed and unmodified, the probate court has no jurisdiction to entertain a petition to issue a citation to the administrator requiring him to further account for the property belonging to the estate which is in his possession, or came into his possession."

The facts and law of the case were then stated in the opinion of the court:

"Sumner W. Matteson, a resident of the county of Ramsey, having real and personal property therein, died intestate on July 22, 1895. The Security Trust Company was duly appointed by the probate court of such county, on September 3, 1895, administrator of his estate, and it duly qualified as such, and duly filed in such court an inventory of such estate. The probate court, on the

same day, by its order, which was duly published, limited the time for presenting claims against the estate to six months from [222] the date of the order. All claims *against the estate presented to the court within the time limited and allowed by the court were paid by the administrator in the due course of administration. Thereafter, and on March 31, 1896, the administrator filed with the court its petition, representing that it had fully administered the estate, paid all the debts against the estate allowed by the court, and the expenses of administration, and asking for the allowance of its final account, and the distribution of the residue of the estate to the persons entitled thereto. Such proceedings were thereafter duly had upon the petition, that the court, on April 27, 1896, allowed the final account of the administrator, and made and entered its decree of distribution of the residue of the estate, describing it, and thereby assigned the property therein described and all other estate of the intestate in the state of Minnesota to his heirs and distributees, naming them, and determining the share of each.

"Afterwards, and on November 21, 1896, the Security Trust Company filed with the probate court its petition, representing that in drafting such final decree certain clerical errors were made, stating them, whereby certain parcels of real estate were erroneously described therein, and other parcels omitted therefrom, and praying that the decree be amended so as to correct the errors. The court made its order so correcting the decree. Neither the order allowing the administrator's account, nor the final decree of distribution, has ever been opened or set aside. On or before December 15, next following, all the heirs and distributees named in the decree transferred and conveyed to the Matteson estate, incorporated, all the property so assigned to them by the final decree. But the Security Trust Company still has in its possession and now holds certain stocks as collateral security under a pledge made to it by the intestate for the payment of a debt owed by him to it at the time of his death. The value of the stocks exceeds the amount of the debt which they secured. No order has ever been made by the probate court in terms discharging the administrator. The Black River National Bank, a nonresident creditor of the intestate, on January 4, 1897, made application to the probate court for leave to file its claim against his estate, and [223] have it allowed and paid out of *the assets of the estate. This was denied by the court for the reason that the administration of the estate had been closed, and the court had no further jurisdiction in the premises. Afterwards the bank and another nonresident creditor each brought an action on their respective claims, which had never been presented to the probate court, against the trust company, as administrator, in the circuit court of the United States for the district of Minnesota. Such proceedings were had therein that judgment, on April 17 1899, was rendered in favor of the plaintiff in each case for the full amount claimed against the administrator. That court directed the judgments to be certified to the probate court as claims duly established against the estate of the intestate, and it was done, but the administrator refused to take any steps for the payment of either of the judgments. Thereupon the relator herein presented to the probate court a petition asking it to issue a citation to the trust company, as such administrator, requiring it to file an account of any property in its possession belonging to such estate, and to report what disposition had been made of the property inventoried as belonging thereto, and to pay so much of the judgments as could be paid from such property. The court refused to entertain the petition, or to make any order in the premises, for the sole reason that it had no jurisdiction to take other or further steps in the administration of the estate. The relator then sued out of the district court of Ramsey county an alternative writ of mandamus based upon the facts here stated, which was directed to the probate court and the judge thereof. The answer of the respondents was an admission of such facts, and upon them the district court awarded judgment, denying a peremptory writ of mandamus, and discharging the alternative writ. The relator appealed from the judgment to this court.

"The question presented by these facts for our consideration relates solely to the legal effect of the final decree of distribution, assigning the residue of the estate of the decedent to the heirs and distributees made by the probate court after the settlement and allowance of the final account of the administrator. Stated concretely, the question is: Did the jurisdiction of the *probate court [224] over the estate in question cease, and the office of administrator become *functus officio*, by force of the order of the court allowing the administrator's final account, and its final decree of distribution assigning the residue of the estate? We answer the question in the affirmative. The jurisdiction of the probate court in Minnesota is not conferred by the common law, nor by any statute of the state, but by our Constitution, and is limited to 'jurisdiction over the estates of deceased persons and persons under guardianship.' Const. art. 6, § 7. It follows that, in cases where a court of probate acquires jurisdiction over the estate of a particular decedent, such jurisdiction is ended, and the office of administrator, which depends upon such jurisdiction, becomes *functus officio*, whenever such estate passes by operation of law from its final control. No argument can make this obvious proposition clearer, for it is self-evident that, if the jurisdiction is limited to the estate of such deceased person, and the sole basis of such jurisdiction—the estate—passes from its control, and the right to the possession and control thereof vests by operation of law in the heirs and distributees, it has no longer any jurisdiction in the premises. It is true that our Probate Code contains no provision for the formal discharge of an administrator, but the necessary theory and effect of its provisions as to the settlement of his account and the final decree of distribution, as interpret-

ed by the repeated decisions of this court, are to devest the probate court of further jurisdiction when such final decree is made, and to render the office of administrator *functus officio*, unless such decree is set aside on motion, or reversed on appeal. A clear illustration of this proposition is found in the decision of this court in the case of *Hurley* v. *Hamilton*, 37 Minn. 160, 33 N. W. 912, holding that the probate court had no jurisdiction to entertain proceedings for the partition of the real estate of a decedent among the heirs and devisees after the administration was closed, and the land assigned to them in common by a final decree of distribution, for the reason that, when such decree was entered, the property passed out of the control of the court, and it had no further jurisdiction."

The court then proceeded to cite and ap-
[225] prove previous decisions, *and particularly the language of Mitchell, J., in the case of *Schmidt* v. *Stark*, 61 Minn. 91, 63 N. W. 255, hereinbefore quoted. Other observations were made by the court pertinent to the case before us, as follows:

"It is, however, urged by counsel for the relator that the removal of the property (that is, the estate) from the jurisdiction of the probate court in nowise affects the continuance in office of the administrator of an estate. To hold otherwise, it is claimed, would be a devesting of the probate court of all authority to execute its decree of distribution, leaving the administrator in possession of the estate, and the heirs and distributees remediless. It necessarily follows from the concession of counsel, although not intended by him, that the office of administrator becomes *functus officio* when the estate is removed, as the result of the decree of distribution, from the jurisdiction of the court, for the office of administrator springs out of and depends for its continued existence upon the jurisdiction of the court over the estate. As well might it be claimed that the branch of a tree can live and put forth its leaves and blossoms after its roots are dead, as to claim that the office of administrator can survive the jurisdiction of the court over the estate of which administration was granted. It is not necessary for the probate court, if it could do so, to retain jurisdiction to enforce its final decree of distribution; the remedy of the distributees in case their respective shares of the residue of the estate are withheld from them by the administrator is an action in the district court against him or against him and his bondsmen. *Schmidt* v. *Stark*, 61 Minn. 91, 63 N. W. 255. . . .

"It is further urged on behalf of the relator that neither the probate court nor the administrator considered that the allowance of the final account and the entry of the decree of distribution ended the jurisdiction of the court, for it afterwards, on the petition of the administrator, amended such decree. It is immaterial what they considered, for the view of either as to the effect of the decree could not change its legal result. The decree was corrected, not in the exercise of any jurisdiction over the estate, but by virtue of the power of the court to amend its records to conform with the facts; that is, to make the records *speak truly as to the [226] past official acts of the court. Gen. Stat. 1894, § 4730.

"Lastly, it is urged by the relator that the administrator still has certain stocks in his possession belonging to the estate, and that it may also have after-discovered personal property of the intestate which it has not disclosed to anyone. There is no basis for this assumption in the admitted facts, except that the trust company holds certain stocks as collateral to secure its individual debt against the intestate. But, were it otherwise, the fact still remains that all such stocks and after-discovered property, if any, passed by the decree to the heirs and distributees, for it assigns to them, not only the property therein specifically described, but also all other estate of the deceased in the state of Minnesota. It follows that the probate court rightly declined to issue the citation."

Some criticism is made, in the brief of the defendant in error, of the decision of the supreme court of Minnesota in this case; that the issue was feigned and an imposition upon the supreme court, and that the purpose of the decision was to forestall the decision of this court.

If, indeed, the judgment of the supreme court in that case were relied on as adjudging a case which had already passed into judgment in the circuit court of the United States, we might readily agree, as urged by the defendant in error, that the decision of the supreme court of Minnesota "should receive little, if any, weight, by this court in the consideration of this case." But that decision is cited and relied on by the plaintiff in error, not as an adjudication of the facts in controversy here, but as an interpretation of the statutes of the state. Cases may be found of decisions made by a state supreme court, even in exposition of state statutes, *after* the institution of litigation in a Federal court, wherein this court has refused to follow such a decision, if in it the state court has departed from its previous decisions, which were in force and relied upon by the Federal suitor. *Burgess* v. *Seligman*, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Carroll County* v. *Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539.

Here, however, the supreme court of Minnesota, in its last opinion, did not depart from or modify its previous decisions *on the subject. On the contrary, it based [227] its reasoning and conclusions upon its frequent previous decisions.

Nor are we permitted on the record in that case to impute to the parties therein an attempt to mislead the court or to improperly invoke its jurisdiction. The case seems to have gone before the probate court, the district court, and the supreme court, in the usual course of procedure, and the decision finally rendered by the supreme court must be received by us as a valid exposition of the law.

The conclusion to which we are brought,

by an examination of the statutes of the state of Minnesota and of the decisions of the courts of that state in construing and applying them, is, that had a suit against an administrator of an estate been brought in the courts of that state, after the expiration of the period limited by the order of the probate court, in which creditors may present claims against the deceased for examination and allowance, and after an allowance of the administrator's final account, and a final decree of distribution, such suit could not have been maintained.

We are now to consider whether such a suit can be successfully maintained in a Federal court by a nonresident owner of a claim against the estate of a decedent.

Some general principles have become so well settled as to require only to be stated. One of these is that a foreign creditor may establish his debt in the courts of the United States against the personal representative of a decedent, notwithstanding the fact that the laws of the state relative to the administration and settlement of decedents' estates do in terms limit the right to establish such demands to a proceeding in the probate courts of the state. *Union Bank* v. *Vaiden*, 18 How. 503, 15 L. ed. 472; *Lawrence* v. *Nelson*, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; *Byers* v. *McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

Another principle, equally well settled, is that the courts of the United States, in enforcing claims against executors and administrators of a decedent's estate, are administering the laws of the state of the domicil, and are bound by the same rules that govern the local tribunals. *Aspden* v. *Nixon*, 4 How. 498, 11 L. ed. 1074.

[228] *"The circuit courts of the United States, with full equity powers, have jurisdiction over executors and administrators, where the parties are citizens of different states, and will enforce the same rules in the adjustment of claims against them that the local courts administer in favor of their own citizens." *Walker* v. *Walker*, 9 Wall. 745, *sub nom. Walker* v. *Beal*, 19 L. ed. 814.

In *Yonley* v. *Lavender*, 21 Wall. 276, 22 L. ed. 536, it was decided that while a nonresident creditor may get a judgment in a Federal court against a resident administrator, and come in on the estate according to the law of the state for such payment as that law, marshaling the rights of creditors, awards to debtors of his class, yet he cannot, because he has obtained a judgment in a Federal court, issue execution and take precedence of other creditors who have no right to sue in the Federal courts, and if he do issue execution and sell lands, the sale is void.

The reasoning of this case is worthy of quotation:

"The several states of the Union necessarily have full control over the estates of deceased persons within their respective limits, and we see no ground on which the validity of the sale in question can be sustained. To sustain it would be in effect to nullify the administration laws of the state by giving to creditors out of the state greater privileges in the distribution of estates than creditors in the state enjoy. It is easy to see, if the nonresident creditor, by suing in the Federal courts of Arkansas, acquires a right to subject the assets of the estate to seizure and sale for the satisfaction of his debt, which he could not do by suing in the state court, that the whole estate, in case there were foreign creditors, might be swept away. Such a result would place the judgments of the Federal court on a higher grade than the judgments of the state court, necessarily produce conflict, and render the state powerless in a matter over which she has confessedly full control. Besides this, it would give to the contract of a foreign creditor made in Arkansas a wider scope than a similar contract made in the same state by the same debtor with a home creditor. The home creditor would have to await the due course of administration for the payment of his debt, while the foreign creditor could, as soon as he got his judgment, seize and sell the estate of his *debtor [229] to satisfy it, and this, too, when the laws of the state in force when both contracts were made provided another mode for the compulsory payment of the debt. Such a difference is manifestly unjust and cannot be supported. . . . The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights. . . . It is possible, though not probable, that state legislation on the subject of the estates of decedents might be purposely framed so as to discriminate injuriously against the creditor living outside of the state; but if this should unfortunately ever happen, the courts of the United States would find a way, in a proper case, to arrest the discrimination, and to enforce equality of privileges among all classes of claimants, even if the estate were seized by operation of law and intrusted to a particular jurisdiction."

In *Morgan* v. *Hamlet*, 113 U. S. 449, 28 L. ed. 1043, 5 Sup. Ct. Rep. 583, it was held that the statute of Arkansas, that "all demands not exhibited to the executor or administrator, as required by this act, before the end of two years from the granting of letters, shall be forever barred," begins on the granting of letters of administration, to run against persons under age out of the state.

The doctrine of the case of *Yonley* v. *Lavender*, 21 Wall. 276, 22 L. ed. 536, was approved in *Byers* v. *McAuley*, 149 U. S. 615, 37 L. ed. 871, 13 Sup. Ct. Rep. 906, wherein it was held that the administration laws of a state are not merely rules of practice for the courts, but laws limiting the rights of parties, to be observed by the Federal courts in the enforcement of individual rights.

In *Pulliam* v. *Pulliam*, 10 Fed. 55, 78, the distinction between ordinary statutes of limitation and statutes of administration of the estates of decedents, limiting the time within which creditors must prove their claims, is pointed out in respect that the lat-

ter are rules of property as well as statutes of limitation, and it was said by Hammond, J., after citing *Union Bank* v. *Vaiden*, 18 How. 504, 15 L. ed. 473; *Payne* v. *Hook*, 7 Wall. 430, 19 L. ed. 261, and other cases:

"These cases, like many others, are only intended to protect the judicial power of the [230] United States from encroachment by *preserving to it the remedies and forms of proceeding which are granted with it, and not at all to set it above the legislative control of the states in matters pertaining to their jurisdiction. The cases cited from the Supreme Court do not, in my judgment, establish or in the least authorize the doctrine that state statutes, prescribing the time within which a creditor of a decedent must present or sue upon his claim in order to entitle him to share in the assets, and having the effect these do, are not binding on this court."

In *Dodd* v. *Ghiselin*, 27 Fed. 405, involving the administration of a decedent's estate, and where it was contended that nonresident minors had a right to have the laws of the state of Missouri regulating the matter disregarded in the Federal court, but it was held otherwise, per Brewer, J.: That the law of the state providing for the settlement of a deceased person's estate is binding upon the Federal as well as upon the state courts.

In *Miner* v. *Aylesworth*, 18 Fed. 199, it was held by the circuit court of the United States for the district of Rhode Island, as against nonresident complainants, that, under the Rhode Island statute, no suit can be commenced against an administrator, as such, after three years from the time he gave public notice of his appointment. *Bauserman* v. *Blunt*, 147 U. S. 652, 37 L. ed. 318, 13 Sup. Ct. Rep. 466.

Applying these principles to the present case, it would seem clear that the defendant in error, as a citizen of the state of New York, and having a legal claim against the estate of S. W. Matteson, deceased, had a right to elect to proceed to establish his claim by bringing a suit in the circuit court of the United States; and if he had brought his action against an existing administrator, the administration of the estate not having been closed under the statutory proceedings, and obtained a judgment, undoubtedly such a judgment, when presented to the probate court within the time fixed by its order, must have been received by that court as a claim against the unadministered estate.

But can it be said that, if the foreign creditor delayed proceedings in the Federal [231] court until after the time fixed by the *order of the probate court for the presentment of claims had expired and after the final distribution of the estate had been effected, and after the final account of the administrator had been allowed and his office had become *functus officio*, and after all claims of local creditors had thus been precluded, he can use the Federal process to devolve a new responsibility upon the person who had acted as administrator, and to interfere with the rights of other parties, creditors or distributees, which had become vested under the regular and orderly administration of the estate under the laws of the state?

It is the policy of the state of Minnesota, like that of many of the states, to prescribe a shorter term of limitations to claims against the estates of decedents than claims against living persons. Can that policy be defeated by a ruling of the Federal courts that the provisions of the state in that regard do not apply to parties bringing suit in those courts? In that event, the very mischief pointed out and deprecated in *Yonley* v. *Lavender* would ensue, that "the rights of those interested in the estate who are citizens of the state where the administration is conducted are materially changed, and the limitation which governs them does not apply to the fortunate creditor who happens to be a citizen of another state." The answer given to such a proposition by this court in the case just cited was: "This cannot be so. The administration laws of Arkansas are not merely rules of practice for the courts, but laws limiting the rights of parties, and will be observed by the Federal courts in the enforcement of individual rights."

Let us now examine the reasoning employed by the circuit court of appeals in reaching its conclusion in the present case. Having correctly held that, so far as the administration law of the state of Minnesota attempts to compel citizens of other states to establish demands against the estates of decedents only by a proceeding in the probate court of the state, it is ineffectual to accomplish that object, the court proceeded to say:

"It is said, however, that although the statute in question may be ineffectual to compel nonresident creditors to submit their demands to the appropriate probate court for allowance, *yet, as a statute of limita- [232] tions, it should be given effect to prevent the establishment of a demand in the Federal court of the state after such lapse of time that it cannot be established in the probate court. The vice of this argument as applied to the case in hand consists in the fact that the legislature of the state of Minnesota has not undertaken to bar any claim against a decedent's estate, absolutely, until after the lapse of eighteen months from the date of the order fixing the period of allowance, and in the case at bar that period had not expired when the action was commenced, to wit, on January 22, 1897.

"It is true that § 4509, when conferring the discretionary power to allow claims within eighteen months, imposes the limitation that they shall be allowed 'before final settlement,' and it is also true that the final account of Matteson's administrator had been submitted to and approved by the probate court before this action was commenced. But it must be borne in mind that the administration law (§ 4523) confers upon the probate court the power to determine when the final settlement of an estate shall be made, and to allow as much as one year and six months for that purpose. We think that the Federal court must be conceded the same power, as respects the claim of a nonresi-

dent creditor, to allow it within eighteen months, which is conferred upon the probate courts of the state; and we are, furthermore, of the opinion that the right of a nonresident creditor to sue for the establishment of his demand in the Federal court cannot be made to depend on the length of time that the probate court happens to allow for making a final settlement. If the Federal court gives effect to laws limiting the period for establishing claims in the probate courts of the state, which differ essentially from the general statute of limitations, it should only be required to apply the absolute bar arising from lapse of time which the legislature has erected. There is much reason, perhaps, for saying that citizens of other states ought not to be allowed to maintain an action in the Federal court against a local administrator or executor after the expiration of a period when by the express command of the legislature no such action can be maintained in the local courts, provided the period fixed by the legislature [233] is reasonable; but *the right of a nonresident creditor to bring his action in the national courts ought not to be conditioned or made to depend upon the time that a local court chances to approve a final settlement when the time of such approval rests in its discretion and is largely a matter of convenience. For these reasons we conclude that the case in hand—the same having been brought within less than eighteen months after the order fixing the period for the allowance of claims was made—was lawfully entertained by the trial court.

"Another claim which is interposed by the administrator as a defense to this action is that the approval of its final account and the order of distribution made thereon by the probate court on April 27, 1896, closed the administration, and operated without more as a discharge of the administrator, so that there was in point of fact no administrator when the suit at bar was instituted. This view evidently was not entertained by the probate court by which the administrator was appointed, since the record discloses that that court, as late as November 21, 1896, entertained a petition on the part of the administrator, and at its instance made an order, founded thereon, by which the decree of April 27, 1896, was amended and corrected in important respects. It is manifest that the probate court acted upon the theory that it had not lost jurisdiction over the administrator, that it was still subject to its orders as to all matters pertaining to the estate, and would remain so until it had fully executed its decree and was formally discharged as administrator by an order made to that effect. And this assumption on which the probate court appears to have acted, in our opinion was entirely correct. The order of distribution that was made on April 27, 1896, required certain acts to be done and performed by the trust company in its capacity as administrator, and until they had been done and performed and the court had approved of the administrator's acts in that behalf, it was clearly subject to the orders of the probate court, and its functions as administrator had not ceased. The view contended for by the administrator is entirely untenable, since it would deny to the probate courts of the state the right to enforce such orders relative to the distribution of estates as they may see fit to *make, leav- [234] ing administrators, when final settlements are approved, in full possession of all the property then in their hands, and at liberty to deal with it as they please, until they are called to account by some other tribunal than that from which they originally derived their authority. We are satisfied, therefore, that under the laws of the state of Minnesota the approval of a final settlement and an order of distribution made thereon does not operate forthwith to discharge the administrator, but that its effect is to give the distributees a right to the possession of the property that has been assigned to them and a right to invoke the power of the probate court as against the administrator to compel obedience to its orders."

The validity of this reasoning depends, of course, upon the correctness of the construction put by the learned court on the state statutes; and, as we have seen, in the cases cited, the supreme court of the state has placed an altogether different meaning on those statutes. They hold that the Probate Code of the state makes no provision for the formal discharge of an administrator, but the necessary legal effect of an order of the probate court, allowing the final account of the administrator and its final decree of distribution, assigning the whole of the estate to the heirs and distributees, is to remove the estate of the deceased from the jurisdiction of the court, and to render the office of administrator, which depends upon such jurisdiction, *functus officio;* and that, after the estate has been so settled and assigned, and while the final decree of distribution remains unreversed and unmodified, the probate court has no jurisdiction to entertain a petition to issue a citation to the administrator requiring him to further account for the property belonging to the estate, which is in his possession, or came into his possession.

Adopting, then, the construction put upon the administration laws of Minnesota by the supreme court of the state, we have only to consider the force of certain other suggestions of the court below, which are, in some measure, independent of those already considered.

It is argued, in the opinion of the circuit court of appeals, that, because § 4523 confers upon the probate court the *power to deter- [235] mine when the final settlement of an estate shall be made, and to allow as much as one year and six months for that purpose, the Federal court must be conceded the same power as respects the claim of a nonresident creditor, to allow it with the eighteen months, which is conferred upon the probate courts of the state. This suggestion is manifestly based on a misconception of the language and legal purport of § 4523. That language is as follows: "The probate court at the time of granting letters testamentary or of administration shall make an order allow-

ing to the executor or administrator a reasonable time, not exceeding one year and six months, for the settlement of the estate."

So that, expressly the time for the settlement of the estate must be fixed by the probate court at the time when the letters of administration are granted, and it is provided, by the following section, that "the probate court may, upon good cause shown by the executor or administrator, extend the time for the settlement of the estate not exceeding one year at a time, unless, in the judgment of the court, a longer time be necessary." [§ 4524.]

These sections have nothing to do with the limitation prescribed for the proof of presentation of the claims of creditors, which is found in § 4509. Moreover, in the present case, the court having fixed the period of six months within which the estate should be settled, the administrator, accordingly, having no good cause to show to the contrary, filed his final account of the settlement of the estate within the time so limited, and the account was allowed and the final decree of distribution made before the institution of the present suit.

Section 4509 provides that, at the time of the granting letters testamentary or of administration, the court shall make an order limiting the time in which creditors may present claims against the deceased for examination and allowance, which shall not be less than six months nor more than one year from the date of such order, and that no claim or demand shall be received after the expiration of the time so limited, unless, for good cause shown, the court may, in its discretion, receive, hear, and allow such claim upon notice to the executor or administrator.

[236] *But it should be observed that such power to extend the time limit must be exercised, on good cause shown, "before final settlement," and, in the present case, no such good cause was shown, either to the probate court or to the circuit court of the United States, before final settlement. It is evident that the discretion to extend the time for proof of claims was to be appealed to for some good reason, that is, reason showing why the claim was not made or the suit brought before the expiration of the time fixed in the original order.

The circuit court of appeals admits that "there is much reason, perhaps, for saying that citizens of other states ought not to be allowed to maintain an action in the Federal court against a local administrator or executor after the expiration of a period when, by the express command of the legislature, no such action can be maintained in the local courts, provided the period fixed by the legislature is reasonable, but the right of a nonresident creditor to bring his action in the national courts ought not to be conditioned or made to depend upon the time that a local court chances to approve a final settlement when the time of such approval rests in its discretion, and is largely a matter of convenience." But the legislation of Minnesota does not make the limit within which claims must be made against the estates of decedents to depend on the exercise of discretionary power by the courts. It does provide that the probate court shall fix a time within which claims must be presented, to wit, not less than six nor more than eighteen months. Between those limits of six and eighteen months the probate court may have power of discretionary action on good cause shown. But having once exercised that power, as in the present case, by fixing the term of probation at six months, any extension of that term could only be had, upon good cause shown, "before final settlement."

We are not called upon by the facts of the present case to determine whether a Federal court might or might not, on good cause shown, extend the time in which a claim might be asserted against a decedent's estate beyond the term previously fixed by the probate court. But it is sufficient to say that, in the present case, no application was made to the Federal court to exercise such a power, either before or after the limitation prescribed *under the state statute had ex- [237] pired. All that was before the circuit court of the United States was an action at law upon a cause of action against a decedent's estate, which, under the laws of the state of Minnesota, could not be maintained in the courts of that state, because barred by the operation of the laws of the state regulating the administration of the estates of deceased persons. Moreover, it is obvious, and it has always been held, that the circuit court cannot, in the trial of an action at law, exercise the power of a court of equity. An application to the Federal court to decree an extension of time beyond the period previously prescribed by the probate court would have to be made by a bill in equity, showing good cause. *Scott* v. *Armstrong*, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148.

Following our previous and repeated decisions, that the courts of the United States, when exercising jurisdiction over executors and administrators of the estates of decedents within a state, are administering the laws of that state, and are bound by the same rules which govern the local tribunals, we conclude, in the present case, that—

*The judgment of the Circuit Court of Appeals must be reversed; the judgment of the Circuit Court is also reversed,* and the cause is remanded to that court, with directions to enter judgment in conformity with the opinion of this court.

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SECURITY TRUST COMPANY, as Administrator of the Estate of Sumner W. Matteson, Deceased, *Petitioner,*

*v.*

WILLIAM H. DENT, as Receiver of the First National Bank of Decorah.

(See S. C. Reporter's ed. 237-239.)

*Certiorari to circuit court of appeals—when writ of error improper.*

A writ of certiorari to the circuit court of appeals may be allowed by the Supreme Court

of the United States under the judiciary act of March 3, 1891, where the cause has been improperly brought up by writ of error; and in such case the copy of the record filed under the writ of error may be directed to be taken and deemed a sufficient return to the certiorari.

[No. 42.]

*Argued April 21, 22, 1902. Decided December 1, 1902.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court of the United States for the District of Minnesota in favor of plaintiff in a suit against an administrator upon a claim against decedent's estate. *Reversed and remanded.*

See same case below, 43 C. C. A. 594, 104 Fed. 380.

The facts are stated in the opinion.

*Mr.* **Edmund S. Durment** argued the cause, and, with *Mr. Albert R. Moore,* filed a brief for petitioner.

*Mr.* **Edward C. Stringer** argued the cause, and, with *Mr. McNeil V. Seymour,* filed a brief for defendant in error.

For contentions of counsel see their briefs as reported in *Security Trust Co.* v. *Black River Nat. Bank, ante,* p. 147.

[238] *Mr. Justice **Shiras** stated the facts and delivered the opinion of the court:

This was an action brought in January, 1897, in the circuit court of the United States for the district of Minnesota, by William H. Dent, as receiver of the First National Bank of Decorah, Iowa, against the Security Trust Company of St. Paul, Minnesota, as administrator of the estate of Sumner W. Matteson, deceased, to recover the sum of $13,535.06, being the amount of principal and interest of certain promissory notes made by said Matteson in his lifetime, and which were the property of the said national bank. The execution and ownership of the notes were not denied, nor that the Security Trust Company had been, on September 3, 1895, duly appointed by the probate court of Ramsey county, Minnesota, administrator of the estate of said Matteson.

The defendant, however, alleged in its answer that the action was not brought until after the expiration of the time limited by the order of the probate court for the filing, examination, and allowance of claims against Matteson's estate, nor until after the examination and allowance of the administrator's final account, whereby, under the laws of the state of Minnesota, the official existence of the defendant company as administrator had ceased, and that, therefore, no action could be maintained against it; and also that the right to a judgment on the notes in suit was, by the laws of Minnesota, forever barred, notwithstanding they were owned by a nonresident of the state, and that recovery was sought in a Federal court.

[239] *The plaintiff obtained a judgment in the circuit court, and that judgment was affirmed by the circuit court of appeals for the eighth circuit. The case is reported in 43 C. C. A. 594, 104 Fed. 380. The cause was then brought here by a writ of error. We think the proper course was to have asked for a writ of certiorari to bring the final judgment of the circuit court of appeals here for review. However, under the powers possessed by us under the judiciary act of March 3, 1891, we now allow a writ of certiorari, and direct that the copy of the record heretofore filed under the writ of error shall be taken and deemed as a sufficient return to the certiorari.

The questions presented are similar to those just decided in the case of *Security Trust Co.* v. *Black River Nat. Bank,* 187 U. S. 211, *ante,* 147, 23 Sup. Ct. Rep. 52, tried in the same court, and where the parties were represented by the same counsel which appear in this one.

Accordingly, for the reasons given in the opinion in that case, *the judgment of the Circuit Court of Appeals is reversed; the judgment of the Circuit Court is likewise reversed,* and the cause is remanded to that court, with directions to enter judgment in accordance with the opinion of this court.

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HENRY B. F. MACFARLAND, John W. Ross, and John Biddle, Commissioners of the District of Columbia, *Appts.,*

*v.*

JESSE BROWN and Rosa Wallach.

(See S. C. Reporter's ed. 239-246.)

*Appeal—final judgment.*

A decree of the court of appeals of the District of Columbia, which reversed an order of the supreme court of that District in condemnation proceedings, and remanded the cause to that court, "that proceedings may be taken and a jury of twelve ordered as directed by the statute," is not a final decree for the purpose of an appeal to the Supreme Court of the United States.

[No. 331.]

*Argued November 5, 1902. Decided December 1, 1902.*

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed an order of the Supreme Court of the District and remanded the cause for further proceedings. *Dismissed.*

See same case below, 30 Wash. L. Rep. 235.

Statement by Mr. Justice **Shiras:**

*Under the act of Congress entitled "An [240] Act for the Extension of Pennsylvania Avenue Southeast, and for Other Purposes," approved March 3, 1899 (30 Stat. at L.

NOTE.—*As to what judgments or decrees are final for purposes of review*—see notes to Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; and Gibbons v. Ogden, 5 L. ed. U. S. 302.

1381, chap. 461), the commissioners of the District of Columbia were by the terms of § 5 of said act "authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet." The provisions of said § 5 are as follows:

"Sec. 5. That within ninety days after the approval of this act the commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute by a petition in the supreme court of the District of Columbia, sitting as a district court, a proceeding to condemn the land necessary for the extension and widening of Sherman avenue from Florida avenue to Whitney avenue with the uniform width of one hundred feet.

"That of the amount found due and awarded for damages for and in respect of the land condenmed under this act for the extension and widening of said Sherman avenue not less than one half thereof shall be assessed by said jury in said proceedings against those pieces or parcels of ground abutting on both sides of Sherman avenue, and the extension thereof as herein provided, to a distance of three hundred feet from the building lines, on the east and west sides of Sherman avenue as widened and extended: *Provided*, That no assessment shall be made against those pieces or parcels of ground out of which land has already been dedicated to the District of Columbia for the purpose of widening Sherman avenue as herein provided for."

Under the authority thereby conferred a petition was filed by the commissioners of the District of Columbia in the supreme [241] court *of the District of Columbia, sitting as a district court, upon the 31st day of May, 1899, being No. 555 on the district court docket, praying that the court direct the marshal of the District of Columbia to summon a jury of seven judicious, disinterested men, not related to any party interested, to be and appear on the premises on a day specified, to assess the damages, if any, which each owner of land through which Sherman avenue is proposed to be extended and widened, as aforesaid, may sustain by reason thereof, and that such other and further orders might be made and proceedings had as were contemplated by said act of Congress and by chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, to the end that a permanent right of way for the public over the said lands might be obtained and secured for the aforesaid extension and widening of Sherman avenue. [D. C. Rev. Stat. p. 29.]

Upon this petition the said court on the 16th day of September, 1899, passed an order requiring interested parties to appear in said court on or before the 2d day of October, 1899, and show cause why the prayer of said petition should not be granted, and why the proceedings directed in said act of Congress should not be taken. Pursuant to such order, the jury was summoned and impaneled by the marshal, and upon the 7th day of February, 1900, were sworn according to law, and thereafter the said jury proceeded according to the provisions of chapter 11 of the Revised Statutes of the United States relating to the District of Columbia, and having been upon the premises, in accordance with said statute, on the 1st day of May, A. D. 1900, made out their written verdict, which was signed by a majority of the said jurors. Upon the 9th day of May, 1900, the same was filed in the said court under the act of March 3, 1899.

Thereafter, on the 3d day of July, 1901, the trial court passed an order nisi confirming said verdict, and requiring all parties to appear and show cause on or before July 22 why such verdict should not be finally confirmed by the court. Upon July 22, 1901, the appellees, in response to said order, filed their exceptions to said verdict.

The court, having heard arguments upon the said exceptions, *on October 2, 1901, [242] passed an order overruling the said exceptions and finally ratifying and confirming in all respects the said verdict.

Thereupon the appellees appealed the case to the court of appeals. The court of appeals reversed the trial court, from which decision the commissioners of the District of Columbia have appealed to this court.

*Messrs.* **Andrew B. Duvall** and **Arthur H. O'Connor** argued the cause, and, with *Mr. Edward H. Thomas*, filed a brief for appellants.

The court declined to hear *Mr.* **Samuel Maddox** for appellees.

Mr. Justice **Shiras** delivered the opinion of the court:

Whether those provisions of § 263 of the Revised Statutes of the District of Columbia which provide for a second jury are applicable to this proceeding under the act of March 3, 1899; whether, if entitled to a second jury, the appellees waived such right by filing, in the supreme court of the district, exceptions to the verdict and award of the first jury, and by appealing from the order of that court, overruling their exceptions and affirming said verdict and award, to the court of appeals of the District; and whether it was the duty of the commissioners, and not the duty of the parties claiming to have been dissatisfied with the verdict, to demand a second jury, if a right to such jury exists,—are important questions, and we can well understand why those who are intrusted with the administration of the law are anxious to have them speedily and finally determined.

But we are of opinion that the case is not before us in a condition to make it our duty to deal with those questions. The decree of the court of appeals, reversing the order of the supreme court, and remanding the cause to that court, "that proceedings may be taken and a jury of twelve ordered as directed by the statute," is not a final

decree from which an appeal will lie to this court.

[243] *It is contended by the learned counsel of the appellants that the case is within the rulings of this court in *Phillips* v. *Negley*, 117 U. S. 665, 29 L. ed. 1013, 6 Sup. Ct. Rep. 201, and in *Humphries* v. *District of Columbia*, 174 U. S. 190, 43 L. ed. 944, 19 Sup. Ct. Rep. 637. It is true that in the first of those cases this court entertained a writ of error to the supreme court of the District, and reversed its judgment. But, in disposing of the question raised, whether the judgment of the court below was or was not a final judgment, this court said:

"Interpreting the judgment of the general term by the opinion of the learned judge who spoke for the court, we must infer that it was intended to dismiss the appeal for want of jurisdiction to entertain it, on the ground that the order of the special term, vacating its own judgment, rendered at a previous term, was not only within the power of that court, but was so purely discretionary that it was not reviewable in an appellate court. The same consideration is urged upon us as a ground for dismissing the present writ of error for want of jurisdiction in this court, it being alleged that the order of the supreme court of the District at special term is not only within the discretion of that court, but that, as it merely vacates a judgment for the purpose of a new trial upon the merits of the original action, it is not a final judgment, and therefore not reviewable on writ of error. If, properly considered, the order in question was an order in the cause, which the court had power to make at the term when it was made, the consequence may be admitted, that no appellate tribunal has jurisdiction to question its propriety; for, if it had the power to make it, and it was a power limited only by the discretion of the court making it, as in other cases of orders setting aside judgments at the same term at which they were rendered, and granting new trials, there would be nothing left for the jurisdiction of an appellate court to act upon. The vacating of a judgment and granting a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If, on the other hand, the order was made without jurisdiction on the part of the court making it, then it is a proceeding which must be the subject of review by an appellate court. The question of the jurisdiction of this [244] court to entertain *the present writ of error, therefore, necessarily involves the jurisdiction of the supreme court of the District, both at special and general term, and the nature and effect of the order brought into review, so that the question of our jurisdiction is necessarily included in the question of the validity of the proceeding itself. The legal proposition involved in the judgment complained of, and necessary to maintain it, is that the supreme court of this District at special term has the same discretionary power over its judgments rendered at a previous term of the court, without any motion or other proceeding to that end made or taken at that term, to set them aside and grant new trials of the actions in which they were rendered, which it has over judgments, when such proceedings are taken during the term at which they were rendered; and that, this being true, the proceeding and order of the court, in the exercise of this jurisdiction and discretion, cannot be reviewed on appeal or writ of error."

The court proceeded to consider the question at length, and having determined that the supreme court of the District had no discretionary power to set aside judgments obtained at a previous term, where no proceeding for that purpose had been taken at that term, held that the court had acted without jurisdiction, and that its judgment was void and reviewable on error.

The distinction between that case and the present one is, therefore, seen in the fact that, in the one, the supreme court of the District acted without jurisdiction, and in the other the court of appeals was in the regular exercise of its appellate power in reversing the judgment of the supreme court of the District and awarding further proceedings. Such action in the present case may have been erroneous, but if so we cannot correct it until brought before us by an appeal from a final judgment. The further proceedings may possibly reach such a result that neither party will desire an appeal.

In *Hume* v. *Bowie*, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582, where this court dismissed a writ of error to the supreme court of the District of Columbia upon the ground that the judgment brought here by the writ was not a final judgment, the case of *Phillips* v. *Negley* *was considered, and the distinction between a judgment ordering a new trial when the court has jurisdiction to make such an order, and a judgment where such jurisdiction does not exist, was pointed out by the chief justice, and where it was held that, in the former case, where jurisdiction existed, a judgment setting aside the judgment of the trial court, and awarding a new trial, is not a final judgment reviewable on error, and in the latter case, where jurisdiction had ceased to exist, by reason of lapse of time, a judgment awarding a new trial is without jurisdiction, would be an order in a new proceeding, and, in that view, final and reviewable. [245]

The other case relied on, *Humphries* v. *District of Columbia*, was a case where, in the supreme court of the District, a verdict had been signed by all twelve of the jurors, but one of them was disabled by illness from being present in court when the verdict was delivered. Upon this verdict a judgment was entered. Proceedings in error were taken, but were dismissed by the court of appeals on account of a failure to have the bill of exceptions prepared in time. Thereafter, and at a succeeding term, the defendant, against whom judgment had been entered, filed a motion to vacate the judgment on the ground that there was no valid verdict, which motion was overruled.

On appeal to the court of appeals this decision was reversed and the case remanded, with instructions to vacate the judgment, to set aside the verdict and award a new trial. This ruling was based on the proposition that the verdict was an absolute nullity, and therefore the judgment resting upon it void, and one which could be set aside at any subsequent term. This view of the nature of the verdict was not approved by this court, which held that the defect or irregularity in the rendering of the verdict was mere matter of error, and not one which affected the jurisdiction.

In the present case no attack is made on the jurisdiction of either the supreme court of the District or of the court of appeals. That the decree of the latter court was not meant to be final is shown by its language, which does not definitely adjudge the whole subject-matter, but anticipates further action of the supreme court. The litigation [246] of the parties on the *merits of the case has not been terminated. "The rule is well settled and of long standing that a judgment or decree, to be final, within the meaning of that term, as used in the acts of Congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered." *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15.

We do not overlook the fact that this statement of the law was made in a case where the appeal was taken directly from the decree of the trial court; but we think the principle on which the rule rests is applicable where the appeal is from the decree of an intermediate appellate court.

We are unwilling to make any departure from the rule that demands finality in a decree to render it subject to review on appeal. It would be very unfortunate if mere errors in the administration of statutes, of this character, not going to their validity, or to the jurisdiction of the courts below, could be brought here, from time to time, in advance of a final disposition of the controversy.

*The appeal is dismissed.*

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HENRY B. F. MACFARLAND, John W. Ross, and John Biddle, Commissioners of the District of Columbia, *Appts.*,

*v.*

EUGENE BYRNES *et al.*

(See S. C. Reporter's ed. 246-248.)

*Appeal—final judgment.*

A decree of the court of appeals of the District of Columbia, which reverses so much of an order of the supreme court of that District as is appealed from, and remands the cause to that court, with directions to vacate that portion of the order, and for such further proceedings in the cause according to law as may be right and just, is not final so as to be within the appellate jurisdiction of the Supreme Court of the United States.

[No. 332.]

*Argued November 5, 1902. Decided December 1, 1902.*

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed in part an order of the Supreme Court of the District, and remanded the cause for further proceedings. *Dismissed.*

See same case below, 30 Wash. L. Rep. 237.

The facts are stated in the opinion.

*Messrs.* **Andrew B. Duvall** and **Arthur H. O'Connor** argued the cause, and, with *Mr. Edward H. Thomas*, filed a brief for appellants.

The court declined to hear *Mr.* **Leo Simmons** for appellees.

*Mr. Justice **Shiras** delivered the opinion [247] of the court:

This is an appeal from a decree of the court of appeals of the District of Columbia, reversing a decree of the supreme court of the District; and there is a motion to dismiss the appeal for the alleged reason that the decree appealed from was not final but contemplated further proceedings in the supreme court.

The following paragraph from the opinion of the court of appeals sufficiently discloses the nature of its decree:

"There is, however, a third consideration, which we cannot ignore in the disposition of this case. By the act of Congress of June 6, 1900, already mentioned, it was provided that, if for any reason the assessments for benefits should be declared void, the commissioners should make application to the court for a reassessment. This evidently has no reference to the invalidity consequent upon judicial decision of the unconstitutionality of the act of Congress of March 3, 1899, for there could then, of course, be no lawful reassessment, since the foundation for the whole proceeding would fail. The holding of this court that the act of March 3, 1899, was unconstitutional did not, therefore, avail to set in motion the instrumentalities of the act of June 6, 1900, for reassessment. And when the Supreme Court of the United States held the act of 1899 to be a constitutional and valid exercise of legislative authority all reason for reassessment under the act of 1900 vanished. Nevertheless, by the discordant tenor of judicial decision the appellees were induced to forego a right which should now be restored to them, that of summoning a second jury of assessment un-

NOTE.—*As to what judgments or decrees are final for purposes of review*—see notes to Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; and Gibbons v. Ogden, 5 L. ed. U. S. 302.

der chapter 11 of the Revised Statutes of the United States for the District of Columbia, under which these proceedings [248] were instituted and *have been prosecuted, if they now desire to avail themselves of that right. They may prefer to forego that right; and they may prefer no longer to contest the propriety and justice of the assessments. If they so elect, the court will, of course, enter the proper order or decree in the cause. If, on the other hand, they elect further to contest the matter according to law, they should have the opportunity to do so. This court, therefore, should not now direct any final order or decree to be entered by the court below in the premises.

"The order appealed from, and only so far as appealed from, will be reversed; and the cause will be remanded to the supreme court of the District of Columbia, with directions to vacate such part of said order, and for such further proceedings in the cause according to law as may be right and just."

It thus plainly appears that the decree appealed from was neither in form nor intention a final one. Accordingly, and for the reasons given in the case of *Macfarland* v. *Brown*, 187 U. S. 239, *ante*, 159, 23 Sup. Ct. Rep. 107, recently decided, and where a similar question was considered, the motion to dismiss must be sustained.

*The appeal is dismissed.*

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ANTON MENCKE, *Petitioner*,
*v.*
A CARGO OF JAVA SUGAR, ex-ship "Benlarig;" James N. Jarvie *et al.*, *Claimants.*

(See S. C. Reporter's ed. 248-257.)

*Shipping—deduction from freight—expense of lighterage—safe port.*

The cost of lightering a vessel's cargo to the discharging berth designated by the assigns of the charterers under the charter party, which the vessel was prevented by an overhead bridge from reaching without cutting off or removing her steel masts, cannot be deducted from the freight, where the charter party required the vessel to discharge "always afloat" at a "safe port," or "so near the port of discharge as she may safely get," and provided that the anchorage directed must be the most convenient, and that if lighterage was necessary, either to reach the port or to deliver the cargo, the expense thereof was chargeable to the receivers of the goods, regardless of any local port custom.

[No. 90.]

*Argued November 13, 1902. Decided December 1, 1902.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the District Court for the District of New York in favor of the libellant in an action to recover an unpaid balance of freight, and remanded the cause, with directions to dismiss the libel. *Reversed*, and the decree of the District Court affirmed.

See same case below, 47 C. C. A. 222, 108 Fed. 89.

Statement by Mr. Justice **Shiras:**

*This action was begun by the filing, on [249] May 27, 1899, of a libel in the United States district court for the eastern district of New York, by Anton Mencke, the master of the British ship Benlarig, against a cargo of sugar that had just been delivered from the vessel, to recover an unpaid balance of freight due for conveying the sugar from Java to New York. The receivers of the cargo, the claimants in the action, had deducted from the freight the cost of lightering the cargo from the dock where it had been discharged to the claimants' refinery, which was above the Brooklyn Bridge. The ship had been ordered by the claimants to proceed directly to the refinery, but was unable to do so because the height of her masts was such that she could not pass under the bridge.

The district court, per Judge Thomas, entered a decree in favor of the libellant January 18, 1900. 99 Fed. 298. The claimants appealed to the United States circuit court of appeals for the second circuit, and that court on April 16, 1901, reversed the decree of the district court, and remanded the cause, with directions to dismiss the libel. 47 C. C. A. 222, 108 Fed. 89.

On May 13, 1901, a writ of certiorari was granted, and the cause was brought to this court. 181 U. S. 620, 45 L. ed. 1031, 22 Sup. Ct. Rep. 946.

*Mr.* **J. Parker Kirlin** argued the cause, and, with *Mr. Charles R. Hickox* and *Messrs. Convers & Kirlin*, filed a brief for petitioner:

So far as the conditions and exceptions of the charter are pertinent to the selection of the place of discharge, the claimants, as purchasers of the bills of lading and the charter party, are to be regarded in no other or better position than if they had been charterers originally, instead of assignees with notice.

Carver, Carriage by Sea, 3d ed. p. 160; *Pollard* v. *Vinton*, 105 U. S. 7, 26 L. ed. 998; *The Asphodel*, 53 Fed. 835; *The Chadwicke*, 29 Fed. 521.

The charterer will be presumed to know the size and characteristics of the vessel.

*Belmont* v. *Tyson*, 3 Blatchf. 530, Fed. Cas. No. 1,281.

The words "in a customary place and manner" qualify the words, "in such dock," and are evidently intended to apply to cases where, as in England and Holland, docks are inclosed by tide gates, and there are many berths in the same dock.

*Dall'Orso* v. *Mason*, 3 Sc. Sess. Cas. 4th Series, 419; *Dahl* v. *Nelson*, L. R. 6 App.

Cas. 38; *Pyman Bros.* v. *Dreyfus Bros.* L. R. 24 Q. B. Div. 152; Carver, Carriage by Sea, 3d ed. § 624 b.

A vessel is not bound to lighter cargo in order to get to the port or place of discharge, nor to enter a port to load if she would be compelled to lighter cargo in order to leave.

*The Alhambra* (1881) L. R. 6 Prob. Div. 68; *Reynolds* v. *Tomlinson* [1896] 1 Q. B. 586; *Shield* v. *Wilkins*, 5 Exch. 304; *The Nifa* [1892] Prob. 411; *The Gazelle*, 128 U. S. 474, 32 L. ed. 496, 9 Sup. Ct. Rep. 139; *Hayton* v. *Irwin*, 4 Asp. Mar. L. Cas. 212.

The terms of the contract require that the place designated for her discharge must be a safe one for her, and one where she may discharge always afloat.

*Atkins* v. *Fibre Disintegrating Co.* 2 Ben. 381, Fed. Cas. No. 601.

The Arbuckle dock would not have been less accessible if there had been a bar at a considerable distance from it, causing too shallow water for the vessel.

*The Gazelle*, 128 U. S. 474, 32 L. ed. 496, 9 Sup. Ct. Rep. 139.

Where, by a charter party, a ship is to be brought to a particular dock, or as near thereto as she may safely get, and she is prevented from getting to her primary destination by any permanent obstacle other than an accident of navigation, the shipowner is entitled to damages for the detention by reason of the charterers' refusal to receive the cargo at the alternative place of delivery, although the obstacle which prevented her from getting into the docks (*viz.*, their crowded state), was not an obstacle endangering her safety.

*Williams* v. *Theobald*, 8 Sawy. 445, 15 Fed. 465.

An obstruction in the air, which bars access to the place designated for the discharge, quite as effectively prevents it from being safe for the ship as if the obstruction were a sand bar or any other obstacle below the water.

*Goodbody & Co.* v. *Balfour, W. & Co.* 8 Asp. Mar. L. Cas. 503.

The expense of lighterage was one that the consignee stipulated to pay.

*Carr* v. *Austin & N. W. R. Co.* 4 Woods, 327, 14 Fed. 419; *The Nifa* [1892] Prob. 411.

In face of explicit provisions, no evidence of a custom for the ship to pay lighterage would be admissible.

*The Nifa* [1892] Prob. 411, 7 Asp. Mar. L. Cas. 324; *Holman* v. *Wade*, London Times, May 11, 1877; *The Nifa*, 7 Asp. Mar. L. Cas. 325; *Hayton* v. *Irwin*, L. R. 5 C. P. Div. 130, 4 Asp. Mar. L. Cas. 212; *Lishman* v. *Christie*, 6 Asp. Mar. L. Cas. 186, L. R. 19 Q. B. Div. 333; *Brenda S. S. Co.* v. *Green* [1900] 1 Q. B. 518.

*Mr.* **Wilhelmus Mynderse** argued the cause and filed a brief for respondent:

A person failing to perform an impossible condition precedent is not entitled to sue upon a contract, although he may sometimes be granted a *quantum meruit* in an action of quasi-contract.

*Paradine* v. *Jane*, Aleyn, 27; *Jacobs* v. *Credit Lyonnais*, L. R. 12 Q. B. Div. 589; *Cutter* v. *Powell*, 6 T. R. 320; *Hopper* v. *Burness*, L. R. 1 C. P. Div. 137.

By the words "customary place" was meant a place usual for vessels of like size and like cargoes, having the usual attributes which strangers to a vessel may assume she possesses, or are charged with knowing that she possesses.

*Devato* v. *823 Barrels of Plumbago*, 20 Fed. 510; *The Port Adelaide*, 38 Fed. 753; *The Mascotte*, 48 Fed. 119, 2 C. C. A. 400, 1 U. S. App. 253, 51 Fed. 606; *The Boston*, 1 Low. Dec. 464, Fed. Cas. No. 1,671.

The vender of an article sold without opportunity of inspection, for a known purpose, warrants the article to be reasonably adapted for that purpose.

*Jones* v. *Just*, L. R. 3 Q. B. 196; *Dushane* v. *Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696.

If a shipowner charters his vessel for a named port without qualification of any kind, he warrants that her cargo shall not be prevented from reaching that port by reason of the character or construction of the vessel; for his undertaking is to carry the cargo to the designated destination "unless prevented by the dangers of the seas or other unavoidable casualties."

*Hunter* v. *Prinsep*, 10 East, 378.

Even where by the charter he reserves the alternative, "or so near thereto as the vessel can safely get," he is not excused by the draft of his vessel, or by any other circumstance of her construction, from taking the goods to within ordinary lighterage distance of the destination, *i. e.*, within the ambit of the port.

*Schilizzi* v. *Derry*, 4 El. & Bl. 873; *Metcalfe* v. *Britannia Iron Works Co.* L. R. 2 Q. B. Div. 423; *Dahl* v. *Nelson*, L. R. 6 App. Cas. 38.

If he charters his vessel for a particular country without naming the port, the character of his vessel will not excuse him from delivering the cargo in a port where such cargoes are usually and generally delivered.

*Smith* v. *Davenport*, 34 Me. 520; 1 Parsons, Shipping, 222.

Nor will it excuse him where the port is named, but no particular district therein is excepted, from delivering the cargo in the district where such cargoes are usually and customarily discharged.

*The Port Adelaide*, 38 Fed. 753; *The Mascotte*, 48 Fed. 119, 2 C. C. A. 400, 1 U. S. App. 253, 51 Fed. 606.

The shipowners are in default under the literal requirements of the charter party.

*Hopper* v. *Burness*, L. R. 1 C. P. Div. 137.

*Mr. Justice **Shiras** delivered the opinion [250] of the court:

Concerning the facts of the case there is no controversy.

The ship Benlarig was chartered under a charter party dated London, July 1, 1898, between Watson Brothers, her owners, and Erdmann & Sielcken, merchants of Batavia.

The vessel duly loaded a full cargo of

sugar at Java, and then proceeded to Barbadoes. There she received orders to proceed directly to New York. This she did, arriving on or about April 14, 1899. Before or about the time of the arrival of the Benlarig at the port of New York the cargo of sugar was sold and transferred, with the accompanying bills of lading, by the owners and consignees thereof, to Arbuckle Brothers, sugar refiners. The agents of the vessel gave notice to Arbuckle Brothers, on April 15, of the arrival of the vessel, and asked for orders for a discharging berth, mentioning that the vessel's mast, being in one piece, would not admit of her going under the Brooklyn Bridge. Arbuckle Brothers ordered the vessel to discharge at their refinery at the foot of Pearl street above the bridge. Subsequently it was agreed that the cargo should be discharged at the West Central pier, Atlantic dock, below the bridge, into lighters provided by Arbuckle Brothers, without prejudice to the rights of either party in respect to the payment of the cost of lighterage. This cost amounted to $1,466.12, which was paid by Arbuckle Brothers and deducted by them from the freight; and this suit is to recover the balance of the freight so deducted.

The clear height of the highest span of the Brooklyn Bridge above mean high water is 135 feet. At dead low water there were not more than 140 feet in the clear at the highest point.

The Benlarig has three steel masts, built up solid from the bottom to the top, and constructed of cylindrical steel plates, riveted together with internal angle iron braces. There was no way of taking any part of the masts down. The mainmast was 139 feet 10 inches above the deck; the [251] *foremast 136 feet 8 inches above the deck; and the mizzenmast was 129 feet above the deck; and the deck was from 7 to 8 feet above the load line of the vessel. The ship, therefore, required 145 feet of clear space in order to pass underneath the bridge. This was more than 5 feet in the clear of the highest point of the bridge when the tide was at the lowest point of the ebb. An additional margin of several feet would have to be allowed for safe passageway; and at the lowest water the Benlarig could not pass under the bridge without cutting off some 8 to 10 feet of her steel masts.

The charter party provided that the Benlarig should load at Java and should proceed to Barbadoes, "thence to Queenstown or Falmouth (as directed by charterers or their agents), for orders to discharge, always afloat, either at a safe port in the United Kingdom or on the continent of Europe between Havre and Hamburg (both included), Rouen excepted, or at option of charterers to order vessel from Barbadoes to proceed to Delaware breakwater for orders to discharge at New York or Boston or Philadelphia or Baltimore, or so near the port of discharge as she may safely get and deliver the same, always afloat, in a customary place and manner, in such dock, as directed by charterers, agreeably to bills of lading." Section 4 of the charter party further provided that "all goods to be brought to and taken from alongside of the ship, always afloat, at the said charterers' risk and expense, who may direct the same at the most convenient anchorage; lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding."

Four bills of lading were issued at the ports of loading, reciting the "shipment of the sugar, and containing the identical conditions that the sugar was to be delivered in the like order and condition at the port of discharge as per charter party dated London, 1st July, 1898 (the dangers of the sea excepted), unto Messrs. Winter & Smillie as agents, or to their assigns, he or they paying freight for the said sugar as per charter party. *General average, if any, to [252] be settled according to York-Antwerp rules, 1890. All other conditions and exceptions, negligence and Harter act clauses included, as per charter party above referred to, with average accustomed."

The positions of the respective parties may be briefly stated thus:

The libellant's contention is that, under clause 1 of the charter party, the right of the charterers or their assigns to select the dock for the discharge of cargo was subject to the limitation that such dock must be one that was safe and suitable for the ship as well as for the cargo, and one to which the ship could proceed without hindrance by permanent obstacles, which she could not pass without being mutilated, crippled, or dismantled; and that, under clause 4 of the charter party, any lighterage necessary to deliver the cargo at the port of destination must be paid by the charterers.

The claimants contend that the discharging berth to which the Benlarig was ordered was safe for vessels of her class, and a customary place of discharge; and she should have proceeded there, or should have delivered her cargo there otherwise at her own expense; and that the lighterage clause of the charter party does not relieve the owners of the ship from their obligation to proceed to a designated dock above the bridge, and to there deliver the cargo.

Another suggestion made on behalf of the claimants, namely, that the Benlarig, though unable to pass under the bridge, might have reached the Arbuckle dock by sailing around Long Island, and then through the sound and Hell Gate to Brooklyn, should be first disposed of. It is, perhaps, sufficient to say that no such allegation appears in the claimants' answer. Nor did the claimants' assignments of error to the judgment of the district court raise any such question. Neither did the claimants, during the negotiations, make any such suggestion. Moreover, the district court and the circuit court of appeals agreed in the statement that "all shipping experts called by the claimants testified that they never had heard of a ship from Java pursuing that course. It may therefore be concluded that such alternative was contrary

[253] to the expectations and understanding *of all parties to this contract, or of any other contract for the carriage of sugar from Java."

The question that remains is, upon which of the parties the expense of the lighterage should fall. The answer, we think, must be found in a proper construction of the contract between them.

It cannot be fairly claimed under the evidence that the expense that would have been occasioned to the owners of the vessel, if they had removed or taken down the mast, would have been trifling or inconsiderable. There was some evidence that, in a few instances, the topmasts of vessels had been taken down in order to permit them to pass under the bridge, and that the expense in each case was small. But those were cases of vessels with wooden masts, so constructed as to permit the topmast to be lowered. The Benlarig's masts were wholly of steel, and the testimony of her master was that if it became absolutely necessary to make the vessel pass beneath some obstruction lower than the top of the masts, the masts would either have to be cut or removed wholly out of the ship. What cost would have been caused by cutting or removing the steel mast does not appear. But the courts below concurred in regarding the mutilation or destruction of the ship's masts as a serious affair.

In such a condition of affairs we think that resort to lighterage was natural and reasonable and within the obvious and fair import of the terms of the charter party. The clause, which is claimed to give the charterers or their assigns the right to appoint the dock in which to discharge cargo contains conditions that the port must be safe, and that the vessel must discharge, always afloat, either at a safe port or so near the port of discharge as she can safely get. It would not be a just exercise of the right to select a dock in getting to which the vessel could not always be afloat or to which she could not safely get. A ship could not be said to be afloat, whether the obstacle encountered was a shoal or bar in the port over which she could not proceed, or a bridge under or through which she could not pass; nor could she be said to have safely reached a dock if required to mutilate her hull or her permanent masts.

[254] *Any doubt that might be felt as to this construction of the clause will be relieved by the express language of § 4: "All goods to be brought to and taken from alongside of the ship, always afloat, at the said charterers' risk and expense, who may direct the same to the most convenient anchorage: lighterage, if any, to reach the port of destination, or deliver the cargo at port of destination, remains for account of receivers, any custom of the port to the contrary notwithstanding." Here, again, is recognized the right of the ship to be "always afloat." The anchorage directed must be the "most convenient;" which must mean convenient as well for the ship as for the consignees; and, finally, if lighterage is necessary, either to reach the port or to deliver the cargo, the expense thereof is chargeable to the receivers of the goods, regardless of any local port customs.

We do not feel constrained to go into an extended consideration of the authorities cited in the briefs of counsel, but shall refer to two or three cases which, in some of their features, seem to be applicable.

The case of *The Alhambra*, L. R. 6 Prob. Div. 68, was where the charter party provided that the vessel should go "to a safe port in the United Kingdom, . . . or as near thereunto as she could safely get, and always lay and discharge afloat. . . . Lighterage (if any) always at the risk and expense of the cargo."

The charterers gave orders to the vessel to proceed to Lowestoft and there discharge the cargo. The average high water in that harbor was about 16 feet, and average low water about 11 feet. The master objected to discharging in Lowestoft harbor, notwithstanding that the purchasers of the cargo gave him notice that they were prepared at their own expense to lighter the vessel in Lowestoft roads sufficiently to enable her to lie always afloat in Lowestoft harbor, if necessary, should her draft of water so require. The vessel went to Harwich as the nearest safe port and there discharged the cargo. The owners of the cargo brought suit for breach of contract, and offered evidence to show that it was the custom of vessels which were too deep to enter the port of Lowestoft to discharge *a portion of their [255] cargo in the roads outside, and that it could be done with reasonable safety. The cargo owners recovered a judgment, but the court of appeals reversed, that court holding that Lowestoft was not a safe port for the vessel within the meaning of the charter party, and that the custom shown by the charterers was inadmissible.

This case was cited with approval by this court in *The Gazelle*, 128 U. S. 474, 32 L. ed. 496, 9 Sup. Ct. Rep. 139, where the charter party provided that the vessel should proceed from Baltimore "to a safe, direct Norwegian or Danish port, as ordered on signing bills of lading, or as near thereunto as she can safely get, and always lie and discharge afloat."

The charterers tendered to the master for signature bills of lading, ordering the vessel to the port of Aalborg, in Denmark, as the port of discharge, "to be landed at Aalborg, or as near thereto as the vessel can safely get." The master refused to sign the bills of lading for the reason that Aalborg was not a safe port. Aalborg is situated in Denmark on the Limiford inlet, about 17 miles from its mouth. Owing to a bar at the mouth of the inlet, there was a depth of water of only 10 or 11 feet. The draft of the Gazelle loaded was about 16 feet. The only place of anchorage for a vessel that cannot cross the bar is off the mouth of the inlet, where vessels were accustomed to discharge into lighters. Thereafter the master filed a libel for demurrage in the district court of the United States for the district of Maryland, whose judgment, sustaining the libel and dismissing the cross-

libel of the charterers, was affirmed by the circuit court. This court said, through Mr. Justice Gray:

"By the express terms of the charter party the charterers were bound to order the vessel 'to a safe, direct Norwegian or Danish port, or as near thereunto as she can safely get and always lay and discharge afloat.' The clear meaning of this is that she must be ordered to a port which she can safely enter with her cargo, or which, at least, has a safe anchorage outside, where she can lie and discharge afloat. *Dahl* v. *Nelson*, L. R. 6 App. Cas. 38; *The Alhambra*, L. R. 6 Prob. Div. 68. The charterers insisted upon ordering her to the port of Aalborg. The circuit court has [256] *found that Aalborg is in a fiord or inlet, having a bar across its mouth, which it was impossible for the Gazelle to pass, either in ballast or with cargo; and that the only anchorage outside the bar is not a reasonably safe anchorage, nor a place where it is reasonably safe for a vessel to lie and discharge."

The charterers offered evidence to show that by the custom of trade between Baltimore and the Atlantic ports and the ports of Norway and Denmark, Aalborg was recognized as being, and understood to be, a safe, direct port of Denmark, within the meaning of the charter party. In respect to which this court said: "Evidence of a custom to consider as safe a particular port, which in fact is not reasonably safe, would directly contradict the charter party, and would, therefore, be incompetent as matter of law."

In *Re An Arbitration between Goodbody and Balfour, Williamson, & Co.* (4 Com. Cas. 119) the facts were that a cargo of wheat per the ship Vanduara had been sold in a contract containing the clause "shipped . . . per Vanduara, sailed, or about to sail, as per bills of lading dated, etc., . . . to any safe port in the United Kingdom of Great Britain and Ireland, or to Havre, or to Dunkirk, or to Antwerp, calling at Queenstown, Falmouth, or Plymouth, for orders as per charter party, vessel to discharge afloat." The vendees declined to take the papers on the ground that by the bills of lading the cargo was stated to have been shipped upon the Vanduara "to discharge at a safe port in the United Kingdom, Manchester excepted," and that such bills of lading did not comply with the contract for delivery in any safe port in the United Kingdom. It was found in the special case stated for the decision of the court that "the Vanduara when loaded with the said cargo would have been unable to go up the Manchester ship canal to the Manchester docks, because the heads of her lower main and mizzenmasts would have been higher than the limit fixed by the canal company's regulations for passing under the Runcorn bridge."

The vendors argued that the addition to the bills of lading of the words, "Manchester excepted," was immaterial, inasmuch as Manchester, in any event, was not a "safe [257] port" in the sense *of the bills of lading, as the ship could not reach it without cutting off or taking down her masts; and of that opinion were the divisional court and the court of appeal (5 Com. Cas. 59), A. L. Smith, L. J., in the latter court saying "it is abundantly proved that Manchester, taken by itself, was not a safe port for this vessel, because it was found as a fact . . . that it would have been necessary to dismantle the ship to enable her to get under Runcorn bridge, which is the first bridge vessels going up the canal to Manchester have to pass." Collins, L. J., was of the same opinion. And Vaughn Williams, L. J., said: "On the findings of the last award it is perfectly plain that in a commercial sense the port of Manchester was not a safe port for the Vanduara to go to."

This case is pertinent as holding that an overhead bridge which prevents access to the place designated for the discharge quite as effectively renders it unsafe for the ship as a sandbar or other obstacle under the water.

The view of the circuit court of appeals, that the construction put upon the charter party by the district court was within its letter but not within its spirit, because "an application to novel circumstances of clauses intended for a different set of circumstances," we cannot accept. We are unable to see anything in the undisputed facts of the case that warrants any other construction of the language employed than that suggested by its ordinary meaning.

*The decree of the Court of Appeals is reversed, and the decree of the District Court is affirmed, with interest thereon from the time of its entry.*

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*NORTHERN CENTRAL RAILWAY COMPANY, *Plff. in Err.*, [258]

*v.*

STATE OF MARYLAND.

(See S. C. Reporter's ed. 258-270.)

*Contracts—reserved power to alter—amendment of corporate charter.*

A state statute fixing the rate of taxation on the gross receipts of a railroad company, enacted for the purpose of settling by agreement a pending controversy as to a charter right of the company to exemption from taxation, must, notwithstanding its contractual form, be regarded as an amendment to such charter, and therefore subject to repeal by reason of a provision of the state Constitution in force at the time of its passage, reserving the power to repeal, alter, or amend corporate charters.

[No. 43.]

*Argued October 16, 1902. Decided December 1, 1902.*

IN ERROR to the Court of Appeals of the State of Maryland to review a judgment

NOTE.—*As to reserved power to alter, amend, or repeal corporate charters*—see note to Greenwood v. Union Freight R. Co. 26 L. ed. U. S. 961.

which affirmed a judgment of the trial court denying a claim of a railroad company to a contract exemption from a tax imposed by a statute of the state. *Affirmed.*

See same case below, 90 Md. 449, 45 Atl. 465, 31 Atl. 1108, 93 Md. 737.

Statement by Mr. Justice **White:**

The Baltimore & Susquehanna Railroad Company was chartered by an act of the legislature of Maryland in 1827, with authority to construct a railroad from the city of Baltimore to the Susquehanna river. The charter contained a provision declaring that the "shares of the capital stock of the company should be deemed and considered personal estate, and should be exempt from the imposition of any tax or burden." It was conceded by both parties in the discussion at bar that the effect of this provision, as interpreted by the settled adjudications of the state of Maryland, was to forever ex-[259]empt the company and *its property from taxation. It was also conceded that at the time this act was passed there was no provision in the Constitution of the state of Maryland restricting the legislative power to exempt, and that no reservation of the power to repeal, alter, or amend was found in the Constitution of the state, or expressed or implied in the charter in question. In 1854 an act was passed by the Maryland legislature, designated as chapter 250 of the laws of that year. The title of this act was as follows:

"An Act to Authorize the Consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company, and the Susquehanna Railroad Company, by the Name of the Northern Central Railway Company."

The companies referred to in this title other than the Baltimore & Susquehanna Railroad were corporations owing their existence to charters granted by the legislature of Pennsylvania, and which were operating railroads in that state connecting with the Baltimore & Susquehanna. The effect of the consolidation was to create one corporation owning and operating one line of railroad from and across the state of Maryland into and across the state of Pennsylvania. The act of 1854 authorizing the consolidation, the title of which has just been stated, by its first section empowered the stockholders of the Baltimore & Susquehanna Railroad, upon their acceptance of the act, "to unite and to consolidate their company or corporation with the York & Maryland Line Railroad, the York & Cumberland Railroad Company, and the Susquehanna Railroad Company of the state of Pennsylvania, so as to form and constitute one company or corporation, to be called the Northern Central Railway Company, on such terms and conditions, and conformably to such agreements and regulations, as the said several companies shall respectively determine and adopt, subject, nevertheless, to the following general provisions: First, that all existing contracts, engagements, and liabilities of the said Baltimore & Susquehanna Railroad Company shall continue to bind said company and its property as fully as before the consolidation herein above authorized, or that the said existing contracts, engagements, and liabilities shall be duly adopted and *assumed by the consolidated company [260] except as herein expressly altered or rescinded; second, that all laws heretofore made in reference to the said Baltimore & Susquehanna Railroad Company and not repealed or modified by the legislature of Maryland, and all ordinances relating to said company heretofore made and not repealed by the mayor and said council of Maryland, shall be binding and operative upon the said consolidated company, so far as its property or its operations may be within the jurisdiction of the state of Maryland or the city of Baltimore respectively, and so far as the laws or ordinances may be applicable to and consistent with the new oganization of the said consolidated company; third, that the consolidated company shall have power from time to time to establish its capital stock at an amount not exceeding eight millions of dollars, the same to be represented by such number of shares, and the said consolidated company shall have power to issue their bonds convertible into stock on such terms as the company may prescribe, and to secure the same by one or more mortgages for any such amounts as they may find necessary for paying off any existing debt of the company."

After providing for a board of directors and officers of the new or consolidated company, the act proceeded to say: "That the company shall make and use a common seal, and possess all the corporate powers and privileges, and be subject to all the duties and obligations, not inconsistent with this act, and its general intent, which are expressed in the charter heretofore granted to the said Baltimore & Susquehanna Railroad Company, and its supplements: *Provided*, that this clause shall not be construed to deprive the parties to the said consolidated company of the right or authority to make such provisions and regulations, notwithstanding said original charter and its supplements, as may be necessary to create and establish said consolidated company, and bring its organization into agreement and consistency with the terms and conditions of the charter of the several companies of which the said consolidated company shall be composed: *And provided also*, That the parties to the consolidated company shall be authorized and empowered to adopt *and [261] conform the organization of the said consolidated company to such provisions or enactments as may be required by the legislature of the state of Pennsylvania, touching the name of said corporation, and of the board of president and directors in said consolidated company, and the conditions relating to their appointments."

The 2d section of the act, among other things, provided that "this act shall take effect whenever and as soon as the said parties hereinbefore referred to shall have agreed to consolidate their several companies into one, and shall have settled, deter-

mined, and agreed upon the terms and conditions of such consolidation in conformity with the provisions of this act. . . ."

In pursuance of the authority thus conferred upon the Maryland corporation, and in virtue of power granted by the legislature of Pennsylvania to the three Pennsylvania corporations, the consolidation was effected, new stock was issued, and a company came into being known as the Northern Central Railway Company, whose affairs were managed by the new board of directors and officers elected or appointed pursuant to the new charter. The corporation, in availing itself of the provisions of the law of 1854, executed articles of consolidation. Although the act of 1854 only provided that the new corporation should have the corporate "powers and privileges" of the constituent bodies, it is stated in argument that the articles of consolidation executed under the law purported to vest the new corporation with, not only the right to the property rights and privileges of the old companies, but also with their *immunities*. In 1854, at the time the act of consolidation was passed, the Maryland Constitution (of 1850) was in force, and provided in § 47, article 3, as follows:

"Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes; and in cases where in the judgment of the legislature the object of the corporation cannot be attained under general laws. All laws and special acts pursuant to this section may be altered from time to time or repealed."

In the years 1872 and 1874 the legislature [262] of Maryland passed *an act imposing a tax of ½ of 1 per cent upon the gross receipts of all steam railroad companies incorporated by the state and doing business therein. Two suits were thereafter (the one in 1873 and the other in 1874) brought by the state of Maryland against the Northern Central Railway Company to recover the ½ of 1 per cent tax upon the gross receipts of that company from that part of its railroad lying in the state of Maryland. The defense of the company was substantially, first, that it was entitled to the exemption from taxation granted by the act of 1827 to the Baltimore & Susquehanna Company; that such exemption was existing and had not been repealed, and, if repealed, the repealing act was void because an impairment of the obligations of the contract resulting from the act of 1827 and the transmission of its immunities to the new company created by the act of 1854. The causes were decided in the trial court in favor of the corporation. The cases were taken to the court of appeals of the state of Maryland. That court (in 1875) reversed the judgment of the court below, and remanded the cases for a new trial. The court of appeals in its opinion conceded that when, in 1827, the charter of the Baltimore & Susquehanna Railroad Company was granted there was no restriction in the Constitution of the state on the power of the general assembly to make a contractual exemption from taxation. It also conceded that at that time there was no general power reserved in the Constitution to repeal, alter, or amend charters, and that no such reservation was found in the charter of 1827. But the court deemed it unnecessary to pass upon the question of whether the consolidation act of 1854 had endowed the new company with the exemption from taxation expressed in the act of 1827, because, conceding, *arguendo*, this to have been the case, it was held that as the consolidation had created a new company with new stock, new franchises, new rights, and new officers, the charter of such newly created company as to all its provisions, including the exemption from taxation, if such exemption were found in it expressly or by implication, was subject to the power to repeal, alter, and amend, reserved by the Constitution. Construing the acts imposing the tax which were sued for in connection with *other laws [263] of the state of Maryland, the court held that the exemption from taxation had been repealed. 44 Md. 162.

The cause on being remanded to the trial court remained untried in 1880. In that year the legislature of Maryland passed an act on the subject of the taxation of the Northern Central Railway Company. The title of that act purported to adjust and settle finally by agreement all pending controversies on the subject of taxation between the state of Maryland and the railroad company. The preamble referred to and recapitulated the organization of the Baltimore & Susquehanna, the consolidation by the act of 1854, and the pending suits on the subject. The title and preamble are reproduced in the margin.†

†An Act to Adjust and Settle Finally, by Agreement, All Pending Controversies between the State of Maryland and the Northern Central Railway Company, by Subjecting the Franchises and Property of Said Company within This State to Taxation for State Purposes to a Certain Extent, and by Providing for the Payment of a Certain Indebtedness Claimed by the State of Maryland to Exist on the Part of Said Northern Central Railway Company to Said State of Maryland, being an Act Supplementary to the Act of Eighteen Hundred and Fifty-Four, Chapter Two Hundred and Fifty, Entitled An Act to Authorize the Consolidation of the Baltimore and Susquehanna Railroad Company with the York and Maryland Line Railroad Company, the York and Cumberland Railroad Company, and the Susquehanna Railroad Company, by the Name of the Northern Central Railway Company.

Whereas, a controversy has arisen and exists between the state of Maryland and the Northern Central Railway Company in reference to the rights of the state of Maryland to subject to taxation the franchises and property of the Northern Central Railway Company, the said company claiming exemption of the same from taxation upon the grounds that among the terms and conditions of the union and consolidation of the several companies by which said Northern Central Railway Company was formed is one, that the latter should have all the rights, privileges, and immunities of each of said companies, which said terms were entered into under the authority given by the act of Maryland of eighteen hundred and fifty-four,

[264] *By the 1st section of the act it was provided that the Northern Central Railway Company "shall have and possess all the powers, rights, privileges, and immunities, and be subject to all the duties and obligations, which are expressed in the act of assembly of Maryland of 1827, chapter 72, entitled, An Act to Incorporate the Baltimore & Susquehanna Railroad Company, and all the franchises and property of every description and gross receipts of said Northern Central Railway Company within the state of Maryland, shall be subject to taxation for state purposes to the extent of an annual tax of one half of one per cent upon the gross receipts from its railroad and franchise lying within the state of Maryland, and from all other sources within this state, and said franchises, property, and gross receipts shall not be subject to any other tax under the laws of the state of Maryland; . . ." The act further provided for the payment of a designated sum by the railroad company for past taxes, declared said payment should acquit such taxes, and directed the discontinuance of all suits pending against the company for such taxes. It was, however, provided that its provisions should not be operative until the payment which the act required had been made and [265] until the acceptance *of the provisions of the act by the stockholders of the company. The act was accepted, the money was paid, and the suits were discontinued. At the time of the passage of this act of 1880 the Constitution of Maryland of 1867 was in force, and therein it was provided (art. 3, § 48): "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes and except in cases where no general laws exist providing for the creation of corporations of the same general character as the corporation proposed to be created, and any act of incorporation passed in violation of this act shall be void. . . . All charters granted or adopted in pursuance of this section, and all charters heretofore granted and created, subject to repeal or modification, may be altered from time to time, or be repealed." In accordance with the act of 1880 the company year by year paid the tax on its gross receipts.

In 1890 the state of Maryland passed a general law entitled "An Act to Provide for State Taxation on the Revenues of Railroad, Telegraph, or Cable, Express or Transportation, Telephone, Parlor Car, Sleeping Car, Safe Deposit, Trust, Guaranty, Fidelity, Oil or Pipe Line, Title, Insurance, Electric Light or Electric Construction Companies Incorporated under Any General or Special Law of This State and Doing Business Therein." [Md. Laws, chap. 559.] By this act a tax of 1 per cent was imposed upon the gross receipts "of all railroad companies worked by steam incorporated by or under the authority of this state and doing business therein." Under the asserted authority of this statute a tax of 1 per cent was levied by the state in each of the years 1891 to 1895, both inclusive, upon the gross receipts of the Northern Central Railway Company for the year preceding, and these taxes were paid by the company under protest. Upon demand, however, being made in 1896 for payment of the tax of 1 per cent upon the gross receipts for the year 1895, compliance was refused. A tender by the company of the taxes, calculated at the rate of ½ of 1 per cent, was refused by the state, and the present action was thereupon brought to recover the taxes thus asserted to be due and payable under the act of 1890. The company defended on the ground that the act of 1880 was a contract *protecting it [266] from a higher rate of tax on its gross receipts than in that act specified; that the act had not been repealed; that if repealed the repealing statute was void, because it impaired the obligations of the contract resulting from the act of 1880. There was judgment in favor of the corporation. The case was taken to the court of appeals of the state of Maryland and the judgment was reversed, the court holding that the provisions of the act of 1880 had been repealed by state statutes to which it referred, and that the repeal did not violate the Constitution of the United States by impairing the obligations of the contract, as asserted by the company, because the corporation held its rights subject to the power to repeal, alter, and amend, as reserved in the Constitution at the time both the acts of 1854 and 1880 were passed. 90 Md. 449, 45 Atl. 465.

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chapter two hundred and fifty, which, moreover, declared that said Northern Central Railway Company should have all the powers and privileges expressed in the charter granted by the state of Maryland to the Baltimore & Susquehanna Railroad Company, among which privileges and immunity from taxation.

And whereas, the state of Maryland having, by the act of eighteen hundred and seventy-two, chapter two hundred and thirty-four, and the act of eighteen hundred and seventy-four, chapter four hundred and eight, imposed an annual tax of one half of one per centum on the gross receipts of all railroad companies worked by steam incorporated by or under the authority of said state of Maryland, and claiming that under said acts the gross receipts of said Northern Central Railway Company are liable to said tax, have instituted suits to recover the same.

And whereas, the property of said company has been also assessed as liable to taxation for county and municipal purposes.

And whereas, the said company has the right to have the question at issue between it and the state of Maryland carried to the Supreme Court of the United States to be there decided.

And whereas, it has been represented to this general assembly that what would be the ultimate decision of said question is a matter of great doubt, and it is deemed to be, moreover, just and proper that an equitable settlement should be made of the matters so in controversy, and it having been represented to this general assembly that the said Northern Central Railway Company, for the purpose of making such settlement, is willing to pay a tax of one half of one per centum on the gross receipts within this state, upon the terms and conditions hereinafter set forth; now, therefore—

The case was remanded for a new trial. It was again tried, the Federal defense of the impairment of the obligation of the contract was again specially urged, the case was decided against the corporation, was taken again to the supreme court of the state of Maryland. That court, adhering to its former view, affirmed the judgment. It is to this judgment that the present writ of error is prosecuted.

*Mr.* **Bernard Carter** argued the cause and filed a brief for plaintiff in error:

The title of an act may be considered in ascertaining the intention of the legislature.

*Church of Holy Trinity* v. *United States*, 143 U. S. 462, 36 L. ed. 229, 12 Sup. Ct. Rep. 511.

The preamble is often a key to the proper understanding of the statute.

*Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 562, 36 L. ed. 542, 12 Sup. Ct. Rep. 689.

A state, unless prohibited by its Constitution, may make a contract with a corporation chartered by it, to exempt all of its property from taxation, or agree to accept from it a less rate of taxation than that to be imposed on others, either for a specified time or permanently, if such contract has a sufficient consideration to support it.

*Delaware Railroad Tax*, 18 Wall. 225, *sub nom. Minot* v. *Philadelphia, W. & B. R. Co.* 21 L. ed. 894; *Ohio Life Ins. & T. Co.* v. *Debolt*, 16 How. 428, 14 L. ed. 1002; *Piqua Branch of State Bank* v. *Knoop*, 16 How. 369, 14 L. ed. 985; *Home of the Friendless* v. *Rouse*, 8 Wall. 437, 19 L. ed. 497; *Appeal Tax Court* v. *Grand Lodge, A. F. & A. M.* 50 Md. 428.

Where a state grants a charter to a corporation, which is accepted, and therein stipulates for an exemption of its property from taxation, partial or total, and the Constitution of the state does not prohibit such exemption, a valid contract for such exemption is made.

*Home of the Friendless* v. *Rouse*, 8 Wall. 437, 19 L. ed. 497.

It is entirely competent for a state, unless prohibited by its Constitution, to make an agreement with a corporation, subsequent to its charter, for an exemption of its property from taxation, partial or total; and such an agreement constitutes a valid contract if supported by a consideration of some kind.

*Appeal Tax Court Grand Lodge, A. F. & A. M.* 50 Md. 428; *Christ Church* v. *Philadelphia County*, 24 How. 300, 16 L. ed. 602; *Tucker* v. *Ferguson*, 22 Wall. 528, 22 L. ed. 805.

At the time of the passage of the act of 1880, chap. 16, there was nothing in the Constitution of Maryland, nor has there ever been anything in any of the Constitutions of Maryland, which prohibited the state from exempting the property of a particular corporation from taxation, either total or partial.

*The Tax Cases*, 12 Gill & J. 117; *Baltimore* v. *Baltimore & O. R. Co.* 6 Gill, 288, 48 Am. Dec. 531; *Philadelphia, W. & B. R. Co.* v. *Bayless*, 2 Gill, 355; *Appeal Tax Court* v. *Grand Lodge, A. F. & A. M.* 50 Md. 428.

Plenary power in the legislature of the state for all purposes of civil government is the rule, and the prohibition to exercise a particular power is the exception.

Cooley, Const. Lim. p. 104; *Baltimore* v. *State ex rel. Bd. of Police*, 15 Md. 387, 74 Am. Dec. 572; *Jackson* v. *Walsh*, 75 Md. 315, 23 Atl. 778.

*Messrs.* **Louis E. McComas** and **George R. Gaither** argued the cause and filed a brief for defendant in error:

The preamble is no part of an act; it cannot enlarge or confer powers, or control the words of the act unless they are doubtful or ambiguous.

*Yazoo & M. Valley R. Co.* v. *Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68.

An immunity from taxation by a state will not be recognized unless granted in terms too plain to be mistaken.

*Phœnix F. & M. Ins. Co.* v. *Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

The act of 1880, chap. 16, does not constitute an irrepealable immunity from additional or greater taxation.

*Citizens' Sav. Bank* v. *Owensboro*, 173 U. S. 644, 43 L. ed. 843, 19 Sup. Ct. Rep. 530; *Covington* v. *Kentucky*, 173 U. S. 231, 43 L. ed. 679, 19 Sup. Ct. Rep. 383; *Ford* v. *Delta & P. Land Co.* 164 U. S. 662, 41 L. ed. 590, 17 Sup. Ct. Rep. 230; *Yazoo & M. Valley R. Co.* v. *Thomas*, 132 U. S. 175, 33 L. ed. 303, 10 Sup. Ct. Rep. 68; *Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Hoge* v. *Richmond & D. R. Co.* 99 U. S. 348, 25 L. ed. 303.

If by the just interpretation of the alleged contract there was no exemption from taxation, then there is no Federal question to be here reviewed.

*St. Paul Gaslight Co.* v. *St. Paul*, 181 U. S. 151, 45 L. ed. 793, 21 Sup. Ct. Rep. 375.

Even in a case where the Supreme Court of the United States may exercise an independent judgment, any reasonable doubt will be resolved in favor of that construction of a state statute which has been adopted by the court of last resort in that state.

*Yazoo & M. Valley R. Co.* v. *Adams*, 181 U. S. 582, 45 L. ed. 1012, 21 Sup. Ct. Rep. 729; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Flash* v. *Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Clark* v. *Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *Board of Liquidation of City Debt* v. *Louisiana*, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. Rep. 263.

Mr. Justice **White**, after making the foregoing statement of the case, delivered the opinion of the court:

In order to confine the controversy arising on this record to the propositions upon which its decision must really rest to elim-

inate the questions discussed at bar, which are either irrelevant or so effectually foreclosed by prior decisions of this court as to be no longer open to controversy, the following propositions are stated:

First. Where a contract is claimed to arise from a state law, and it is held below that a subsequent statute has repealed the [267] *alleged contract, and effect is thereby given to the subsequent law, the mere question whether the alleged contract has been repealed by the subsequent law is a state, and not a Federal, question. In such a case this court concerns itself, not with the question whether the state law, from which the contract is asserted to have arisen, has been repealed, but proceeds to determine whether the repeal was void because it produced an impairment of the obligations of the contract within the purview of the Constitution of the United States. In other words, where the state court has given effect to a subsequent law, this court decides whether such effect, so given by the state court, violates the Constitution of the United States. *Gulf & S. I. R. Co.* v. *Hewes*, 183 U. S. 66, 46 L. ed. 86, 22 Sup. Ct. Rep. 26. We therefore put out of view the question whether the acts of 1854 or of 1880 were repealed by the subsequent state statutes as held by the court below, and, treating such repeal as an accomplished fact, shall determine whether the repealing acts were void because impairing the obligations of the contract relied upon, in violation of the Constitution of the United States. In considering this question, it will be borne in mind that it is elementary that where the constitution of a state reserves the right to repeal, alter, or amend, all charters granted by the legislature are subject to such provision, and therefore are wanting in that attribute of irrevocability which is essential to bring them within the intendment of the clause of the Constitution of the United States protecting contracts from impairment. The cases supporting this doctrine are so numerous that they need not be cited. We content ourselves, therefore, by referring to one of them: *Citizens' Sav. Bank* v. *Owensboro*, 173 U. S. 636, 641, 43 L. ed. 840, 842, 19 Sup. Ct. Rep. 530. It is, moreover, conclusively determined that where the constitution of a state reserves the power to repeal, alter, or amend a charter, such provision is applicable to the charter of a consolidated corporation where, as the result of the consolidation, a new corporation takes being, new stock is provided for, new franchises are conferred, and new officers appointed. In other words, that where a legislature is inhibited by the constitution from making an irrepealable charter it cannot create a new contract and bring into being a new cor- [268] poration, and yet *by the charter of such corporation give rise to the irrepealable contract which the constitution absolutely prohibits. To state the doctrine in another form, it is this: That where a new corporation is chartered, subject to a constitution which forbids the granting of an irrepealable right, such new corporation cannot become endowed by the effect of a legislative contract with an irrepealable right forbidden by the constitution. If one of the constituent elements of the corporation possessed, prior to the formation of the new corporation, such right, and under the assumption that the right itself passed to the new body, it loses its irrepealable character, because the new corporation is subject by the very law of its being to the provision of the constitution forbidding irrepealable grants.

The doctrine as just stated has been so frequently declared by this court that it is no longer open to discussion. The whole subject has been so recently fully reviewed and restated, it is sufficient to refer to that case: *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 1, 17, 45 L. ed. 395, 405, 21 Sup. Ct. Rep. 240 *et seq.*, and authorities there cited.

Coming to apply the principles just stated to the case before us, it is apparent that unless there is something peculiar in this case which takes it from under the control of the doctrine referred to, that the court below correctly held that the new corporation created by the act of 1854 had no irrepealable contract exempting it from taxation either as the result of the act of 1854 or of the act of 1880. The positive prohibition existing in the Constitution of the state against irrepealable charter grants, both when the act of 1854 and the act of 1880 were passed, renders any other conclusion impossible. But it is insisted that, as the Constitution of 1867, which was in force when the law of 1880 was enacted, reserved the right to repeal, alter, or amend only charters granted or adopted, the act of 1880 did not come within the right to repeal or amend because it was not a charter, but a contract entered into between the state and the corporation. True, the act of 1880 was put, not in the form of a charter amendment, but in that of a contract. The lower court, after quoting from the opinion rendered by it, when the case was before it under the act of 1854 (44 Md. 162) said:

*"'It is to be observed that the court does [269] not rest the inability of the legislature to grant to a corporation an irrepealable exemption from taxation upon the form or character of the particular statute then under consideration, but puts it upon the broad ground of the want of power in the legislature under the Constitution to make such a grant at all. The court certainly in effect determines that any form of law which grants to a corporation such a corporate privilege as immunity from taxation is one passed pursuant to the section of the Constitution referred to, and is therefore subject to alteration or repeal by future legislatures."

Without pausing to consider whether, as contended, the rule as thus announced may have been in some respects too broadly stated, we think it clear that the mere form adopted by a legislature in conferring a right on a corporation cannot be controlling, for if it were so the provision of the Con-

stitution, instead of being commanding and prohibitive, would merely be precatory or advisory. We are also clearly of the opinion that the act of 1880, in its essential nature and effect, in whatever form couched, was intended to be and necessarily operated as an amendment to the charter of the company created by the act of 1854. Such being its essential nature and necessary effect, we think it plainly came within the provisions of the Constitution of 1867, and was therefore subject to repeal, alteration, or amendment.

It is strenuously, however, insisted that this case should not be controlled by the reasons previously stated because of the following considerations: The decision of the court of appeals of Maryland under the act of 1854 (44 Md.), it is urged, was not unanimous. There was an elaborate dissent. For this reason, and because the case was open to review in this court on the question of the impairment of the obligations of the contract, it is said there was necessarily grave doubt as to the rights of the parties. In view of the foregoing conditions and of such doubt, the act of 1880 embodied but an honest effort by way of contract and compromise to close the doubtful controversy in the interest of both parties, the state on the one hand and the corporation on the other; [270] hence the act of 1880 was *not subject to repeal, alteration, or amendment. Conceding, *arguendo*, the premise upon which the above deduction is based, the conclusion itself is devoid of foundation. It but reiterates in another mode of statement the argument that the form in which a contract is couched, and not its substance and necessary effect, is the criterion by which to ascertain whether it is controlled by the constitutional provision forbidding irrepealable contracts. Moreover, it disregards the elementary principle that the power to grant an irrepealable right by a compromise agreement depended on the existence of the authority to make such grant by original action. The power to compromise on the subject was as limited as the power to contract originally. *District of Columbia* v. *Bailey* (1897) 171 U. S. 161, 43 L. ed. 118, 18 Sup. Ct. Rep. 868. Indeed, the entire argument upon this branch of the case, reiterated in many forms, amounts but to the contention, when ultimately considered, that because the act of 1880 is asserted to have been enacted with the view of settling what was honestly deemed to be a pending and serious controversy, it was unwise, and it may be unjust to repeal it. Pretermitting the infirmity in the proposition which naturally is suggested by the fact that shortly after the decision in 44 Md. this court decided that the possession of the rights and privileges of a former corporation did not endow a new corporation with an exemption from taxation enjoyed by the old (*Morgan* v. *Louisiana* [1876] 93 U. S. 217, 23 L. ed. 860), and putting out of view the other cases to the same effect, decided by this court prior to 1880, the proposition is untenable. It but invokes reasons of expediency or policy. Into these considerations we may not enter; we are concerned alone with the question of power, and on passing on such question cannot hold that an act which by the very terms of the state Constitution was made repealable, nevertheless engendered an irrepealable contract protected from impairment by the Constitution of the United States.

*Affirmed.*

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*JOHN H. EVANS, as Receiver, *Plff. in Err.*, [271]

*v.*

ANDREW J. NELLIS.

(See S. C. Reporter's ed. 271-280.)

*Corporations—enforcement of stockholder's liability—Federal courts—enforcement of remedy created by state statute—construction of statute by state courts.*

1. The receiver of the assets of a corporation is not authorized to maintain an action to enforce the liability of a stockholder, by Kan. Gen. Stat. 1868, §§ 32, 44, since that act made the liability of the stockholder, not an asset of the corporation, but an asset which a creditor of the corporation alone could recover for his individual benefit to the extent required to pay a judgment obtained by him against the corporation.
2. The remedy against a stockholder of an insolvent corporation, given to the receiver of its assets by Kan. Laws 1899, chap. 10, cannot be enforced until such receiver has first brought suit against the corporation and all resident stockholders, in order to fix the sum required to pay the corporate debts.
3. A Federal court cannot enforce the statutory liability of a nonresident stockholder of a foreign corporation at the suit of a receiver of its assets, where the latter has not first taken the steps which the statutes of the state, as construed by its courts, make a prerequisite to any action against an individual stockholder.

[No. 66.]

*Argued and Submitted November 4, 1902. Decided December 1, 1902.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting a question as to the right of a receiver of a Kansas corporation to maintain an action to enforce the statutory liability of a nonresident stockholder. *Answered in the negative.*

Statement by Mr. Justice **White**:

The questions to be answered and the case on which they arise are shown in the statement of facts and resulting questions of law constituting the certificate of the court below, which is as follows:

"Statement of facts.

"That the Inter-State Loan & Trust Com-

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NOTE.—*On the right to enforce stockholder's liability outside of the state of incorporation*—see note to Cushing v. Perot (Pa.) 34 L. R. A. 737.

*On the rights of receiver to property outside the jurisdiction in which he is appointed*—see note to Gilman v. Hudson River Boot & Shoe Mfg. Co. (Wis.) 23 L. R. A. 52.

pany is a corporation created and organized under and by virtue of the general laws of the state of Kansas, July 22, 1885, and as such was authorized to transact business as a land-mortgage company; that in or about the month of November, 1897, E. B. Crissey commenced an action against the said the [272] Inter-State Loan & *Trust Company in the United States circuit court for the district of Kansas, first division, to which court jurisdiction in that behalf duly appertained; that said action was duly commenced by the issue of a summons to said company; that said summons was duly served upon the said company, and that said company duly appeared in said suit by attorney and defended the same, and that such proceedings were afterwards had in said action that on the 31st day of December, 1897, a judgment was duly given and made in and by said court in said action in favor of the said plaintiff and against the said company, in and by which judgment it was decided, adjudged, and decreed that there was due and owing to the plaintiff therein from and by the said company the sum of $6,792.20 and $56.45 costs, and that the plaintiff therein have and recover said sum from the said company, with interest thereon from said date at the rate of 6 per cent per annum, and that the said plaintiff have execution therefor against the said company; that thereafter an execution against the property of the said the Inter-State Loan & Trust Company was duly issued out of the said court upon said judgment for the said sum of $6,792.20 and the costs as aforesaid, directed to the United States marshal for the district of Kansas, and that thereafter the said marshal duly returned said execution wholly unsatisfied for the reason that no property, real or personal, belonging to said company could be found whereon to levy the same; that thereafter and on or about the 9th day of June, 1898, upon the application of the said E. B. Crissey, the plaintiff herein was duly appointed receiver of the said the Inter-State Loan & Trust Company by the circuit court of the United States for the district of Kansas, first division, to which said court jurisdiction therein duly appertained, and has duly qualified and acted as such; that thereafter and on or about the 9th day of February, 1899, an order was duly given and made in and by said circuit court of the United States for the district of Kansas, first division, by which order it was considered, adjudged, ordered, and decreed that the said John H. Evans, as receiver, proceed against all or any of the stockholders of the Inter-State Loan & Trust Company from whom, in his judg- [273] ment, a recovery *can be had to collect all of their liability as stockholders in said company, a copy of which order is hereto annexed and marked exhibit A, and which copy the plaintiff herein prays may be considered as part of his complaint as if herein set forth in full; that the defendant is a citizen of the state of New York, and prior to the month of November, 1897, became a stockholder of said corporation and the owner of 602 shares of the capital stock thereof of the par value of $100 a share, and has ever remained a stockholder and the owner of said shares. At the time when the defendant became a stockholder of said corporation, and from that time ever since, it was provided by the Constitution of the state of Kansas (art. 12, § 2), as follows: 'Dues from corporations [organized and existing under the laws of the state of Kansas] shall be secured by individual liability of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law; but such individual liabilities shall not apply to railroad corporations nor corporations for religious or charitable purposes.' At the time the defendant became a stockholder of said corporation it was provided by the General Statutes of Kansas of 1868 (chap. 23, §§ 32, 44) as follows:

"'Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property whereon to levy such execution, then execution may be issued against any of the stockholders, to an extent equal in amount to the amount of stock by him or her owned, together with any amount unpaid thereon; but no execution shall issue against any stockholder, except upon an order of the court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open court, after reasonable notice in writing to the person or persons sought to be charged; and, upon such motion, such court may order execution to issue accordingly; or the plaintiff in the execution may proceed by action to charge the stockholders with the amount of his judgment.'

"'Sec. 44. If any corporation, created under this or any general *statute of this state, [274] except railway, or charitable or religious corporations, be dissolved, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the corporation in such suit; and if judgment be rendered, and execution satisfied, the defendant or defendants may sue all who were stockholders at the time of dissolution, for the recovery of the portion of such debt for which they were liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder, respectively; and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally among all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved.'

"By a law of Kansas enacted January 11, 1899, §§ 32 and 44 aforesaid were repealed,

and by §§ 14 and 15 it was provided as follows:

"'Sec. 14. That section 32, chapter 23, of the General Statutes of 1868, be and the same is hereby amended to read as follows: Sec. 32. If any execution shall have been issued against the property or effects of a corporation, except a railway or a religious or charitable corporation, and there cannot be found any property upon which to levy such execution, such corporation shall be deemed to be insolvent, and upon application to the court from which such execution was issued, or to the judge thereof, a receiver shall be appointed to close up the affairs of said corporation. Such receiver shall immediately institute proceedings against all stockholders to collect unpaid subscriptions to the stock of such corporation, together with the additional liability of such stockholders equal to the par value of the stock held by each. All collections made by the receiver shall be held for the benefit of all creditors, and shall be disbursed in such manner and at such times as the court may direct. Should the collections made by the receiver exceed the amount necessary to pay all claims against such corporation, together with all [275] costs and expenses of the receivership, the remainder shall be distributed among the stockholders from whom collections have been made, as the court may direct; and in the event any stockholder has not paid the amount due from him the stockholders making payment shall be entitled to an assignment of any judgment or judgments obtained by the receiver against such stockholder, and may enforce the same to the extent of his proportion of claims paid by them.

"'Sec. 15. That section 46, chapter 23, of the General Statutes of 1868 be and the same is hereby amended to read as follows: Sec. 46. The stockholders of every corporation, except railroad corporations or corporations for religious or charitable purposes, shall be liable to the creditors thereof for any unpaid subscriptions, and, in addition thereto, for an amount equal to the par value of the stock owned by them, such liability to be considered an asset of the corporation in the event of insolvency, and to be collected by a receiver for the benefit of all creditors.' [Kan. Gen. Stat. 1901, §§ 1302, 1315, pp. 293, 296.]

"The present action was brought in the circuit court of the United States for the northern district of New York by the receiver of the said the Inter-State Loan & Trust Company, appointed as aforesaid, against the defendant to recover the sum of $60,200, alleging his liability as a stockholder and the owner of the said 602 shares of the said corporation.

"Upon the foregoing facts this court desires instructions upon the following questions:

"Questions of law.

"1st. Are §§ 14 and 15 of the laws of Kansas of 1899 valid legislation in view of the provision of the Constitution of the state of Kansas respecting the individual liability of the stockholders of corporations, or are they invalid as subjecting such stockholders to liabilities other than 'dues from corporations?'

"2d. Do §§ 14 and 15 aforesaid contravene the Constitution of the United States by impairing the contractual liability of the defendant previously existing as a stockholder of a corporation of the state of Kansas?

"3d. Is the plaintiff, as a receiver ap- [276] pointed as aforesaid, entitled to maintain an action in the circuit court of the United States for the northern district of New York?

"In accordance with the provisions of § 6 of the act of March 3, 1891, establishing courts of appeals, etc., the foregoing questions of law are by the circuit court of appeals for the second circuit hereby certified to the Supreme Court." [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

*Mr.* **Stephen B. Stanton** submitted the cause for plaintiff in error. *Messrs. L. A. Stebbins, C. J. Evans,* and *P. Tecumseh Sherman* were with him on the brief.

A receiver may maintain an action in a jurisdiction other than that in which he was appointed.

*Hawkins* v. *Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Glenn* v. *Liggett*, 135 U. S. 533, 34 L. ed. 262, 10 Sup. Ct. Rep. 867; *Glenn* v. *Marbury*, 145 U. S. 499, 36 L. ed. 790, 12 Sup. Ct. Rep. 914; *Great Western Teleg. Co.* v. *Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *First Nat. Bank* v. *Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739.

A foreign receiver will be permitted to sue and defend as a foreign receiver in all courts of other states than that in which he was appointed, on the principle of comity, except where the rights of citizens of the state of the forum are prejudiced thereby, or where it would be in contravention of the policy of such state.

Smith, Receivership, p. 167.

The business relations between the citizens and institutions of the several states are so intimate that to deprive those competent to sue in one jurisdiction from suing in another, without special reasons, is manifestly absurd and out of harmony with the trend of events.

*Howarth* v. *Angle*, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489; *Howarth* v. *Ellwanger*, 86 Fed. 54; *Howarth* v. *Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; *Relfe* v. *Rundle*, 103 U. S. 222, *sub nom. Life Asso. of America* v. *Rundle*, 26 L. ed. 337; *Hale* v. *Hardon*, 37 C. C. A. 240, 95 Fed. 747. See also, to the same effect, *Runk* v. *St. John*, 29 Barb. 585; *Pugh* v. *Hurtt*, 52 How. Pr. 22; *Stoddard* v. *Lum*, 159 N. Y. 265, 45 L. R. A. 551, 53 N. E. 1108; *Winans* v. *Gibbs & S. Mfg. Co.* 48 Kan. 780, 30 Pac. 163; *Robertson* v. *Staed*, 135 Mo. 139, 33 L. R. A. 203, 36 S. W. 610; *Castleman* v. *Templeman*, 87 Md. 546, 41 L. R. A. 367, 40 Atl. 275; *Hurd* v. *Elisa-*

*beth*, 41 N. J. L. 2; *Swing* v. *Bentley & G. Furniture Co.* 45 W. Va. 283, 31 S. E. 925; *Merchants' Nat. Bank* v. *McLeod*, 38 Ohio St. 174; *Metzner* v. *Bauer*, 98 Ind. 425; *Boulware* v. *Davis*, 90 Ala. 214, 9 L. R. A. 601, 8 So. 84; *Lycoming F. Ins. Co.* v. *Wright*, 55 Vt. 526; *Weil* v. *Bank of Burr Oak*, 76 Mo. App. 34; *Hale* v. *Tyler*, 104 Fed. 757; *Small* v. *Smith*, 14 S. D. 621, 86 N. W. 649; 6 Thomp. Corp. p. 5844.

A very liberal rule now prevails in this court as to the scope and extent of the doctrine of comity in proceedings to enforce contractual liabilities.

*Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

*Mr.* **Andrew J. Nellis** *in propria persona* argued the cause and filed a brief for defendant in error:

Under the law in question (chapter 10 of 1898), the proceeding to collect from stockholders of a corporation a judgment previously obtained against the corporation is an equitable proceeding, and all stockholders within the jurisdiction must be made parties, to the end that all debts of the corporation may be adjudged, and assessments made sufficient to satisfy such debts.

*Waller* v. *Hamer* (Kan.) 69 Pac. 185.

The receiver has no extra-territorial jurisdiction or power of official action, and cannot, as a matter of right, go into a foreign state or jurisdiction, and there institute an action for the recovery of demands or debts due to the person or estate subject to his receivership.

*Wyman* v. *Eaton*, 107 Iowa, 214, 43 L. R. A. 695, 77 N. W. 865; *Booth* v. *Clark*, 17 How. 322, 15 L. ed. 164; *Winans* v. *Gibbs & S. Mfg. Co.* 48 Kan. 777, 30 Pac. 163.

An order of appointment of a receiver which gives him authority to bring suits in other states is without efficacy to create such right, without sanction in the states where the suits are brought.

*Wyman* v. *Eaton*, 107 Iowa, 214, 43 L. R. A. 695, 77 N. W. 865.

A receiver of a corporation appointed in another state should not be allowed by an exercise of comity to sue for the enforcement of the liability of stockholders, when it would be in contravention of the rights of the citizens of the state and operate to their injury.

*Ibid.*

A receiver cannot take charge of any proceeding in a foreign jurisdiction by commencing an action, or defending an existing action, without the express authority of the court whose officer he was, so as to bind any property or effects in his hands as receiver.

*Pendleton* v. *Russell*, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743; *Booth* v. *Clark*, 17 How. 322, 15 L. ed. 164.

Leave to bring this particular action should have been obtained, both of the court appointing the receiver, and of the court in which the action was brought. General leave to bring any action is improper.

*Witherbee* v. *Witherbee*, 17 App. Div. 181, 45 N. Y. Supp. 297; *Fogg* v. *Supreme Lodge, U. O. of G. L.* 159 Mass. 9, 33 N. E. 692; *Castleman* v. *Templeman*, 87 Md. 546, 41 L. R. A. 367, 40 Atl. 275; *Swing* v. *White River Lumber Co.* 91 Wis. 517, 65 N. W. 174; *Rockwell* v. *Merwin*, 45 N. Y. 166; *Waters-Pierce Oil Co.* v. *American Exch. Bank*, 71 Mo. App. 653; *Brigham* v. *Ludington*, 12 Blatchf. 237, Fed. Cas. No. 1,874.

Mr. Justice **White** delivered the opinion of the court:

The third question lies at the threshold, and requires to be answered before approaching the consideration of the first and second questions. This becomes apparent when it is seen that if the first and second be answered in such a manner as to sustain the cause of action, the question would yet remain whether the receiver, appointed as stated, had authority to prosecute the suit, whilst, on the other hand, if the conclusion be reached that the receiver was without power to bring the suit—irrespective of what might be the reply to the first two questions—these questions become irrelevant and the case is disposed of.

The judgment against the corporation in the circuit court of the United States for the district of Kansas was rendered on December 31, 1897, prior, therefore, to the enactment of the Kansas statute of 1899. So, also, the execution was issued and the receiver appointed prior to the passage of that act. After the receiver had been appointed, however, and subsequent to the passage of the act of 1899, the court entered an order, directing the receiver to proceed against "all or any of the stockholders of the Inter-State Loan & Trust Company, from whom, in his judgment, a recovery can be had to collect all of their liability as stockholders in said company." Now the authority to so direct the receiver must rest upon either the statute of *Kansas of 1868, [277] referred to in the certificate, or upon the statute of 1899. But the right of the receiver of the assets of the corporation to sue under the Kansas law to recover the liability of a stockholder, cannot be evolved from the act of 1868, since that act made the liability of the stockholder, not an asset of the corporation, but an asset which the creditor of the corporation alone could recover for his individual benefit, to the extent required to pay his judgment obtained against the corporation. In *Abbey* v. *W. B. Grimes Dry Goods Co.* 44 Kan. 415, 418, 24 Pac. 426, 427, it was said, referring to the liability under the act of 1868:

"The nature of this liability is peculiar; it seems to have been created for the exclusive benefit of corporate creditors. The liability rests upon the stockholders of the corporation to respond to the creditors for an amount equal to the stock held by each, and it has been held that the action to enforce this liability can only be maintained by the creditors themselves in their own right and for their own benefit."

The nature and extent of the liability under the Kansas statute of 1868 was so fully reviewed and stated in *Whitman* v. *Oxford Nat. Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477, that we content ourselves

with referring to that case as conclusively demonstrating the proposition previously stated. Tested, then, by the Kansas act of 1868, it is manifest that the receiver had no authority to bring this suit even in the courts of the state of Kansas, and he clearly, therefore, had no power to prosecute such action in the courts of another jurisdiction. Indeed, it is manifest that the suit brought by the receiver which is now under consideration was not deemed by him to be a suit under the Kansas act of 1868, since the recovery which he seeks was not the amount of the judgment rendered in favor of the creditor in the particular suit wherein the receiver was appointed, but the whole sum of the stockholder's double liability, which could only be upon the theory that the receiver was entitled to take such liability as the receiver of the corporation and as a corporate asset to pay the debts generally. In fact, the foregoing propositions might have been taken as conceded, since in the argument at bar the right of the receiver to sue was upheld, not on the ground that he was acting under the act of [278] 1868, but that he was proceeding *in furtherance of and in supposed conformity to the act of 1899. This contention being in effect rested on the proposition that although the judgment was rendered and the receiver appointed before the passage of the act of 1899, the order of the court empowering him to enforce the liability of stockholders was entered after the enactment of the act of 1899, and therefore conferred upon the receiver the authority which it is in the argument assumed he would have had a right to exercise if appointed under that act.

The question then is, Conceding *arguendo*, the proposition that the receiver was appointed under the act of 1899 and in supposed conformity to it, was he authorized to prosecute this suit by virtue of the act of 1899? The import of the Kansas act of 1899 and the extent of the powers which it called into being, were decided by the supreme court of Kansas in *Waller* v. *Hamer* (June 7, 1902), not yet reported in the official reports,† but found in the advanced sheets of the 69th Pacific Reporter, p. 185. In that case two creditors obtained judgment in a Kansas court against a corporation. Execution having been issued and returned no property found, one of the creditors moved for the appointment of a receiver to close up the affairs of the corporation, which motion was allowed. The receiver thus appointed brought suit against a stockholder to recover his unpaid subscription and statutory liability. The defendant filed an answer and a plea in abatement, which, among other things, we quote from the opinion of the Kansas court, asserted "that the receiver should not be permitted to further prosecute the action against him until all the stockholders were brought into court, to the end that a final ascertainment of the debts of the corporation and an adjustment and settlement of the liabilities of the stockholders to the corporation and as between themselves might be had. To this plea in abatement the plaintiff demurred, which demurrer was sustained. Thereafter, upon leave of court, the defendant demurred to the petition for the reasons: (1) That the plaintiff had no legal capacity to institute and maintain the present action; (2) that the petition did not state facts sufficient to constitute a cause of action against the defendant; (3) that there is a defect of *parties plaintiff; [279] (4) that there is a defect of parties defendant. This demurrer was overruled, and thereafter the defendant answered." In reviewing the action of the trial court the supreme court of Kansas said:

"Prior to the enactment of chapter 10, Laws of 1899, the creditor of a business corporation, other than a railway or bank, might proceed against the individual stockholders only (1) by motion after judgment and execution against the corporation returned *nulla bona;* (2) by action after dissolution, either by expiration of time, judgment of dissolution, or suspension of business for more than one year, as provided in §§ 32, 46, corp. act 1868. Chapter 10 of the Laws of 1899 repealed said §§ 32 and 46, and substituted therefor §§ 14 and 15."

The sections of the act of 1899 referred to are those set out in the certificate of the court below. The court then further said that it was obvious that the act of 1899 created an "entirely different remedy from that provided by the act of 1868," and declared, referring to the act of 1899, that "there exists no other statute by which the creditor of an insolvent or dissolved corporation may proceed against its stockholders. It follows, therefore, that if a creditor desires to make a stockholder respond for the debts of the corporation, he must proceed against him in the mode thus prescribed, and no other." Proceeding, then, to test the right of the receiver to sue, by the act of 1899, the court held that, as he had not brought a suit against the corporation and all the resident stockholders, in order in such suit to fix the sum required to pay the corporate debts, he, the receiver, was wholly without authority under the statute to make any demand whatever against a stockholder, as the previous suit to fix the sum required to pay the debts was an essential prerequisite under the statute to any action by a receiver appointed under the act of 1899 against a stockholder. Summing up its view of the act of 1899, the court said:

"This act provides a complete system for collecting the assets and paying the debts of an insolvent corporation, and of adjusting the liabilities of the stockholders between themselves. To do this the receiver must bring in all stockholders that are within the jurisdiction of the court, that in one proceeding the *court may ascertain and deter- [280] mine the indebtedness of the corporation, the amount each stockholder should pay, and, if one has paid more than his proportion, award him such relief against the other stockholders as may appear just. The

†65 Kan. 168.

receiver having failed to comply with this plain statutory requirement, the demurrer to the plea in abatement should have been overruled."

It therefore follows that there was no authority conferred by the act of 1899 of Kansas, from which the right of the receiver to bring the suit which is now before us can be deduced. It having been heretofore demonstrated that there was no such right under the act of 1868, and as there is no such power under the act of 1899, it follows necessarily that the receiver was without any authority whatever, and the third question must be answered no. Of course, in answering this question we express no opinion whatever as to how far, if at all, the act of 1899 could validly operate to repeal the right of action in favor of creditors given by the Kansas statute of 1868, so far as creditors are concerned, whose debts accrued prior to the repeal. We, of course, also express no opinion whatever upon the question of how far the rights and remedies conferred by the act of 1899 could lawfully be enforced against stockholders in corporations who became such stockholders prior to the passage of that act. And this, of course, excludes the intimation of any opinion as to how far a judgment rendered in a court of Kansas in a suit brought by a receiver against the corporation and the resident stockholders, to fix the sum required to pay the corporate debts, would be binding upon nonresident stockholders not directly a party to such action, especially where their subscription to stock had been made prior to the enactment of the act of 1899. The third question will be answered no, and it is unnecessary to answer the other questions.

And it is so ordered.

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[281] *MILTENBERGER LAWDER *et al.*, *Petitioners*,

*v.*

WILLIAM F. STONE, Collector.

(See S. C. Reporter's ed. 281-294.)

*Duties—worthless articles—decayed fruit.*

That portion of a cargo of pineapples which on arrival within the limits of a port of entry of the United States was found to be so decayed as to be utterly worthless is not dutiable, though the loss was less than 10 per cent of the total invoice, as entirely worthless articles are not within the provision of the customs administrative act of June 10, 1890, § 23, that no allowance shall be made for damage to "goods, wares, and merchandise" imported into the United States, unless the importer shall abandon to the United States a portion of such articles amounting at least to 10 per cent of the total invoice.

[No. 82.]

*Submitted November 11, 1902. Decided December 1, 1902.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which reversed a judgment of the Circuit Court for the District of Maryland affirming the decision of the board of general appraisers which sustained a protest of importers against the assessment of duties on decayed fruit. *Reversed.*

See same case below, 41 C. C. A. 621, 101 Fed. 710.

Statement by Mr. Justice **White:**

In the months of May, June, and July, 1897, the petitioners, copartners trading as S. M. Lawder & Sons, imported into the port of Baltimore from the British West Indies several cargoes of pineapples, invoiced as a specified number of dozens.

Upon the discharge of the cargo at Baltimore, after the pineapples *had been taken [282] out of the vessels and their number estimated by the inspectors, there remained in the holds a quantity of what was described as "slush," consisting of decomposed vegetable matter, mixed with bilge water and other *débris* of the cargo, some of it in a semi-liquid condition. This slush was brought up from the holds in baskets and included by the inspectors in their appraisement of the cargoes. The pineapples alleged to be contained in the slush were uncountable, and their number was roughly estimated by the inspectors by counting the pineapple tops and butts contained in a number of baskets of the slush, striking an average of those baskets, and then calculating the number contained in the whole quantity of slush according to that average. The material thus removed from the vessels was commercially valueless, and under the sanitary regulations of the city of Baltimore was taken down the river on a scow and dumped overboard. The number of pineapples so estimated by the inspectors to be contained in the slush was less than 10 per cent of the total invoice, and the collector treated the loss as a case of damage to the cargo within the meaning of § 23 of the customs administrative act of June 10, 1890, and assessed duty on the whole number of pineapples estimated by the inspectors to be contained in the cargoes, including this quantity of slush.

The board of general appraisers sustained a protest of the importers against the assessment of duties on the worthless and indistinguishable mass referred to, and this decision was affirmed, on appeal of the collector, by the circuit court of the United States for the district of Maryland. On a further appeal by the collector the circuit court of appeals for the fourth circuit reversed the decisions which had been made in favor of the importers and sustained the action of the collector. 41 C. C. A. 621, 101 Fed. 710. The case was then brought to this court by writ of certiorari.

*Mr.* **Edward S. Hatch** submitted the cause for petitioners. *Messrs. J. Stuart Tompkins* and *Winifred Sullivan* were with him on the brief:

The actual quantity of merchandise imported determines the amount of duty, and not the original quantity bought and shipped from abroad.

*Arnold* v. *United States*, 9 Cranch, 120, 3 L. ed. 676; *Marriott* v. *Brune*, 9 How. 619, 13 L. ed. 282; *United States* v. *Southmayd*, 9 How. 637, 13 L. ed. 290; *Balfour* v. *Sullivan*, 8 Sawy. 648, 17 Fed. 231; *Weaver & Sterry* v. *Saltonstall*, 38 Fed. 493; *American Sugar Ref. Co.* v. *United States*, 91 Fed. 646; *Shaw* v. *Dix*, 72 Fed. 166.

The fact that probable loss during the voyage may have been an element in fixing the price of the merchandise at the port of exportation can have no weight in determining the amount of duty.

*United States* v. *Southmayd*, 9 How. 637, 13 L. ed. 290; *American Sugar Ref. Co.* v. *United States*, 91 Fed. 646.

"Goods, wares, and merchandise" do not include a quantity of waste material.

*Shaw* v. *Dix*, 72 Fed. 166.

Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It cannot substitute for the clear expressions which Congress has actually used, other expressions which the court thinks Congress ought to have used.

*Rice* v. *United States*, 4 C. C. A. 104, 10 U. S. App. 670, 53 Fed. 911.

*Assistant Attorney General* **Hoyt** submitted the cause for respondent. *Mr. James A. Finch* was with him on the brief:

An importation is complete and duty attaches the moment the goods enter a port of this country.

*United States* v. *Vowell*, 5 Cranch, 368, 3 L. ed. 128; *Arnold* v. *United States*, 9 Cranch, 104, 3 L. ed. 671; *Meredith* v. *United States*, 13 Pet. 486, 10 L. ed. 258.

[283] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

As mentioned in the preceding statement, the collector of customs for the district of Baltimore treated the loss arising from the worthless condition of the portion of the cargo in question as a case of damage to the entire cargoes, within the meaning of § 23 of the customs administrative act of June 10, 1890. That section reads as follows:

"That no allowance for damage to goods, wares, and merchandise imported into the United States shall hereafter be made in the estimation and liquidation of duties thereon; but the importer thereof may, within ten days after entry, abandon to the United States all or any portion of goods, wares, and merchandise included in any invoice, and be relieved from the payment of the duties on the portion so abandoned: *Provided*, That the portion so abandoned shall amount to 10 per centum or over of the total value or quantity of the invoice; and the property so abandoned shall be sold by public auction, or otherwise disposed of for the account and credit of the United States under such regulations as the Secretary of the Treasury may prescribe." [26 Stat. at L. 140, chap. 407, U. S. Comp. Stat. 1901, p. 1930.]

Do pineapples, which, on the voyage to this country, become so decayed as to be utterly worthless, constitute, upon arrival within the limits of a port of entry of the United States, goods, wares, and merchandise imported into the United States, within the meaning of this expression as employed in the section above quoted? is the question for decision.

In *Marriott* v. *Brune* (1850) 9 How. 619, 13 L. ed. 282, it was held that, under the 11th section of the tariff act of July 30, 1846, where a portion of a cargo of sugar and molasses was lost by leakage on the voyage to this country, duty should be exacted only upon the quantity of sugar and molasses which arrived here, and not upon the quantity which appeared to have been shipped. In the course of the opinion the court said (p. 632, L. ed. p. 288):

"The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is imported,—for *nothing is imported till it [284] comes within the limits of a port. See cases cited in *Harrison* v. *Vose*, 9 How. 372, 13 L. ed. 179. And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries; or the importation from them, or what is imported. 5 Stat. at L. 548, 558, chap. 270. The very act of 1846 under consideration imposes the duty on what is 'imported from foreign countries.' [9 Stat. at L. chap. 74] p. 68 [48]. The Constitution uses like language on this subject. Art. 1, §§ 8, 9. Indeed, the general definition of customs confirms this view; for says McCulloch (vol. 1, p. 548): 'Customs are duties charged upon commodities on their being imported into or exported from a country.'

"As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures, and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

"When the duty was specific on this article, being a certain rate, per pound, before the act of 1846, it could, of course, extend to no larger number of pounds than was actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad, whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor required to enforce just rights.

"It is also the quantity actually received here by which alone the importer is benefited. It is all he can sell again to customers. It is all he can consume. It is all he can re-export for drawback. 1 Stat. at L. 680-689, chap. 22; 4 Stat. at L. 29, chap. 136."

After instancing certain cases provided [285]for in a statute where *a fixed percentage was directed to be deducted for leakage and breakage and a reduction in weight for tare and draff, the court further said (p. 633, L. ed. p. 288):

"But beside these instances, in cases of an actual injury to an article arriving here in a damaged state, a reduction from the value is permitted expressly on account of the diminished value. 1 Stat. at L. 41, chap. 5, 166, chap. 35, 665, chap. 22.

"The former cases referred to for illustration rest on their peculiar principles, and allowances in them are made by positive provisions in acts of Congress, even though the quantity and weight of the real article meant to be imported should arrive here. Because, knowing well that the whole is not likely to arrive, and being able to fix, by a general average, the ordinary loss in those cases with sufficient exactness, the matter has been legislated on expressly.

"Yet there are other cases of loss, from various causes, which may be very uncertain in amount, for which no fixed and inflexible rate of allowances can be prescribed, and which must, therefore, in each instance, be left to be regulated by the general provisions for assessing duties, and the general principles applicable to them, as before explained. Consequently, where a portion of the shipment in cases like these does not arrive here, and hence does not come under the possession and cognizance of the customhouse officers, it cannot, as heretofore shown, be taxed on any ground of law or of truth and propriety, and does not therefore require for its exemption any positive enactment by Congress.

"Such is the case of a portion being lost by perils of the sea, or by being thrown overboard to save the ship; or by fire, or piracy or larceny, or barratry, or a sale and delivery on the voyage, or by natural decay. If there be a material loss, it can make no difference to the sufferer or the government whether it happened by natural or artificial causes. In either case, the article to that extent is not here to be assessed, nor to be of any value to the owner.

"To add to such unfortunate losses, the burden of a duty on them, imposed afterwards, would be an uncalled-for aggravation, would be adding cruelty to misfor- [286]tune, and would not be *justified by any sound reason or any express provision of law. On the contrary, Congress, in several instances, when the articles imported actually arrived here, and were afterwards destroyed by fire before the packages had been opened and entered into the consumption of the country, have refunded or remitted the duties. 2 Stat. at L. 201, chap. 6; 5 Stat. at L. 284, chap. 174; 6 Stat. at L. 2, chap. 20.

"But much more should duties not be exacted on what was lost or destroyed on its way hither; and which never came even into the possession or control of the customhouse officers, and much less into the use of the community."

The doctrine of this decision clearly supports the proposition that it would be inequitable and presumably not within the intention of Congress to assess duty upon an article which on a voyage to this country and before arrival within the limits of a port of entry had become utterly worthless by reason of casualty, decay, or other natural causes, and which the importer might rightfully abandon and refuse to receive or enter for consumption. In other words, that articles thus circumstanced were not in truth within the category of goods, wares, and merchandise imported into the United States, within the meaning of the tariff laws. The ruling in *Marriott* v. *Brune* was approved and applied in *United States* v. *Southmayd*, 9 How. 637, 13 L. ed. 290, and *Lawrence* v. *Caswell*, 13 How. 488, 14 L. ed. 235, and it has been consistently recognized by this court that as a general rule duties are intended to be levied only upon the value of goods which possess some intrinsic or other value at the time when ordinarily the duty would attach on an article.

That the policy we have stated was regarded by Congress as the true doctrine to be applied, is shown by the legislation with respect to the remission of duties upon goods, wares, and merchandise in general, to the extent that the same were damaged. Thus, as stated in *United States* v. *Bache*, 8 C. C. A. 258, 20 U. S. App. 286, 59 Fed. 762, 763, the statutory system, from 1799 to the adoption of the tariff act of October 6, 1890, in regard to rebates of duties on account of damage to imported merchandise in transit, was embodied in § 2927 of the Revised Statutes, being a substantial reproduction of a section of the act of 1799. The section of the Revised Statutes reads as follows:

*"Sec. 2927. In respect to articles that [287]have been damaged during the voyage, whether subject to a duty ad valorem, or chargeable with a specific duty either by number, weight, or measure, the appraisers shall ascertain and certify to what rate or percentage the merchandise is damaged, and the rate of percentage of damage, so ascertained and certified, shall be deducted from the original amount subject to a duty ad valorem, or from the actual or original number, weight, or measure, on which specific duties would have been computed. No allowance, however, for the damage on any merchandise that has been entered, and on which the duties have been paid or secured to be paid, and for which a permit has been granted to the owner or consignee thereof, and which may on examining the same prove to be damaged, shall be made, unless proof to ascertain such damage shall be lodged in the custom house of the port where such merchandise has been landed

within ten days after the landing of such merchandise."

So, also, by § 2921 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 1929], it was provided as follows:

"Sec. 2921. If, on the opening of any package, a deficiency of any article shall be found, on examination by the appraisers, the same shall be certified to the collector on the invoice, and an allowance for the same be made in estimating the duties."

By the act of July 14, 1870 (16 Stat. at L. 265, chap. 255), however, an exception was ingrafted upon the general provision as to allowances for damage which might have resulted to goods, wares, and merchandise on the voyage, by the enactment that no allowance should be made with respect to certain fruits, for loss by decay on a voyage, unless the same should exceed 25 per centum of the whole quantity, and the allowance then made should be only for the amount of loss in excess of 25 per centum of the whole quantity. As said in *Scattergood* v. *Tutton*, 2 Fed. 28, the limitation was applied "manifestly to avoid allowance for trifling losses." While, however, certain fruits were made dutiable by the tariff act of March 3, 1883 (22 Stat. at L. 504, chap. 121), and certain other fruits (including pineapples) were placed on the free list (Id. 519, chap. 121), the discrimination referred to against damage allowances upon [288] importations of fruit *was not continued, and in § 23 of the customs administrative act of 1890 fruits are not discriminated against.

In its decisions upon applications of importers to be exempted from payment of duties because of the practical destruction of an article while in transit to this country, or for an allowance because of damage occasioned to imported goods before arrival here, the Treasury Department has frequently applied the doctrine enunciated by this court in *Marriott* v. *Brune, viz.*, that the purpose of Congress in enacting tariff laws was to exact the payment of duty only upon imported articles which were, in truth and in fact, entitled to the appellation of goods, wares, and merchandise, articles which were not absolutely worthless, but may possess some value for use or consumption. Thus, in treasury decision No. 424, of date July 15, 1869, duties were ordered to be remitted on four cases of needles which had become worthless by reason of being submerged in salt water on the voyage of importation. It was held that the case did not come within the prohibition of the 33d paragraph of the 3d section of the act of July 14, 1862 [12 Stat. at L. 546, chap. 153], which prescribed that no allowance for partial loss or decay should be made in consequence of rust of iron or steel, etc. Again, in treasury decision No. 1,167, of date July 8, 1872, fruit which had become worthless on the voyage of importation was held not dutiable, and the provision of the act of July 14, 1870, limiting the damage allowance on fruit, was held not to apply, and it was ordered that the case should be treated as if no importation had been made. In the course of the decision, known as treasury decision No. 3,236, of date May 14, 1877, after ruling that the "quantity" specified in the act of July 14, 1870 [16 Stat. at L. 265, chap. 255, § 21], limiting allowances for damage to green fruit, referred to the quantity specified in the damage application and landed in the United States, it was observed (italics not in the original):

"In many instances a *portion* of a cargo of green fruit becomes wholly worthless by decay, and such portion is to be excluded in considering the quantity upon which damage is to be estimated, unless it is included in the damage warrant."

In treasury decision No. 3,272, dated July 21, 1877, passing upon a case where an importer, in his application for damage *al- [289] lowance upon 41 barrels of oranges, included as part of the 41 barrels, 20½ barrels of entirely worthless oranges, it was declared that, if the goods had been landed in the United States as any other merchandise, and no damage application had been filed, duty would have accrued thereon; whereas if they had been thrown overboard at sea, no duty would accrue, as there would have been no importation of that quantity. In treasury decision No. 4,126, of date August 1, 1879, upon application being made for a damage allowance upon an invoice of certain oranges and lemons, the goods were reported damaged "to the extent of 100 per cent,—in other words, entirely worthless." The ruling in treasury decision No. 1,167 was applied, and it was held that, where fruit was so damaged on the voyage of importation as to be entirely worthless, the clause in the statute limiting the damage allowance to the excess over 25 per cent did not apply, and that the case should be treated the same as if no importation had been made. Treasury decision No. 9,719, dated November 19, 1889, reads as follows:

"Sir: The Department is in receipt of your letter of the 13th instant, reporting further on the appeal (537*x*) of Messrs. Riley & Grey from your assessment of duty on certain card clothing, imported by them per 'Bulgarian' February 16, 1889, and found, upon examination, to have been destroyed by water during the voyage of importation.

"The appraiser reports that the clothing in question was wound in coils, and has been subjected to a complete soaking with salt water, which has permeated the entire coil, oxidizing the wire and completely rotting the cotton backing, so that it is absolutely worthless, and cannot be used for any purpose whatever, even as old junk.

"In view of this report, the Department is of opinion that the card clothing is not an importation of merchandise within the meaning of the law, and you are hereby authorized to readjust the entry and to refund the duty levied thereon."

After the passage of the customs administrative act of June 10, 1890, the board of general appraisers, on June 6, 1891, announced its decision upon a protest against the exaction of *duty on an alleged shortage [290]

of 35,700 oranges, part of an invoice of 280,000 oranges, on which entry had been made and the duty paid. The shortage was not ascertained until after the payment of the duties, and such shortage was presumably represented by a quantity of "rots and slush," which had been removed from the vessel in obedience to the health ordinance of the city of Baltimore. The collector and naval officer reported that they were satisfied by proof that the 35,700 oranges became rotten and worthless on the voyage and never went into consumption. It was held that the collector was authorized to make allowance for the shortage in the liquidation of the duty on the entries. In the course of the decision it was said:

"As they could not be abandoned in the manner provided for the abandonment of merchandise in § 23 of the act aforesaid, the collector exacted duty upon the entire entry. Article 609 of the general regulations permits an allowance for lost or missing articles when it is shown by proof satisfactory to the collector and naval officer that they have been lost or destroyed by accident during the voyage. Loss of fruit by decay may reasonably be held to be an accident, it being a loss by a contingency, chance, or casualty. Section 23 aforesaid would not apply where there had been a total loss of dutiable articles, for the word 'damaged' is there used in the sense of impairment or injury, and the section contemplates that something remains to be abandoned."

Treasury decision No. 16,138, dated June 8, 1895, related to a claim of allowance for shortage on an importation of cocoanuts, the shortage being occasioned by the rotting and breaking of certain cocoanuts on the voyage of importation. In consequence of the ruling in *United States* v. *Bache*, 8 C. C. A. 258, 20 U. S. App. 286, 59 Fed. 762, wherein it was held that glass broken on the voyage of importation, *but which possessed some value for manufacture*, should be allowed for as a damage within the meaning of § 23 of the customs administrative act of 1890, the Treasury Department refused to accept the doctrine laid down by the board of general appraisers, *viz.*, that merchandise the value of which is totally destroyed ceases to be damage, and [291]may *properly be treated as a shortage. This last was but another form of stating the proposition that that which has been rendered worthless on the voyage to this country, by casualty, decay, or other natural causes, is not embraced within the category of goods, wares, and merchandise, even though existent on the vessel on its arrival within the limits of a port of entry. On the controversy, however, being brought into the courts, the decision of the board of general appraisers was upheld. *Shaw* v. *Dix*, 72 Fed. 166. In distinguishing the case before it from the *Bache Case* the court said (p. 167):

"In *United States* v. *Bache*, 8 C. C. A. 258, 20 U. S. App. 286, 59 Fed. 762, the facts presented raised a very different issue. The importation was glass in cases or packages, and a considerable breakage of glass in the cases occurred during the voyage. The cases all arrived. The contents were not destroyed, but were damaged. It was clearly a case within the language of § 23, and no question would have arisen but for the fact that 'broken glass, fit only to be remanufactured,' was by law exempt from duty and admitted free. The importer claimed that as during the voyage a portion of each case became broken glass, its character as merchandise was changed, and it became an article specifically exempted from duty and entitled to come in free, and that it made no difference that the dutiable and non-dutiable goods happened to come into this country in the same box. He claimed that he was chargeable with duty on the merchandise as it came into this country, and not as it was when it was put aboard the ship in the foreign port. It was held by the circuit court of appeals for the second circuit that, Congress having enacted a general statutory system for the ascertainment of the damage to imported goods, and for allowance in respect to such damage, it could not be supposed that damages to importations of glass were to be exempted out of that general system simply because importations of broken glass had been put on the free list, and held that there was nothing indicating an intention by Congress to take the one article of glass out of the general system. The general system provides that if the damage amounts to 10 per cent of the total invoice, the importer may abandon any portion of the *invoice[292] and be relieved from the duties on the portion so abandoned.

"I think it is clear that the board of general appraisers was right in holding, in deciding the present case, that this section contemplated a case where there remains something to be abandoned, in the sense of being impaired in value, but that it is not applicable to a case where specific items of the invoice have been so entirely destroyed as that, in reckoning up to the items of the invoice, they cannot be counted, and where the destroyed items are valueless, and there remains nothing which can be the subject of abandonment. Section 23 of the act of 1890 is not inconsistent with the general provisions of § 2921 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 1929], nor with §§ 906 and 922 of the general regulations, providing that, if the quantity which arrives is less than the invoice, there may be an allowance for the deficiency. In the present case it was not possible for the appraisers to say what number of cocoanuts was contained in the mass of *débris* remaining after the discharge of the cargo. It was estimated that this mass contained the difference between the number discharged and the number stated in the invoice. But the number specified in the invoice is not the result of an accurate count, the nuts being often brought on board in small boats through the surf, so that it is not possible to say with any accuracy what number the mass of *débris* did represent. It is quite manifest that there is no ground for the contention that § 23 is applicable to

this case. The decision of the board of general appraisers is sustained."

Article 1236 of the customs regulations of 1899 was referred to in the argument at bar as supporting the contention on behalf of the government that Congress intended by § 23 of the customs administrative act of June 10, 1890, to classify everything reaching this country, invoiced from a foreign port, as imported goods, wares, and merchandise, however worthless specific articles might have become during the voyage. But the regulation lends no support to this contention. It was based upon § 2984 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 1958], which conferred authority upon the Secretary of the Treasury to remit impost [293] *duties paid or accruing upon imported merchandise which had been injured by accidental fire or other casualty after arriving in this country and while in the actual or constructive possession of the officers of the government. In effect, by the terms of the regulation, § 2984 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 1958], is construed as not conferring authority upon the Secretary of the Treasury to make allowances for any deterioration or damage to such merchandise from natural or avoidable causes, arising after the arrival of merchandise and the attaching of duties thereon, a ruling which throws no light upon the proper decision of the question we are considering.

When Congress enacted the customs administrative act of 1890 it must be presumed to have possessed knowledge of the decisions of this court to which we have referred and the consistent application made of the doctrine of those decisions by the officials charged with the execution of the tariff laws, as evidenced by the cited treasury decisions. In the light of this fact, it would require a clear expression by Congress of its intention to adopt a contrary policy, before a court would be justified in holding that such was the purpose of the legislative branch of the government. Section 23 of the customs administrative act contains no such clear expression of an intention to alter the prior practice, but the contrary. The reference in § 23 to an allowance for "damage," and the provision that the abandoned portion of cargo should "be sold by public auction or otherwise disposed of for the account or credit of the United States," manifestly imports that it related to an article which, when the duty attached, was possessed of some value, and therefore negatives the idea that Congress was concerning itself with that which was destitute of all value. When, therefore, it was enacted that in a certain contingency no allowance should be made for "damage to goods, wares, and merchandise imported into the United States," it is reasonable to construe this language as not referring to an article, case, or package, which, though in the semblance of merchandise, had become absolutely valueless by reason of natural causes or casualty occurring thereto while the article, case, or package was in transit to the United States. The section then not embracing *articles which upon arrival in [294] this country were outside of the category of imported goods, wares, and merchandise, such articles must be held, in accordance with the prior rulings on the subject, not to be susceptible to assessment for duty. If, as is conceded by the government, the rotten and worthless pineapples in question had been thrown overboard before the vessel reached this country, and no duty could have been assessed upon the fruit thus disposed of, the circumstance that the mass of rotten fruit in question could not, perhaps, have been gotten at upon the voyage by reason of the extent and character of the cargo of which it formed a part, so as to permit of the worthless stuff being dumped overboard before the arrival of the vessel in the United States, ought not, in justice, to debar the importer from successfully contending that the worthless material when it reached this country was not goods, wares, or merchandise within the intent of the tariff acts.

*Judgment of the Circuit Court of Appeals is reversed; judgment of the Circuit Court affirmed;* and the cause remanded to that court, with a direction to carry its judgment into effect.

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## CHEROKEE NATION *et al.*, *Appts.*,
*v.*
## ETHAN A. HITCHCOCK, Secretary of the Interior.

(See S. C. Reporter's ed. 294-308.)

*Equity—jurisdiction — necessary parties—Indians—leases of minerals in tribal lands—executive department—matters of administration—power of Congress over Indians.*

1. A sufficient showing of equitable jurisdiction is made by a bill filed by the Cherokee Nation to restrain any further action by the Secretary of the Interior upon applications for leases of its tribal lands for mining purposes, which contains general allegations of the absence of an adequate remedy at law, the necessity of relief to avoid a multiplicity of suits and to prevent the casting of a cloud upon the title, and a claim that irreparable injury will be caused, and wrong and oppression result, and that there will be a deprivation of property rights.
2. A corporation referred to in a bill to restrain any further action by the Secretary of the Interior upon applications for leases of Indian lands for mining purposes, as one

NOTE.—*As to Federal jurisdiction and control over the Indians*—see note to Worcester v. Georgia, 8 L. ed. U. S. 483.

*As to necessary parties in equity*—see note to Marshall v. Beverley, 5 L. ed. U. S. 97.

*On the separation of the departments of government*—see notes to Titusville Iron Works v. Keystone Oil Co. (Pa.) 1 L. R. A. 361; Fleming v. Guthrie (W. Va.) 3 L. R. A. 53; King v. State (Tenn.) 3 L. R. A. 210; and State *ex rel.* Jameson v. Denny (Ind.) 4 L. R. A. 79.

*On the construction and operation of treaties*—see note to United States v. The Amistad, 10 L. ed. U. S. 826.

of the successful applicants, is not a necessary party defendant to the suit, which is instituted on the theory of the want of power in the Secretary to execute leases affecting such lands.

3. The action taken by the Secretary of the Interior upon applications for leases for mining purposes of tribal lands in the Indian territory under the act of June 28, 1898 (30 Stat. at L. 459, chap. 517), authorizing him to execute such leases, is a matter of administration, cognizable solely by the executive department.

4. The Cherokee Nation was not so vested, by the treaty of 1835 (7 Stat. at L. 478), and the patent based thereon, with the sole control over the lands thus ceded to it as to preclude Congress, under its plenary power of control over the Indian tribes in the Indian territory, from enacting those provisions of the act of June 28, 1898 (30 Stat. at L. 495, chap. 517), which authorize the Secretary of the Interior to prescribe regulations for the leasing of minerals in its tribal lands for the purpose of making them productive and of securing therefrom an income for the benefit of the tribe.

[No. 340.]

*Submitted October 23, 1902. Decided December 1, 1902.*

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District sustaining a demurrer to and dismissing a bill to restrain the Secretary of the Interior from taking any further action upon applications for leases of Indian lands for mining purposes. *Affirmed.*

Statement by Mr. Justice **White:**

[295] This cause was begun on the equity side of the supreme court of the District of Columbia. The complainants named in the bill were the Cherokee Nation, and its principal chief and treasurer and sundry other citizens of the nation, suing on behalf of themselves and of citizens of the nation residing in the Indian territory. Ethan A. Hitchcock, as Secretary of the Interior, was made sole defendant. It was claimed in the bill that, by virtue of certain treaties and a patent based thereon, the Cherokee Nation was vested with a fee-simple title to its tribal lands in the Indian territory, and it was also averred that, by a treaty executed in 1835, there was secured to the nation the right, by its national council, to make and carry into effect all such laws as the Cherokees might deem necessary for the government and protection of the persons and property within their own country belonging to their people, or such persons as had connected themselves with [296] them. A synopsis *of the pertinent portions of the treaties above referred to is set out in the margin.†

*The patent referred to in the bill was [297] executed on December 31, 1838. It conveyed to the Cherokee Nation the lands secured and guaranteed by the treaties of 1828, 1833, and 1835. *In the patent the [298] 7,000,000-acre tract, together with the perpetual outlet, was described as one tract, aggregating 13,574,135.14 acres. In addition the patent specified the boundaries of a tract of 800,000 acres ceded by the treaty of 1835. The description of the two tracts was succeeded by the following habendum clause:

"Therefore, in execution of the agreements and stipulations contained in the said several treaties, the United States have given and granted, and by these presents do give and grant, unto the said Cherokee Nation the two tracts of land so surveyed and hereinbefore described, containing in the whole fourteen millions, three hundred and seventy-four thousand, one hundred and thirty-five acres, and fourteen-hundredths of an acre, to have and to hold the same, together with all the rights, privileges, and appurtenances thereto belonging to the said Cherokee Nation forever; subject, however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article, and subject also to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved; and subject also to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-recited third article, and which condition is, that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same."

Averring that the Cherokee Nation and its citizens possessed the exclusive right to the use, control, and occupancy of its tribal lands, it was alleged that the Secretary of the Interior, without having lawful authority so to do, was assuming the power to, and was about to, pass favorably upon applications for leases, and was about to grant leases of lands belonging to said nation for the purpose of mining for oil, gas, coal, and other minerals, one such successful applicant being stated to *be the Chero- [299] kee Oil & Gas Company, an Arkansas corporation. Based upon general allegations of the absence of an adequate remedy at law, the necessity of relief to avoid a multiplicity of suits and to prevent the casting of a cloud upon the title of the nation to its said lands, and the claim that irrepar-

†By article 2 of the treaty of May 6, 1828 (7 Stat. at L. 311), the United States, in order to secure to the Cherokee Nation "a permanent home," agreed to "possess the Cherokees, and to guarantee it to them forever," 7,000,000 acres of land, within described boundaries, and in addition "guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the

able injury would be caused and wrong and oppression result, and that there would be a deprivation of property rights of the complainants and of other citizens of the Cherokee Nation, an injunction was prayed against further action by the Secretary of the Interior in the premises. A demurrer was filed to the bill upon the grounds following:

"1. Said bill is bad in substance and for want of equity, and does not state facts sufficient to entitle complainants to the relief prayed for, or to any relief.

"2. The court has no jurisdiction over the subject-matter of the suit.

"3. There is a defect of parties defendant."

Without considering or passing upon the objection of a defect of parties defendant, the trial court sustained the demurrer and entered a decree dismissing the bill of complaint. This decree was affirmed, on appeal, by the court of appeals of the District. 20 App. D. C. 185.

An appeal was thereupon taken to this court.

*Mr.* **William M. Springer** submitted the cause for appellants:

The five civilized tribes in the Indian territory have received from the United States grants and patents conveying to them their lands in fee simple, subject only to the proviso that such lands shall revert to the

above-described limits, and as far west as the sovereignty of the United States and their right of soil extend."

By article 1 of the treaty of February 14, 1833 (7 Stat. at L. 414), the United States, by a corrected description as to the 7,000,000-acres tract, renewed the guaranty as to such tract, the outlet, etc., contained in article 2 of the treaty of 1828, with the reservation respecting use by other Indians of the salt plain if within the limits of the outlet. The article concluded with the statement that "letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed."

By article 2 of the treaty of December 29, 1835 (7 Stat. at L. 478), after reciting that by the treaties of 1828 and 1833 "the United States guaranteed and secured to be conveyed by patent, to the Cherokee Nation of Indians," a described tract of 7,000,000 acres of land, and had further guaranteed to the Cherokee Nation a perpetual outlet west, etc., ceded an additional 800,000 acres of land, in the following terms:

"And whereas it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation on their removal west of the Mississippi, the United States in consideration of the sum of $500,000 therefore hereby covenant and agree to convey to the said Indians and their descendants, by patent, in fee simple, the following additional tract of land."

By article 3 of the same treaty the United States also agreed "that the lands above ceded by the treaty of February 14, 1833, including the outlet, and those ceded by this treaty, shall all be included in one patent executed to the Cherokee Nation of Indians by the President of the United States according to the provisions of the act of May 28, 1830."

The act of May 28, 1830 (4 Stat. at L. 411, chap. 148), conferred authority upon the President to create districts of territory in lands west of the Mississippi to be exchanged for lands held by Indians in a state or territory. Respecting the title to the lands so to be given in exchange, it was provided in § 3 as follows:

"Sec. 3. *And be it further enacted,* That in the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always,* That such lands shall revert to the United States, if the Indians become extinct, or abandon the same."

The article of the treaty of 1835 upon which is based the claim that an exclusive right is vested in the Cherokee Nation to the use, control, and occupancy of its tribal lands is the following (7 Stat. at L. 481):

"Article 5. The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the foregoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any state or territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: *Provided always,* That they shall not be inconsistent with the Constitution of the United States and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians; and also, that they shall not be considered as extending to such citizens and army of the United States as may travel or reside in the Indian country by permission, according to the laws and regulations established by the government of the same."

By the treaty of August 6, 1846 (9 Stat. at L. 871), providing for an adjustment of the differences theretofore existing between different portions of the people constituting and recognized as the Cherokee Nation of Indians, it was provided in article 1 as follows:

"That the lands now occupied by the Cherokee Nation shall be secured to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, including the 800,000 acres purchased, together with the outlet west, promised by the United States, in conformity with the provisions relating thereto, contained in the 3d article of the treaty of 1835, and in the 3d section of the act of Congress, approved May 28th, 1830, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, 'to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always,* That such lands shall revert to the United States, if the Indians become extinct or abandon the same."

The treaty of July 19, 1866 (14 Stat. at L. 799), does not require particular notice.

United States if the Indians become extinct or abandon the same.

16 Am. & Eng. Enc. Law, 2d ed. p. 231.

A properly constituted Indian reservation, such as that occupied by appellants, is not public land of the United States until the Indian title is extinguished with their consent; and a mineral location thereon is void.

20 Am. & Eng. Enc. Law, 2d ed. p. 690, note 2: *Kendall* v. *San Juan Silver Min. Co.* 144 U. S. 658, 36 L. ed. 583, 12 Sup. Ct. Rep. 779, Affirming 9 Colo. 349, 12 Pac. 198; *McFadden* v. *Mountain View Min. & Mill. Co.* 38 C. C. A. 354, 97 Fed. 670; *Golden Terra Min. Co.* v. *Mahler*, 4 Morrison, Min. Rep. 390.

When persons have been in undisputed and peaceable possession of real or personal property for thirty years, it is too late to question the validity of the title.

*Doe ex dem. Protestant Episcopal Church* v. *Newbern Academy*, 9 N. C. (2 Hawks) 233; 1 Greenl. Ev. § 21, note 5.

When the state has executed a deed, and under that deed property rights have grown up and been recognized, and persons, acting on the truth of the recitals in such deed, have made expenditures and incurred liabilities, the doctrine of estoppel applies against the state as well as against individuals.

11 Am. & Eng. Enc. Law, 2d ed. p. 396, note 8; *Vermont* v. *Society for Propagation of Gospel*, 2 Paine, 545, Fed. Cas. No. 16,920; *Carver* v. *Jackson ex dem. Astor*, 4 Pet. 87, 7 L. ed. 791; *Menard* v. *Massey*, 8 How. 313, 12 L. ed. 1093.

Recitals in deeds of matters which are particular and essential will bind the parties thereto, and their privies in blood, in estate, and in law.

11 Am. & Eng. Enc. Law, 2d ed. p. 400; *Fort* v. *Allen*, 110 N. C. 191, 14 S. E. 685; *Coloma* v. *Eaves*, 92 U. S. 484, 23 L. ed. 579; *Venice* v. *Murdock*, 92 U. S. 494, 23 L. ed. 583; *Converse* v. *Fort Scott*, 92 U. S. 503, 23 L. ed. 621; *Marcy* v. *Oswego Twp.* 92 U. S. 637, 23 L. ed. 748; *Douglas County* v. *Bolles*, 94 U. S. 104, 24 L. ed. 46; *Johnson County* v. *January*, 94 U. S. 202, 24 L. ed. 110; *Buchanan* v. *Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Independent School Dist.* v. *Stone*, 106 U. S. 186, 27 L. ed. 90, 1 Sup. Ct. Rep. 84.

The stipulations of the treaty must be given effect "in the manner and to the extent which the parties have declared, and not otherwise."

*United States* v. *Choctaw Nation*, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149.

Where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.

*Downes* v. *Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

*Assistant Attorney General* **Van Devanter** and *Mr.* **William C. Pollock** submitted the cause for appellee:

The Indians are wards of the United States.

*Cherokee Nation* v. *Georgia*, 5 Pet. 1, 8 L. ed. 25; *United States* v. *Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Choctaw Nation* v. *United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722.

Congress has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for territories what the people, under the Constitution of the United States, may do for the states.

*First Nat. Bank* v. *Yankton County*, 101 U. S. 129, 25 L. ed. 1046; *Murphy* v. *Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747; *Church of Jesus Christ, L. D. S.* v. *United States*, 136 U. S. 4, 34 L. ed. 481, 10 Sup. Ct. Rep. 792; *Utter* v. *Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183; *De Lima* v. *Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; *Downes* v. *Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

Congress has, therefore, authority to enact legislation for the management of the property of these wards of the nation.

Cooley, Const. Lim. 6th ed. pp. 115 *et seq.*; *Hoyt* v. *Sprague*, 103 U. S. 613, 26 L. ed. 585; *Rice* v. *Parkman*, 16 Mass. 326; *Louisville, N. O. & T. R. Co.* v. *Blythe*, 69 Miss. 939, 16 L. R. A. 251, 11 So. 111; *Henderson* v. *Dowd*, 116 N. C. 795, 21 S. E. 692; *Davison* v. *Johonnot*, 7 Met. 388, 41 Am. Dec. 448; *Cochran* v. *Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570; *Wheeler* v. *Smith*, 9 How. 55, 13 L. ed. 44; *Fontain* v. *Ravenel*, 17 How. 369, 15 L. ed. 80; *Church of Jesus Christ, L. D. S.* v. *United States*, 136 U. S. 4, 34 L. ed. 481, 10 Sup. Ct. Rep. 792.

Congress is not merely clothed with the power of protecting these Indian wards, but is charged with the duty of doing so.

*Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *United States* v. *Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

Nor is this duty one that can be surrendered or contracted away.

*Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

Indians who received allotments under the act of 1887, thereby becoming citizens, are not deprived of the care and control of Congress, as the status of citizenship is not incompatible with the status of a tribal Indian or the continued guardianship of the government.

*Eells* v. *Ross*, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; *Beck* v. *Flournoy Live-Stock & Real-Estate Co.* 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30; *United States* v. *Flournoy Live-Stock & Real-Estate Co.* 69 Fed. 886; *Farrell* v. *United States*, 49 C. C. A. 183, 110 Fed. 942; *State* v. *Columbia George*, 39 Or. 127, 65 Pac. 604.

An act of Congress may supersede a treaty.

*Head Money Cases*, 112 U. S. 580, *sub nom. Edye* v. *Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Whitney* v. *Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep.

456; *Botiller* v. *Dominguez*, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; *Chinese Exclusion Case*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Horner* v. *United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Barker* v. *Harvey*, 181 U. S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690; *The Cherokee Tobacco*, 11 Wall. 616, *sub nom.* *207 *Half Pound Papers of Smoking Tobacco* v. *United States*, 20 L. ed. 227; *Foster* v. *Neilson*, 2 Pet. 314, 7 L. ed. 435; *Taylor* v. *Morton*, 2 Curt. C. C. 454, Fed. Cas. No. 13,799; *Clinton Bridge*, Woolw. 155, Fed. Cas. No. 2,900; *Ward* v. *Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; *Thomas* v. *Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Tuttle* v. *Moore* (Ind. Terr.) 64 S. W. 585.

Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members.

*Cherokee Trust Funds*, 117 U. S. 288, *sub nom. Eastern Band of Cherokee Indians* v. *United States*, 29 L. ed. 880, 6 Sup. Ct. Rep. 718; *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 39 L. ed. 120, 15 Sup. Ct. Rep. 55; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722.

Even if there were doubt as to the validity of the legislation under consideration, that would not be sufficient to justify the courts in declaring it unconstitutional. The doubt must be resolved in favor of the legislative action.

Cooley, Const. Lim. 6th ed. pp. 216, 217; *Fletcher* v. *Peck*, 6 Cranch, 87, 3 L. ed. 162.

The whole matter was carefully investigated and considered by Congress, and the act under consideration was passed, after due deliberation, with a full knowledge of existing conditions and the importance of the subject-matter, and with full conviction of their authority in the premises. This deliberate conclusion of a co-ordinate branch of the government is entitled to and will receive great weight in any examination of the question by the courts.

*M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Lindsey & P. Co.* v. *Mullen*, 176 U. S. 126, 44 L. ed. 400, 20 Sup. Ct. Rep. 325; *Luther* v. *Borden*, 7 How. 1, 12 L. ed. 581; *Taylor* v. *Beckham*, 178 U. S. 548, 44 L. ed. 1187, 20 Sup. Ct. Rep. 890.

The bill of complaint here is fatally defective because of the failure to make the Cherokee Oil & Gas Company a party defendant.

*California* v. *Southern P. Co.* 157 U. S. 229, 39 L. ed. 683, 15 Sup. Ct. Rep. 591; *New Orleans Waterworks Co.* v. *New Orleans*, 164 U. S. 471, 41 L. ed. 518, 17 Sup. Ct. Rep. 161; *Chadbourne* v. *Coe*, 2 C. C. A. 327, 10 U. S. App. 78, 51 Fed. 479.

The statements of the bill as to the necessity for relief by way of injunction to prevent multiplicity of suits and irreparable injury to complainants are not sufficient.

*Cruickshank* v. *Bidwell*, 176 U. S. 73, 44 L. ed. 377, 20 Sup. Ct. Rep. 280.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The grounds of demurrer to the bill of complaint were summarized in the following reasons embodied in a statement filed with the demurrer:

"1. The matters named in the bill are matters of administration, which cannot be taken away from an executive department and carried into the courts.

*"2. That the Cherokee Oil & Gas Company named in the bill is a necessary party to the suit, as shown by the bill. [300]

"3. That the defendant is proceeding in conformity with the act of Congress approved June 28, 1898 (30 Stat. at L. 495, chap. 517), which is a valid exercise of the power of Congress over the property of an Indian tribe."

Preliminary to considering the fundamental question raised by the demurrer, it is necessary to notice two subjects not expressly referred to in the opinion below. They are, first, the objection to the formal sufficiency of certain of the averments in the bill; and, second, the claim that the Cherokee Oil & Gas Company was an indispensable party defendant. With respect to the first-mentioned ground of objection, without going into detail, we think the statements in the bill were sufficient to show that the jurisdiction of a court of equity was properly invoked. So far as the second ground of objection is concerned, we presume that the courts below omitted to pass expressly thereon, because it was deemed that the company named was properly omitted from the bill. As the bill assailed generally the want of power in the Secretary of the Interior to execute leases affecting lands owned by the tribe, and referred to the application pending for a lease made by the Cherokee Oil & Gas Company, as manifesting but a particular instance in which it was charged that the Secretary of the Interior might exercise the power conferred by the statute, the corporation named was not an indispensable party to the bill. Clearly, every person with whom the Secretary might contract, if he exercised the discretion vested in him by the statute, were not indispensable parties to the determination of the question whether the statute had lawfully conferred such discretionary power upon the official in question. This brings us to consider the fundamental question which the case involves, that is, the contention on behalf of the government that the decree below should be sustained because the act of June 28, 1898, is a valid exercise of power vested in Congress, and fully authorized the Secretary of the Interior to do and perform the things which the complainants seek to have him enjoined from doing.

Before noticing the pertinent provisions of the act of June 28, 1898, *reference will [301]

be made to antecedent legislation by Congress, which led up to the enactment of the statute in question. In the statement preceding the opinion, delivered through Mr. Chief Justice Fuller, in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, it was said:

"By the 16th section of the Indian appropriation act of March 3, 1893 (27 Stat. at L. 612, 645, chap. 209), the President was authorized to appoint, by and with the advice and consent of the Senate, three commissioners 'to enter into negotiations with the Cherokee Nation, Choctaw Nation, Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of the extinguishment of the national or tribal title to any lands within that territory now held by any and all such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a state or states of the Union which shall embrace the lands within said Indian territory.'

"The commission was appointed and entered on the discharge of its duties, and under the sundry civil appropriation act of March 2, 1895 (28 Stat. at L. 939, chap. 189), two additional members were appointed. It is commonly styled the 'Dawes commission.'"

On November 20, 1894, and November 18, 1895, the Dawes commission made reports of the condition of affairs in the Indian territory. These reports, as also a report of the Senate committee on the five civilized tribes, of date May 7, 1894, were referred to and were quoted from in the statement of facts made by the court in the *Stephens Case*. The reports asserted the existence of a state of affairs in the Indian territory "abhorrent to the spirit of our institutions," [302] and declared the necessity *of assumption by the United States of "responsibility for future conditions in the territory" and the need of independent legislation by Congress in that behalf. Thus, the Senate committee on the five civilized tribes of Indians, in a report on May 7, 1894 (Sen. Rep. No. 377, 53d Cong. 2d sess.), said in part:

"As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the government of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.

"In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection and for the security of life, liberty, and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights unless the government does interfere to administer such trust."

By a provision in the act of June 10, 1896 (29 Stat. at L. 321, 339, chap. 398), said commission was directed to continue the exercise of the authority already conferred upon it, and was invested with further powers in respect of hearing and determining applications for citizenship in said tribes and making rolls of the members thereof.

A provision in the act of June 7, 1897 (30 Stat. at L. 62, 84, chap. 3), directed said commission to continue to exercise all authority theretofore conferred upon it to negotiate with said five tribes, and gave further direction respecting the making of rolls of citizenship.

The act of June 28, 1898 (30 Stat. at L. 495, chap. 517), entitled "An Act for the Protection of the People of the Indian Territory, and for Other Purposes," contains provisions for the completion of the rolls of citizenship of said tribes, for the reservation of town sites *and the sale of lots therein, [303] and for the allotment of the exclusive use and occupancy of the surface of all lands susceptible of allotment among the citizens of the respective tribes, with a provision as follows (§ 11):

"But all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such land shall carry the title to such oil, coal, asphalt, or mineral deposits."

Section 13 of said act contains provisions for leasing the oil, coal, asphalt, and mineral deposits as follows:

"That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. No lease shall be made or renewed for a longer period than fifteen years, nor cover the mineral in more than six hundred and forty acres of land, which shall conform as nearly as possible to the surveys. Lessees shall pay on each oil, coal, asphalt, or other mineral claim at the rate of one hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years, and five hundred dollars, in advance, for each succeeding year thereafter, as advanced royalty on the mine or claim on which they are made. All such payments shall be a credit on royalty when each said mine is de-

veloped and operated and its production is in excess of such guaranteed annual advanced payments; and all lessees must pay said annual advanced payments on each claim, whether developed or undeveloped; and should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance shall then become and be the money and property of the tribe. Where any oil, coal, asphalt, or other mineral is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the [304] damage done to the *other land and improvements, shall be ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land by the lessee or party operating the same, before operations begin: *Provided*, That nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt, or mineral, which have been assented to by act of Congress, but all such interest shall continue unimpaired hereby, and shall be assured to such holders or owners by leases from the Secretary of the Interior for the term not exceeding fifteen years, but subject to payment of advance royalties as herein provided, when such leases are not operated, to the rate of royalty on coal mined, and the rules and regulations to be prescribed by the Secretary of the Interior, and preference shall be given to such parties in renewals of such leases: *And provided further*, That when, under the customs and laws heretofore existing and prevailing in the Indian territory, leases have been made of different groups or parcels of oil, coal, asphalt, or other mineral deposits, and possession has been taken thereunder and improvements made for the development of such oil, coal, asphalt, or other mineral deposits by lessees or their assigns, which have resulted in the production of oil, coal, asphalt, or other mineral in commercial quantities by such lessees or their assigns, then such parties in possession shall be given preference in the making of new leases, in compliance with the directions of the Secretary of the Interior; and in making new leases due consideration shall be made for the improvements of such lessees; and in all cases of the leasing or renewal of leases of oil, coal, asphalt, and other mineral deposits preference shall be given to parties in possession who have made improvements. The rate of royalty to be paid by all lessees shall be fixed by the Secretary of the Interior."

Section 16 contains a provision as to the payment and distribution of rents and royalties due said tribes, as follows:

"That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber or lumber, or any other kind of property whatsoever, or any rents on any *lands or [305] property belonging to any one of said tribes or nations in said territory, or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong."

As the acts done and contemplated to be done by the appellee and assailed by the bill of complaint are presumably not the subject of criticism, in the event that the act of June 28, 1898, was a constitutional and valid exercise of power by Congress, we will now address ourselves to a consideration of that statute.

Prior to the act of March 3, 1871 (16 Stat. at L. 544, 566, chap. 120, now § 2079 of the Revised Statutes), which statute, in effect, voiced the intention of Congress thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them, the customary mode of dealing with the Indian tribes was by treaty. As, however, held in *Cherokee Nation* v. *Southern K. R. Co.* 135 U. S. 641, 653, 34 L. ed. 295, 300, 10 Sup. Ct. Rep. 965, reaffirmed in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 484, 43 L. ed. 1041, 1055, 19 Sup. Ct. Rep. 722, while the Cherokee Nation and other Indian tribes domiciled within the United States had been recognized by the United States as separate communities, and engagements entered into with them by means of formal treaties, they were yet regarded as in a condition of pupilage or dependency, and subject to the paramount authority of the United States.

Reviewing decisions of this court rendered prior to the act of 1871, and particularly considering the status of the very tribe of Indians affected by the present litigation, the court commented upon a declaration made in a previous decision that this government had "admitted, by the most solemn sanction, the existence of the Indians as a separate and distinct people, and as being invested with rights which constitute them a state, or separate community." It was observed of this declaration that it fell "far short of saying that they are a sovereign state, with no superior within the limits of its territory." Considering the treaty of 1835 with the Cherokee Nation, under which it is now claimed, *on behalf of the appellants, that [306] the Cherokees became vested with the sole control over the lands ceded to them, the court observed (p. 485, L. ed. p. 1055, Sup. Ct. Rep. p. 737):

"By the treaty of New Echota, 1835, the United States covenanted and agreed that the lands ceded to the Cherokee Nation should at no future time, without their consent, be included within the territorial limits or jurisdiction of any state or territory.

and that the government would secure to that nation 'the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country, belonging to their people or such persons as have connected themselves with them;' and, by the treaties of Washington, 1846 and 1866, the United States guaranteed to the Cherokees the title and possession of their lands, and jurisdiction over their country. Revision of Indian Treaties, pp. 65, 79, 85. But neither these nor any previous treaties evinced any intention, upon the part of the government, to discharge them from their condition of pupilage or dependency, and constitute them a separate, independent, sovereign people, with no superior within its limits."

It results, then, from the doctrine of the decisions of this court, that the demurrer was properly sustained, because of the fact that the matters named in the bill were matters of administration, to which the act of June 28 was applicable, and they were solely cognizable by the executive department of the government. The decision in *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722, is particularly in point, as that case involved the validity of the very act under consideration, and the precedent correlative legislation, wherein the United States practically assumed the full control over the Cherokees as well as the other nations constituting the five civilized tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed. Thus, in the course of its opin-
[307] ion, *after alluding to the legislation concerning the Dawes commission, the court said:

"It may be remarked that the legislation seems to recognize, especially the act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of the acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

The holding that Congress had power to provide a method for determining membership in the five civilized tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and secure therefrom an income for the benefit of the tribe.

Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds*, 117 U. S. 288, 308, *sub nom. Eastern Band of Cherokee Indians* v. *United States*, 29 L. ed. 880, 886, 6 Sup. Ct. Rep. 718. The manner in which this land is held is described in *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 207, 39 L. ed. 120, 124, 15 Sup. Ct. Rep. 55, 60, where this court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: "Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed, was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them."

There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise, by virtue of the act of 1898, has relation merely to the control and *development of [308] the tribal property, which still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation.

We are not concerned in this case with the question whether the act of June 28, 1898, and the proposed action thereunder, which is complained of, is or is not wise, and calculated to operate beneficially to the interests of the Cherokees. The power existing in Congress to administer upon and guard the tribal property, and the power being political and administrative in its nature, the manner of its exercise is a question within the province of the legislative branch to determine, and is not one for the courts.

*Affirmed.*

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EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, *Plff. in Err.*,

*v.*

CECIL BROWN, Administrator of the Estate of David B. Smith, Deceased.

(See S. C. Reporter's ed. 308–315.)

*Error to Hawaiian courts—governed by principles controlling error to state courts—dismissal on motion.*

1. The jurisdiction of the Supreme Court of

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

the United States to review judgments of the courts of the territory of Hawaii is, under the act of April 30, 1900, § 86 (31 Stat. at L. 141, chap. 339), to be measured by the power conferred upon the former court to review judgments of state courts.

2. The dismissal on motion of a writ of error to the supreme court of the territory of Hawaii, which is governed by the principles controlling writs of error to state courts, will be ordered, instead of granting a motion to affirm, where the subject-matter of the controversy is not inherently Federal, and the only Federal question raised has been so explicitly decided by the Supreme Court of the United States in accordance with the ruling of the lower court as to foreclose further argument on the subject.

[No. 320.]

*Submitted October 20, 1902. Decided December 1, 1902.*

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which affirmed a judgment of the trial court in favor of plaintiff in an action on a policy of life insurance. On motion to dismiss or affirm. *Dismissed.*

The facts are stated in the opinion.

*Mr.* **Allan McCulloh** submitted the cause for plaintiff in error.

*Mr.* **Cecil Brown** submitted the cause for defendant in error:

Where the question is not as to the validity of the Constitution or act, but merely as to the application of the same to the case, no Federal question is involved.

2 Desty, Fed. Proc. 9th ed. § 223, p. 778; *Cameron* v. *United States*, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184.

A real, and not a fictitious, Federal question, is essential to the jurisdiction of this court.

*Millingar* v. *Hartupee*, 6 Wall. 258, 18 L. ed. 829; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Wilson* v. *North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Hamblin* v. *Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

Mr. Justice **White** delivered the opinion of the court:

The questions for decision arise on a motion to dismiss or affirm this writ of error which is prosecuted to a judgment of the supreme court of the territory of Hawaii. The act of April 30, 1900, providing a government for the territory of Hawaii (31 Stat. at L. 141, chap. 339), enacts (§ 86) that "the laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states, shall govern in such matters and proceedings as between the courts of the United States and the courts of the territory of Hawaii." It follows that the jurisdiction of this court to review judgments of the courts of the territory of Hawaii is more restricted than is the jurisdiction to review the judgments of the courts of other organized territories, and is to be measured by the power conferred upon this court to review judgments of state courts. Rev. Stat. 709 [U. S. Comp. Stat. 1901, p. 575]. In *Ex parte Wilder's S. S. Co.* 183 U. S. 545, 46 L. ed. 321, 22 Sup. Ct. Rep. 225, the distinction made by the law in question between Hawaii and other territories was pointed out.

The case, as stated below, and as substantially admitted by both parties in their printed argument, is as follows:

David B. Smith died, intestate, on December 24, 1899, in the city of San Francisco. Long prior to and at the time of his death he was domiciled in Honolulu, in the territory of Hawaii. He there applied to the plaintiff in error, a New York corporation, for a policy on his life payable to his estate. The policy was issued, was delivered to Smith in Honolulu, and was found among his effects in Honolulu after his death. At the instance of the daughter of the deceased, who was his legal heir, the defendant in error was appointed administrator of the estate of Smith by a Hawaiian [310] court having jurisdiction to that end, and the administrator took possession of the policy and made the requisite proof of death. After the appointment of the Hawaiian administrator and the making by him of the proof of death, a relative of the deceased made application to a court in the city of New York for letters of adminstration upon the estate of Smith, which were issued. Prior to any attempted action by the New York administrator to enforce the policy in question, in consequence of the refusal of the insurance company to pay the loss, the Hawaiian administrator brought suit in a court in Hawaii having jurisdiction, to recover the amount of the insurance. Service of process in this action was made on the general agent of the insurance company in Hawaii, which agent, the supreme court of the territory declared in its opinion rendered in this cause, "we presume, is the person designated for such purpose by the defendant under the statute. Civil Laws, chap. 130, since amended, Laws of 1898, act 45. At any rate, the defendant answered generally, and did not question the validity of the service." Before the trial of the cause in the courts of Hawaii the administrator appointed in New York instituted an action upon the policy against the insurance company in the circuit court of the United States for the southern district of New York. When the suit came to trial in the Hawaiian court, no judgment having been rendered in the suit brought in New York, the defendant corporation, to support its

contention that the plaintiff was not entitled to recover, claimed the benefit of the due faith and credit clause of the Constitution of the United States, and to sustain this asserted right offered proof of the appointment of the New York administrator and tendered an exemplification of the record of the proceedings had in the action, brought by the New York administrator in the Federal court in that state. The trial court rejected the evidence, and exceptions were duly taken. A verdict was returned in favor of the plaintiff for the full amount sued for. The case having been taken to the supreme court of the territory, the judgment was affirmed, the court expressly deciding that the right asserted under the due faith and credit clause of the Constitution of the United States was without mer-
[311] it. From *the foregoing it results that a claim under the Constitution and laws of the United States was made and decided in the court below, and if the fact that such a claim was formally made and disposed of below without reference to its substantial foundation determines the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. "There must be a real substantive question on which the case may be made to turn," that is, "a real, and not a merely formal, Federal question is essential to the jurisdiction of this court." Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691, and authorities there cited. The power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject-matter of the controversy is *per se* and inherently Federal. *Swafford* v. *Templeton*, 185 U. S. 487, 493, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783. It has also been decided by this court that even where the motion to dismiss is denied, and where such motion should be treated as without color, considering alone the formal making of such question, yet notwithstanding the provisions of subdivision 5 of rule 6, the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by this court as to absolutely foreclose further contention on the subject. *Chanute* v. *Trader*, 132 U. S. 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67; *Richardson* v. *Louisville & N. R. Co.* 169 U. S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268; *Blythe* v. *Hinckley*, 180 U. S. 338, 45 L. ed. 561, 21 Sup. Ct. Rep. 390.

*Is the motion to dismiss or the motion to [312] affirm within the principles established by prior decisions of this court as just previously stated? In substance, the contention of the plaintiff in error is that on the facts above recited the *situs* of the indebtedness upon the policy in question was an asset solely within the jurisdiction of the state of New York and of its courts, and that the debt had not its *situs* in the territory of Hawaii, the domicil of the deceased, where the policy was delivered and where it was actually present. But this contention has in effect been decided by this court to be unsound. *New England Mut. L. Ins. Co.* v. *Woodworth*, 111 U. S. 138, 28 L. ed. 379, 4 Sup. Ct. Rep. 364. In that case recovery was had in a court of the United States in the state of Illinois upon an insurance policy issued on the life of a resident of the state of Michigan by a corporation which had been chartered in the state of Massachusetts. At the time of her death the deceased was still a resident of the state of Michigan. It was argued in this court, on behalf of the defendant in error, that the Illinois court which had granted the letters of administration had no power to do so, because the state of Illinois was not the domicil of the decedent, because there were no assets belonging to the decedent in Illinois at the time of her death, and the bringing of the policy subsequently into Illinois did not constitute the debt thereunder an asset of the estate of the decedent, as such a debt was a simple contract debt and was a local asset only at Boston, the domicil of the debtor company. It was, however, held that the letters of administration issued by the Illinois court were apparently authorized by law, and that it was essential that the facts detailed in the record should distinctly negative the validity of such authority, before it could be adjudicated that the plaintiff's authority to sue was not supported by them. The court then said (p. 144, L. ed. p. 381, Sup. Ct. Rep. p. 366):

"This is not done. On the contrary, the declaration of the letters that the intestate had personal property in Illinois when she died is, we think, supported by what appears in the record, even if such property consisted solely of this policy.

"In the growth of this country, and the expansions and ramifications of business, and the free commercial intercourse between *the [313] states of the Union, it has come to pass that large numbers of life and fire insurance companies and other corporations established with the accumulated capital and wealth of the richer parts of the country, seek business and contracts in distant states which open a large and profitable field. The inconveniences and hardships

resulting from the necessity, on the part of creditors, of going to distant places to bring suits on policies and contracts, and from the additional requirement, in case of death, of taking out letters testamentary or of administration at the original domicil of the corporation debtor, in order to sue, has led to the enactment in many states of statutes which enable resident creditors to bring suits there against corporations created by the laws of other states. Such a statute existed in Illinois, in the present case, requiring every life insurance company not organized in Illinois to appoint in writing a resident attorney, upon whom all lawful process against the company might be served with like effect as if the company existed in Illinois, the writing to stipulate that any lawful process against the company, served on the attorney, should be of the same legal force and validity as if served on the company, a duly authenticated copy of the writing to be filed in the office of the auditor, and the agency to be continued while any liability should remain outstanding against the company in Illinois, and the power not to be revoked until the same power should be given to another, and a like copy be so filed; the statute also providing that service upon said attorney should be deemed sufficient service on the company. Rev. Stat. 1874, chap. 73, § 50, p. 607.

"In view of this legislation and the policy embodied in it, when this corporation, not organized under the laws of Illinois, has, by virtue of those laws, a place of business in Illinois, and a general agent there, and a resident attorney there for the service of process, and can be compelled to pay its debts there by judicial process, and has issued a policy payable, on death, to an administrator, the corporation must be regarded as having a domicil there, in the sense of the rule that the debt on the policy is assets at its domicil, so as to uphold the grant of letters of administration there. [314] The corporation will be presumed *to have been doing business in Illinois by virtue of its laws at the time the intestate died, in view of the fact that it was so doing business there when this suit was brought (as the bill of exceptions alleges), in the absense of any statement in the record that it was not so doing business there when the intestate died. In view of the statement in the letters, if the only personal property the intestate had was the policy, as the bill of exceptions states, it was for the corporation to show affirmatively that it was not doing business in Illinois when she died, in order to overthrow the validity of the letters, by thus showing that the policy was not assets in Illinois when she died."

Indeed, the contention that because the policy was issued by a New York corporation, and was payable in the state of New York, it could not be sued upon by one having possession of it at the domicil of the deceased in another state or in a territory, is directly contrary to the settled rule upheld by the court of appeals of the state of New York. *Sulz* v. *Mutual Reserve Fund Life Asso.* 145 N. Y. 163, 28 L. R. A. 379, 40 N. E. 242.

From the analysis just made, it results that although a Federal question was raised below in a formal manner, that question, when examined with reference to the averments of fact upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit. This being so, the case is brought directly within the rule announced in *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345, 46 L. ed. 936, 941, 22 Sup. Ct. Rep. 691, and authorities there cited. It is likewise also apparent from the analysis previously made that even if the formal raising of a Federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the Federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of Federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted under the rule announced in *Chanute* v. *Trader*, 132 U. S. 210, 33 L. ed. 345, 10 Sup. Ct. Rep. 67, *Richardson* v. *Louisville & *N. R. Co.* 169 U. [315] S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268, and *Blythe* v. *Hinckley*, 180 U. S. 338, 45 L. ed. 561, 21 Sup. Ct. Rep. 390. This being the case, it is obvious that on this record either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect, to finally dispose of this controversy. The question then is, To which of the motions should the decree which we are to render respond? As this is a case governed by the principles controlling writs of error to state courts, it follows that the Federal question upon which the jurisdiction depends is also the identical question upon which the merits depend, and therefore the unsubstantiality of the Federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing,—that is, the two questions are therefore absolutely coterminous. Hence, in reason, the denial of one of the motions necessarily involves the denial of the other, and hence, also, one of the motions cannot be allowed except upon a ground which also would justify the allowance of the other. Under this state of the case (there being, of course, no inherently Federal question, *Swafford* v. *Templeton*, 185 U. S. 487, 493, 46 L. ed. 1005, 1008, 22 Sup. Ct. Rep. 783), we think the better practice is to cause our decree to respond to the question which arises first in order for decision, that is, the motion to dismiss, and therefore *the writ of error is dismissed.*

FIDELITY & DEPOSIT COMPANY OF MARYLAND, *Plff. in Err.*,
*v.*
UNITED STATES OF AMERICA TO THE USE OF LEWIS E. SMOOT.

(See S. C. Reporter's ed. 315–322.)

*Stare decisis—failure to give reasons for decision—validity of court rule requiring affidavit of defense—right to trial by jury.*

1. The authority of a decision of the Supreme Court of the United States upholding a rule of a court of the District of Columbia is not lessened by the former court's failure to give the grounds for its decision, as this omission does not give rise to an inference that it had doubts as to the validity of the rule, but rather that it regarded the grounds of challenge to such validity as without foundation.
2. The constitutional right of trial by jury is not denied by rule 73 of the supreme court of the District of Columbia, authorizing judgment for plaintiff for want of a sufficient affidavit of defense in actions *ex contractu* in which plaintiff has filed a supporting affidavit.
3. An action against principal and surety on a bond to insure the faithful performance of a contract is one "arising *ex contractu*," within the meaning of rule 73 of the supreme court of the District of Columbia, authorizing judgment for plaintiff in such actions for want of a sufficient affidavit of defense.
4. Copies of the bonds in suit, and of the contracts the faithful performance of which they were executed to secure, need not be filed in order to comply with the provisions of rule 73 of the supreme court of the District of Columbia, that in actions *ex contractu* a plaintiff who has filed an affidavit setting out distinctly his cause of action shall be entitled to judgment unless a sufficient affidavit of defense is filed.

[No. 381.]

*Submitted October 31, 1902. Decided December 1, 1902.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District entered under the 73d rule for failure of the defendant to file with his plea a sufficient affidavit of defense. *Affirmed.*

See same case below, 30 Wash. L. Rep. 532.

Statement by Mr. Justice **McKenna:**

[316] *This action was brought in the supreme court of the District of Columbia, by defendant in error, against one Peyton D. Vinson, as principal, and plaintiff in error as surety, on certain bonds, to recover the sum of $530.06. One of the bonds was in the penal sum of $25,000, for the faithful performance of the covenants and conditions of a contract entered into by said Vinson with the District of Columbia. It was covenanted in the bond that Vinson would "promptly make payments to all persons supplying him with labor or materials in the prosecution of the work provided for in said contract." And it was alleged in the declaration that Lewis E. Smoot furnished said Vinson certain materials, which were used by the latter in the completion of the work under the contract, of the value $599.73, of which amount only $206.95 was paid, leaving a balance of $392.78 due.

The other bond was for the penal sum of $6,000, with like covenants and conditions. The declaration alleged that said Smoot furnished materials of the value of $143.28 to Vinson, which were used in the performance of the latter's contract with the District of Columbia, and that said amount was not paid, though demanded. And recovery of said amounts due was prayed against Vinson and the plaintiff in error, amounting *to the sum of $530.06. The dec- [317] laration was accompanied by an affidavit made by Smoot under the requirements of rule 73 of the court, hereinafter set out. The affidavit was very full and circumstantial, and virtually repeated the declaration.

The plaintiff in error filed pleas to the declaration, in which it alleged that neither it nor Vinson owed the sums of money demanded, or any part of either, "in the manner and form as the said United States above complained." And also pleaded that neither it nor Vinson had broken the conditions, or any of them, on said bonds "in the manner and form as the said United States had above complained."

The plaintiff in error on March 14, 1902, filed the following affidavit of defense:

"J. Sprigg Poole, being first duly sworn, deposes and says:

"1. That he is now, and for ten years last past has been, the general agent for the District of Columbia of the Fidelity & Deposit Company of Maryland, the defendant in the above-entitled cause.

"2. That the said defendant admits the execution of the bonds as alleged in the declaration in said cause.

"3. That the said defendant, its officers and agents, has no personal knowledge of the contracts alleged in said declaration to have been entered into by and between Lewis E. Smoot and Peyton D. Vinson, or of the indebtedness alleged to be due from said Vinson to said Smoot under said alleged contracts; that the said defendant, its officers and agents, has not sufficient information, in the opinion of the affiant and of the counsel of said defendant, its attorney of record in said cause, to be safe in admitting or denying under oath the allegations of said declaration in regard to said contracts between said Smoot and Vinson, or the indebtedness thereunder, and in so far as said defendant is sought to be charged with the payment of said alleged indebtedness from Vinson to Smoot it calls for strict proof of said alleged indebtedness.

NOTE.—*On the right to trial by jury*—see notes to Grand Rapids & I. R. Co. v. Sparrow (C. C. W. D. Mich.) 1 L. R. A. 480; Anderson v. O'Donnell (S. C.) 1 L. R. A. 632; Ellenbecker v. Plymouth County Dist. Ct. 33 L. ed. U. S. 801; Perego v. Dodge, 41 L. ed. U. S. 13; and Thompson v. Utah, 42 L. ed. U. S. 1061.

"4. That said defendant is advised by its counsel that it is entitled under the law of the land to trial by jury as to the truth of the allegations of the declaration in regard to said alleged contracts between the said [318] Smoot and Vinson and the *alleged indebtedness under said contracts; that said defendant does not waive, but expressly claims, the benefit of the right of trial by jury, and prays that this honorable court will not enter judgment against it, the said defendant, without trial by jury upon the issues tendered by the pleas filed to said declaration.

"That this prayer for trial by jury is not made for the purpose of delay, but solely because the defendant is advised by counsel, and believes, that, under the law of the land, it is entitled to trial by jury in this cause, and that it cannot waive or surrender that right without exposing itself to the danger of being deprived of its property without due process of law."

On the 18th of March the defendant in error filed a motion "for judgment, under the 73d rule, for failure of the defendant to file with his plea a sufficient affidavit of defense."

Upon hearing, the motion was granted and judgment entered as prayed for in the declaration. The judgment was affirmed by the court of appeals, and the case was then brought here.

The 73d rule is as follows:

"In any action arising *ex contractu*, if the plaintiff or his agent shall have filed, at the time of bringing his action, an affidavit setting out distinctly his cause of action, and the sum he claims to be due, exclusive of all set-offs and just grounds of defense, and shall have served the defendant with copies of his declaration and of said affidavit, he shall be entitled to a judgment for the amount so claimed, with interest and costs, unless the defendant shall file, along with his plea, if in bar, an affidavit of defense denying the right of the plaintiff as to the whole or some specified part of his claim, and specifically stating also, in precise and distinct terms, the grounds of his defense, which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part. And where the defendant shall have acknowledged in his affidavit of defense his liability for a part of the plaintiff's claim as aforesaid the plaintiff, if he so elect, may have judgment entered in his favor for the amount so confessed to be due.

"Sec. 2. The provisions of this rule shall not apply to defendants who are representatives of a decedent's estate except when the affidavit filed with the declaration sets [319] forth that the contract *sued on was directly with such representative, or that a promise to pay was made by him.

"Sec. 3. When the defendant is a corporation, the affidavit of defense may be made by an officer, agent, or attorney of such corporation.

"Rules of the supreme court of the District of Columbia adopted at the April term, 1898, p. 28."

*Mr.* **L. H. Poole** submitted the cause for plaintiff in error:

Judicial proceedings cannot be valid unless they proceed upon inquiry and render judgment only after trial.

*Hovey* v. *Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

The 73d rule is "inconsistent" with that provision of the District Code which continues the "common law" in force in the District.

3 Bl. Com. p. 342; *Tayloe* v. *Riggs*, 1 Pet. 596, 7 L. ed. 277; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Union P. R. Co.* v. *Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000.

The affirmative description of the cases in which the jurisdiction may be exercised implies a negative on the exercise of such power in other cases.

*Marbury* v. *Madison*, 1 Cranch, 174, 2 L. ed. 72.

The courts which affirm the validity of the rule characterize *ex parte* affidavits, upon which alone judgment is rendered under the rule, as "a kind of testimony the law abhors, and never resorts to except in case of necessity."

*Fries* v. *Fries*, 1 MacArth. 294.

Such evidence lacks the essential element and crucial test of cross-examination, and presents more frequently the ingenious manipulation of counsel than the candid testimony of witnesses.

*Hart* v. *Hines*, 10 App. D. C. 373; *Standard Oil Co.* v. *Oeser*, 11 App. D. C. 85.

The rule is "inconsistent" with the common-law principle governing the burden of proof.

*Reeves* v. *Low*, 8 App. D. C. 115; *Daniels* v. *Solomon*, 11 App. D. C. 175; *United States ex rel. de Yturbide* v. *Metropolitan Club*, 11 App. D. C. 201; *Faul* v. *Hulick*, 18 App. D. C. 22.

A contested issue of fact at common law can only be determined by a trial before a jury of twelve men, and the unanimous verdict of those twelve men upon the issue.

*District of Columbia* v. *Humphries*, 12 App. D. C. 127.

In the District of Columbia the common law prevails, except as it may have been changed or modified by statute.

*Willard* v. *Wood*, 1 App. D. C. 57; *De Forest* v. *United States*, 11 App. D. C. 466.

"Trial by jury, as it existed at the common law," is not "preserved" under a "rule depriving a party, under certain conditions, of his right to a trial by jury in the regular mode of the common law."

*Gleason* v. *Hocke*, 5 App. D. C. 5.

The common-law system of pleading is in force in the District, binding alike upon this court and the inferior courts, in the absence of statutory provisions changing that law.

*Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 219, 3 L. ed. 204; *United States* v. *Eliason*, 16 Pet. 301, 10 L. ed. 972; *McKenna* v. *Fisk*, 1 How. 249, 11 L. ed. 120; *Baker* v.

*Cummings*, 181 U. S. 122, 45 L. ed. 778, 21 Sup. Ct. Rep. 578.

Changes in the common-law system of pleading in the District are to be made by Congress.

*Baker* v. *Cummings*, 181 U. S. 122, 45 L. ed. 778, 21 Sup. Ct. Rep. 578; 3 Bl. Com. 81, 84; *Roach* v. *Vanktswick*, MacArth. & M. 178; *Prigg* v. *Pennsylvania*, 16 Pet. 617, 10 L. ed. 1089.

The actions *ex contractu* to which the rule has reference are necessarily such as arise upon money demands pure and simple,— actions for a liquidated and specific amount of money, for the payment of which there is an express contract between the parties, or for which the law implies a contract.

*Deane* v. *Echols*, 2 App. D. C. 528. See also *Bailey* v. *District of Columbia*, 4 App. D. C. 369, 171 U. S. 161, 43 L. ed. 118, 18 Sup. Ct. Rep. 868.

The demand which the affidavit-of-defense law makes upon parties sued, to set forth, within a comparatively short space of time and with a considerable degree of precision and minuteness of detail, a complete defense to the cause of action, must necessarily proceed upon the supposition that the party is speaking of his own affairs.

Endlich, Affidavits of Defense, § 317.

Bonds with collateral conditions are not within the spirit or principle of the affidavits-of-defense rule.

Endlich, Affidavits of Defense, §§ 90, 100, 101, 103–105, 107–110.

The same is true of a "contract of suretyship for goods, etc., to be furnished to a third person."

Ibid. § 158.

Instruments which are executory on the plaintiff's part, or which for any reason require averments supplemental to the copy filed, to complete the showing of defendant's liability, are without the affidavit-of-defense law.

Ibid. §§ 171, 178.

Contracts under which the defendant's liability is in any manner conditional are outside the scope and legitimate intention of the affidavit-of-defense law.

Ibid. § 182.

It is not every case of assumpsit, express or implied, which comes within the rule, but only those in which there is some direct dealing between plaintiff and defendant.

Ibid. § 225.

Without violation of the fundamental rule of evidence that the best evidence must be produced, the contents of the bonds in suit and of the contracts between the District and Vinson could not be proved by the plaintiff's *ex parte* affidavit.

Ibid. §§ 227, 228; *Sebree* v. *Dorr*, 9 Wheat. 563, 6 L. ed. 161.

A general and excellent test of the sufficiency of an affidavit of defense is contained in the rule that, if it put the plaintiff upon proof of any matter *dehors* the instrument (or copy), it will be sufficient to prevent judgment. Conversely, if the plaintiff be obliged, in order to make out his case against the defendant, to introduce matters *dehors* the copy filed by him as the basis and sole evidence of his claim, he cannot be entitled to judgment; for if that rule means anything it means that the plaintiff's case, as regards the defendant's liability, must rest upon the face of the copy, unaided by any extraneous averments.

Endlich, Affidavits of Defense, §§ 289–293.

As the statute which created the right to such a recovery also prescribed the remedy, that remedy was exclusive of all others for the enforcement of that right.

*Stephens* v. *Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336; *Slacum* v. *Pomery*, 6 Cranch, 221, 3 L. ed. 204.

When the case turns, in whole or in part, upon the construction to be given to an instrument in writing, the original or a copy should be filed as an exhibit.

*Whitaker* v. *Middle States Loan, Bldg. & Constr. Co.* 7 App. D. C. 207; *Siggers* v. *Snow*, 15 App. D. C. 408.

It is the court's duty to construe all written instruments given in evidence, as a question of law.

*United States* v. *Hodge*, 6 How. 282, 12 L. ed. 439.

Defendant's affidavit is sufficient to put the plaintiff to proof.

5 Wash. L. Rep. 130; *Young* v. *Grundy*, 6 Cranch, 51, 3 L. ed. 149; *Brown* v. *Pierce*, 7 Wall. 205, 19 L. ed. 134.

The rule is inconsistent with the laws of the United States, because it impairs defendant's right to "due process of law."

*Hovey* v. *Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

The rule is inconsistent with such laws, because it impairs defendant's right to "trial by jury" in cases within the 7th Amendment, and authorizes summary judgment against him in such cases without such trial.

*Barney* v. *Schmeider*, 9 Wall. 248, 19 L. ed. 648; *Hodges* v. *Easton*, 106 U. S. 408, 27 L. ed. 169, 1 Sup. Ct. Rep. 307; *Baylis* v. *Travellers' Ins. Co.* 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494; *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

The rule is inconsistent with such laws, because it impairs defendant's right to the protection of the statutory "mode of proof," and authorizes the entry of summary judgment against him without such proof.

*Union P. R. Co.* v. *Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724.

The rule is inconsistent with such laws, because it impairs defendant's right to have the damages assessed in the manner provided by law, and authorizes the entry of summary judgment against him without such assessment of damages.

*Simonton* v. *Winter*, 5 Pet. 149, 8 L. ed. 78.

The rule is inconsistent with such laws, because it exacts of defendant in actions at law discovery, in advance of trial, in cases in which he is not required by law to make

discovery, and authorizes the entry of summary judgment against him if he fails to make such discovery.

*Union P. R. Co.* v. *Botsford*, 141 U. S. 250, 35 L. ed. 734, 11 Sup. Ct. Rep. 1000; *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *National Cash-Register Co.* v. *Leland*, 37 C. C. A. 372, 94 Fed. 502, 77 Fed. 242; *Turner* v. *Shackman*, 27 Fed. 184; *Sulzer* v. *Watson*, 39 Fed. 414; *Thomas* v. *American Freehold, Land & Mortg. Co.* 12 L. R. A. 681, 47 Fed. 554; *Shellabarger* v. *Oliver*, 64 Fed. 307; *Tabor* v. *Indianapolis Journal Newspaper Co.* 66 Fed. 424; *United States* v. *National Lead Co.* 75 Fed. 94; *Despeaux* v. *Pennsylvania R. Co.* 81 Fed. 898.

The rule inverts the rule of discovery laid down by this court.

*Brown* v. *Swann*, 10 Pet. 502, 9 L. ed. 510.

The rule is inconsistent with the laws of the United States, because it violates the rule requiring the best evidence, and permits the contents of written instruments in suit to be proved by *ex parte* affidavit.

*Tayloe* v. *Riggs*, 1 Pet. 596, 7 L. ed. 277; *Mills* v. *Bank of United States*, 11 Wheat. 439, 6 L. ed. 514.

That formal proof of the execution of instruments in suit is dispensed with unless denied under oath cannot authorize secondary evidence of their contents.

*Sebree* v. *Dorr*, 9 Wheat. 563, 6 L. ed. 161.

*Mr.* **Crandal Mackey** submitted the cause for defendant in error:

The requirement of an affidavit of merits in certain actions is an old common-law rule of practice.

3 Chitty, Gen. Pr. p. 543; 1 Tidd, Pr. p. 302.

The constitutionality and legality of the rule have been attacked in every possible way, and the rule has been everywhere sustained.

*Vanatta* v. *Anderson*, 3 Binn. 423; *Hoffman* v. *Locke*, 19 Pa. 57; *Lord* v. *Ocean Bank*, 20 Pa. 387, 59 Am. Dec. 728; *Lawrance* v. *Borm*, 86 Pa. 225; *Randall* v. *Weld*, 86 Pa. 357; *Lawrance* v. *Smedley*, 6 W. N. C. 42; *Honeywell* v. *Tonery*, 5 Kulp, 360; *Krause* v. *Pennsylvania R. Co.* 20 W. N. C. 111; *Hunt* v. *Lucas*, 99 Mass. 404; *Merchants' Nat. Bank* v. *Glendon Co.* 120 Mass. 97; *McDonnell* v. *Olwell*, 17 Ill. 375; *Roberts* v. *Thompson*, 28 Ill. 79; *Honore* v. *Home Nat. Bank*, 80 Ill. 489; *Harres* v. *Com.* 35 Pa. 416.

In the District of Columbia the constitutionality and legality of the 73d rule is no longer an open question.

*Cropley* v. *Vogeler*, 2 App. D. C. 28; *Foertsch* v. *Germuiller*, 2 App. D. C. 340; *Smoot* v. *Rittenhouse*, 27 Wash. L. Rep. 741.

Rule 28 of the supreme court of New York requires an affidavit of defense to prevent judgment in all common-law actions.

3 Wait, Pr.

The statute of Massachusetts requires an affidavit of defense in all common-law actions.

*Hunt* v. *Lucas*, 99 Mass. 404.

Even at common law, in certain cases, affidavits of defense were required to be drawn with great technical skill and accuracy to prevent judgment for the plaintiff.

Chitty, Gen. Pr. 543; 1 Tidd, Pr. 302.

The rule requires no more than that the defendant shall file a special plea under oath, where the plaintiff makes an affidavit of merits.

*Cropley* v. *Vogeler*, 2 App. D. C. 28; *Lawrance* v. *Borm*, 86 Pa. 225; *Hunt* v. *Lucas*, 99 Mass. 404; *Honore* v. *Home Nat. Bank*, 80 Ill. 489.

Actions against sureties on bonds are within the purview of the rule.

*Coursen* v. *Browning*, 86 Ill. 57; *Myers* v. *Shoneman*, 90 Ill. 80.

The contracts and bonds being matters of public record, it was not even necessary for the plaintiff to make profert of them.

*United States* v. *Ritchie*, 3 Mackey, 162.

The allegation of profert only need be made in the declaration, and the deed is then, constructively, in possession of the court.

Bouvier, Law Dict. 769; *Tucker* v. *State, use of Kneighton*, 11 Md. 322; *Germain* v. *Wilgus*, 14 C. C. A. 561, 29 U. S. App. 564, 67 Fed. 597.

Mr. Justice **McKenna** delivered the opinion of the court:

The principal assignments of error are reducible to these contentions: (1) The court had no power to enact the rule; (2) that the rule was invalid, in that it deprived defendants of due process of law and the right of trial by jury, in contravention of the Constitution of the United States and "the mode of proof of trial" prescribed by Revised Statutes, §§ 861 *et seq.*

The rule was formerly number 75 and has existed a long time. The court of appeals of the District has sustained its validity in a number of cases. This court also sustained its validity in *Smoot* v. *Rittenhouse* [27 Wash. L. Rep. 741] decided January 10, 1876.

The case is questioned as authority because, it is said, that "if this court upheld a rule of such important character and doubtful validity it would give the grounds of its decision." But the objection assumes that the court had doubts. The better inference is that the court regarded the grounds of challenge to the validity of the rule as without foundation. And its validity was challenged and necessarily passed on, which disposes of contention that the decision was based on another point.

2. There is but one element in this contention,—the right of a jury trial. In passing upon it we do not think it necessary to follow the details of counsel's elaborate argument. In *Smoot* v. *Rittenhouse* [27 Wash. L. Rep. 741] the validity of the rule was sustained, as well as the power of the [320] court to make it. If it were true that the rule deprived the plaintiff in error of the *right* of trial by jury, we should pronounce

it void without reference to cases. But it does not do so. It prescribes the means of making an issue. The issue made as prescribed, the right of trial by jury accrues. The purpose of the rule is to preserve the court from frivolous defenses, and to defeat attempts to use formal pleading as means to delay the recovery of just demands.

Certainly a salutary purpose, and hardly less essential to justice than the ultimate means of trial. And the case at bar illustrates this. It certainly does not seem unreasonable to charge one who has become responsible for the performance of an act by another with knowledge of that act or with means of ascertaining it, so as to state a defense within the liberal interpretation of the rule declared by the court of appeals.

As early as 1879 the supreme court of the District recited the history of the rule, and explained its purpose. "It is a rule," the court said, "to prevent vexatious delays in the maturing of a judgment where there is no defense. . . . Now, what does the rule mean, this being its office? It is couched in very plain language. It says the defendant shall set out his *grounds* of defense, and swear to them. It does not mean a defense in all its details of incident and fact, but the foundation of the defense. That is all. Those grounds ought not to be vague and indefinite. They should have significance and meaning, and should express the idea of defense upon the ground to which they are addressed. It was never contemplated that this rule required a party to follow his case through all the lights and shadows of the evidence in it. That would be to hold it essential that he should try his case in his plea." *National Metropolitan Bank* v. *Hitz*, MacArth. & M. 198.

This interpretation was affirmed in *Cropley* v. *Vogeler*, 2 App. D. C. 28; see also 2 App. D. C. 340; *Gleason* v. *Hoeke*, 5 App. D. C. 1, 12 App. D. C. 161; *Bailey* v. *District of Columbia*, 4 App. D. C. 356.

And the facts stated in the affidavit of defense will be accepted as true. *Strauss* v. *Hensey*, 7 App. D. C. 289, 36 L. R. A. 92.

It would seem a logical result of the ar-
[321] gument of plaintiff *in error that there was a constitutional right to old forms of procedure, and yet it seems to be conceded that Congress has power to change them, even to the enactment of rule 73. The concession of that power destroys the argument based on the Constitution, and whether Congress exercised the power directly or delegated it to the supreme court of the district of Columbia can make no difference. And that such power had been delegated to the supreme court of the District was virtually decided in *Smoot* v. *Rittenhouse*, 27 Wash. L. Rep. 741.

3. It is urged that the causes of action set out in the declaration "are not within the purview of the rule." By "purview of the rule" is meant, as counsel explains, the spirit of the rule, and that, it is urged, intends only "money demands, pure and simple," not contracts of suretyship or conditional obligations. It is, however, conceded that the causes of action are within the letter of the rule, and we are not disposed to make exceptions based on disputable considerations of its spirit against the interpretation of the court, which has administered the rule for many years.

4. Plaintiff in error asserts the sufficiency of its affidavit, and asserts the insufficiency of that of defendant in error. In support of the latter assertion, it is claimed, "copies of the bonds in suit and of the contracts between the District and Vinson should have been filed." We may adopt the reply of the court of appeals of a like claim in that court. That learned court said:

"There is no merit in the formal objections urged to the declaration and supporting affidavit of the plaintiff. The bond is alleged to have been executed in accordance with the formal provision of the statute which makes it a public record, and profert of it was not required to be made. It is nothing more than a simple statutory obligation to pay any and all demands against the contractor of the nature claimed by the plaintiff. It does not appear that there was any formal written contract between the contractor and the plaintiff relating to the materials furnished by the latter, upon the necessary interpretation of which the liability in whole or in part depends. For the purposes of recovery it was sufficient to say, as was done, that *plaintiff agreed to [322] furnish certain materials at a certain price, for use, by the contractor, that he did furnish the same in specific amounts, and that the contractor received them and then refused to pay the sum due for them."

The affidavit of plaintiff in error was not sufficient. The rule requires the affidavit, not only to deny the right of the plaintiff, but to state also in precise and distinct terms the grounds of defense, "which must be such as would, if true, be sufficient to defeat the plaintiff's claim in whole or in part." See cases cited above.

Finding no error in the record, *the judgment is affirmed.*

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UNITED STATES, *Appt.*,
*v.*
EDWARD A. MOSELEY.

(See S. C. Reporter's ed. 322-327.)

*Claims—telegrams sent by Interstate Commerce Commission—necessity of disclosure of contents.*

Substantial compliance with the requirements of the Comptroller of the Treasury that the original telegrams relating to the business of the Interstate Commerce Commission, or copies thereof, or certificates that such telegrams are of a confidential nature, shall accompany telegraph vouchers for which credit is asked, is made by an order of the Commission, filed by the secretary with his accounts, which directs him to disregard such requirement as to copies of telegrams, and declares that such messages are so far confidential as to justify the refusal to disclose their contents, and that the requirement for

their production is unreasonable and against public interest.

[No. 248.]

*Argued and Submitted October 29, 1902. Decided December 1, 1902.*

APPEAL from the Court of Claims to review a judgment which allowed a claim of the secretary of the Interstate Commerce Commission for the cost of telegrams sent at the direction of such Commission. *Affirmed.*

See same case below, 36 Ct. Cl. 599.

The facts are stated in the opinion.

*Assistant Attorney General* **Pradt** submitted the cause for appellant:

The judicial power will not interpose to limit or direct the action of departmental officers in respect to matters within their discretion.

*Decatur* v. *Paulding*, 14 Pet. 497, 10 L. ed. 559; *Watkins* v. *United States*, 9 Wall. 759, 19 L. ed. 820; *United States* v. *Fletcher*, 147 U. S. 664, 37 L. ed. 322, 13 Sup. Ct. Rep. 434.

*Mr.* **Holmes Conrad** argued the cause and filed a brief for appellee:

The Supreme Court does not regard a rule of conduct of the accounting officers, even though of forty years' standing, as affording sanction for overruling the statutes.

*United States* v. *Temple*, 105 U. S. 97, 26 L. ed. 967.

Neither a court nor the head of an executive department can establish rules and regulations which are not expressly or impliedly authorized by Congress.

*Harvey* v. *United States*, 3 Ct. Cl. 38; *Clyde* v. *United States*, 13 Wall. 38, 20 L. ed. 479.

Mr. Justice **McKenna** delivered the opinion of the court:

This was a petition in the court of [323] claims to recover the *sum of $310.37, disallowed by the auditing officers of the government.

The petitioner is secretary of the Interstate Commerce Commission, and the claim disallowed was incurred for telgrams sent at the direction of the Commission. Judgment passed for the petitioner October 28, 1901, and the United States took this appeal.

The findings of fact and the conclusion of law by the court of claims were as follows:

"I. The claimant herein, a citizen of the United States, is secretary and disbursing agent of the Interstate Commerce Commission, and as such agent it becomes his duty to disburse the moneys appropriated by Congress from time to time to enable the Commission to carry out the provisions of the act of February 4, 1887, and amendments thereto. The disbursements were made under the direction of the Commission; and the accounts therefor, together with itemized vouchers, approved by the chairman of the Commission, were presented to the accounting officers of the Treasury Department for the quarter and year ending June 30, 1899; and also his supplemental accounts, with vouchers so made out and approved, for the same year, among which were the accounts and itemized vouchers for $310.37 for money paid from time to time to the Western Union Telegraph Company and Postal Telegraph Cable Company for sundry despatches sent over their lines under the direction of said Commission.

"II. The accounts for money so expended for telegrams were disallowed by the Auditor for the State and other Departments, and on appeal to the Comptroller of the Treasury the decision of the Auditor was sustained on the ground that the claimant had not complied with the requirement of the Comptroller to furnish the original telegrams or copies thereof, or, if of a confidential nature, to furnish in lieu thereof a certificate to that effect signed by the chairman of the Commission.

"In response to that ruling the claimant presented and filed with his said accounts the following order, issued by the Commission April 27, 1899:

"'That so much of the Comptroller's communication as requires *copies of telegrams [324] relating to the business of the Commission to accompany telegraph vouchers for which credit is asked be disregarded by the secretary and disbursing agent, the Commission holding that such messages are so far confidential as to justify refusal to disclose their contents, and that the requirement for their production is unreasonable and against public interest.'

"And that the Interstate Commerce Commission did, through their secretary, address to the Hon. R. J. Tracewell, Comptroller of the Treasury, a letter dated October 4, 1900, containing an invitation to inspect the books, papers, and other matters relating to the accounts of the disbursing agent, as follows, *viz.:*

"'By the act of March 15, 1898 (Acts 1897-99, page 316 [30 Stat. at L. chap. 68]), it is provided:

"'Sec. 5. All books, papers, and other matters relating to the accounts of officers of the government in the District of Columbia shall at all times be subject to inspection and examination by the Comptroller of the Treasury and the Auditor of the Treasury authorized to settle such accounts, or by the duly authorized agents of either of said officers.'

"'I am authorized by the Commission to extend to the officers and agents referred to in this section the fullest opportunity of making such examination, in the offices of the Commission, of all such books, papers, and other matter relating to the accounts of the disbursing agents as they may see proper to examine, and among these all such telegrams as are embraced in the accounts of the disbursing agent. By this means the objections which the Commission have made to the undue publicity of their telegrams will, in some measure, be avoided, and the purposes of the auditing officers should be thereby fully attained.'

"'But the decision of the Comptroller was adhered to.'

"III. The accounts and itemized vouchers

were presented to the accounting officers in the form prescribed by statute; that is to say, that each telegram sent by the Commission, and the cost thereof, and the dates, number of words, persons from and to whom sent, places from and to which sent, and the charge for each message transmitted, were fully shown in a voucher approved by Martin A. Knapp, chairman, and the defendants [325] *concede the correctness of the several amounts so expended.

"IV. After the disallowance of the claimant's accounts for the moneys so disbursed to the Western Union Telegraph Company and Postal Telegraph Cable Company, as aforesaid, and to avoid any balance being stated against him, he, under protest, paid into the Treasury of the United States the full amount of the sum so disallowed, to wit, $310.37.

"V. That prior to January, 1899, the original telegrams, or copies thereof, or certificates that such telegrams were of a confidential character, were not required by the auditing officers of the Treasury to be produced by the disbursing officers of the Department of State, or the Postoffice Department, or the Navy Department, or the Interstate Commerce Commission, with the vouchers produced by these disbursing officers, for the telegrams sent from such Departments on official business.

"VI. The correspondence by official communications between the Comptroller of the Treasury and the claimant appears in the letter of June 15, 1900, from Edward A. Moseley, secretary and disbursing agent, to Hon. R. J. Tracewell, Comptroller; letter of July 23, 1900, from the Acting Comptroller to the claimant; the letter of October 4, 1900, from the claimant to the Comptroller, and the letter of October 6, 1900, to the claimant; which were filed as part of the claimant's petition and exhibits therewith.

"Conclusion of law.

"From the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to recover judgment against the United States, on the authority of the *Moseley Case* (35 Ct. Cl. 347), in the sum of three hundred and ten dollars and thirty-seven cents ($310.37)."

The case is in narrow compass. There is no controversy over the fact of expenditure of the sum sued for, and the court of claims found that "the accounts and itemized vouchers were presented to the accounting officers in the form prescribed by statute; that is to say, that each telegram sent by the Commission, and the cost thereof, and the dates, number of words, persons [326] *from and to whom sent, places from and to which sent, and the charge for each message transmitted, were fully shown in a voucher approved by Martin A. Knapp, chairman, and the defendants concede the correctness of the several amounts so expended."

Relying on a former decision between the same parties (35 Ct. Cl. 347), the court evidently thought that the issue made by the government was not substantial. In that case it was said: "The claimant's statement of account being in the form prescribed by statute—*i. e.*, 'itemized vouchers therefor, approved by the chairman of the Commission,' is prima facie correct. The defendants do not controvert the fact of the expenditures therein shown to have been made under the direction of the Commission, nor of the money paid into the Treasury; and, as under the circumstances of this case we have no reason to doubt the correctness or legality of such expenditures, the claimant is entitled to recover, and judgment will be entered accordingly."

The case comes, therefore, to a very narrow question. The Act to Regulate Commerce, as amended March 2, 1889 (Rev. Stat. Supp. 690, chap. 382, U. S. Comp. Stat. 1901, p. 3168), provides "all of the expenses of the Commission . . . shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman of the Commission." The appropriation act of the same date (Rev. Stat. Supp. 698, chap. 411) provides: "That hereafter expenses of the Interstate Commerce Commission shall be audited by the proper accounting officers of the Treasury."

It is claimed that these provisions can be reconciled and leave unimpaired the first as the only condition of the allowance and payment of the expenses of the Commission. Not passing upon that, but granting the power of the auditing officers to require something more, we think their requirement was substantially complied with.

It is to be remembered that the petitioner (appellee) is but the secretary of the Commission. He does not direct its functions, its expenditures, or control its records. He could only submit the requirement of the Comptroller to the Commission and its response to the Comptroller. Its response was "that *so much* of the Comptroller's [327] communication as requires copies of telegrams relating to the business of the Commission to accompany telegraph vouchers for which credit is asked be disregarded by the secretary and disbursing agent, the Commission holding that such messages are so far confidential as to justify refusal to disclose their contents, and that the requirement for their production is unreasonable and against public interest." This was a substantial compliance with the requirement of the Comptroller.

*Judgment affirmed.*

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C. ELLIOTT & CO. *et al.*, *Appts.*,
*v.*
FERDINAND TOEPPNER.

(See S. C. Reporter's ed. 327-335.)

*Appeal — bankruptcy proceedings — jury trial—review only by writ of error.*

A judgment that a person is not a bankrupt, entered by a court of bankruptcy on a ver-

NOTE.—*On distinction between appeal and writ of error*—see note to Miners' Bank v. Iowa *ex rel.* District Prosecuting Attorney, 13 L. ed. U. S. 867.

dict of not guilty in a trial by jury demanded as of right under § 19 of the bankruptcy act (30 Stat. at L. 551, chap. 541, U. S. Comp. Stat. 1901, p. 3429), is reviewable only by writ of error, as no power to re-examine the facts determined by a jury under this section, otherwise than according to the rules of the common law, was conferred by § 24, investing the Federal appellate courts with "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases," or by § 24*b*, providing for the revision of such proceedings "in matter of law," or by § 25*a*, authorizing appeals as in equity from a judgment in bankruptcy proceedings adjudging or refusing to adjudge defendant a bankrupt.

[No. 85.]

*Submitted November 12, 1902. Decided December 8, 1902.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit presenting the question whether the proceedings upon a jury trial in a bankruptcy proceeding can be re-examined on an appeal from a judgment that defendant was not a bankrupt, entered on a verdict of not guilty. *Answered in the negative.*

Statement by Mr. Chief Justice **Fuller**:

[328] *Elliott and others filed their petition for the adjudication of Ferdinand Toeppner as a bankrupt, in the district court of the United States for the eastern district of Michigan, which averred that Toeppner was insolvent, and that he had committed certain enumerated acts of bankruptcy under subdivisions (1), (2), and (3) of § 3*a* of the bankruptcy act. Toeppner answered, denying that he was insolvent at the time the petition was filed, and denying insolvency at the time of the commission of the acts charged under subdivisions (2) and (3); and at the same time filed in writing his demand for a jury trial. The issues were tried before a jury, who returned a verdict of not guilty. A motion for new trial was made and overruled, and the court entered judgment adjudging that Toeppner was not a bankrupt, and dismissing the petition. From this judgment petitioners prayed an appeal to the circuit court of appeals accompanied with an assignment of errors. No bill of exceptions was asked or taken, and no writ of error was asked or allowed.

The appeal was allowed and duly perfected by giving the bond required, and a transcript of the record was filed in the circuit court of appeals for the sixth circuit, which included, in addition to the proceedings before stated, what purported to be the evidence heard by the jury; exceptions reserved to evidence admitted or excluded; the charge of the court, and exceptions; and instructions asked and refused, and exceptions.

The errors assigned related exclusively to errors alleged to have been committed during the trial, before the jury, of the issues submitted.

By the certificate to the transcript by the clerk of the district court, and under its seal, it was certified that "the above and foregoing is a full and true transcript of the record in the matter above entitled; that I have carefully compared the same with the original records and files of said matter in my office, and find the same to be a true transcript of the said originals *and [329] of the whole thereof, together with the original exhibits produced on the trial of said matter."

After the transcript had been filed Toeppner moved the circuit court of appeals to dismiss the appeal, and to strike from the transcript so much as purported to set out the proceedings on the jury trial of the issues submitted to the jury. The motions coming on to be argued, the court, being in doubt, certified a statement of the foregoing facts to this court, together with the following question:

"Has this court, under the appeal granted from the judgment refusing to adjudicate Ferdinand Toeppner a bankrupt, authority to re-examine the proceedings upon the jury trial, and remand for a new trial if it shall appear from the transcript, as certified to us, that there was error in instructions given or refused, or in the admission or rejection of evidence?"

No brief was filed for appellants.

*Mr.* **Michael Brennan** submitted the cause for appellee. *Mr. Adolph Sloman* was with him on the brief.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The judgment of the district court was a final judgment that Toeppner was not a bankrupt, and that the petition be dismissed. The question is whether the judgment could be otherwise revised than on writ of error, for if a writ of error should have been brought, then the circuit court of appeals had no authority to re-examine the proceedings on the jury trial, on appeal, or to remand for a new trial because of error in instructions given or refused, or in the admission or rejection of evidence, exceptions not having been preserved by a bill of exceptions.

Section 18*d* of the bankruptcy act provides: "If the bankrupt, or any of his creditors, shall appear within the time limited, and controvert the facts alleged in the petition, the judge shall determine, as soon as may be, the issues presented *by the plead- [330] ings, without the intervention of a jury, except in cases where a jury trial is given by this act, and make the adjudication or dismiss the petition." [30 Stat. at L. 551, chap. 541, U. S. Comp. Stat. 1901, p. 3429.]

By § 1 of the act "a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or

delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

By subdivision (1) of § 3 an act of bankruptcy is committed when a person has "conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them;" but by clause c "it shall be a complete defense to any proceedings in bankruptcy instituted under the 1st subdivision of this section to allege and prove that the party proceeded against was not insolvent as defined in this act at the time of the filing the petition against him." *George M. West Co.* v. *Lea Bros.* 174 U. S. 590, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836.

Under subdivisions (2) and (3) insolvency must exist at the time of the commission of the acts specified.

In this case, so far as acts of bankruptcy under subdivision (1) were charged, insolvency at the time of the filing of the petition was denied, and so far as acts of bankruptcy under subdivisions (2) and (3) were charged, insolvency at the time the acts were committed was denied.

The burden of proving solvency in proceedings under the 1st subdivision was on the alleged bankrupt by clause c, and on the petitioning creditors in proceedings under the 2d and 3d subdivisions, unless in the contingency named in clause d.

The issues presented by the pleadings were clearly defined, and Toeppner made written application for a trial by jury, to which he was entitled by § 19, which reads:

"Sec. 19. Jury Trials.—a. A person against whom an involuntary petition has been filed shall be entitled to have a trial by jury, in respect to the question of his in-[331] solvency, except as *herein otherwise provided, and any act of bankruptcy alleged in such petition to have been committed, upon filing a written application therefor at or before the time within which an answer may be filed. If such application is not filed within such time, a trial by jury shall be deemed to have been waived.

"b. If a jury is not in attendance upon the court, one may be specially summoned for the trial, or the case may be postponed, or, if the case is pending in one of the district courts within the jurisdiction of a circuit court of the United States, it may be certified for trial to the circuit court sitting at the same place, or by consent of parties when sitting at any other place in the same district, if such circuit court has or is to have a jury first in attendance.

"c. The right to submit matters in controversy, or an alleged offense under this act, to a jury shall be determined and enjoyed, except as provided by this act, according to the United States laws now in force, or such as may be hereafter enacted, in relation to trials by jury."

The right to a trial by jury on written application thus given is absolute, and cannot be withheld at the discretion of the court. In that respect it differs from the trial of an issue out of chancery, which the court of equity is not bound to grant, nor bound by the verdict if such trial be granted. The court cannot, as the chancellor may, enter judgment contrary to the verdict, but the verdict may be set aside or the judgment may be reversed for error of law as in common-law cases.

Section 566 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 461], provides that "the trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

The district courts as courts of bankruptcy are invested with "such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings" in the particulars named, it being provided that the specification of certain powers should not deprive them of powers they would possess but for the enumeration. The proceedings in administration of the estate are equitable in their nature, but the bankruptcy *courts act under specific[332] statutory authority, and when on an issue of fact as to the existence of ground for adjudication a jury trial is demanded, it is demanded as of right, and the trial is a trial according to the course of the common law. This being so, judgments therein rendered are revisable only on writ of error. *Knickerbocker Ins. Co.* v. *Comstock*, 16 Wall. 258, 21 L. ed. 493; *Parsons* v. *Bedford*, 3 Pet. 448, 7 L. ed. 737; *Duncan* v. *Landis*, 45 C. C. A. 666, 106 Fed. 839.

By § 41 of the bankruptcy act of 1867 it was provided that the courts should, if the debtor so demanded in writing, order a trial by jury to ascertain the fact of the alleged bankruptcy, and in *Knickerbocker Ins. Co.* v. *Comstock*, Mr. Justice Clifford, speaking for the court, said: "Such a provision is certainly entitled to a reasonable construction, and it seems plain, when it is read in the light of the principles of the Constitution and of analogous enactments, and when tested by the general rules of law applicable in controversies involving the right of trial by jury, that the process, pleadings, and proceedings must be regarded as governed and controlled by the rules and regulations prescribed in the trial of civil actions at common law." The 1st paragraph of § 2 of the act was referred to, which provided "that the several circuit courts of the United States, within and for the districts where the proceedings in bankruptcy shall be pending, shall have a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when special provision is otherwise made, may, upon bill, petition, or other proper process, of any party aggrieved, hear and determine the case in a court of equity" (14 Stat. at L. 517, chap. 176); and it was held that the case was excluded from the general superintendence and jurisdiction of the circuit court by the exception; and that, even admitting that decrees in equity rendered in the district court might be revised in a summary way if Congress should so provide, it was "clear that judgments in

actions at law rendered in that court, if founded upon the verdict of a jury, can never be revised in the circuit court in that way, as the Constitution provides that 'no fact tried by a jury shall be otherwise re-examined in any court of the United [333] States than according to 'the rule of the common law.' Two modes only were known to the common law to re-examine such facts, to wit: The granting of a new trial by the court where the issue was tried or to which the record was returnable, or, secondly, by the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings. All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means, not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted." In these observations Mr. Justice Clifford affirmed the rulings in *Parsons* v. *Bedford*, where Mr. Justice Story considered the 7th Amendment in connection with the language of article 3 and the judiciary act of 1789 [1 Stat. at L. 73, chap. 20], and treated the last clause of the amendment as "a substantial and independent clause," pointing out that "the phrase 'common law' . . . is used in contradistinction to equity, and admiralty, and maritime jurisprudence."

In *Duncan* v. *Landis* similar views as to review of judgments on verdicts in trials by jury demandable as of right were expressed by the circuit court of appeals for the third circuit, whose opinion by Gray, J., contains a lucid exposition of the general subject.

We need not, however, be drawn into a discussion of the controlling force of the 7th Amendment, as we think the provisions of the present bankruptcy act are consistent with the conclusions heretofore announced.

By the 24th section of the act the Supreme Court of the United States, the circuit courts of appeals, and the supreme courts of the territories are invested with "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases." And it is also provided (§ 25*d*) that "controversies may be certified to the Supreme [334] Court of the United States from other courts of the United States, and the former court may exercise jurisdiction thereof and issue writs of certiorari pursuant to the provisions of the United States laws now in force or such as may be hereafter enacted." [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432.]

In *Bardes* v. *First Nat. Bank*, 175 U. S. 526, 44 L. ed. 261, 20 Sup. Ct. Rep. 196, we held that the 5th and 6th sections of the judiciary act of March 3, 1891 [26 Stat. at L. 827, 828, chap. 517, U. S. Comp. Stat. 1901, p. 549, 550], were not changed by the bankruptcy act. The 6th section gives the courts of appeals jurisdiction to review by appeal or writ of error final decisions in the district and circuit courts in cases other than those provided for in the 5th section.

Section 24*b* of the bankruptcy act is: "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432.] This is confined to questions of law, and does not contemplate a review of the facts. *Mueller* v. *Nugent*, 184 U. S. 1, 9, 46 L. ed. 405, 409, 22 Sup. Ct. Rep. 269.

Section 25*a* provides that "appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, and to the supreme courts of the territories, in the following cases, to wit: (1) From a judgment adjudging or refusing to adjudge the defendant a bankrupt. . . ."

The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by this court, and been recognized by the legislation of Congress from the foundation of the government. *Dower* v. *Richards*, 151 U. S. 658, 663, 38 L. ed. 305, 307, 14 Sup. Ct. Rep. 452; *Wiscart* v. *Dauchy*, 3 Dall. 321, 1 L. ed. 619.

So far from any restriction being imposed by § 25*a*, the language used is "appeals, as in equity cases," and on appeals in equity cases the whole case is open.

But Congress did not thereby attempt to empower the appellate court to re-examine the facts determined by a jury under § 19 otherwise than according to the rules of the common law. The provision applies to judgments "adjudging or refusing to adjudge the defendant a bankrupt," when trial by jury is not demanded, and the court [335] of bankruptcy proceeds on its own findings of fact. In such case, the facts and the law are re-examinable on appeal, while the verdict of a jury on which judgment is entered concludes the issues of fact and the judgment is reviewable only for error of law.

And it follows that alleged errors "in instructions given or refused or in the admission or rejection of evidence," must appear by exceptions duly taken and preserved by bill of exceptions.

In *First Nat. Bank* v. *Klug*, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899, the point raised in this case was not suggested. The question was whether the case as presented by the record could be brought by appeal directly to this court, and we held that it could not. The case did not come within § 5 of the judiciary act of March 3, 1891, nor within any provision of the bankruptcy act.

*The question is answered in the negative.*

IOWA LIFE INSURANCE COMPANY,
*Plff. in Err.,*
*v.*
LULA T. LEWIS.

(See S. C. Reporter's ed. 335-356.)

*Insurance contract—printed conditions on premium receipt—forfeiture for nonpayment of premium—waiver—authority of agent—constitutional law—state statute penalizing insurance companies for failure to pay losses—courts—state construction of state statutes.*

1. A notice upon the back of a premium receipt, that if a note is given for payment of premium, and is not paid at maturity, the policy shall determine, constitutes a part of the contract of insurance, where such receipt states on its face that it is subject to the terms of the contract and the conditions on the back, which the assured is directed to read.
2. A policy of life insurance is forfeited, without any affirmative action on the part of the insurance company, by the failure to pay at maturity a note given for the payment of the premium, which was accepted on the condition that if not paid at maturity the policy shall "cease and determine."
3. The authority of an agent of an insurance company to waive a forfeiture which had accrued by reason of nonpayment of a premium note at maturity cannot be inferred from the act of the company in sending such note to the agent for collection some time before it was due,—especially where his contract with the company and the provisions of the policy prohibited the exercise of such authority.
4. The Texas statute authorizing the recovery of damages and attorneys' fees for failure by life and health insurance companies to pay losses is not repugnant to the guaranty of the equal protection of the laws, made by the Federal Constitution.
5. The construction by the state courts of a state statute which penalizes life insurance companies for failure to pay losses, as requiring a demand of payment notwithstanding the company's denial of liability, which demand can be made, however, after suit, and can be set up by an amended petition as an original suit, will be adopted by the Federal courts.

NOTE.—*On forfeiture of insurance for nonpayment of premiums*—see notes to Fowler v. Metropolitan L. Ins. Co. (N. Y.) 5 L. R. A. 805; Dennis v. Massachusetts Ben. Asso. (N. Y.) 9 L. R. A. 189; and Phœnix Ins. Co. v. Tomlinson (Ind.) 9 L. R. A. 317.

*As to waiver of forfeiture of insurance for nonpayment of premium*—see notes to Garner v. Germania L. Ins. Co. (N. Y.) 1 L. R. A. 256; Phœnix Ins. Co. v. Tomlinson (Ind.) 9 L. R. A. 317; and Thompson v. Knickerbocker L. Ins. Co. 26 L. ed. U. S. 765.

*As to validity of class legislation*—see State v. Goodwill (W. Va.) 6 L. R. A. 621, and note; and State v. Loomis (Mo.) 21 L. R. A. 789, and note.

*As to constitutional equality of privileges, immunities, and protection*—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, and note.

*As to when United States Supreme Court follows decisions of state courts*—see notes to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508; United States *ex rel.* Butz v. Muscatine, 19 L. ed. U. S. 490; and Elmendorf v. Taylor, 6 L. ed. U. S. 290.

[No. 53.]

*Argued October 21, 22, 1902. Decided December 8, 1902.*

IN ERROR to the Circuit Court of the United States for the Northern District of Texas to review a judgment in favor of plaintiff in an action on a policy of life insurance. *Reversed* and remanded, with directions to award a new trial.

Statement by Mr. Justice **McKenna:**

*This is an action upon a life insurance [336] policy, and was originally brought in the district court of Tarrant county, Texas, and removed by the defendant, plaintiff in error here, to the circuit court of the United States for the northern district of Texas on the ground of diversity of citizenship.

The action was to recover $3,000, alleged to have become due upon a life insurance policy issued by plaintiff in error to Thomas M. Lewis, the husband of the defendant in error. The defendant in error also, under the laws of Texas (Tex. Rev. Stat. art. 3071), prayed judgment for interest on the said $3,000 from the date of the death of the said Thomas M. Lewis, together with a penalty of 12 per cent on the amount due, and for an attorney's fee of $750.

The case was tried to a jury and resulted in a verdict for the defendant in error for $3,000, the principal of the policy, with interest from January 1, 1900, $300 damages, and an attorney's fee of $500. Judgment was entered in accordance with the verdict.

The statute of the state of Texas, allowing interest and attorney fees, was attacked by plaintiff in error as being in contravention of the Constitution of the United States. The statute was sustained, and the case was brought here under § 5 of the judiciary act of 1891. [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

By the policy the plaintiff in error promised to pay defendant in error the sum of $3,000 upon the death of Thomas M. Lewis, if death should occur on or before the 4th day of March, 1900, and to pay the sum within sixty days after the *receipt by [337] plaintiff in error of satisfactory proofs of death and its cause. Lewis died on the 7th of October, 1899.

The issues in the case besides the constitutionality of the Texas statute are (1) whether the insurance company waived proof of death; (2) whether the policy had ceased and determined before the death of the insured by nonpayment of the premium. The evidence bearing upon the issues is as follows:

"The first sentence of the policy sued upon, appearing upon the face thereof, reads as follows: 'The Iowa Life Insurance Company, in consideration of the stipulations and agreements in the application herefor (a copy of which is hereto attached), and of the provisions and requirements upon the next page of this policy, all of which are a part of this contract; and in

consideration, also, of the payment of seventy-four dollars and sixty-one cents, being the premium hereon for the first year, hereby promises to pay the sum of three thousand dollars to Lula T. Lewis (wife of the insured) if living, if not living, to the insured's executors, administrators, or assigns (less any indebtedness of the insured or beneficiary to this company, together with the balance of any year's premium remaining unpaid), within sixty days after receipt and acceptance, at the company's office in Chicago, Illinois, of satisfactory proofs of the fact and cause of death, within the terms of this policy, of the said Thomas M. Lewis, of Fort Worth, county of Tarrant, state of Texas (the insured under this policy), provided such death shall occur on or before 12 o'clock noon of the fourth day of March, A. D. 1900.'

"Upon the second page of the policy is a provision reading as follows, it being one of the provisions referred to in the sentence above quoted from the face of the policy: 'This policy is a contract made and to be performed in accordance with the laws of the state of Iowa, and shall be construed only in accordance with the charter of said company and the laws of said state, and shall not go into effect until the premium hereunder, or a semi-annual or quarterly instalment thereof, shall have been actually paid during the lifetime and continuance in good health of the insured. Upon payment of the premium there shall be delivered a [338] receipt signed by the *president or secretary, and countersigned by an authorized agent.'

"Another provision appearing upon the second page of the policy reads as follows: 'All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company.'

"The policy sued upon is of the kind designated by the defendant as a 'ten-year convertible term stock' policy. It is dated March 13, 1899. The annual premium thereon is $74.61.

"The policy sued upon was issued in pursuance of a written and printed application therefor made by the insured under date of March 4, 1899. Said application requests the issuance of a 'ten-year convertible term stock' policy, and states that the premium of $74.61 is to be paid annually. It concludes with a recital as follows: 'A note for premium of $74.61 has been paid under this application, to make the insurance binding from the date hereof, on condition that if the risk is not assumed by the company this sum is to be returned, in accordance with the receipt given as voucher for said payment.'

"On March 4, 1899, the insured executed and delivered to S. E. Starn, as agent of the defendant, in partial settlement of his premium, his note, reading as follows:

"$37.30. March 4th, 1899.

"Six months after date I promise to pay to the order of myself thirty-seven 30-100 dollars, at Ft. Worth, Texas, value received, with interest at 6 per cent per annum.

"T. M. Lewis, M. D.

"Which he indorsed in blank as follows: 'T. M. Lewis, M. D.'

"On March 5, 1899, S. E. Starn transmitted to the defendant the insured's said application and note with a letter, which, in so far as it is material to this bill of exceptions, reads as follows: 'I herewith hand you application of Thomas M. Lewis for $3,000.00, 10-year term con. stock. Also his note to cover settlement.' These papers were received by the defendant March 8, 1899, at its office in Chicago.

*"The application was accepted by the de- [339] fendant March 13, 1899. The defendant did not signify to Thomas M. Lewis its acceptance of his application in any way other than by making out and forwarding to its agent, S. E. Starn, for delivery, the policy sued upon, and the premium receipt hereinafter mentioned, which it did on March 16, 1899.

"On March 18, 1899, S. E. Starn countersigned the premium receipt, and delivered it and the policy sued upon to the insured. The policy and receipt were delivered at the same time and were received by the insured.

"Said premium receipt reads as follows.

"Iowa Life Insurance Company.
"Chicago office.

"Received $74.61, being the first annual premium due March 4, 1899, under policy No. 30,140, on the life of Thomas M. Lewis, subject to the terms of the contract and the conditions on the back hereof.

"Read the notice to policy holders on the back of this receipt.

"This receipt is not binding unless it is countersigned by

"(Signed) C. E. Mabie, President.
"S. E. Starn, Ag't, Ft. Worth, Tex.

"Countersigned this 18th day of March, 1899. S. E. Starn.

(On back of receipt.)

"For terms of mutual agreement, see application and policy.

"Notice to Policy holders.

"This receipt, to be valid, must be signed by the president or secretary of the company, and in exchange therefor, cash or its equivalent, be given by the holder of the policy, on or before date payment is due, and when payment hereon is made to an authorized agent or collector, such agent or collector must countersign at the date of payment to him.

"If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine.

"For the first annual premium, the insured gave the above-described note for $37.30, and agreed to perform professional *services for S. E. Starn to the value of the [340] remaining $37.31. Starn was to furnish professional work to be done by Dr. Lewis in the examination of applicants for insur-

ance and otherwise, and Dr. Lewis was to do it and let Starn have the fees. No work ever was done, and no money ever was paid to S. E. Starn or the defendant in pursuance of this verbal arrangement. Except that the note was given and the verbal agreement made, as just above stated, the defendant never received, and the insured never paid, anything upon account of the premium for the policy sued upon. S. E. Starn testified that before the issuance of the policy he reported to the defendant his agreement with Dr. Lewis concerning the payment of the premium.

"The policy sued upon is in the form always used by the defendant in making contracts of insurance of the kind designated by its 'ten-year convertible term stock' contracts. At the time of issuing said policy it was the defendant's universal practice to issue with its policies premium receipts in form like the one delivered to the insured in this case.

"The defendant never sold or transferred the note received by it from the insured, but continued to be the owner thereof until the time of the trial. Some time before its maturity the defendant sent said note to S. E. Starn for collection. S. E. Starn deposited it for collection with the Farmers' & Mechanics' National Bank of Fort Worth, Texas, on August 24, 1899. The bank held the note until September 25, 1899, when it returned it unpaid to S. E. Starn. The manager of its collection department testified that it would have accepted payment of the note at any time before its return to S. E. Starn, and that it had received no instructions from S. E. Starn with reference to the acceptance of payment after maturity.

"S. E. Starn made no effort to collect the note before its maturity, except that he deposited it in the bank for that purpose, nor had he, up to that time, furnished any professional work for the insured to do, in pursuance of the verbal agreement, or made any effort to get the insured to do any work, or pay any money on account of such agreement.

"About September 29, 1899, S. E. Starn called at the residence of the insured in Fort Worth (he being at the time confined [341] *to his bed from illness, the nature of which was typhoid fever, and from the effects of which he died October 7) and there had an interview with the plaintiff and the insured. Concerning this interview the evidence is conflicting. The evidence introduced by the plaintiff tended to prove that Starn stated that he had called for the purpose of collecting the note, that the plaintiff promised that it should be fixed up at once, and that Starn stated that it could be paid at any time before the date on which he was required to make his monthly report, to wit: October 1 following. The evidence was sufficient to have supported a verdict that this was a fact. Mr. Starn denied that he called for the purpose of collecting the note, and denied that he had made the statement that the note could be paid at any time before October 1, or the date on which he would make his report to the defendant.

"Dr. Green, one of the physicians attending the insured, met Mr. Starn as the latter was coming out of the plaintiff's house. Starn inquired of the doctor if he intended returning to the city after seeing his patient. Being answered in the affirmative, Starn stated that he would wait in the doctor's buggy and go up town with him. While the doctor was in the house the plaintiff requested him to call on J. R. Reeves at the latter's pharmacy and ask him to pay off the insured's note for them, held by Starn; the doctor agreeing to do so. Dr. Green and S. E. Starn rode in the former's buggy from the plaintiff's residence to the business portion of the city of Fort Worth. Mr. Starn left the buggy as soon as the business portion of the city was reached and Dr. Green drove immediately to Reeves's pharmacy and indicated to him the plaintiff's request. Mr. Reeves agreed to pay off the note as requested, and the doctor agreed to notify Starn.

"Concerning the conversation which ensued between Dr. Green and Mr. Starn on the way to town, the evidence is conflicting. Dr. Green testified that Mr. Starn stated that he had called at the plaintiff's house to collect the note. Mr. Starn denied having made such statement.

"Some time during the afternoon of this day Dr. Green notified S. E. Starn that J. R. Reeves, the druggist, would pay *off the [342] note. Concerning the conversation which occurred between Dr. Green and Starn immediately following this notification, the evidence is conflicting. Dr. Green testified that Starn said he would go down to the pharmacy for that purpose; that some statement was made about his going to Reeves's pharmacy to get the money that evening, and that Starn said it would not be necessary, that he would go down by 9 or 10 o'clock the next morning. S. E. Starn testified that he stated to Dr. Green that he would call and see Mr. Reeves the next morning.

"The night following this interview Mr. Starn sent to the defendant a night rate telegram, reading as follows:

"Forth Worth, Texas, September 29, '99.
"Iowa Life Ins. Co., Chicago:
"Dr. T. M. Lewis offers to pay premium to-day. Very sick. Shall I receive it?
S. E. Starn.

"The next morning, September 30, 1899, the defendant, through its secretary, telegraphed to S. E. Starn as follows:

"To S. E. Starn, 615 Grove St., Fort Worth, Texas:
"Do not accept payment on note due September 4. Answer.
R. E. Sackett, Sec.

"On the same day defendant wrote to S. E. Starn a letter reading as follows:

"Mr. S. E. Starn,
615 Grove St., Fort Worth, Texas.
"Dear Sir:—
"We are in receipt of your telegram as

follows: 'Dr. T. M. Lewis offers to pay premium to-day. Very sick. Shall I receive it?' to which we replied as follows: 'Do not accept payment of note due September 4. Answer.' We presume this telegram refers to policy No. 30,140, Thomas M. Lewis, $3,000, convertible term, premium $37.60, upon which note was received at this office in the sum of $37.30, due September 4, 1899, and which was sent to you for collection.

"Very truly yours,
"R. E. Sackett, Sec.

"Some time in the morning of September 30, 1899, S. E. Starn called at the phar-
[343] macy of J. R. Reeves, and Mr. Reeves *informed him that he had the money to pay off the Lewis note and had been waiting for him. Mr. Starn thereupon informed Mr. Reeves that he could not accept the payment of the notes because he had received a telegram from the company instructing him not to do so. Later in the day Mr. Reeves and Dr. Green called on Mr. Starn, and Reeves made a tender of the amount of the note, which Starn refused to accept. Reeves kept the money he tendered to Starn and did not pay or deliver same to the plaintiff or the insured or to anyone for them, and had no interview with the plaintiff or the insured.

"On the same day Starn telegraphed the defendant as follows:

"Fort Worth, Texas, September 30th, '99.
"Iowa Life Ins. Co., Chicago:—
"I have refused payment on Lewis policy this 10:30 A. M. S. E. Starn.

"The only testimony with regard to any consideration for the promise claimed by the plaintiff to have been made to her by S. E. Starn that he would accept payment of the note is the following passage from the cross-examination of the plaintiff: 'Q. Did you pay Mr. Starn anything? A. No, sir. Q. He simply told you he had come to see the doctor about his note, and that it ought to be fixed up, and you said you would attend to it? A. Yes, sir. Q. That is all that occurred between you? A. Yes, sir.'

"The attention of the plaintiff was not directed to the fact that she was being questioned concerning a consideration for the extension of the time for payment of note other than is indicated by the questions put to her.

"At the request of the defendant, S. E. Starn returned to it the note of the insured, which thereafter continued in the defendant's possession. The defendant never offered to return the note to the insured, and never before the death of the insured did anything in the way of an affirmative forfeiture or cancelation of the policy, and no communication passed between the defendant and S. E. Starn regarding said note between the transmission of the note to Starn for collection and Starn's above-quoted telegram of September 29, 1899.

[344] *"Except for the evidence upon the question of the extent of S. E. Starn's authority, the foregoing is a full statement of all material facts upon the issue of the forfeiture of the policy sued upon for nonpayment of the premium note, and the waiver of such forfeiture."

*Mr.* **Maurice E. Locke** argued the cause and filed a brief for plaintiff in error:

The defendant was under no obligation to pay the sum assured until after it had received or had waived the proofs of death stipulated for in the policy.

*Worsley* v. *Wood*, 6 T. R. 710; *O'Reilly* v. *Guardian Mut. L. Ins. Co.* 60 N. Y. 169, 19 Am. Rep. 151; *Bryant* v. *Commonwealth Ins. Co.* 6 Pick. 131; *Scottish Union & Nat. Ins. Co.* v. *Clancey*, 83 Tex. 113, 18 S. W. 439; *McCormack* v. *North British Ins. Co.* 78 Cal. 468, 21 Pac. 4.

The company was bound to accept as satisfactory any proof which was reasonably sufficient,—any proof which ought to be satisfactory.

Bunyon, Life Assurance, 490; 2 May, Ins. § 465.

Apparent authority of an insurance agent to waive proof of death cannot be shown under an allegation of actual authority; and it would not be sufficient if it were shown.

*Rail* v. *City Nat. Bank*, 3 Tex. Civ. App. 557, 22 S. W. 865; *Mutual Ben. L. Ins. Co.* v. *Collin County Nat. Bank*, 17 Tex. Civ. App. 477, 43 S. W. 831.

The soliciting agent of an insurance company has no implied authority to waive proofs of loss.

*Lohnes* v. *Insurance Co. of N. A.* 121 Mass. 439; *Bush* v. *Westchester F. Ins. Co.* 63 N. Y. 531; *Kirkman* v. *Farmers' Ins. Co.* 90 Iowa, 457, 57 N. W. 952; *Knudson* v. *Hekla F. Ins. Co.* 75 Wis. 198, 43 N. W. 954; *Smith* v. *Niagara F. Ins. Co.* 60 Vt. 682, 1 L. R. A. 216, 15 Atl. 353; *Bowlin* v. *Hekla F. Ins. Co.* 36 Minn. 433, 31 N. W. 859.

The prohibitions of the policy against waiver are binding unless waived by the company.

*Globe Mut. L. Ins. Co.* v. *Wolff*, 95 U. S. 326, 24 L. ed. 387; *Knickerbocker L. Ins. Co.* v. *Norton*, 96 U. S. 234, 24 L. ed. 689; *Cleaver* v. *Traders' Ins. Co.* 65 Mich. 527, 32 N. W. 660; *Franklin L. Ins. Co.* v. *Sefton*, 53 Ind. 380; *Union Mut. L. Ins. Co.* v. *McMillen*, 24 Ohio St. 67; *Porter* v. *United States L. Ins. Co.* 160 Mass. 183, 35 N. E. 678; *Marvin* v. *Universal L. Ins. Co.* 85 N. Y. 278, 39 Am. Rep. 657; *Catoir* v. *American L. Ins. & Trust Co.* 33 N. J. L. 487; *Northern Assur. Co.* v. *Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133.

The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions.

*Globe Mut. L. Ins. Co.* v. *Wolff*, 95 U. S. 326, 24 L. ed. 387.

The clause printed on the back of the receipt given for the first premium, "If note be given for the payment of the premium hereon, or any part thereof, and same is not paid at maturity, the said policy shall cease and determine,"—was a part of the contract.

*Bailey* v. *Hannibal & St. J. R. Co.* 17 Wall. 96, 21 L. ed. 611; *Laughlin* v. *Fidelity Mut. Life Asso.* 8 Tex. Civ. App. 448, 28 S. W. 411; *Bobbitt* v. *Liverpool & L. & G. Ins. Co.* 66 N. C. 70, 8 Am. Rep. 494; *Hunt* v. *Livermore*, 5 Pick. 395; *Makepeace* v. *Harvard College*, 10 Pick. 298.

When the company accepted the application, it did so, subject to all the terms and conditions usually embraced in its contracts of that kind, of which the clause under consideration was one.

*Eames* v. *Home Ins. Co.* 94 U. S. 621, 24 L. ed. 298; *Barre* v. *Council Bluffs Ins. Co.* 76 Iowa, 609, 41 N. W. 373; *De Grove* v. *Metropolitan Ins. Co.* 61 N. Y. 594, 19 Am. Rep. 305; *Newark Mach. Co.* v. *Kenton Ins. Co.* 50 Ohio St. 549, 22 L. R. A. 768, 35 N. E. 1060.

Defendant should have been permitted to prove that, before the delivery of the policy and premium receipt, the form of contract which the assured was to receive was fully discussed between himself and the agent, and that it was agreed and understood that as a part of his contract he was to receive such a receipt as was given him.

*Bailey* v. *Hannibal & St. J. R. Co.* 17 Wall. 96, 21 L. ed. 611; *Cornell* v. *Todd*, 2 Denio, 130; *Verzan* v. *McGregor*, 23 Cal. 339; *Heywood* v. *Perrin*, 10 Pick. 228, 20 Am. Dec. 518; *Myers* v. *Munson*, 65 Iowa, 423, 21 N. W. 759.

Under the terms of the contract, the insurance ceases immediately upon nonpayment of the premium note at maturity, without necessity of affirmative action of any kind upon the part of the company.

*Thompson* v. *Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765; *Laughlin* v. *Fidelity Mut. L. Asso.* 8 Tex. Civ. App. 448, 28 S. W. 411, Writ of Error Refused by Supreme Court, 93 Tex. 733; *Pitt* v. *Berkshire L. Ins. Co.* 100 Mass. 500; *McIntyre* v. *Michigan State Ins. Co.* 52 Mich. 188, 17 N. W. 781; *Joliffe* v. *Madison Mut. Ins. Co.* 39 Wis. 111, 20 Am. Rep. 35; *Fowler* v. *Metropolitan L. Ins. Co.* 116 N. Y. 389, 5 L. R. A. 805, 22 N. E. 567; *Manhattan L. Ins. Co.* v. *Pentecost*, 105 Ky. 642, 49 S. W. 425; *Banholzer* v. *New York L. Ins. Co.* 74 Minn. 387, 77 N. W. 295, 78 N. W. 244, 84 N. W. 1115.

The company had the right to collect the past-due premium note, without thereby waiving the forfeiture consequent upon its nonpayment at maturity.

*Union Cent. L. Ins. Co.* v. *Wilkes*, 92 Tex. 468, 49 S. W. 1038; *Laughlin* v. *Fidelity Mut. L. Asso.* 8 Tex. Civ. App. 448, 28 S. W. 411; *Union Cent. L. Ins. Co.* v. *Chowning*, 8 Tex. Civ. App. 455, 28 S. W. 117; *Joliffe* v. *Madison Mut. Ins. Co.* 39 Wis. 111, 20 Am. Rep. 35; *Moreland* v. *Union Cent. L. Ins. Co.* 104 Ky. 129, 46 S. W. 516; *Park* v. *Hilton*, 21 Ky. L. Rep. 1319, 54 S. W. 949; *Wall* v. *Home Ins. Co.* 36 N. Y. 157; *Smith* v. *Saratoga County Mut. F. Ins. Co.* 3 Hill, 508; *Shultz* v. *Hawkeye Ins. Co.* 42 Iowa, 239; *Williams* v. *Albany City Ins. Co.* 19 Mich. 451, 2 Am. Rep. 95; *Limerick* v. *Gorham*, 37 Kan. 739, 15 Pac. 909; *Smith* v. *Continental Ins. Co.* 6 Dak. 433, 43 N. W. 810; *Matthews* v. *American Ins. Co.* 40 Ohio St. 135; *Farmers' Mut. F. Ins. Co.* v. *Hull*, 77 Md. 498, 27 Atl. 169; *Economic Life Asso.* v. *Spinney* (Iowa) 89 N. W. 1095.

Any state may classify the persons within its jurisdiction, and impose a different burden upon the individuals of each class. But such classification must not be based upon arbitrary or irrelevant distinctions. It "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed."

*Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423.

The equal protection of the laws guaranteed by the Constitution includes "the equal right to resort to the appropriate courts for redress."

*Missouri* v. *Lewis*, 101 U. S. 22, *sub nom. Bowman* v. *Lewis*, 25 L. ed. 989.

The "loss" of a life or health insurance company is nothing but a debt, and its failure to pay the same is merely a breach of contract. This is not within the scope of the police power of the states as commonly understood, or a proper subject for classification.

*Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Williamson* v. *Liverpool, L. & G. Ins. Co.* 105 Fed. 31.

It is the duty of every person to pay his rightful debts; but it is not the duty of anyone to pay an unjust claim made upon him.

Von Ihering, Struggle for Law.

A life insurance company cannot, even by an express promise, bind itself to pay a man's personal representatives a policy matured by his deliberate suicide.

*Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed 693, 18 Sup. Ct. Rep. 300.

Few courts would tolerate an attempt to make a policy of life insurance absolutely incontestable from its date.

Bunyon, Life Assurance, 115.

A statute allowing attorneys' fees to plaintiffs in actions to recover damages for injuries to stock occurring in consequence of the failure of a railway company to fence its track as required by law is unconstitutional.

*Paddock* v. *Missouri P. R. Co.* 155 Mo. 524, 56 S. W. 453.

Statutes allowing attorneys' fees to the successful plaintiffs in suits to enforce mechanics' liens are unconstitutional.

*Davidson* v. *Jennings*, 27 Colo. 187, 48 L. R. A. 340, 60 Pac. 354; *Randolph* v. *Builders' & Painters' Supply Co.* 106 Ala. 501, 17 So. 721.

A statute giving to employees of corporations liens and attorneys' fees in suits to enforce the same is invalid.

*Johnson* v. *Goodyear Min. Co.* 127 Cal. 4, 47 L. R. A. 338, 59 Pac. 304.

A statute which applies to all kinds of insurance companies, and allows the penalties only in case of their vexatious refusal to pay, has been held unconstitutional.

*Williamson* v. *Liverpool, L. & G. Ins. Co.* 105 Fed. 31; *Thompson* v. *Traders' Ins. Co.* 169 Mo. 12, 68 S. W. 889.

A statute declaring that if any insurance company refuse to pay a loss within sixty days after demand it shall be liable, in addition to the loss, for not more than 25 per cent of its amount and all reasonable attorneys' fees, provided it shall be made to appear that the company's refusal of payment was made in bad faith, violates the equal protection clause of the 14th Amendment.

*Phenix Ins. Co.* v. *Hart*, 112 Ga. 765, 38 S. E. 67.

This court has not hesitated, whenever the facts required it, to step across the path of states seeking to deprive foreign corporations of their property without due process of law, or of their right to remove causes to the Federal courts.

*Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365; *Barron* v. *Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931.

The state of Texas has not the power to impose conditions "repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

*Lafayette Ins. Co.* v. *French*, 18 How. 404, 15 L. ed. 451; *Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365; *Barron* v. *Burnside*, 121 U. S. 186, 30 L. ed. 915, 1 Inters. Com. Rep. 295, 7 Sup. Ct. Rep. 931; *Blake* v. *McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Dayton Coal & I. Co.* v. *Barton*, 183 U. S. 23, 46 L. ed. 61, 22 Sup. Ct. Rep. 5.

So important is the right of access to the courts, that one cannot bind himself in advance by an agreement not to resist any suits of a particular kind which may be brought against him, or by an agreement to submit to arbitration whatever disputes may grow out of a transaction.

*Home Ins. Co.* v. *Morse*, 20 Wall. 445, 22 L. ed. 365; *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 36 L. ed. 414, 12 Sup. Ct. Rep. 632; *Thompson* v. *Charnock*, 8 T. R. 139; *Rowe* v. *Williams*, 97 Mass. 163; *Delaware & H. Canal Co.* v. *Pennsylvania Coal Co.* 50 N. Y. 250.

The right to damages and attorneys' fees did not accrue to the plaintiff without previous demand for payment, notwithstanding the defendant's denial of liability.

*Northwestern Life Assur. Co.* v. *Sturdivant*, 24 Tex. Civ. App. 331, 59 S. W. 61.

*Mr.* **Michael J. Colbert** argued the cause, and, with *Messrs. William Capps, S. B. Cantey*, and *George E. Hamilton*, filed a brief for defendant in error:

A denial of liability, or a denial of the existence of a contract, by the insurer, is a waiver of the condition requiring proof of the loss or death.

*Knickerbocker L. Ins. Co.* v. *Pendleton*, 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. Rep. 314; May, Ins. §§ 469–473, 473A; *Niagara Ins. Co.* v. *Lee*, 73 Tex. 641, 11 S. W. 1024; 4 Joyce, Ins. § 3380.

Where the contract contains no stipulation for forfeiture upon the nonpayment of a note given for the premium, when due, payment is not a condition precedent to the validity of the contract; and the policy continues in force, notwithstanding such nonpayment at maturity.

Joyce, Ins. §§ 1211, 1212; *Franklin L. Ins. Co.* v. *Wallace*, 93 Ind. 7; *McAllister* v. *New England Mut. L. Ins. Co.* 101 Mass. 558, 3 Am. Rep. 404; *Trade Ins. Co.* v. *Barracliff*, 45 N. J. L. 543, 46 Am. Rep. 792; *Michigan Mut. L. Ins. Co.* v. *Bowes*, 42 Mich. 19, 51 N. W. 962; *Shaw* v. *Republic L. Ins. Co.* 69 N. Y. 286; May, Ins. §§ 345–345E.

The defendant did not evince any intention to declare the policy forfeited, even if it had the right to do so; and if it had this right it should have declared such intention by some prompt and unequivocal statement or action.

*Mutual L. Ins. Co.* v. *French*, 30 Ohio St. 240, 27 Am. Rep. 443; *Thompson* v. *Knickerbocker L. Ins. Co.* 104 U. S. 253, 26 L. ed. 765.

The necessity of a formal demand is often waived or obviated by the contract of the other party, or where the state of the case is such as to show that the demand would have been entirely unavailing.

*Heard* v. *Lodge*, 20 Pick. 53, 32 Am. Dec. 197; *Abels* v. *Glover*, 15 La. Ann. 247; *Lazensky* v. *Supreme Lodge K. of H.* 31 Fed. 592; *Equitable Life Assur. Soc.* v. *Winning*, 7 C. C. A. 359, 19 U. S. App. 173, 58 Fed. 541.

*Mr. Justice **McKenna** delivered the [344] opinion of the court:

1. It will be observed that there was printed upon the back of the receipt given for the first premium the following: "If note be given for the payment of the premium hereon, or any part thereof, and same

is not paid at maturity, the said policy shall cease and determine." The contention of plaintiff in error is that such provision constituted a part of the contract; and, contending also that the note was not paid, urges that the policy ceased and determined. The same contention was made in the trial court, but rejected. The court held that the provision on the back of the receipt constituted no part of the contract, and instructed the jury, against the objection of plaintiff in error, "that the contract, by its own explicit terms, is wholly included in the policy,—the life insurance proper, and in the application for such life insurance policy, which, by the terms of the policy, is made a part of the contract. This is recited to be the case in the face of the policy and on the back of the receipt itself. *Under the provisions and stipulations of these two instruments, by the passing of the insurance policy to the deceased and the note of the deceased and his promise to pay to the insurance company, the minds of the insurance company and the deceased met, upon the conditions and provisions of the note, contract, and the application for the insurance, which made a part of the contract. In the opinion of the court there was no meeting of the minds, or agreement* [345] *between the parties as to the *provision upon the back of the receipt.* [The italics are ours.] Such provision is nowhere noted in the face of the contract of insurance; it is nowhere noted in the application for the insurance, and the only place it is found is upon the back of the receipt, no reference being made to any such provision elsewhere. Even if the provision were considered a part of the contract entered into between the parties, yet it is such a provision that, if taken advantage of, would require affirmative action on the part of the company; that is to say, when the note was not paid at maturity the company should have within a reasonable time thereafter notified the insured that in view of the fact that his note given in part payment of the premium upon the policy had not been paid, the policy, which was issued in consideration of such note, ceased and determined. There is no evidence that any such action was taken on the part of the insurance company."

The court also instructed the jury "that it was the duty of the company to notify the insured of the nonpayment of the note, and that the policy, because of such nonpayment, had ceased and determined, and that the company would no longer be liable thereunder."

These instructions, expressing the conception of the law, and the rights of the parties entertained by the court, and the court also regarding the conduct of the company as waiving proofs of death, naturally instructed the jury that it was its "duty to return a verdict for the plaintiff for the face of the policy," with interest and penalty, and attorneys' fees, as prescribed by the Texas statute. "This, therefore," said the court, "leaves to the jury but one question to determine, the fixing of reasonable attorneys' fees for the prosecution of this suit."

Were the instructions correct? And first, as to what papers constituted the contract.

The delivery of a policy of insurance and the payment of the premium are reciprocal or concurrent considerations. Necessarily, therefore, the payment of the premium can be exacted simultaneously with the delivery of the policy. Of course, such payment can be waived and a note—the credit of the assured — accepted, either absolutely or upon conditions. *And we do not see how it [346] can make any difference where the conditions are expressed,—whether in the policy, in the note, or in the receipt given for the premium, or whether on the face of the latter or on its back. The agreements of parties may be expressed in many papers, and if the connection of the papers is not apparent it may be shown by parol. The present case does not even need the aid of that rule. The receipt expressed the conditions upon which the note was received,—unmistakably expressed them. The receipt of the premium was expressed to be "subject to the terms of the contract and the conditions on the back" of the receipt. And the assured was directed to read the notice upon the back of the receipt. The notice was as follows: "If note be given for the payment of the premium hereon or any part thereof, and same is not paid at maturity, the said policy shall cease and determine."

It is not contended that it was not competent for the company to make the condition. It is asserted that it did not become a part of the contract upon which the minds of the parties met,—that the minds of the parties only met upon the application, the policy, and the note. We cannot assent to this view. The payment of the premium was a very essential thing, and the manner of its payment, whether in cash or by note, and provision for the payment of the note and the effect of its nonpayment, were also essential things, and necessarily must have been of mutual concern to the parties and upon which their minds must be considered as having met. To hold otherwise would be to hold that the parties were indifferent to that which materially concerned them. It was certainly of concern to the assured to know whether he would be indebted upon an overdue note, or whether his insurance had lapsed.

All of the papers, therefore, embodied the agreement of the parties. In *Knickerbocker L. Ins. Co.* v. *Norton*, 96 U. S. 234, 24 L. ed. 689, the agreement was considered as "embodied in the policy and the indorsements thereon, as well as in the notes and the receipt given therefor." (p. 240, L. ed. p. 691.)

2. But determining that the minds of the parties met upon the receipt does not solve the main question in the case. The receipt provides that, if the note, or any part of it, be not paid *at maturity, the [347] policy shall "cease and determine." What does this mean? That the policy shall cease and determine at the occurrence of

maturity, or at the option and upon some affirmative action of the company? The latter is the contention of the defendant in error, and, as we have seen, the ruling of the trial court; the former is the contention of the plaintiff in error. Upon the issue thus made, the cases are not harmonious. The decisions of this court, however, support the contention of plaintiff in error.

In *New York L. Ins. Co.* v. *Statham*, 93 U. S. 24, 23 L. ed. 789, Mr. Justice Bradley, delivering the opinion of the court, said: "Promptness of payment is essential in the business of life insurance. . . . Delinquency cannot be tolerated nor redeemed, except at the option of the company. . . . Time is material and of the essence of the contract. Nonpayment at the day involves absolute forfeiture, if such be the terms of the contract. . . . Courts cannot, with safety, vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence." The intervention of war was held not to avoid a forfeiture.

This case was quoted, and its doctrine announced again, in *Klein* v. *New York L. Ins. Co.* 104 U. S. 88, 26 L. ed. 662; and again in *Thompson* v. *Knickerbocker L. Ins. Co.* 104 U. S. 252, 26 L. ed. 765.

In *Klein* v. *New York L. Ins. Co.* it was said: "If the assured can neglect payment at maturity, and yet suffer no loss or forfeiture, premiums will not be punctually paid. The companies must have some efficient means of enforcing punctuality. Hence, their contracts usually provide for the forfeiture of the policy upon default of prompt payment of the premiums. If they are not allowed to enforce this forfeiture, they are deprived of the means which they have reserved by their contract of compelling the parties insured to meet their engagements. The provision, therefore, for the release of the company from liability on a failure of the insured to pay the premiums when due is of the very essence and substance of the contract of life insurance. To hold the company to its promise to pay the insurance, notwithstanding the default of the assured in mak-[348]ing punctual payment of *the premiums, is to destroy the very substance of the contract."

A forfeiture, of course, may be waived, for the obvious reason expressed in *Knickerbocker L. Ins. Co.* v. *Norton*, 96 U. S. 235, 24 L. ed. 689, "a party always has the option to waive a condition or stipulation in his own favor;" and an agent can be given such power, and whether it has been given or not may be proved by parol.

The latter case is an important one. The policy provided that, not only a failure to pay any premium, but "the failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest due under said policy or contract, shall then and thereafter cause said policy to be void without notice to any party or parties interested therein."

The court not only asserted the doctrine of strict punctuality of payment *ad diem*, but applied the rule to a note for part payment.

Expressing its view of forfeitures, the court said: "Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture upon such compensation being made. It is true, we held in *Statham's Case*, 93 U. S. 24, 23 L. ed. 789, that in life insurance time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given the courts should be liberal in construing the transaction in favor of avoiding a forfeiture."

We shall presently consider how far these principles apply to a claim of waiver of forfeiture in the case at bar. Our present inquiry is, when and how does forfeiture occur, and it seems an obvious conclusion from the cited cases that forfeiture occurs upon nonpayment of the premium *ad diem*. But against the conclusion, *Mutual L. Ins. Co.* v. *French*, 30 Ohio St. 240, 27 Am. Rep. 443, and its approval by this court in *Thompson* v. *Knickerbocker L. Ins. Co.*, are cited.

It was contended in the latter case that the mere taking of notes in payment of the premium was, in itself, a waiver of the conditional forfeiture, and *Mutual L. Ins. Co.* v. *French*, 30 Ohio St. 240, 27 Am. Rep. 443, was cited to support the contention. To the contention *and citation it was replied: [349] "But in that case no provision was made in the policy for a forfeiture in case of the nonpayment of a note given for the premium, and an unconditional receipt for the premium had been given when the note was taken; and this fact was specially adverted to by the court. We think that the decision in that case was entirely correct. But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that whilst the primary condition of forfeiture for nonpayment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity."

A review of *Mutual L. Ins. Co.* v. *French* is demanded. Was the reasoning in that case approved, or only its conclusion? The policy passed upon contained a provision for forfeiture if the *premium* should not be paid, but no provision for forfeiture if *premium notes* should not be paid. The receipt which had been given was absolute. The provision for forfeiture was contained in the note. The case was somewhat complicated by questions of fact regarding the power of the company's agent to accept the notes or to grant extensions of time, but that the power existed was accepted as concluded by the verdict. The insurance company, nevertheless, asserted as a conclusion

from the nonpayment of the note that the policy had been forfeited. To this the court (supreme court of Ohio) replied:

"In most of the cases which have been cited in argument the policy contained a clause that it should be void upon nonpayment of the premium, or any note given for such premium. This policy, however, contains no clause of avoidance for the nonpayment of notes given for premium.

"It is not insisted that the nonpayment of the check alone forfeited the policy, but it is claimed that failure to pay the note does work out this result. It will be seen that the note stipulates in terms that if it is 'not paid at maturity said policy is to be null and void.'

"It cannot be successfully maintained that [350] this clause makes *the policy absolutely void upon nonpayment of the note. Under the authorities such a clause, being introduced for the benefit of the insurance company, means that the policy shall be void if the company insist upon it; but it is their option to say whether this result shall follow or not."

And further—

"We, therefore, cannot consider payment of this note as absolutely necessary before the renewal attached. It may not, perhaps, be necessary to hold, as did the court below, that demand of payment the day the note was due was necessary to work a forfeiture, but certainly something must be done between the date the note was due and the end of the year, to establish and proclaim the forfeiture, or it must be held to be waived."

To sustain the conclusion the following Illinois cases were cited: 77 Ill. 384; 37 Ill. 354, 87 Am. Dec. 251; 49 Ill. 180. The court also cited *Joliffe* v. *Madison Mut. Ins. Co.* 39 Wis. 119, 20 Am. Rep. 35, and quoted the following principle: "Forfeitures are not favored in the law, and will not be sustained upon mere inferences. Where, upon breach by one party of a condition or stipulation in a contract, the other party thereto has the option to declare the contract forfeited, and thus relieve himself from liability upon it, and seeks to exercise such option, he must do so unconditionally, and in plain, positive, and unmistakable terms." And the court finally concludes that, "in the case at bar, the company should not have retained the check and note and remained silent, as they did. Yet it appears that on July 6, 1868, when Simpson refused the premium for that year, French offered to give up his policy if the company would return his check and note. This was refused."

What, then, did this court mean by pronouncing the decision in *Mutual L. Ins. Co.* v. *French* as "entirely correct?" Were the various principles the law expressed in that case approved, or only the conclusion of the court from the facts? Did this court intend to approve the proposition that to cause a forfeiture some affirmative action [351] was necessary by the company,—a *declaration to that effect and the surrender of the premium notes? To hold the latter would be to hold that this court intended to reverse a number of decisions made upon careful consideration. Indeed, it would be contrary to the reasoning in the very opinion in which the *French Case* is approved. A replication was set up alleging a usage of the insurance company to give notice to the assured of the date of payment, and, answering it, this court said: "This is no excuse for nonpayment. The assured knew, or was bound to know, when his premiums became due. . . . The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not."

And again, as to the usage of the company not to demand punctual payment at the day, or to give thirty days of grace, it was said: "This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of 'leniency.'"

In our other decisions, which we have cited, it was held that time is the essence of the contract, and nonpayment at the day involves absolute forfeiture. In none of the cases was there any affirmative action by the company. Forfeiture occurred from nonpayment of the premium. The same principle was announced and illustrated in *Knickerbocker L. Ins. Co.* v. *Pendleton*, 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. Rep. 314. In that case a foreign bill of exchange was accepted in payment of the premium, but upon presentation to the drawee was not accepted. There was some controversy as to whether it was presented for payment. The trial court (circuit court of the United States) held (7 Fed. 169), and instructed the jury, that the true measure of the duty of the company was to be found in the rules of law governing the holder of commercial paper; that by taking the draft the company assumed all of the duties of the holder of such paper, and that it was, therefore, the duty of the company to have had the draft protested and to have given notice of nonacceptance *as a condition of forfeiture. [352] This court disagreed with the circuit court, and held that protest and notice were not necessary. In other words, held, not the law of commercial paper, but the contract of the parties, determined the conditions of forfeiture, and that the contract of the parties was expressed in the draft to be that the policy should become void if the draft was not paid at maturity. "We think it clear," was said:

"Therefore, that, notwithstanding the renewal receipt, the condition expressed in the draft was binding on the insured. As we have shown, that condition was that the policy should become void if the draft was not paid at maturity. The draft, being without grace, matured on the 14th of October, 1871. If not paid on that day the policy was forfeited, unless it was the usage of the New Orleans banks to grant days of

grace even when they were waived, of which there was some evidence on the trial. In such case the forfeiture would take place, if the draft were not paid on the 17th of October. Of course, it must be presented for payment on the one day or the other,—for the drawees could not pay it unless it was presented, for they would not know where to find it. But, supposing it to have been presented for payment, and payment refused by the drawees, then the condition of forfeiture was complete. Protest and notice of nonpayment might be further necessary to hold the drawer, if the insurance company desired to hold him; but they were not necessary to the forfeiture. That occurred when nonpayment at maturity or presentation occurred. The drawer, Pendleton, who took entire charge of the policy for his children, put its existence on the condition of payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid; that the requisite funds were in the hands of the drawees, or that they would pay it whether in funds or not. Such, we think, was the clear purport of the condition, and as the court below took a different view, holding that the insurance company was bound, not only to present the draft for payment, but to have it protested for nonpayment, before a forfeiture would ensue, the judgment must be reversed."

[353] *See also same case, 115 U. S. 339, 29 L. ed. 432, 6 Sup. Ct. Rep. 74.

It has been held in cases in the state courts, as in *Mutual L. Ins. Co.* v. *French*, that no forfeiture is incurred until notice by the company has been given that it is claimed. And other cases hold that when the condition of forfeiture is in the note only, the mere fact of nonpayment at maturity does not of itself avoid the policy. A review of the cases we do not consider necessary. We prefer to follow our own decisions.

Some of those decisions hold, however, as we have seen, that a waiver of forfeiture may be inferred from the conduct of the company, and that "courts seize hold of any circumstances that indicate an election or intent to waive a forfeiture." 96 U. S. 244, 24 L. ed. 692.

We do not think such circumstances exist in this case. Of course, such circumstances must have come from the company, or from its agent acting within his authority. In the case at bar we need only look at that which took place after the note was given. What preceded that, including the arrangement between Starn, the agent of plaintiff in error, and the assured, for the employment of the latter by the former, must be considered as having been approved by the company. Its rights and the rights of the assured depend, therefore, upon what it did in regard to the note before or after it became due, or what Starn did within his authority. The company did nothing but send the note to Starn for collection, and Starn deposited it for collection with the Farmers' & Mechanics' National Bank of Fort Worth, Texas, on August 24, 1898,—a month before it was due. The assured did nothing; made no movement, as far as the record shows, for its payment. In other words, the day of maturity came and went, and the note was not paid, and the condition upon which the policy should "cease and determine" occurred, unless Starn's authority lasted and could be exercised after the note became due. He received the note back from the bank on the 25th of September, and on the 29th of September he called at the residence of the assured,—the latter then being confined to his bed with typhoid fever (of which he died October 7). The evidence of what transpired there was conflicting, but the record admits would have supported a verdict; *"that Starn stated that [354] he had called for the purpose of collecting the note; that the plaintiff promised that it should be fixed at once, and that Starn stated that it could be paid at any time before the date on which he was required to make his monthly report, to wit: October 1st following." And it must also be accepted as true that Starn told Dr. Green that he (Starn) had called at Lewis's house to collect the note, and that the doctor notified Starn that Reeves, the druggist, would pay it, and the latter, on September 30, in the presence of Dr. Green, tendered the amount of the note to Starn, who refused it.

On the 29th of September, as set out in the statement of facts, Starn telegraphed to the company that Lewis offered to pay the premium, and asked if he should receive it. On the 30th the company replied in the negative, and on the same day wrote to Starn. Were Starn's acts authorized? They can only be so held as an inference from the authority given him to collect the note. In other words, that the authority to collect the note conferred authority to extend the time of payment and to waive the forfeiture which had occurred by nonpayment. It would be difficult to so hold even if his contract with the company did not forbid the exercise of such power and the provisions of the policy preclude it. The policy provides as follows: "All agreements made by this company are signed by the president or secretary. This power will not be delegated. No other person can alter or waive any of the conditions of this policy, or issue permits of any kind, or make an agreement binding upon said company."

And the contract constituting Starn the company's agent contains the following: "The party of the second part agrees to submit to and abide by all rules and regulations of said company. . . . Agents are not authorized to collect any renewal premium after the day on which the same becomes due, except in accordance with special instructions from the company in each individual case."

There is no evidence of any course of dealing of the company or of Starn which enlarged or modified these instructions, or which induced and excused the default of the assured.

3. The circuit court instructed the jury substantially that *the plaintiff in error was [355]

estopped from setting up the provision of the policy requiring proofs of death. The instruction is assigned as error. We concur with the circuit court. The conduct of the company was tantamount to a waiver. *Knickerbocker L. Ins. Co.* v. *Pendleton*, 112 U. S. 696, 28 L. ed. 866, 5 Sup. Ct. Rep. 314.

4. Notwithstanding our decision in *Fidelity Mut. L. Asso.* v. *Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, the plaintiff in error urges the unconstitutionality of the Texas statute, authorizing the recovery of damages and attorneys' fees for failure by life and health insurance companies to pay losses. We are, however, entirely satisfied with the case and its reasoning.

It is insisted, however, that to justify a recovery of the statutory damages demand of payment of the policy before suit was necessary, notwithstanding the denial of liability by the company. The contention is sustained by the decision of the court of civil appeals of Texas in the case of the *Northwestern Life Assur. Co.* v. *Sturdivant*, 24 Tex. Civ. App. 331, 59 S. W. 61. That case also decided "that the suit itself would not be such demand as the statute intended." It was held, however, that demand could be made after suit and set up by "an amended petition as an original suit." The supreme court of Texas refused a writ of error to review the case. 94 Tex. 706. We may therefore adopt its construction of the state statute. It can be easily conformed to by defendant in error if a new trial of the case at bar be prosecuted.

On account of the errors indicated, *the judgment of the Circuit Court is reversed*, and the cause remanded, with directions to award a new trial.

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[356] *WHITNEY LAYTON, *Plff. in Err.*,
*v.*
STATE OF MISSOURI.

(See S. C. Reporter's ed. 356-361.)

*Error to state court—Federal question.*

1. An objection raised in the state court, that a state statute is unconstitutional and void, relates only to the power of the state legislature under the state Constitution, and raises no Federal question which will give the Supreme Court of the United States jurisdiction to review a judgment of the state court sustaining the validity of the statute.

2. A judgment of a state court upholding a state statute which is claimed to violate the Federal Constitution is not reviewable in the Supreme Court of the United States, where the state court declined to pass on the Federal question because it was not raised in the trial court as required by the state practice.

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

[No. 69.]

*Submitted November 6, 1902. Decided December 22, 1902.*

IN ERROR to the Supreme Court of the State of Missouri to review a judgment of Division No. 2 of that court which affirmed a conviction in the St. Louis Court of Criminal Correction of a violation of a statute to prevent the use of unhealthy chemicals in articles to be used in the preparation of food. *Dismissed.*

See same case below, 160 Mo. 474, 61 S. W. 171.

Statement by Mr. Chief Justice **Fuller**:

Layton was prosecuted in the St. Louis court of criminal correction, on information, for violation of an act of the general assembly of the state of Missouri, entitled "An Act to Prevent the Use of Unhealthy Chemicals or Substances in the Preparation or Manufacture of Any Article Used, or to be Used, in the Preparation of Food," approved May 11, 1899, and reading as follows:

"Sec. 1. That it shall be unlawful for any person or corporation doing business in this state to manufacture, sell, or offer to sell any article, compound, or preparation, for the purpose of being used, or which is intended to be used, in the preparation *of [357] food, in which article, compound, or preparation there is any arsenic, calomel, bismuth, ammonia, or alum.

"Sec. 2. Any person or corporation violating the provisions of this act shall be deemed guilty of a misdemeanor, and shall, upon conviction, be fined not less than $100, which shall be paid into and become a part of the road fund of the county in which such fine is collected." Mo. Laws 1899, p. 170.

The information charged that the defendant, in the city of St. Louis, then and there doing business in the state of Missouri, unlawfully manufactured, sold, and offered for sale a certain compound and preparation for the purpose of its being used, and with intent that it should be used, in the preparation of food, and that said compound and preparation so manufactured and sold contained alum.

Defendant pleaded not guilty, and, a jury being waived, the cause was submitted to the court for trial.

The compound and preparation consisted of two dozen one-pound cans of baking powder, and the facts as charged in the information were admitted; but defendant contended that he should not be convicted, because the statute was unconstitutional; and he offered voluminous evidence tending to show the details of the manufacture of baking powders of various kinds, and among them baking powders containing alum, as well as the history of the business of the manufacturing, selling, and using

alum baking powders, which tended to establish that that business was, and had been for many years, very extensive in Missouri and in the United States, and that defendant, for some years before the statute was enacted, had been engaged in that business. He further offered evidence to the effect that the use of alum in baking powders was wholesome, useful, and economical; and that most grocers in Missouri kept and sold alum baking powders, and no harm had been known to result from their use in the preparation of food. All this evidence, on objection by the state for incompetency, irrelevancy, and immateriality, was excluded by the court, and defendant excepted.

Defendant asked the court to give six separate instructions predicated on the admis-[358]sion of the testimony which had been *excluded, in which the court was requested to declare the law to be that defendant must be acquitted, if the court sitting as a jury found the facts to be as the excluded evidence tended to show. These instructions were refused and defendant excepted.

The court found defendant guilty as charged in the information, and assessed the penalty at $100. Motions for new trial and in arrest were made and overruled, and exceptions taken. Judgment having been entered, defendant perfected an appeal to the supreme court of the state of Missouri, and the cause was docketed in division No. 2 of that court, being the criminal division. The judgment was affirmed (160 Mo. 474, 61 S. W. 171), and thereupon defendant moved that the cause be transferred to the court in banc, which motion was overruled. The case was then brought here on writ of error.

*Messrs.* **Silas H. Strawn** and **James L. Blair** submitted the cause for plaintiff in error. *Messrs. James H. Seddon* and *Stanley Stoner* were with them on the brief.

*Mr.* **E. C. Crow** submitted the cause for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

While it appears from the proceedings on the trial and the grounds assigned for the motion for new trial, that the unconstitutionality of the act was relied on in defense, the record does not show that it was contended in the trial court that the act was in contravention of the Constitution of the United States; and it is settled that the objection in the state courts that an act of the state is "unconstitutional and void" relates only to the power of the state legislature under the state Constitution. *Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Jacobi* v. *Alabama*, 187 U. S. 133, *ante*, 106, 23 Sup. Ct. Rep. 48.

In the supreme court of Missouri, division No. 2, Layton filed his statement and brief, which brief contained an assignment of errors, as required by the rules of that [359]court. Four *errors were assigned, the third of which was that "the court erred in refusing to declare that the law under which the defendant was convicted was unconstitutional and void." This assignment was followed by points one of which was that "the law under which the defendant was convicted conflicts with the 14th Amendment to the Constitution of the United States, which guarantees to every man the equal protection of the law;" and these points were accompanied by printed arguments, in which it was insisted that the law violated "the guaranties of the Constitutions of the state of Missouri and of the United States, in that it deprives the appellant of his liberty and his property without due process of law."

The supreme court, however, did not in terms pass on the question whether the act was in contravention of the Constitution of the United States, and, on the contrary, said that its constitutionality was assailed on two grounds, namely: that it violated the provisions of § 28 of article 4 of the Constitution of Missouri, providing that no bill "shall contain more than one subject, which shall be clearly expressed;" and that it conflicted with §§ 4 and 30 of article 2 of that Constitution, providing "that all persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry; that to give security to these things is the principal office of government . . .;" and "that no person shall be deprived of life, liberty, or property without due process of law."

It was held that when an act of the legislature is attacked as unconstitutional because invading the right of the citizen to use his faculties in the production of an article for sale for food or drink, the rule of construction that legislative acts should not be declared void "unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt," required the test of constitutionality to be that "if it be an article so universally conceded to be wholesome and innocuous that the court may take judicial notice of that fact, the legislature, under the Constitution, has no right to prohibit it; but if there is a dispute as to the fact of its wholesomeness for food or drink, then the legislature can either regulate or prohibit it;" and the validity of the act was sustained.

*The decision was strictly a decision sus-[360]taining its validity when tested by the provisions of the state Constitution, and whatever the similarity between the language of those provisions and that of the 14th Amendment, the state court cannot be regarded as having decided the Federal question now suggested because necessarily involved in the case, if it appears from the record that it was not called upon to do so, and that its decision rested on another ground.

After judgment was entered affirming the judgment of the trial court, defendant moved that the cause be transferred to the court in banc, and the motion was denied.

By the Constitution of Missouri, the supreme court was divided into two divisions;

division No. 1, consisting of four judges, and division No. 2, consisting of three judges, the latter having exclusive cognizance of all criminal causes; and it was provided that cases, in certain circumstances, among others when a Federal question was involved, on the application of the losing party, should be transferred to a full bench for decision. *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Moore* v. *Missouri*, 159 U. S. 678, 40 L. ed. 303, 16 Sup. Ct. Rep. 179. And see *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 46, as to exclusive appellate jurisdiction of state supreme court over cases involving constitutional questions.

It thus appears that the supreme court, not only by declining to consider the contention in the brief and argument in respect of the 14th Amendment, but by denying the motion to transfer the cause, was of opinion that the validity of the statute was not so drawn in question for repugnancy to the Constitution of the United States as to require decision as to its validity in that view.

The rules of the court provided: "The brief filed by appellant shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown the court shall otherwise direct." Rule 15, cl. 3, 160 Mo. appx. iv., 16 S. W. vi.

By rule of division No. 2, in criminal cases, printed statements containing assignment of errors and brief of points of argument were required, or, in prosecutions *in forma pauperis*, the same in typewriting. 160 Mo. appx. vi., 47 S. W. v.

[361] *Errors were so assigned, but the only one of them which referred to the constitutionality of the act was the third, stating that "the court erred in refusing to declare that the law under which the defendant was convicted was unconstitutional and void." This related to the state Constitution, and the court so treated it, and confined its decision to the errors specified. Whether it was obliged to do this is not material, as the court in any event proceeds on the record of the trial court for errors committed there. Exceptions in criminal cases occupy the same footing as in civil. *State* v. *Cantlin*, 118 Mo. 111, 23 S. W. 1091; *State* v. *Sacre*, 141 Mo. 64, 41 S. W. 905; *State* v. *Laycock*, 141 Mo. 274, 42 S. W. 723; *State* v. *Barton*, 142 Mo. 450, 44 S. W. 239.

And it has been repeatedly laid down by the supreme court of Missouri, in disposing of questions of jurisdiction as between itself and intermediate courts of appeal, that "the appellate jurisdiction of the supreme court contemplates a review only of the matters submitted to and examined and determined by the trial court. Hence it is well settled that this court has no jurisdiction of an appeal, on the ground that a constitutional question is involved, unless the question was raised in and submitted to the trial court." *Browning* v. *Powers*, 142 Mo. 322, 44 S. W. 224; *Bennett* v. *Missouri P. R. Co.* 105 Mo. 645, 16 S. W. 947; *Shewalter* v. *Missouri P. R. Co.* 152 Mo. 551, 54 S. W. 224.

As we observed in *Jacobi's Case*, we cannot interfere with the action of the highest court of a state in adhering to the usual course of its judgments, and we have frequently ruled that this court cannot review the final judgments of the state courts on the ground that the validity of state enactments under the Constitution of the United States had been adjudged, where those courts "did nothing more than decline to pass upon the Federal question because not raised in the trial court, as required by the state practice." *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 154, 46 L. ed. 847, 850, 22 Sup. Ct. Rep. 605, 607.

This case falls within that rule, and *the writ of error is dismissed.*

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*S. M. BURT and H. R. BURT, *Petitioners*, [362]

*v.*

UNION CENTRAL LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 181-197.)

*Life insurance—insurance against crime or miscarriage of justice.*

A policy of life insurance does not insure against the legal execution of the insured for crime, even though he may in fact have been innocent, and therefore unjustly convicted and executed.

[No. 70.]

*Argued and Submitted November 6, 1902. Decided December 22, 1902.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Texas sustaining a demurrer to a petition in an action on a policy of life insurance. *Affirmed.*

See same case below, 44 C. C. A. 548, 105 Fed. 419.

Statement by Mr. Justice **Brewer:**

This was an action to recover on a policy of life insurance, commenced in the district court of Travis county, Texas, and removed to the circuit court of the United States for the western district of Texas. The policy was issued August 1, 1894. William E. Burt was the insured. The policy, in case of death, was payable to Anna M. Burt, the wife of the insured, if living, otherwise to his executors, administrators, or assigns. On September 10, 1895, the beneficiary, Anna M. Burt, and her husband, the insured, assigned a one-half interest to plaintiffs to secure them as creditors of the assignors. On July 24, 1896, the beneficiary, Anna M. Burt, died intestate, as did also the only children of the beneficiary and the

insured. On February 4, 1897, the insured, William E. Burt, conveyed to the plaintiffs the remaining interest in the policy, making them the sole owners of it. They are also [363] his sole heirs, and as such are *entitled, to the full benefit of the policy, there being no administration on his estate, nor any necessity for one.

On November 27, 1896, the insured, having been indicted for the murder of his wife, Anna M. Burt, the beneficiary, was tried and convicted in the district court of Travis county, Texas, a court of competent jurisdiction, was sentenced to be put to death, and on May 27, 1898, was hanged pursuant to such sentence. The petition in this case alleged that, notwithstanding such conviction, sentence, and execution, the insured, William E. Burt, did not in fact commit the crime of murder, nor participate therein, but that, if he did, the policy was not avoided thereby because he was at the time insane.

The policy, which in its general scope was an ordinary policy of life insurance, contained these provisions:

"Third. If the insured should, without the written consent of the company, at any time enter the military or naval service, the militia excepted, or become employed in a liquor saloon, or if the insured should die by self-destruction, whether sane or insane, within three years from date hereof, this policy shall be null and void.

. . . . . .

"The contract of insurance between the parties hereto is completely set forth in this policy and the application for the same."

A demurrer to the petition was sustained and judgment entered for the defendant, which was thereafter affirmed by the court of appeals of the fifth circuit (44 C. C. A. 548, 105 Fed. 419), and thereupon the case was brought here on certiorari. 181 U. S. 617, 45 L. ed. 1030, 22 Sup. Ct. Rep. 945.

*Mr.* **Gardner Ruggles** submitted the cause for petitioners:

The only implied understanding or agreement between assured and the company (the policy being silent as to the death of assured at the hands of the law) was that the assured should not intentionally or voluntarily, while of sound mind, vary the risk insured against by the commission of crime which effected such death.

*Amicable Soc. for a Perpetual Life Assur. Office* v. *Bolland*, 4 Bligh, N. R. 194; *Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; *Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918; *Terry* v. *Life Ins. Co.* 1 Dill. 403, Fed. Cas. No. 13,829; *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 580, 21 L. ed. 236; *Mutual L. Ins. Co.* v. *Armstrong*, 117 U. S. 600, 29 L. ed. 997, 6 Sup. Ct. Rep. 877; *Dean* v. *American Mut. L. Ins. Co.* 4 Allen, 96; *Breasted* v. *Farmers' Loan & T. Co.* 4 Hill, 73, 8 N. Y. 299, 59 Am. Dec. 482; *Supreme Commandery, K. of G. R.* v. *Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332; *Clift* v. *Schwabe*, 3 C. B. 437; *Hatch* v. *Mutual L. Ins. Co.* 120 Mass. 550; 1 May, Ins. §§ 308 *et seq.*

Although assured died at the hands of the law, nevertheless, if he was innocent in fact of the act for which he suffered, there was no such voluntary or intentional variation of the risk on his part, or violation of any covenant or agreement.

*Breasted* v. *Farmers' Loan & T. Co.* 8 N. Y. 299, 59 Am. Dec. 482; Bliss, Life Ins. §§ 223 *et seq.*; 2 Biddle, Ins. §§ 837 *et seq.*; 2 Black, Ins. §§ 910 *et seq.*; 1 May, Ins. §§ 326 *et seq.*, § 310-(8); *Phillips* v. *Louisiana Equitable L. Ins. Co.* 26 La. Ann. 404, 21 Am. Rep. 549; *Connecticut Mut. L. Ins. Co.* v. *Groom*, 86 Pa. 92, 27 Am. Rep. 689; *Schultz* v. *Insurance Co.* 40 Ohio St. 217, 48 Am. Rep. 676; *Connecticut Mut. L. Ins. Co.* v. *Akens*, 150 U. S. 468, 37 L. ed. 1148, 14 Sup. Ct. Rep. 155; *Robertson* v. *French*, 4 East, 130, 14 Eng. Ruling Cas. pp. 13, 23; Joyce, Ins. §§ 2606 *et seq.*

Although he died at the hands of the law, and actually killed his wife (the act for which he suffered), yet if he was in fact insane and wholly irresponsible for his acts at the time he killed her, there was still no such voluntary or intentional variation of the risk or violation of the contract on his part as avoided or forfeited the policy, and his situation was the same as if he had been wholly innocent of the act.

*Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 121, 27 L. ed. 878, 3 Sup. Ct. Rep. 99; *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527, 30 L. ed. 740, 7 Sup. Ct. Rep. 685; *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 586, 21 L. ed. 240; *Horn* v. *Anglo-Australian & Universal Family L. Ins. Co.* 7 Jur. N. S. 673; *Hartman* v. *Keystone Ins. Co.* 21 Pa. 466; *Phadenhauer* v. *Germania L. Ins. Co.* 7 Heisk. 567, 19 Am. Rep. 623; *De Gogorza* v. *Knickerbocker L. Ins. Co.* 65 N. Y. 232; 1 May, Ins. §§ 320 *et seq.*; Bliss, Life Ins. §§ 225-238; *Van Zandt* v. *Mutual Ben. L. Ins. Co.* 55 N. Y. 169, 14 Am. Rep. 215; *Coverston* v. *Connecticut Mut. L. Ins. Co.* 4 Bigelow Life & Acci. Ins. Rep. 169; *Moore* v. *Connecticut Mut. L. Ins. Co.* 4 Bigelow Life & Acci. Ins. Rep. 138; *Dormay* v. *Borradaile*, 10 Beav. 335; *Stormont Waterloo Life & Casualty Co.* 1 Fost. & F. 22; *Fowler* v. *Mutual L. Ins. Co.* 4 Lans. 202; *Gay* v. *Union Mut L. Ins. Co.* 2 Bigelow's Life & Acci. Ins. Rep. 4; *Eastabrook* v. *Union Mut. L. Ins. Co.* 54 Me. 224, 89 Am. Dec. 743; *St. Louis Mut. L. Ins. Co.* v. *Graves*, 6 Bush, 268.

The judgment and sentence of the criminal court against assured were inadmissible in evidence herein.

*Cluff* v. *Mutual Ben. L. Ins. Co.* 99 Mass. 317; *Cottingham* v. *Weeks*, 54 Ga. 275; *Cluff* v. *Mutual Ben. L. Ins. Co.* 99 Mass. 317; Black, Judgm. §§ 535, 540, 548, 549, 610; *Teal* v. *Terrell*, 48 Tex. 508; *McCamant* v. *Roberts*, 66 Tex. 263, 1 S. W. 260; *Mutual Ben. L. Ins. Co.* v. *Tisdale*, 91 U. S. 238, 23 L. ed. 314; *Duchess of Kingston's Case*, 3 Smith Lead. Cas. 1998.

The judgment and sentence of the criminal court against assured, and his execution pursuant thereto, if admissible, could prove

nothing more than the rendition of such judgment and sentence and the fact of such execution.

Greenl. Ev. Lewis's ed. §§ 537, 538; *Mead* v. *Boston*, 3 Cush. 404; *Cluff* v. *Mutual Ben. L. Ins. Co.* 99 Mass. 317; Freeman, Judgm. § 319.

If said judgment, sentence, and execution were admissible and material, they were prima facie evidence only, and in no manner conclusive as against the claims of plaintiffs herein.

Freeman, Judgm. § 319; Bigelow, Estoppel, pp. 115 *et seq.*; Greenl. Ev. §§ 537 *et seq.*

*Mr.* **Robert Ramsey** argued the cause and filed a brief for respondent:

Death under sentence of law, upon just conviction of a capital offense, is not an insurable risk.

*Amicable Soc. for a Perpetual Life Assur. Office* v. *Bolland*, 4 Bligh, N. R. 194; *Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300.

The event insured against is death under the operation of natural, not of human, laws.

*Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300; *Supreme Commandery, K. of G. R.* v. *Ainsworth*, 71 Ala. 436, 46 Am. Rep. 332.

The words "death at the hands of the law," or their equivalent, relate only to the nature of the death itself, and not to any of the causes or conditions which may have preceded it.

3 Joyce, Ins. § 2611; *Clift* v. *Schwabe*, 3 C. B. 437.

Insurance against the miscarriage of justice would be a mere gambling transaction, and would not differ in principle from gambling upon the rise and fall of markets, which is held invalid.

*Irwin* v. *Williar*, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; *Bryant* v. *Western U. Teleg. Co.* 17 Fed. 825.

It would be tainted with the added vice of wagering upon the results of trials, having a tendency to influence the administration of justice.

*Evans* v. *Jones*, 5 Mees. & W. 77.

Such insurance would have a tendency to persuade an innocent accused to barter away his defense, or even to plead guilty, leaving the proofs of his innocence in the hands of his family for their recovery of the funds. The right and duty to defend against unjust accusation cannot be bartered away.

*Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 36 L. ed. 414, 12 Sup. Ct. Rep. 632.

Mr. Justice **Brewer** delivered the opinion of the court:

There is nothing in the policy which in terms covers the contingency here presented, the extracts therefrom given in the [364] preceding *statement being all that, even remotely, by suggestion or inference, can have any bearing. The question, therefore, is whether an ordinary life policy containing no applicable special provisions is a binding contract to insure against a legal execution for crime. The petitioners would distinguish between cases in which the insured is justly convicted and executed, and those in which he is unjustly convicted. The allegation here is that, notwithstanding his conviction and execution, he was not in fact guilty, that he did not participate in the killing of his wife, and that, if he did, he was insane at the time, and therefore not responsible for his actions.

Accepting the division made by counsel as one facilitating a just conclusion concerning the rights of the parties hereto, we inquire, first, whether a policy of life insurance is a contract, binding the insurer to pay to the beneficiary the amount of the policy in case the insured is legally and justly executed for crime. In other words, do insurance policies insure against crime? Is that a risk which enters into and becomes a part of the contract?

The researches of counsel have found but one case directly in point, *Amicable Soc.* v. *Bolland*, decided by the House of Lords in 1830, and reported in 4 Bligh, N. R. 194, 211. The Lord Chancellor, delivering the opinion, after stating the question, answered it in the following brief but cogent words:

"It appears to me that this resolves itself into a very plain and simple consideration. Suppose that in the policy itself this risk had been insured against; that is, that the party insuring had agreed to pay a sum of money year by year upon condition that, in the event of his committing a capital felony, and being tried, convicted, and executed for that felony, his assignees shall receive a certain sum of money,—is it possible that such a contract could be sustained? Is it not void upon the plainest principles of public policy? Would not such a contract (if available) take away one of those restraints operating on the minds of men against the commission of crimes,—namely, the interest we have in the welfare and prosperity of our connections? Now, if a policy of that description, with such a form of condition inserted in it in express terms, cannot, on grounds of *public policy, be sustained, how is it to [365] be contended that in a policy expressed in such terms as the present, and after the events which have happened, that we can sustain such a claim? Can we, in considering this policy, give to it the effect of that insertion, which, if expressed in terms, would have rendered the policy, as far as that condition went, at least, altogether void?"

There are some differences between that case and the present in the surrounding facts, but none that are material. There the policy was taken out for the benefit of the insured's estate. Here the beneficiary was the wife of the insured, or, if she should not be living at the time of his death, his estate. As her death preceded his, the conditions of the insurance became practically the same. In that case the insured had assigned all his interest in the policies upon certain trusts, though the plaintiffs were his assignees in bankruptcy.

Here he and his wife, the original beneficiary, transferred a half interest to these plaintiffs, who were their creditors, but the amount of the indebtedness is not shown, and the policy provided "should this policy be assigned or held as security, a duplicate of said assignment must be filed with the company, and due proofs of interest produced with proofs of death. This company does not guarantee the validity of any assignment;" a requirement which does not appear to have been complied with. So that the rights of the plaintiffs depend mainly, if not wholly, upon the fact of the assignment made by the insured after the killing of his wife and prior to his execution, and the further fact that they are his sole heirs. The plaintiffs, therefore, in each of the cases claimed directly under the insured, and sought to recover on a policy obtained by him, the maturity of which was accelerated by his execution for crime. In neither policy was there any express stipulation in respect to such a contingency, so that the reasoning of the Lord Chancellor is pertinent to this case, and it is reasoning the force of which it is impossible to avoid. It cannot be that one of the risks covered by a contract of insurance is the crime of the insured. There is an implied obligation on his part to do nothing to wrongfully accelerate the maturity of the policy. Public policy forbids the insertion in a contract of a condition which would [366] tend to *induce crime, and as it forbids the introduction of such a stipulation it also forbids the enforcement of a contract under circumstances which cannot be lawfully stipulated for.

That case was cited with approval in *Ritter v. Mutual L. Ins. Co.* 169 U. S. 139, 42 L. ed. 693, 18 Sup. Ct. Rep. 300, in which we held that a life insurance policy taken out by the insured for the benefit of his estate was avoided when he, in sound mind, intentionally took his own life; and this, irrespective of the question whether there was a stipulation in the policy to that effect, or not. In the opinion other cases were cited bearing more or less directly on the general question. Among them was *New York Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 591, 600, 29 L. ed. 997, 1000, 6 Sup. Ct. Rep. 877, 881, an action by the assignee of a life insurance policy, and the defense that the assignee murdered the insured in order to get the benefit of the policy; in respect to which Mr. Justice Field, speaking for the court, said:

"It would be a reproach to the jurisprudence of the country if one could recover insurance money payable on the death of a party whose life he had feloniously taken. As well might he recover insurance money upon a building that he had wilfully fired."

Also *Hatch v. Mutual L. Ins. Co.* 120 Mass. 550, 552, 21 Am. Rep. 541, 542, an action on a policy of insurance on the life of a married woman whose death was caused by a miscarriage produced by illegal operation performed upon and voluntarily submitted to by her with an intent to cause an abortion, and without any justifiable medical reason for such an operation, from the opinion in which these words were quoted:

"We can have no question that a contract to insure a woman against the risk of her dying under or in consequence of an illegal operation for abortion would be contrary to public policy, and could not be enforced in the courts of this commonwealth."

Also *Supreme Commandery K. of G. R. v. Ainsworth*, 71 Ala. 436, 447, 46 Am. Rep. 332, 336, a case of the suicide of the insured, in which is this language:

"Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the time of its occurrence is the material element and *consideration of the [367] contract. It cannot be in the contemplation of the parties that the assured, by his own criminal act, shall deprive the contract of its material element; shall vary and enlarge the risk and hasten the day of payment of the insurance money. . . . The fair and just interpretation of a contract of life insurance made with the assured is that the risk is of death proceeding from other causes than the voluntary act of the assured producing or intended to produce it. . . . The extinction of life by disease, or by accident, not suicide voluntary and intentional by the assured while in his senses, is the risk intended; and it is not intended that, without the hazard of loss, the assured may safely commit crime."

But the stress of the plaintiffs' contention rests on the allegation that the insured was unjustly convicted and executed; that he did not in fact commit the crime of murder or participate therein, and that if he did it was while he was insane and not responsible for his actions. It is urged that, according to the authorities heretofore cited, the risk which is not insured against is death as a punishment for crime; that if there be no crime, no wrong done by the insured, the mere fact of his death as the outcome of proceedings in a court of justice does not vitiate the contract of insurance unless there is some express stipulation therefor. It is said that the adjudication in the criminal case is not, as to these plaintiffs, conclusive of the insured's guilt; that they may show in this independent action facts which would satisfy a jury that the outcome of those legal proceedings was unjust because the insured did not participate in the crime, or, if he did, that he was legally irresponsible therefor by reason of insanity. It is not doubted that the criminal prosecution was an adjudication of the insured's guilt, his sanity and legal responsibility for the crime, but the principle of *res judicata* is that a judgment is conclusive only as between the parties and their privies, and these plaintiffs say they were not parties to the criminal action, and are not privies to either party thereto.

If the case turned on the applicability of the principle of *res judicata* there would be little difficulty in reaching a conclusion.

There is no identity of parties, nor are the [368] two parties to *this action privies to those in the criminal proceeding. A judgment in a criminal prosecution for assault and battery cannot be invoked as *res judicata* in a civil action by the party injured to recover damages. But there the two actions run along parallel lines, and the relief sought in each is the direct and natural result of the wrong complained of. Here the civil action is founded upon the result of the other,—cannot be maintained but for the fact of that result. If the insured had been acquitted, there would have been no cause of action on the policy, while the fact that the defendant in the illustration given was acquitted of the criminal offense would not bar the civil action to recover damages. *Cottingham* v. *Weeks*, 54 Ga. 275.

This action can be maintained only on the assumption that there was a failure of justice in the criminal case. It implies a miscarriage of justice. But can there be a contract of insurance against the miscarriage of justice? In the opinion of the court of appeals the question is thus stated and answered:

"Can there be a legal life insurance against the miscarriage of justice? Can contracts be based on the probability of judicial murder? If one policy so written be valid, the business of insuring against the fatal mistakes of juries and courts would be legitimate. The same principle could be applied, in a kind of accident insurance, to the miscarriage of justice in cases that led to convictions and punishments not capital. And in each suit to enforce such a policy the issue as to the fatal judicial mistake would be tried by another jury and court not infallible.

. . . . . .

"It is the policy of every state or organized society to uphold the dignity and integrity of its courts of justice. Such contracts would be speculations upon whether the courts would do justice. They would tend to encourage a want of confidence in the efficiency of the courts. They would tend to stir up litigation,—litigation that would reopen tried issues. They would impress the public with the belief that the results of trials of the gravest kind were so uncertain that the innocent could not escape condemnation by a jury and unjust judgment by the court, or obtain pardon of the executive. Such contracts would encourage litigation and bring reproach upon the [369] state, *its judiciary, and executive, and would, we think, be against public policy and void. The policy of the law often permits and even requires, for error, a new trial of a convicted defendant, but never after his execution."

The views thus expressed commend themselves to our judgment. There is a wagering feature in such a stipulation which forbids its being incorporated into a policy of insurance, and, if it cannot be formally incorporated into the contract, its omission therefrom does not, by implication, give it life and validity.

See to what any other conclusion would lead: Suppose beneficiaries at the time of the trial of an insured for murder were possessors, and the sole possessors, of a knowledge of facts that would establish his innocence. As good citizens it would be their duty to furnish that evidence and thus prevent a miscarriage of justice. As beneficiaries it would be their interest to withhold their evidence, and thus let an innocent man be punished. Can a contract be upheld which is not only a wager upon the result of criminal proceedings, but also tends to place before individuals an inducement to assist in bringing about such miscarriage of justice?

In *Evans* v. *Jones*, 5 Mees. & W. 77, an action was brought on a wager as to the conviction or acquittal of a prisoner on trial on a criminal charge, and it was held that the action could not be sustained. Lord Abinger observed: "No man has a right to acquire, by his own act, an interest in interfering with the proceedings of courts of justice, more especially of criminal justice, in which a man is bound honestly to declare all he knows relative to the case in the course of adjudication. Here the party had acquired by the wager a direct interest in procuring the conviction of the prisoner; and although it is impossible to say in what precise manner an improper bias may be exerted, or whether it will have any effect or not, yet the very tendency of his mind to act in such a way as to pervert the course of justice is a sufficient foundation for the illegality of such wagers." (p. 81.) Baron Parke concurred in these words: "I entirely agree. No case has been cited at variance with the principle laid down by the Lord Chief Baron. It appears to me that it is a reasonable objection to the legality of a *wager that it has [370] a tendency to influence and pervert the course of criminal justice. There ought to be a disposition in every person to come forward and give any evidence which he may be in possession of, tending to insure either the acquittal or conviction of a person lying under a criminal charge; but the necessary tendency of a wager of this description is to induce the party to it either to give false testimony, if it be his interest to procure a conviction, or, if the other way, to withdraw from the court evidence which he may either possess at the time of laying the wager, or which may afterwards come to his knowledge. And even if a party be not in a situation to suppress or fabricate evidence, still he may influence the result of the trial by prejudicing the public mind on the case, and thus deprive the party charged of the fair trial to which he is entitled." (p. 82.)

It may be said the plaintiffs have made no contract in which any element of wager exists. The contract was between the insured and the company, and in that there was no other element of wager than is found in any ordinary insurance policy.

This may be technically true. The plaintiffs made no contract, but they are seeking to enforce one containing, so far as they are concerned, all the elements which, as indicated in the quotations just made, forbid its enforcement on the ground of public policy. They claim in part, under an assignment made before the homicide, the value of which, however, they do not disclose, and they were the heirs of the insured, and after the death of his wife and children, would, in the absence of any will, become the beneficiaries in full. So they stood prior to the trial, with a personal interest drawing them in one direction, and a public duty which might possibly compel active efforts in a contrary direction. That these plaintiffs may have known nothing in respect to the circumstances of the homicide, or been unable to furnish any evidence *pro* or *con* on the matter of insanity, is immaterial. It is enough that the contract has such a tendency, and it is not essential that, in fact, it produced a conflict in the minds of these plaintiffs or changed their conduct.

*The judgment of the Court of Appeals is affirmed.*

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[371] PHINEAS PAM-TO-PEE and Others, *Appts.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 371-401.)

*Indian claimants—right to share in distribution of award—laches—court of claims—right to inquire into execution of its judgment.*

1. The failure of some of the claimants under a judgment awarding a certain sum to unidentified Pottawatomie Indians, to furnish any evidence of their right to share therein until after the Indian Department, in pursuance of the judgment, has attempted to identify the claimants, and the fund has been distributed to the claimants thus identified, will preclude them from maintaining a suit against the government for the share which they should have received.

2. Jurisdiction of a petition which raises the question as to the due and proper execution of a prior judgment of the court of claims making an award to the Pottawatomie Indians, but leaving to the Indian Department the identification of the claimants entitled to share in its distribution, was given such court by the act of March 19, 1890 (26 Stat. at L. 24, chap. 39), conferring upon it jurisdiction to try all questions arising out of treaty stipulations between such Indians and the United States, and to render judgment thereon.

[No. 211.]

*Argued October 22, 23, 1902. Decided December 22, 1902.*

APPEAL from the Court of Claims to review a judgment dismissing a petition of certain Indian claimants for a judgment against the United States for the share which they should have received out of an award which has been distributed. *Affirmed.*

See same case below, 36 Ct. Cl. 427.

Statement by Mr. Justice **Brewer:**

On March 19, 1890, Congress passed an act (26 Stat. at L. 24, chap. 39) giving to the court of claims jurisdiction to try all questions arising out of treaty stipulations between the United States and the Pottawatomie Indians of Michigan and Indiana, unembarrassed by reason of any estoppel supposed to arise from the joint resolution of Congress approved April 18, 1866, or a receipt in full given by certain Pottawatomie Indians under the provisions of that resolution. Under the authority of this act two petitions were filed in the court of claims, one on April 14, 1890, in behalf of "the Pottawatomie Indians of Michigan and Indiana," no individuals being named, by John Critcher, their attorney, his authority being, as stated, an "agreement between said Critcher and the business committee of said Indians, dated September 29, 1887," the other on November 5, 1890, by Phineas Pam-to-pee and 1,371 other Pottawatomie Indians of Michigan and Indiana, by John B. Shipman, their attorney. On January 8, 1891, these two cases were consolidated, and on June 27, 1892 (27 Ct. Cl. 493), a judgment was rendered against the United States for $104,626. The claimants in each of the cases so consolidated appealed to this [372] court, which on April 17, 1893, affirmed the judgment. 148 U. S. 691, 37 L. ed. 613, 13 Sup. Ct. Rep. 742. On April 20, 1893, the mandate was filed in the court of claims.

While the judgment determined the amount due from the United States, it did not determine to how many or which of the various individual plaintiffs, or in what proportion, the amount thus adjudged to be due from the United States should be paid. The court of claims, in its opinion, said (p. 414):

"Congress have recognized, by the very title of the act, a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana,' and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that department of the government which by law has incumbent on it the administration of the trust which in legal contemplation exists between the United States and the different tribes of Indians."

By this court it was stated (p. 703, L. ed. p. 617, Sup. Ct. Rep. p. 747):

"How the moneys so awarded should be

NOTE.—*As to laches as a defense*—see notes to Hammond v. Hopkins, 36 L. ed. U. S. 135; Felix v. Patrick, 36 L. ed. U. S. 720; Middletown v. Newport Hospital (R. I.) 1 L. R. A. 191; Calhoun v. Delhi & M. R. Co. (N. Y.) 8 L. R. A. 248; and Coffey v. Emigh (Colo.) 10 L. R. A. 125.

distributed among the several claimants it is not easy for us to say. The findings of the court below, and the contradictory statements of the several briefs filed by the appellants, have left this part of this subject in a very confused condition."

And, after quoting the language of the court below, we further said:

"On the other hand, it is contended, with great show of reason, by the petitioners who are represented in case No. 1,125 (16,842 in the court below), that the question of what Indians are entitled to participate in the fund is one of law, to be settled by the court, and should not be left to clerical functionaries. Our difficulty in disposing of this part of the subject is that we have neither findings nor concessions that enable us to deal with it intelligently.

"It is to be observed that the court below found as a fact (see finding 10) that the average proportion between the Indians who removed west and those who remained was as 2,812 of the former to 291 of the latter, and the court used that relative proportion of numbers as a factor in computing the amount due the petitioners.

[373] *"The petitioners, however, number 1,371 in case No. 1,125, but the number represented in No. 1,133 (16,473 in the court below) is not precisely stated. It is alleged in the brief filed in behalf of petitioners in case No. 1,125 that only 91 Indians are actually represented in case No. 1,133, and that the other 200 Indians are among those represented in case 1,125.

"But these facts are not found for us in any authoritative form. Nor, indeed, would it seem that the court below was furnished with information sufficient to enable it to define what Indians or what number of Indians entitled to distribution are represented by the respective attorneys or agents.

"Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund.

"As these petitioners no longer have any tribal organization, and as the statutes direct a division of the annuities and other sums payable, by the head, and as such has been the practice of the government, perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund. *United States* v. *Old Settlers*, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650."

On August 23, 1894, Congress passed an act (28 Stat. at L. 450, chap. 307) appropriating money for the payment of judgments of the court of claims, including therein the amount of this judgment in favor of the Pottawatomie Indians. On March 2, 1895, it passed a further act (28 Stat. at L. 894, chap. 188) directing the Secretary of the Interior to detail or employ an Indian inspector to take a census and prepare a roll of the Pottawatomie Indians of Michigan and Indiana who were entitled to share in such judgment, and appropriated the sum of $1,000 therefor. After an inspector had been appointed under this act, and while he was engaged in taking the census, counsel for the present petitioners, who was counsel for petitioners in the second of the original suits, addressed a communication to the Secretary of the Interior of date July 27, 1895, representing that such census, *by reason of the [374] basis upon which it was ordered, would omit many Indians entitled to share in the judgment. Before any further instructions could be given, and in August, 1895, the inspector filed in the Interior Department his report and census. Acting upon the suggestions made in the letter of counsel, a new inspector was, on February 5, 1896, designated to examine and report upon the claims of any parties other than those already upon the census roll, and upon his report, of date March 14, 1896, making some slight additions, payment of the entire amount of the judgment was made, and made *per capita*, to all the individuals on the revised list. Thereafter, and on April 22, 1899, these petitioners filed their petition in the court of claims, alleging in substance that they were entitled to participate in the sum awarded against the United States, and, as they had not received their share of those moneys, they prayed a judgment therefor. Upon a hearing, the court of claims decided against them, and on May 20, 1901, entered a judgment (36 Ct. Cl. 427) dismissing their petition, from which judgment this appeal was taken.

*Mr.* **John B. Shipman** argued the cause and filed a brief for appellants:

The court of claims has jurisdiction of a claim based upon the unpaid balance of a judgment.

*United States* v. *O'Grady*, 22 Wall. 641, 22 L. ed. 772; *Hobbs* v. *United States*, 19 Ct. Cl. 220; *Brown's Case*, 6 Ct. Cl. 171.

Under the specific appropriations made by Congress, a means of satisfying the claim was provided. The claim is therefore also founded upon a law of Congress within the meaning of U. S. Rev. Stat. § 1059, and is one of which the court of claims has jurisdiction.

*United States* v. *Weld*, 127 U. S. 51, 32 L. ed. 62, 8 Sup. Ct. Rep. 1000; *Hukill's Case*, 16 Ct. Cl. 562; *Huffman's Case*, 17 Ct. Cl. 55; *Mordecai Case*, 19 Ct. Cl. 11; *Wray* v. *United States*, 19 Ct. Cl. 154; *Jordon* v. *United States*, 19 Ct. Cl. 108; *George* v. *United States*, 18 Ct. Cl. 432; *Blount* v. *United States*, 21 Ct. Cl. 274.

A debtor is bound to know his creditor, and to find and pay him before his obligation will be canceled.

*Jones* v. *Ricketts*, 7 Md. 108; *Startup* v. *Macdonald*, 6 Mann. & G. 593; 1 Beach, Contr. § 329.

The fact that a claim has never been presented to any department for payment, and has never been allowed or rejected by any

officer of the government, is immaterial and in no way affects the claimant's right to sue and recover upon it.

*United States* v. *Clyde*, 80 U. S. 38, 20 L. ed. 479; *United States* v. *Kaufman*, 96 U. S. 571, 24 L. ed. 792; *Campbell* v. *United States*, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759; *United States* v. *Knox*, 128 U. S. 230, 32 L. ed. 465, 9 Sup. Ct. Rep. 63; *United States* v. *Ewing*, 140 U. S. 144, 35 L. ed. 389, 11 Sup. Ct. Rep. 743; *United States* v. *Fletcher*, 147 U. S. 667, 37 L. ed. 323, 13 Sup. Ct. Rep. 434.

Trustees and all other persons having money in their hands to distribute and pay over to other persons must see that the money reaches the hands of the persons entitled to receive it; for if they make any mistake in the person to whom they pay the money, they are still liable to pay it to the proper person.

2 Perry, Tr. § 926; 2 Beach, Tr. §§ 523, 524; 1 Lewin, Tr. 344, § 6; Underhill, Tr. pp. 486–488.

No Indian agent had or could be invested with authority to drop or leave off one Indian upon any of the rolls, whatever the cause might be.

*United States* v. *O'Grady*, 22 Wall. 641, 22 L. ed. 772.

*Mr.* **William H. Button** argued the cause, and, with *Assistant Attorney General Pradt*, filed a brief for appellee:

The original suit must have been brought for the benefit of all interested.

Story, Eq. Pl. §§ 98, 99; *Leigh* v. *Thomas*, 2 Ves. Sr. 312; *Brown* v. *Ricketts*, 3 Johns. Ch. 553.

In such suits anyone who has an interest in the matter in controversy can come in and claim that interest, although he is not made a party to the bill.

Story, Eq. Pl. § 99; *West* v. *Randall*, 2 Mason, 181, Fed. Cas. No. 17,424; *Waite* v. *Temple*, 1 Sim. & Stu. 319; *Gifford* v. *Hort*, 1 Sch. & Lef. 409.

It is therefore evident that any one of the claimants in the present suit had a right to enter as a claimant in the suit in which the judgment was rendered, or to press his claim before the Indian office had distributed the judgment.

A decree in such a suit, fixing the amount of the fund to which a class is entitled, is binding on the whole class, although some of them may not have been made parties to the suit, and may not have taken advantage of the decree.

Story, Eq. Pl. § 99; *Kenyon* v. *Worthington*, 2 Dick. 668.

When a distribution is made under a decree of court in such a suit, those who do not come in and claim their shares and prove their right thereto before such distribution are bound thereby, and cannot afterwards maintain a suit for the share which they should have received.

Story. Eq. Pl. § 94; *Farrell* v. *Smith*, 2 Ball & B. 337; *David* v. *Frowd*, 1 Myl. & K. 500; *Gillespie* v. *Alexander*, 3 Russ. 131; *Greig* v. *Somerville*, 1 Russ. & M. 338; *Hallett* v. *Hallett*, 2 Paige, 15; *Campbell* v. *Texas & N. O. R. Co.* 1 Woods, 368, Fed. Cas. No. 2,366; *Kerrison* v. *Stewart*, 93 U. S. 155, 23 L. ed. 843.

In many of the Indian cases that have come before the court of claims, where it was necessary to distribute a fund to individual Indians, that court has directed the fund to be distributed practically in the same way that this fund was distributed.

*Western Cherokee Indians* v. *United States*, 27 Ct. Cl. 61; *Journeycake* v. *Cherokee Nation*, 28 Ct. Cl. 319; *Whitmire* v. *Cherokee Nation*, 30 Ct. Cl. 187.

These claimants are estopped from claiming a share in this fund.

Pomeroy, Eq. Jur. 2d ed. § 805.

Mr. Justice **Brewer** delivered the opinion of the court:

There is an apparent hardship in the result of this litigation, but one which we are constrained to believe the plaintiffs are chiefly responsible for, and which can be relieved only by the action of Congress. Two sets of claimants appeared in the former suits, each represented by separate counsel, and, after a consolidation, the litigation proceeded only so far as to determine the fact of the liability of the government and the extent of that liability, leaving undetermined the individuals entitled to share in the amount awarded against the government, or the proper basis of distribution between those so entitled. In the *first of the [375] suits ninety-one Indians were, it is said, represented, while the petition in the second suit set forth the names of 1,371 persons whose names and residences were given, and who were alleged to be entitled to share in whatever money should be awarded against the government. The court of claims, after finding the amount that was due, in terms declared that it left "the question of distribution to that department of the government which by law has incumbent on it the administration of the trust which in legal contemplation exists between the United States and the different tribes of Indians." This court affirmed that decision, and in so doing, after saying that there was nothing in the record which would enable them to identify the claimants, added: "Perhaps the necessities of the situation demand that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund." Such being the final orders in the consolidated cases, proceedings for ascertaining the individual beneficiaries were rightfully had in accordance with the directions then made. It is no argument against upholding that which was done to say that some other and more satisfactory procedure might have been ordered. Possibly it would have been better for the court to have appointed a master and proceeded according to the rules of equity in identifying the beneficiaries of the fund. However, it was not so ordered, and both the claimants and the government were in-

structed and concluded by the decision in respect to the method of identification.

The mandate of this court was filed in the court of claims on April 20, 1893, and on August 23, 1894, Congress passed an act appropriating money for the payment of the judgment. The fund thereby became available for distribution. No action, so far as appears, was taken in the court of claims or in the Indian Department looking to an identification of the parties entitled to this money until after March 2, 1895. Nearly two years had passed, and no effort had been made by the petitioners to establish to the satisfaction of the court or the officers of the Indian Department their right to be counted among the distributees of this fund. Obviously, these petitioners, [376] whose *names and places of residence were stated in the second of the original petitions, could, if they had seen fit, have furnished proofs of identification.

After the passage of the act of March 2, 1895, appropriating $1,000 for expenses, an inspector was detailed as agent to take a census and prepare a list or roll. Then, for the first time, and after he had commenced his work, do we hear of any action on the part of these petitioners, and that action consisted wholly of a single letter from their counsel to the Secretary of the Interior. This was the scope of that letter which was of date July 27, 1895: The instructions given to the agent were that, in taking the census, he should be guided by a pay roll made in 1866, upon which there had been a *pro rata* distribution of money awarded by Congress, and to account for all the Indians whose names appeared upon that roll, and also to enroll all who could furnish proof of being their legal descendants. The letter was a protest against these instructions, calling attention to the fact that there were prior rolls, particularly those of 1843 and 1844, which should be taken into account in preparing the new census or list. The writer also attached a list of the names of some, who, so far as ascertained, were, he stated, heirs of persons named on one or other of these rolls, and of other individuals who were also entitled to enrollment. Apparently before any action was taken by the department upon this protest, the agent had returned a list or census roll of those found by him entitled to share in the fund.

Nevertheless, the contention made in the letter of counsel having been presented to the Secretary of the Interior, he ruled that those persons should be enrolled who were on any of the rolls made during the years from 1843 to 1866, or descended from one upon those rolls. Thereupon a new agent was appointed, and directed to ascertain what additions to the list returned by the first agent should be made under the new rulings. The work of this agent was not fruitful in results, as he only reported the names of two persons entitled to be added to the list or roll. Thereafter one was added by the Department, and upon the list thus completed the money was paid out *per capita*. The number to whom distribution was made, being all included *in the com- [377] pleted list or roll, was 272. This distribution was made during the month of November, 1896, according to the statement of Chief Justice Nott, in delivering the opinion of the court, although there is no specific finding to that effect. The report of the second agent was dated March 14, 1896. No action appears to have been taken by the petitioners intermediate this report in March, and the distribution in November; none, indeed, until the filing of this petition on April 22, 1899, more than three years after the report.

The fourth finding in the present suit contains this statement:

"None of the Indians, parties in or represented by the present suit, were paid as aforesaid. A large number of them, to wit, 272, whose names are set forth in schedule A annexed to claimants' requests for findings, were descended from Indians whose names were enrolled on the rolls of Indians in Michigan in the years 1843, 1844 and 1866."

But in respect to this finding it was stated by Chief Justice Nott:

"The evidence now produced to establish the fact that 272 of the present claimants are direct descendants of the Indians who were upon the rolls in 1843 and 1844 is not altogether satisfactory to the court, but in the absence of countervailing testimony it may be said to present a prima facie case."

So the case stands thus: Congress having referred to the court of claims an inquiry whether anything was due to "the Pottawatomie Indians of Michigan and Indiana" by reason of treaty stipulations, nearly fifteen hundred individuals appeared in two suits, subsequently consolidated, claiming that there was a large amount due under those stipulations, and representing that they were the parties entitled to the benefit thereof. The result of that litigation was to determine that a certain amount was due to those Indians, but there being no evidence to identify the individuals who came within the description and were entitled to share in the amount found due, the judgment was simply for a recovery of such amount, and it was specially directed that the identification of the individuals entitled thereto should be left to the officers of the Indian Department. After two years had passed without any evidence being furnished by *individuals of their [378] right to participate in the fund, Congress directed the Secretary of the Interior to appoint an agent to examine into the matter and prepare a proper roll or list. While such agent was acting, a protest was made by the counsel in one of those suits against the basis upon which he was preparing the roll. Although that agent had finished his work, the Secretary of the Interior accepted the suggestion of counsel, and directed a new agent to examine and report any names which, upon the basis suggested by counsel, should be added to the roll already prepared. As the result of the reports of these

two agents a roll was prepared containing the names of 272 persons, and the fund was distributed among them.

There is nothing in the record in the way of finding, report, or letter tending to show what efforts the first agent made in respect to the matter of identification, what course he pursued or what steps he took, and in respect to the second agent all that is disclosed is that which appears in his report, which details at some length his various efforts to secure evidences of identification of different individuals. In short, it must be assumed, in the absence of any showing to the contrary, that the officers of the government acted reasonably, fairly, and with all needed diligence in discharging the duty imposed upon them. While from the present findings it appears that they made a mistake, and did not include all who ought to have been included as beneficiaries, yet their instructions conformed to the suggestions of counsel for petitioners, and there is nothing to show that they did not make a full and honest effort to carry out those instructions. Complaint, therefore, must be upon one of two grounds: Either that the proper course to pursue in the way of identification was not taken,—but that objection comes too late, for it was concluded by the prior decision,— or that, a mistake having been made in the matter of identification, the government must assume all the burden of the mistake, and pay a second time that which it has once paid in pursuance of the directions of the court. That is really the contention of the petitioners.

They were petitioners in one of the original suits, and contend that they were en-
[379] titled to share in the fund, and that, as *the full amount awarded by the court and appropriated by Congress has already been paid to others, they are entitled to a judgment against the government for that which ought to have been paid to them out of the prior appropriation. The court of claims finds that of these petitioners 272 ought to have been placed upon the census roll, and were entitled to a share in the fund. The failure to receive their share may be a hardship to these petitioners, but it must be remembered that the method of ascertaining those entitled was prescribed by the court and pursued by the government. Having been so pursued, that fund must be considered as properly distributed.

This is not an ordinary judgment at law in which the plaintiff entitled to receive and the defendant bound to pay are both named, and in which the absolute duty is cast upon the defendant to see that the right party is paid, but a case in which the amount of a fund for distribution was determined, and directions made for ascertaining the beneficiaries of that fund. The debtor and the beneficiaries were each interested in the question of identification, and both bound by the conclusion reached in respect thereto if the directions were fully complied with.

To what would any other ruling result? The finding which, evidently from the opinion of Chief Justice Nott, was not very clearly established, that 272, in addition to those already paid, were entitled to a part of the fund, does not include other claimants, and if these petitioners should obtain a judgment against the United States, other petitioners might come forward with like claim, and so the government be compelled to pay over and over again, although it had made one payment in compliance with the directions of the court. Further, if there were really more beneficiaries entitled to share in this fund than those who actually received payment, those who were paid received each too much and should return the overplus; and the amount of that overplus would be constantly increased as in successive actions there were added further beneficiaries, for the distribution was, as stated, *per capita*,—a mode of distribution contended for by the petitioners. Petitioners seem to assume that, although the government took the course prescribed by the court in ascertaining the individuals entitled to *share in that fund, it assumed [380] all the risk of mistake, however made, and that they could wait until after the government had acted and made the distribution, and that no responsibility rested upon them to furnish evidences of their title. For reasons stated we cannot assent to this view. Where a fund has been created, and the mode of distribution prescribed by the court which established the amount of the fund, its disposition in accordance with the course prescribed by the court must be held a finality, and in the case at bar any further relief must be obtained from Congress, and cannot be given by the courts.

It is suggested, though not by counsel, that the court of claims had no jurisdiction to entertain this action, and, that therefore, our order should be to reverse the judgment and remand the case with instructions to dismiss for want of jurisdiction. The basis of this suggestion is the contention that the act of March 19, 1890, simply gave to the court of claims jurisdiction to determine the sum due the Pottawatomie Indians of Michigan and Indiana, without the power to identify the particular individuals entitled to share in the amount found due, and it is said that this was so decided in the prior case. We do not so understand that decision. The act, so far as material, reads as follows:

"Whereas, representatives of the Pottawatomie Indians of Michigan and Indiana, in behalf of all the Pottawatomie Indians of said states, make claim against the United States on account of various treaty provisions which, it is alleged, have not been complied with: Therefore,

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the court of claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon; power is hereby granted the

said court to review the entire question of difference *de novo*, and it shall not be estopped by the joint resolution of Congress, approved twenty-eighth July, eighteen hundred and sixty-six, entitled 'Joint Resolu-
[381] tion for the relief of certain *Chippewa, Ottawa and Pottawatomie Indians,' nor by the receipt in full given by said Pottawatomies under the provisions of said resolution, nor shall said receipt be evidence of any fact except of payment of the amount of money mentioned in it."

Two suits were commenced in the court of claims, as heretofore stated, and by that court consolidated. In one a certain number of individuals were named as petitioners. In the other it was admitted that ninety-one persons were represented by their authorized attorney, as appeared by agreement between the attorney and their business committee. The court, after consolidating the two actions, proceeded to determine the amount due, and made no finding as to the individuals entitled to share in such amount; but such identification was for want of sufficient evidence to enable the court to determine the question. This is apparent from the opinion of that court in the present case, for it is said by Chief Justice Nott, in delivering that opinion: "It is unfortunate for some of the claimants in the present suit that the evidence upon which they now rely was not before the court then. . . . The court deemed itself bound by the action of the government in recognizing the parties represented by the former suit [that is, one of the two suits consolidated], and accordingly rendered judgment for them; but the court did not undertake to determine who the then existing individual claimants were who were entitled to participate in the distribution."

Again, after quoting from the opinion of this court, he said: "At this point, if the former case had been a similar suit in chancery between ordinary litigants, it would have been referred to a master or referee to ascertain and report as to the individual claimants entitled to recover, and the final decree would not have been entered until a coming in and confirmation or correction of the master's report. The Secretary of the Interior, however, seems to have inferred from language in the opinions of the two courts that he was authorized to proceed and ascertain who those Indians were, and to prescribe the methods for so ascertaining and determining the amount to be distributed to each individual claimant."
[382] And after referring *to a plea in behalf of these individual claimants on account of their ignorance, added, "but the former case, in which the court might have exercised the discretion of a court of equity, and allowed parties to come in even after the decree and assert their rights, is closed; the judgment therein has been satisfied; the claimants stand directly upon their legal rights, and there cannot be one law for the intelligent and another for the ignorant."

And this court, in its opinion, used the language quoted in the preliminary statement of fact. It is obvious from these quotations from the opinions that both the court of claims and this court understood that the act gave jurisdiction not only to ascertain the amount due, but also to identify the individuals entitled to share therein, and that the failure to find the latter resulted from a lack of evidence,—a lack the plaintiffs endeavor in this action to supply.

But even if the language of the prior opinions of the court of claims and this court can be tortured into a different construction, still there can be no question of the jurisdiction of the court of claims over the present action. The jurisdiction of a court is not exhausted by the mere entry of a judgment. It always has power to inquire whether that judgment has been executed, and the contention here is—and it is the basis of this suit—that the judgment which was rendered in the prior suit has not been executed. It would be an anomaly to hold that a court having jurisdiction of a controversy, and which renders a judgment in favor of A against B, had no power to inquire whether that judgment has been rightly executed by a payment from B to C. If the court of claims had no authority to inquire into the execution of its judgment, it was shorn of a part of the ordinary jurisdiction of a court. The question what is essential in order to confer jurisdiction in this court over the judgments of the court of claims was exhaustively examined by Chief Justice Taney in *Gordon v. United States*, reported in 117 U. S. 697, and that judgment has been more than once referred to by this court as conclusive of the questions therein considered. *District of Columbia* v. *Eslin*, 183 U. S. 62, 46 L. ed. 85, 22 Sup. Ct. Rep. 17; *District of Columbia* v. *Barnes*, 187 U. S. 637, *post*, 344, 23 Sup. Ct. Rep. 846. In that opinion he said (p. 702):

*"The inferior court, therefore, from [383] which the appeal is taken, must be a judicial tribunal authorized to render a judgment which will bind the rights of the parties litigating before it, unless appealed from, and upon which the appropriate process of execution may be issued by the court to carry it into effect. And Congress cannot extend the appellate power of this court beyond the limits prescribed by the Constitution, and can neither confer nor impose on it the authority or duty of hearing and determining an appeal from a commissioner or auditor, or any other tribunal exercising only special powers under an act of Congress; nor can Congress authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect."

"The award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is

no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction, yet it is the whole power that the court is allowed to exercise under this act of Congress."

It follows from these considerations that the court of claims not only had jurisdiction to find the amount due from the United States to the Pottawatomie Indians of Michigan and Indiana, and render judgment therefor, but also to inquire into the question whether that judgment had been duly and properly executed.

*The judgment is affirmed.*

[384] *Mr. Justice **White**, dissenting:

It results from the findings of the court below that the petitioners in that court who are appellants, apart from the question of their laches, are entitled to the relief which they seek. This was conceded by the court below in the conclusion of law which it drew from the findings of fact, was not challenged by the government in the argument at bar, and is, besides, not now questioned by this court in its opinion. But the lower court held, and this court now affirms such conclusion, that because of their laches the petitioners are cut off from obtaining that judicial relief to which they would otherwise be entitled. In other words, it is decided that although the power exists in the court to grant relief, its duty is not to exert its lawful powers to that end because the petitioners have so neglected their rights that they are not entitled now to enforce them. From this conclusion I am constrained to dissent, because, in my opinion, there is no power in the court to entertain jurisdiction, and therefore no right in it to decide the question of laches. In other words, I think the plaintiffs in error must be relegated to Congress for relief, not because they have lost their right to redress in the courts by their neglect, but because the wrong which they have suffered is one which can only be remedied by Congress, the courts being without jurisdiction over the subject-matter. Whilst both in the opinion of the court and in my view the plaintiffs in error can only obtain relief at the hands of Congress, there is a serious difference in the grounds upon which the conclusion proceeds; for, manifestly, it is one thing to refer the plaintiffs to Congress because they have lost their rights by neglect, and another to refer them to Congress because that body alone has power over the subject. Because of the difference between these views and the effect which this difference may have on the rights of the parties when their claim for relief is presented to Congress, I deem it my duty to state quite fully the reasons for my dissent.

The history of this controversy was stated in the opinion in *Pam-to-pee* v. *United States*, 148 U. S. 691, 37 L. ed. 613, 13 Sup. Ct. Rep. 742. For the *purpose of [385] present clearness, however, the salient facts are again recapitulated.

On the 26th and 27th of September, 1833, by a treaty and articles supplementary thereto, the united nation of Chippewa, Ottawa, and Pottawatomie Indians ceded certain lands in Michigan and Illinois to the United States, and agreed to remove within three years west of the Mississippi. 7 Stat. at L. 431, 442. Among other payments to be made on account of the cessions, there was to be paid to the Indians under the treaty proper, the sum of $280,000, and, under the articles supplementary, $40,000, in twenty annual instalments of $14,000 and $2,000 respectively.

Appended to the articles supplementary was a provision wherein it was recited:

"As, since the signing of the treaty, a part of the band residing on the reservations in the territory of Michigan have requested, on account of their religious creed, permission to remove to the northern part of the peninsula of Michigan, it is agreed that, in case of such removal, the just proportion of all annuities payable to them under former treaties and that arising from the sale of the reservation on which they now reside shall be paid to them at l'Arbre Croche." 7 Stat. at L. 445.

Only a portion of the Indians embraced by the provision just quoted removed from their reservations to the northern part of Michigan. The others dispersed throughout Michigan, and a few settled in Indiana.

From the year 1843 to the year 1865, inclusive, payments were made to the Pottawatomie Indians who had not removed west, and who were deemed to be entitled to the annuity benefits stipulated in the articles supplementary signed on September 27, 1833. These payments were made at the Mackinac agency, and it would seem that the payments embraced Indians who had not removed to the northern part of Michigan, but who had located elsewhere in Michigan and Indiana. A schedule showing the dates of payments, the names of the agents who made them, and the number of Indians to whom the aggregate sums were paid, is annexed in *the margin.† The [386]

| †Year. | Name. | No. paid. | Amount. |
|---|---|---|---|
| 1843 | Robert Stuart | 253 | $1,587.50 |
| 1844 | do. | 269 | 1,587.50 |
| 1845 | Wm. A. Richmond | 217 | 1,587.50 |
| 1846 | do. | 204 | 1,587.50 |
| 1847 | do. | 244 | 1,587.50 |
| 1848 | do. | 260 | 1,587.50 |
| 1849 | Chas. P. Babcock | 260 | 1,587.50 |
| 1850 | do. | 218 | 1,587.50 |
| 1851 | Wm. Sprague | 229 | 1,587.50 |
| 1852 | do. | 214 | 1,587.50 |
| 1853 | Henry C. Gilbert | 219 | 1,587.50 |
| 1854 | do. | 236 | 1,587.50 |
| 1855 | do. | 236 | 1,587.50 |
| 1856 | do. | 221 | 1,587.50 |
| 1857 | A. N. Fitch | 229 | 1,587.50 |
| 1858 | do. | 234 | 1,587.50 |

amounts which were paid, as stated in the schedule, embraced sums deemed to be due under an annuity of $16,000, arising from a treaty made on July 27, 1829, and the annuity of $2,000, mentioned in the articles supplementary of September 27, 1833.

By a treaty signed in June, 1846 (9 Stat. at L. 853), all the Indians (Chippewas, Ottawas, and Pottawatomies) embraced in the treaty of 1833, who had removed to the west and retained their tribal organization, were designated as the Pottawatomie Nation.

In accordance with a joint resolution of July 28, 1866 (14 Stat. at L. 370), the sum of $39,000 was paid to the Chippewa, Ottawa, and Pottawatomie Indians in Michigan and Indiana. This sum was paid to the "chiefs, head men, heads of families, and individuals without families" of the Indians in question, within the Mackinac agency, there being 230 persons falling within the classes above designated, each [387] one of the distributees receiving *an equal share; that is, $169.50. The money thus paid was receipted for as in full and complete satisfaction of all payments of every kind and nature, past, present, or future, in favor of the persons to whom the payment was made and those by them represented, against the United States or the Pottawatomie Nation of Indians. Despite the receipt in full thus given, the Indians to whom the payment in question had been made continued to assert a claim against the United States on account of what was alleged to be still due to them under treaty stipulations. Finally, by the act of March 19, 1890 (26 Stat. at L. 24, chap. 39), the court of claims was authorized "to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the said Pottawatomie Indians of Michigan and Indiana, and to render judgment thereon." It was provided that the payment of $39,000 heretofore referred to should not be given the finality which its terms imported, and appellate jurisdiction over any judgment which might be rendered was conferred upon this court. The 2d section of the act reads as follows:

"Sec. 2. That said action shall be commenced by a petition stating the facts on which said Pottawatomie Indians claim to recover, and the amount of their claims, and said petition may be verified by a member of any 'Business Committee' or authorized attorney of said Indians as to the existence of such facts, and no other statements need be contained in said petition or verification."

Under this act two petitions were filed in the court of claims. The first of these petitions was entitled *The Pottawatomie Indians of Michigan and Indiana* v. *The United States;* the second was entitled *Phineas Pam-to-pee and* 1,371 *other Pottawatomie Indians of Michigan and Indiana* v. *The United States.* The right asserted in both of these petitions was based on the averment that the petitioners were entitled to recover a stated sum from the United States, because they had not received their due proportionate share of the annuities or other sums due the Pottawatomie Nation of Indians. However, although both the petitions substantially stated the same facts as constituting the cause of action, the amount claimed in each petition was widely different. This arose from the fact that in the first petition *it was asserted [388] that about 300 of the Indians who had not removed west were entitled to their proportionate share of the tribal annuities under the articles supplementary to the treaty of 1833, it being alleged that those who had removed west were about 4,000 in number. The claim was that the distribution should proceed upon that basis; whilst in the second petition it was asserted that the Indians who had not removed west were 1,200 in number, and that distribution should be made in the ratio that 1,200 bore to 4,000, the latter being the number of Indians asserted to have gone west. Although, however, there was a difference in the claims of the two petitions as to the amount of the indebtedness owing by the United States, in both petitions recovery was only sought of an aggregate sum as due to the Pottawatomie Indians in Michigan and Indiana entitled to take under the articles supplementary to the treaty of 1833, and in neither petition was there any allegation as to the proportionate sum of the total amount claimed to which any particular Indian was entitled, nor did either petition purport to state the representative capacity in which any particular Indian was entitled to take his share of the whole fund, if any.

The two petitions referred to were consolidated and heard together. The court of claims decided that there was due to the Pottawatomie Indians of Michigan and Indiana, after deducting payments made, the sum of $104,626, and entered judgment for that sum. 27 Ct. Cl. 403, 421.

The "just proportion" which the court thus found to be due to the Pottawatomie Indians of Michigan and Indiana, in the aggregate, entitled to share in the funds of the Pottawatomie Nation, was arrived at first by ascertaining from various reports the number of Indians who had moved west under the treaty of 1833, and then by ascertaining the number of Indians entitled to share who had remained in Michigan. This latter number was arrived at by averaging the number of such Indians as shown by various payments made from 1843 to and

| †Year. | Name. | No. Paid. | Amount. |
|---|---|---|---|
| 1859 | do. | 253 | 1,587.50 |
| 1860 | do. | 236 | 1,587.50 |
| 1861 | De Witt C. Leach | 235 | 1,587.50 |
| 1862 | do. | 247 | 1,587.50 |
| 1863 | do. | 246 | 1,587.50 |
| 1864 | do. | 242 | 1,237.50 |

| †Year. | Name. | No. Paid. | Amount. |
|---|---|---|---|
| 1865 | Richard M. Smith, principal in currency | $1,587.50 | |
| | Richard M. Smith, gold premium in currency | 692.24 | 232 2,279.74 |

including 1866, as manifested in the schedule of such payments heretofore excerpted or referred to

The court was of opinion that under the [389] jurisdictional act of *1890 it could only find and decree the aggregate amount due all the Indians entitled to participate in the fund found due, and that it was not incumbent upon it to determine who were the particular Indians entitled to take such aggregate amount and the distributive share to which each particular Indian was entitled. It said:

"Congress have recognized by the very title of the act a claimant designated as the 'Pottawatomie Indians of Michigan and Indiana,' and under that generic head is to be determined the aggregate right of such claimant, leaving the question of distribution to that department of the government which by law has incumbent on it the administration of the trust which in legal contemplation exists between the United States and the different tribes of Indians."

On appeal this court affirmed the judgment of the court of claims, 148 U. S. 691, 37 L. ed. 613, 13 Sup. Ct. Rep. 742. After determining that there was no error in the judgment under review, in so far as it fixed the aggregate amount due, the question was then considered whether it was the duty of the court to ascertain what particular Indian was entitled to share in the fund, and the amount of his or her distributive share. On this subject, after quoting approvingly the reasoning of the court of claims, by which that court sustained its action under the jurisdictional act of 1890, in finding only the aggregate amount due and leaving the distribution of the fund to the executive officers of the government, and after pointing out that the suit was brought to recover only such aggregate amount, and that there was no finding made by the court below which would justify a decree distributing the fund, the court said (p. 705, L. ed. p. 618, Sup. Ct. Rep. p. 748):

"Unable as we are to safely adjudicate this question as between these classes of claimants, we can do no better than acquiesce in the suggestion of the court below, that it is one to be dealt with by the authorities of the government when they come to distribute the fund.

"As these petitioners no longer have any tribal organization, and as the statutes direct a diversion of the annuities and other sums payable by the head, and as such has been the practice of the government, perhaps the necessities of the situation de- [390] mand *that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the government in paying out the fund. *United States* v. *Old Settlers*, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650."

By the deficiencies appropriation act of August 23, 1894 (28 Stat. at L. 424, chap. 307), various sums were appropriated "for payment of judgments of the court of claims," one item reading as follows: "To the Pottawatomie Indians of Michigan and Indiana, $104,626.00." In the Indian Department appropriations act of March 2, 1895 (28 Stat. at L. 876, chap. 188), was contained the following, italics not in the original (p. 894):

"Miscellaneous.

. . . . .

"That the Secretary of the Interior is hereby authorized and directed to detail or employ an Indian inspector to take a census of the Pottawatomie Indians of Indiana and Michigan who are entitled to a certain sum of money appropriated by Congress to satisfy a judgment of the court of claims in favor of said Indians. *And for the purpose of making the payment to the Pottawatomie Indians of Indiana and Michigan* of the $104,626, appropriated by the last Congress to satisfy a judgment of the court of claims, there is hereby appropriated the sum of one thousand dollars."

In the Indian Department appropriations act of August 15, 1894 (28 Stat. at L. 286, chap. 290), there was appropriated $6,243.90 as the amount due certain Pottawatomie Indians of Indiana and Michigan for their proportion due June 30, 1893, June 30, 1894, and June 30, 1895, of the perpetual annuities ($22,300.00) as ascertained by the judgment of the Supreme Court of the United States pronounced in the case of the Pottawatomie Indians of Michigan and Indiana against the United States, on April 17, 1893, and which annuities were not embraced in the judgment aforesaid. *Id.* 295. An appropriation of $2,081.30 for the proportion of the perpetual annuities due the Pottawatomie Nation for the year ending June 30, 1896, was made by the Indian Department appropriations act of March 2, 1895 (28 Stat. at L. 876, 885, chap. 188). It was recited, as in the previous statute, that the amount of the perpetual annuities *had been ascertained by the [391] judgment of this court on April 17, 1893. By a proviso the Commissioner of Indian Affairs was directed "to withhold from distribution among the said Indians so much of any moneys due them by the United States as may be found justly and equitably due for legal services rendered, and to pay the same on account of the prosecution and recovery of the moneys aforesaid." In the Indian Department appropriations act of June 10, 1896 (29 Stat. at L. 321, chap. 398), there was appropriated to pay the same Indians $2,081.30 as their proportion of the perpetual annuities for the year ending June 30, 1897, and also the sum of $41,626.00, as a "final settlement by capitalizing their proportion of the perpetual annuities in question." Reference was made to the judgment of this court as in the prior appropriation acts.

The action of the Secretary of the Interior in respect to the disbursement of the moneys so appropriated is summarized in finding of facts numbered 3 made by the court of claims in this action. It reads as follows:

"In June, 1895, the Secretary of the Inte-

rior ordered and directed that a census of the Indians be made under the act 2d March, 1895 (28 Stat. at L. 894, chap. 188). The census roll was prepared under instructions of the Commissioner of Indian Affairs, dated June 8, 1895— approved by the Secretary of the Interior June 15, 1895— by John W. Cadman, and is known as the 'Cadman census roll.' While the agent was so engaged in taking the census, John B. Shipman, Esq., attorney of record in the case of *Pam-to-pee* v. *United States*, addressed a communication to the Secretary of the Interior, dated July 27, 1895, representing that such census, by reason of the manner in which it was being taken, would omit many Indians entitled to be paid under the judgment of the court. . . .

"Inclosed in the said letter of John B. Shipman was a list containing the names of over 150 of the claimants herein, the names of their ancestors and number on the payroll of 1843 and 1844 being given as stated in the letter.

"Before further instructions were given by the Secretary of the Interior, the agent, Cadman, in August, 1895, made and returned and filed in the Interior Department the census so made by him.

"After this roll had been prepared, many applications for enrollment were received by the Commissioner of Indian Affairs, based upon the statement that, while such applicants were not on the roll of 1866, they were on prior rolls from 1843 to 1866, [392] *or were the descendants of such persons. The question was then submitted to the Secretary of the Interior for an opinion as to whether the rolls from 1843 to 1866 should be considered in connection with the enrollment of those who were entitled to participate in the distribution of the $104,626 awarded by the court of claims.

"On January 10, 1896, the Secretary of the Interior made his final decision in regard to the Indians who should be enrolled and paid under the judgment of this court and the appropriation of Congress. Marcus D. Shelby, a special Indian agent, was designated by the Commissioner of Indian Affairs to examine and report upon the claims of the several parties alleging to be descendants of the Pottawatomie Indians of Indiana and Michigan, who were permitted by supplemental clause to the treaty of September 27, 1833, to remain east, and for whom the court of claims rendered a decision in their favor of $104,626, June 27, 1892. The instructions given to the agent by the Commissioner were dated February 5, 1896. The agent so designated proceeded to Michigan and reported the result of his investigation, bearing date of March 14, 1896. The report so made was accepted by the Secretary of the Interior as substantially correct, and the amount appropriated by Congress in satisfaction of the judgment of this court (28 Stat. at L. 450, chap. 307), as well as other funds appropriated to pay the Indians upon treaties mentioned in the petitions in said suits (the sum paid being $118,554.52), paid to the persons upon the roll made by Cadman, after adding thereto two names on the recommendation of Shelby in closing his report as persons mentioned on the census roll [by Inspector Cadman, but not found on the roll] of 1866. Later, one more was added by the Department. The money was paid to the Indians as communal owners. That is to say, it was paid *pro rata* to every living member of that portion of the tribe entitled to participate in the fund, and not *per stirpes*."

*The report of agent Shelby was made a [393] part of the findings of the court. The manner in which he proceeded to ascertain who were entitled to be added to the Cadman roll was thus summarized in the opinion below:

"His report to the Commissioner of Indian Affairs, March 14, 1896, shows that he traveled through the country where these Indians resided or were supposed to reside, and notified them, so far as he could, to appear and prove their cases. In his report he said: 'I found these people very badly scattered, and as they do not frequent postoffices, the notices prepared for me to be posted in the various postoffices to give them notice of my coming were of but little value. In nearly every instance on reaching the vicinity of these Indians I had to take teams and drive to their homes. I got, however, the newspapers to publish the principal points I would visit.' A number appeared, some of whom claimed because their ancestors' names were on the rolls of 1843 and 1844, others because they had Pottawatomie blood in their veins. All of these applicants were rejected for various reasons, some because their proof was insufficient, some because they or their forefathers had allied themselves with other Indian tribes, some because their fathers' names had been erroneously placed, in the opinion of Indian agents, upon the former rolls and had been dropped from subsequent rolls."

There was no finding that any notice had been given to Mr. Shipman of the movements of agent Shelby, nor was it found that any of the Indians whose names were furnished by Mr. Shipman to the Secretary of the Interior ever had actual notice of the investigation which the representative of the Secretary of the Interior made, intermediate the receipt of the instructions of February 5, 1896, and the return of Shelby to Washington in the early part of the following month.

On April 22, 1899, the present action was instituted in the court of claims, the petition being filed on behalf of Phineas Pam-to-pee and 362 other named Indians, alleged to be a portion of the Indians in whose favor the judgment for $104,626 was rendered. The proceedings in the prior actions were set out, and the passage of the various appropriating acts to which *allu- [394] sion has already been made was averred, as also that distribution had been made of the greater part of the funds among 273 Indians, while nothing had been paid to the

petitioners. Judgment was prayed for such proportionate amount of the various funds as the evidence might show the petitioners were entitled to, to be "allotted and awarded to them severally."

After issue joined, the cause was tried and the court of claims filed findings of facts and conclusions of law. Finding 3 has heretofore been set out. Finding 4 reads as follows:

"None of the Indians, parties in or represented by the present suit, were paid as aforesaid. A large number of them to wit, 272, whose names are set forth in schedule A annexed to claimants' request for findings, were descended from Indians whose names were enrolled on the rolls of Indians in Michigan in the years 1843, 1844, and 1866. A portion of the Indians who remained in Michigan as coming within the exemption of the treaty of September 27, 1833, were represented in both petitions in the cases of *The Pottawatomie Indians* v. *The United States* and the *Pam-to-pee Indians* v. *The United States*."

The court of claims thus expressly found that a large number of the Indians, claimants in this suit, had received nothing in the distribution made by the Secretary of the Interior, although some of these Indians were parties to or represented in the consolidated case, and were also represented by Mr. Shipman before the Secretary of the Interior, and were entitled to share in such distribution. In addition, from the facts found concerning the investigation made by agent Shelby prior to the distribution referred to, the court below expressed the opinion that the investigation by agent Shelby "was hurried, and, to the judicial mind, unsatisfactory." Moreover, the court, considering the judgment rendered in the previous consolidated case and the acts of Congress making the appropriation to pay the judgment of $104,626, arrived at the conclusion that "there is not a line in the judgment of this court or in any statute of Congress which empowered or authorized the Secretary to dispose of the fund." It was decided that the suit must be dismissed because the petitioners had been guilty of such laches in pressing their claims after the appropriation was made and whilst the [395] distribution *was pending, as to debar them from all right to relief at the hands of the court.

It is difficult for me to determine precisely on what ground the theory of laches was predicated. In one aspect of the opinion below it would seem to have been rested upon the theory that, as the distribution of the money was a judicial act, and not an administrative one, it was incumbent on the petitioners to have invoked the power of the court to control the Secretary of the Interior, and compel him to distribute the money rightfully; on the other, that, although the petitioners had formally notified the Secretary of their claims, they were nevertheless guilty of laches because they did not foresee that that officer would distribute the money without notice to them, and after an investigation which the court itself finds to have been wholly unsatisfactory to the judicial mind.

In the argument at bar the error which was committed in the distribution in question as shown by the facts found by the court below is not disputed. On the contrary, in addition to the error in the distribution so shown it is expressly conceded that the distribution was, besides, fundamentally wrong, because it was made on an illegal basis. Thus it is said in the brief on behalf of the United States:

"It appears from the record in this case that the judgment was distributed not *per stirpes*, but *per capita*. That is to say, all the Indians discovered were allowed to participate equally in the fund, irrespective of the generation to which they belonged. The son of an Indian who appeared on one of the pay rolls was allowed only the same amount which each of, say, five grandchildren of an Indian on one of the pay rolls was allowed. They should have taken by representation. The aggregate of the five shares of the five grandchildren mentioned should have equaled the share of the son of the original payee. The consequence is that the whole judgment was distributed on a wrong basis. The payments became due to individuals at various times. The record discloses no reason why the estate of the individual to whom such payment was due is not entitled to the whole of such payment.

"If anyone on the pay rolls at the time the annuities became *due died without heirs [396] who could inherit, there is no reason why this share should not escheat. It is perfectly evident that a mere enumeration of the Indians, and an equal division among them, does not fulfil the requirements of the situation."

The deduction which the government makes from the admission just quoted being that the petitioners are not entitled to relief, because relief cannot be administered without making parties defendant all those to whom the distribution was made, and securing an entire readjustment and settlement of the rights of all parties.

This court now affirms the judgment of the court below. In effect, the application of the rule of laches made by the lower court is approved, and the decisive result of the laches is additionally sustained by the conclusion that, although it was not shown that any notice was served upon the petitioners prior to the distribution made by the Secretary of the Interior, the presumption that the officers of the government discharged their duty raises the legal inference that, before making the payment, such full and fair investigation had been made by the executive officers as warranted the paying out of the money in the manner in which it was disbursed. This court now, moreover, holds that as the judgment in the consolidated case, although it only found the amount due to the Pottawatomie Indians in Michigan and Indiana as a body, had remitted the question of what Indians

were entitled to such gross sum to the proper executive department of the government, the executive officers who made the distribution in effect acted under the order of the court.

The jurisdiction to entertain the action can alone be predicated upon the following considerations: First, the act of Congress of 1890, by the authority of which the original judgment in the consolidated case was rendered, or upon the judgment thus rendered; or, second, the appropriation made by Congress to pay such judgment and the acts of Congress in connection therewith.

By § 1066 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 739), it is provided that the jurisdiction of the court of claims "shall not extend to any claim against the government . . . growing out of or dependent on any treaty stipulation entered [397] into . . . with *the Indian tribes." Clearly, therefore, aside from the jurisdiction conferred by the act of 1890, there was no power in the courts to consider and determine the question of the proper distribution of the funds due the Pottawatomie Nation of Indians, or to fix the just proportion to which the Pottawatomie Indians of Michigan and Indiana were entitled. Now, the act of 1890, which conferred jurisdiction on the court of claims to determine the sum due the Pottawatomie Indians of Michigan and Indiana out of the tribal funds, was susceptible of being construed in one of two ways: First, that it alone delegated the power to determine the aggregate amount of the just proportion of the tribal funds due to the Indians in question, or that it conferred such authority, and, in addition, imposed the duty of ascertaining the particular Indians who were entitled to share in the distribution when the total sum for distribution was judicially determined. That the statute embraced only the first power, that is, of fixing the aggregate amount, seems to me to conclusively result from the judgment rendered by the court of claims and affirmed by this court. It cannot be doubted that the court of claims expressly decided that the authority conferred by the act of 1890 related only to determining the aggregate amount, and not to the ascertainment of the particular persons entitled to share in the same and the amount they were respectively entitled to take. True, this court, in its opinion, in 148 U. S. 691, 37 L. ed. 613, 13 Sup. Ct. Rep. 742, referred to the absence of evidence as to who were entitled to the distributive shares, and the impossibility of rendering a decree on that subject, yet it nevertheless, in affirming the judgment, expressly approved the conclusion of the court of claims limiting the judgment to the determination of the aggregate amount and leaving the distribution of that sum, when Congress should thereafter appropriate therefor, to the action of the executive officers of the government.

It follows that the jurisdictional power conferred by the act of 1890 was exhausted by the decree of affirmance, and the subsequent distribution of the gross sum when the appropriation had been made was solely a matter within the jurisdiction of Congress and the administrative officers of the government. *That such was the legislative [398] conception of the effect of the judgment of affirmance rendered by this court is conclusively shown by the appropriation to pay the money, and the other legislative acts concerning that sum and other sums awarded to the Indians in question, since such acts treat of the ascertainment of the individuals entitled to the gross amount found due as a purely administrative question, with no intimation whatever that it was conceived that the administrative discretion which the acts imposed was subject to be reviewed and controlled by the judicial branch of the government. To repeat, the jurisdiction under the act of 1890 having been exhausted, and the judgment fixing the aggregate sum having expressly remitted the distribution to the administrative branch of the government, it follows that no support for the jurisdiction over the present suit, either in the court of claims or in this court, can be founded upon the act of 1890, or the judgment rendered thereunder. Did, then, jurisdiction arise from the act of Congress appropriating the sum necessary to pay the judgment referred to, or from the other appropriation acts to which reference has heretofore been made?

From what has already been stated, it would seem that a negative answer must be given to this question. In view of the terms of § 1066 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 739), I think it is clearly requisite that the intention of Congress to commit to the courts the ultimate regulation and control of a distribution prima facie intended to be made or expressly directed to be made among unascertained beneficiaries by the executive officers of the government should be plainly made to appear before it should be held that such authority was conferred on the judiciary. Now, there had been no claims presented to Congress on behalf of Pottawatomie Indians seeking individual relief; but the claims urged were on behalf of the whole body of Pottawatomie Indians in Michigan and Indiana, who asserted the nonpayment of their just proportion of the tribal annuities. On twenty-four different occasions, during as many years, Congress, through the Interior Department, had ascertained and determined who were the individuals constituting the Pottawatomie Indians of Michigan and Indiana, entitled to a just *proportion of tribal annuities, and neither [399] in the jurisdictional act of 1890 nor in any of the appropriating acts was language used importing that it was deemed that a necessity existed for a judicial ascertainment of the particular individuals who might possess a right to share in the "just proportion" referred to. The various acts in which the appropriations in question were embodied made provision for numerous other appropriations, in compliance with stipulations embodied in treaties made with

sundry Indian tribes, and, as in the particular appropriating paragraphs in question payments were merely directed to be made to unascertained individuals constituting a body of Indians, there was certainly no clearly implied or expressed intention that the payments should be subject to the ultimate control of the courts, or that the disbursement of the funds should be under any other direction or control than that of the Secretary of the Interior, who had made prior payments of a similar character upon his own ascertainment of the individual beneficiaries. As a matter of fact, also, a contrary intent is clearly manifested in several of the appropriating paragraphs. Thus, in the act of March 2, 1895 (28 Stat. at L. 894, chap. 188), the duty is expressly imposed on the Secretary of the Interior to take a census of the Indians who were entitled to the fund appropriated by the previous Congress to pay the judgment of $104,626, thus implying that there had not been any provision in the judgment of the court of claims or of this court for the ascertainment of such individual beneficiaries; and $1,000 was appropriated "*for the purpose of making the payment*," obviously to those who, by a proper performance of the duty imposed on the Secretary of the Interior, should be found to be embraced within the class. So, also, in the same act (28 Stat. at L. 885) the absolute control which Congress deemed it was exercising for the distribution of the sums found due to the Indians as a body was evinced in the direction to the Commissioner of Indian Affairs "to withhold from distribution among the said Indians so much of any moneys due them by the United States as may be found justly and equitably due for legal services rendered, and to pay the same on account of the prosecution and recovery of the moneys aforesaid." Bearing in mind that the [400] appropriated *sums in question, though a "just proportion," were in fact tribal funds, and that the expenditure of tribal funds is peculiarly regulated by Congress and committed to the Indian Department (Rev. Stat. §§ 2086 *et seq.*), it seems to me beyond reasonable controversy that Congress intended that the ascertainment of the particular beneficiaries entitled to the funds and the distribution among them should be performed solely by its own agencies.

The decision in *United States* v. *Weld*, 127 U. S. 51, 32 L. ed. 62, 8 Sup. Ct. Rep. 1000, is not an authority opposed to the views just expressed. In that case a judgment had been rendered by the court of commissioners of Alabama claims, in favor of certain claimants, and they had received a portion of such judgment. The amount of the gross fund due all claimants had been fixed in the statute, what should be deducted had been specifically declared, and it had also been explicitly provided that the balance which would necessarily result should be distributed to the judgment creditors. The holding of this court was simply that creditors whose claims against the fund had been adjudicated by the commission provided for in the statute possessed a right to sue in the court of claims to recover their share of a portion of the fund which had been improperly retained by the Treasury Department.

Being of opinion that the judgment below should be reversed for want of jurisdiction, and that the sole remedy of the petitioners lies in an appeal to the fairness and sense of justice of the legislative branch of the government, it would, of course, be out of place for me to discuss the grounds upon which the laches is held to apply. It is manifest, however, that the reasoning by which I have been led to the conclusion that the court was without jurisdiction, if sound, is in absolute conflict with the theory that laches can be imputed to the petitioners because they did not invoke the aid of the court below to control the discretion to distribute the money vested in the Secretary of the Interior by the acts of Congress making the appropriations. This ground of laches being put out of view, the only other theory upon which it can be rested is that, although the petitioners formally presented their claim to the Secretary of the Interior and called his attention to their rights, *they yet lost them because they did not [401] foresee that that officer would, without notice, proceed to distribute the money to the wrong persons and upon a basis which the government now, whether advisedly or not I need not consider, declares to have been absolutely unjust and illegal.

I am authorized by Mr. Justice **McKenna** to say that he joins in this dissent.

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YOUNG WOMEN'S CHRISTIAN HOME, *Appt.*,

*v.*

JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased. (No. 73)

BARBARA FAUL and ANDREW WASNER, *Appts.*,

*v.*

JOHN L. FRENCH, Administrator of Eugene Rhodes, Deceased. (No. 74)

(See S. C. Reporter's ed. 401-419.)

*Wills—intention of testatrix—death in common disaster.*

The intention of a testatrix that, failing husband or son surviving, her estate should go to a designated charity, is so manifest from the terms of her will, by which she devised her entire estate to her son, subject to a provision for her husband's support, and provided that in case she survived both husband

NOTE.—*On presumption as to survivorship*—see note to *Re* Willbor (R. I.) 51 L. R. A. 863. *That the intention of a testator is to govern in the construction of a will*—see notes to Dougherty v. Rogers (Ind.) 3 L. R. A. 847; Boston Safe Deposit & Trust Co. v. Coffin (Mass.) 8 L. R. A. 740; Davidson v. Coon (Ind.) 9 L. R. A. 584; Masterson v. Townshend (N. Y.) 10 L. R. A. 816; and Pray v. Belt, 7 L. ed. U. S. 309.

and son it should go to such charity, which was also to receive the estate at the husband's death in case he alone survived, that such charity will take to the exclusion of the next of kin of either the testatrix or her son, where both survive the husband, but perish in a common disaster with nothing to show the order of death.

[Nos. 73, 74.]

*Argued November 5, 6, 1902. Decided January 5, 1903.*

APPEALS from the Court of Appeals of the District of Columbia to review a decree which reversed a decree of the Supreme Court of the District on a bill of interpleader filed by administrators with the will annexed, awarding the estate to a charity designated in such will. *Reversed* and remanded, with a direction to affirm the decree of the Supreme Court of the District.

See same case below, 18 App. D. C. 9.

Statement by Mr. Chief Justice **Fuller:**

These are appeals from a decree of the court of appeals of the District of Columbia on a bill of interpleader exhibited in the supreme court of the District by the administrators with the will annexed of the estate of Sophia Rhodes, deceased. At the conclusion of the administration there remained in the hands of the administrators a fund of $14,891.89 for distribution, which was claimed by the Young Women's Christian Home, a corporation of the District of Columbia, created by act of Congress; the next of kin of Sophia Rhodes; and the administrator of the estate of Eugene Rhodes, deceased; and the interpleader was filed to determine the rights of the parties.

The will of Sophia Rhodes was executed at Washington, May 10, 1894, and read as follows:

"In the name of the bountiful Giver of all. Amen.

"I, Sophia Rhodes, of the city of Hutchinson, in the state of Kansas, temporarily residing at Washington, in the District of Columbia, being now of sound and disposing mind and memory, do make, publish, and declare this my last will and testament, hereby revoking all former wills or testamentary dispositions of my property.

"I now dispose of the property and estate which it has pleased Almighty God to intrust to me, as follows, *viz.:*

"*Imprimis.* I will that all my just debts and funeral expenses shall be paid by my executor hereinafter named, out of the first money from my estate that shall come into his hands.

"*Item* 1. I give, devise and bequeath unto my husband Oliver Wheeler Rhodes, during his life one half (½) of the income from all my properties and estate in the next following item of this last will and [403] testament disposed of, to be paid *over to him from time to time by my executor hereinafter named, who, for this purpose, shall also act as trustee.

"*Item* 2. I now give, devise, and bequeath unto my only and beloved son, Eugene Rhodes, all my property, real, personal, and mixed, of whatsoever nature, kind, or description, including moneys, credits, and evidences of indebtedness of which I may be possessed at the time of my death, to be his absolutely, to hold and to dispose of as unto him may seem good and proper, and subject only to the provisions of item 1 of this last will and testament.

"*Item* 3. In the event of the death of my son, Eugene Rhodes, before the decease either of myself or of my husband, I then give, devise, and bequeath all my property, everything I own on earth, as follows, *viz.:*

"1st. I give, devise, and bequeath all my pictures and paintings to the Young Women's Christian Home, in the city of Washington, District of Columbia. It is my will that the said pictures and paintings may, so long as the said home shall exist, be the ornaments of the said home, with my name as the giver connected with them during that time.

"2nd. All the rest and residue of my property, real, personal, and mixed, I give, devise, and bequeath to Michael H. Fitch, of Pueblo, Colorado, to have and to hold, in trust nevertheless, to invest the same to the best of his knowledge and experience, and to pay over the rents and profits arising therefrom to my husband, Oliver Wheeler Rhodes, during his, my said husband's life; and on the death of my said husband to turn over the said property, moneys, etc., with whatsoever accumulation thereon may be existing, to the Young Women's Christian Home, of Washington, in the District of Columbia, to be the property of the said home absolutely.

"*Item* 4. In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then give, devise, and bequeath all my property, real, personal, and mixed, of whatsoever nature, kind, or description, to the Young Women's Christian Home, of the city of Washington, in the District of Columbia, to have and to hold the same absolutely and forever, for the good of that institution. *It is my will that my pictures and [404] paintings shall be disposed of in this event as provided in paragraph 1st, of item 3, of this last will and testament.

"*Lastly.* I hereby constitute and appoint my only son, Eugene Rhodes, the sole executor and trustee of this my last will and testament; and it is my will that my said sole executor and trustee shall administer and execute this last will and testament without giving bond therefor."

The facts were stipulated, and may be shortly stated thus: Oliver Wheeler Rhodes died at Washington, January 27, 1895, at which time his wife, Sophia Rhodes, and their only child, Eugene Rhodes, were in Heidelberg, Germany. They sailed for home from Bremen on the steamship Elbe at three o'clock P. M. on Tuesday, January 29, 1895. About half-past 5 o'clock the next morning the Elbe collided with another steamship,

and sank in about twenty minutes after the collision. Mrs. Rhodes was about fifty-two years old, corpulent, and short of breath, and her son was about twenty-three years old, a single man, and rather a good swimmer. His body came up in a fishing net off the coast of Holland some six weeks after the collision, but his mother's body was never recovered. Of the persons who survived the shipwreck, only two had any knowledge of the mother and son at the time of the disaster. One of them saw Mrs. Rhodes come out of her cabin just after the collision with a blanket over her night dress, and some minutes later saw her son. The other saw the mother and son on deck after the collision, the son endeavoring to put a shawl around his mother, and she with her arms thrown around her son's neck. This person was the last to get into the last boat to leave the ship, and, when it had gotten some distance away, the ship went down with a lurch and everyone on board was drowned. He testified that "both of these parties died together, and, so far as this affiant was able to learn, after he saw these parties on the deck clasped in an embrace that would never be loosened until after death, no one else saw them."

The supreme court of the District held that there was no presumption of survivorship as between the mother and son; that the will manifested an unmistakable desire [405] to guard *against intestacy; and that the intention of Mrs. Rhodes was clearly apparent that if her husband and son should not survive her so as to receive the property, or if it remained under her control at the time of her death, it should go absolutely to the charity she had named, the Young Women's Christian Home; and decreed accordingly. [28 Wash. L. Rep. 391.] From this decree Barbara Faul and Andrew Wasner, next of kin of Mrs. Rhodes, and John L. French, administrator of Eugene Rhodes, carried the case to the court of appeals of the District, which concurred in the view that there was no presumption of survivorship as between the testatrix and her son, but held that, the terms of the will "vesting the estate in Eugene Rhodes immediately upon testatrix's death, we agree that it raises a prima facie right in the personal representatives of the son, and imposes the burden upon her next of kin of displacing them by proof of his mother's survival;" and that the representatives and next of kin of the son were entitled to the entire fund. The decree was thereupon reversed, and the cause remanded to the court below with a direction to enter a decree in conformity with that conclusion. 18 App. D. C. 9.

*Mr.* **Joe J. Darlington** argued the cause, and, with *Mr. John B. Larner*, filed a brief for appellant Young Women's Christian Home:

Each of the persons perishing in the common disaster should be treated as the survivor, in so far as his or her property was concerned, the property of each going to his own heirs and next of kin.

*Taylor* v. *Diplock*, 2 Phillim. Eccl. Rep. 261; *Mason* v. *Mason*, 1 Meriv. 308; *Murray's Goods*, 1 Curt. Eccl. Rep. 596; *Doe ex dem. Knight* v. *Nepean*, 5 Barn. & Ad. 86; *Johnson* v. *Merithew*, 80 Me. 116, 13 Atl. 132; *Ehle's Estate*, 73 Wis. 459, 41 N. W. 627; *Russell* v. *Hallett*, 23 Kan. 276; *Coye* v. *Leach*, 8 Met. 375, 41 Am. Dec. 518; *Schaub* v. *Griffin*, 84 Md. 562, 36 Atl. 443; *Satterthwaite* v. *Powell*, 1 Curt. Eccl. Rep. 705; *Re Willbor*, 20 R. I. 126, 51 L. R. A. 863, 37 Atl. 634.

The burden of proof is upon the next of kin, who derive title through the survivorship of one out of several lost in a common calamity, to prove the fact.

*Newell* v. *Nichols*, 12 Hun, 604, Affirmed in 75 N. Y. 78, 31 Am. Rep. 424; *Wright* v. *Netherwood*, 2 Salk. 593, 2 Phillim. Eccl. Rep. 261, note c; *Taylor* v. *Diplock*, 2 Phillim. Eccl. Rep. 261; *Satterthwaite* v. *Powell*, 1 Curt. Eccl. Rep. 705.

When a testator means to dispose of all his property, and uses the words "if the legatee should not survive," they mean "if the preceding legacy should from any cause fail."

*Avelyn* v. *Ward*, 1 Ves. Sr. 420; *Rickman* v. *Morgan*, 2 Bro. Ch. 396; *Jones* v. *Westcomb*, 1 Eq. Cas. Abr. 245; *Foster* v. *Cook*, 3 Bro. Ch. 347; *Doo* v. *Brabant*, 3 Bro. Ch. 397; *Taylor* v. *Taylor*, Atk. 386; *Jackson ex dem. Beach* v. *Durland*, 2 Johns. Cas. 314.

The intent of the testator is to be given effect, without regard to literal adherence to the language used, where such literal adherence would defeat the testator's manifest desire.

*Roe ex dem. Wilkinson* v. *Tranmarr*, Willes Rep. 682; *Towns* v. *Wentworth*, 11 Moore P. C. C. 520; *Abbott* v. *Middleton*, 7 H. L. Cas. 68, 21 Beav. 143; *Liston* v. *Jenkins* 2 W. Va. 62; *Coy* v. *Britt*, 22 Ark. 567; *Chapman* v. *Brown*, Burr. 1635; *McKeehan* v. *Wilson*, 53 Pa. 74; Jarman, Wills, 456, 414, chap. 17; *Aulick* v. *Wallace*, 12 Bush, 531; *Re Redfern*, L. R. 6 Ch. Div. 133; *Doe ex dem. Leach* v. *Micklem*, 6 East, 486. See also *Eatherly* v. *Eatherly*, 1 Coldw. 461, 78 Am. Dec. 499; *Freeman* v. *Freeman*, 8 Vin. Abr. title *Devise*, 51; *Sessoms* v. *Sessoms*, 22 N. C. (2 Dev. & B. Eq.) 453; Perry, Trusts, § 724; *Key* v. *Key*, 4 De G. M. & G. 73; *Pearsall* v. *Simpson*, 15 Ves. 29; *Robinson* v. *Female Orphan Asylum*, 123 U. S. 702, 31 L. ed. 293, 8 Sup. Ct. Rep. 327; *Smith* v. *Bell*, 6 Pet. 68, 8 L. ed. 322; *Patch* v. *White*, 117 U. S. 210, 29 L. ed. 860, 6 Sup. Ct. Rep. 617, 710; *Newell* v. *Nichols*, 12 Hun, 604, Affirmed in 75 N. Y. 78, 31 Am. Rep. 424.

The intention is to be gathered from everything contained within the four corners of the instrument.

*Re Swenson*, 55 Minn. 300, 56 N. W. 1115.

In ascertaining the intention of the testator, the court is authorized to put itself in the position occupied by him at the time the will was executed, and, taking into view the then existing circumstances, to discover, from that standpoint, what was intended by

the testator when using the language demanding construction.

*Re Swenson*, 55 Minn. 308, 56 N. W. 1115; *Yates* v. *Shern*, 84 Minn. 165, 86 N. W. 1004.

*Mr.* **A. A. Hoehling, Jr.,** argued the cause and filed a brief for appellants Faul *et al.:*

It is not permissible under the guise of construction to incorporate distinct provisions into a will, or to insert therein conditions or contingencies not provided for by the testatrix.

1 Redf. Wills, pp. 459 *et seq.;* 1 Roper, Legacies, p. 750; 2 Redf. Wills, 1464; *Underwood* v. *Wing*, 4 De G. M. & G. 633, 8 H. L. Cas. 205; *Illinois Land & Loan Co.* v. *Bonner*, 75 Ill. 317; *Gibson* v. *Seymour*, 102 Ind. 485, 52 Am. Rep. 688, 2 N. E. 305; *Rupp* v. *Eberly*, 79 Pa. 141.

The will of the testatrix does not show an intent that the home should receive her entire estate, save only in the event of the substantial survivorship of the son.

*Wing* v. *Angrave*, 8 H. L. Cas. 205.

Property rights of two or more persons who perish in a common disaster are disposed of as if death had occurred to all at the same time.

*King* v. *Hay*, 1 Wm. Bl. 640; *Taylor* v. *Diplock*, 2 Phillim. Eccl. Rep. 261; *Murray's Goods*, Curt. Eccl. Rep. 596; *Satterthwaite* v. *Powell*, 1 Curt. Eccl. Rep. 705; *Underwood* v. *Wing*, 19 Beav. 459; 1 Greenl. Ev. §§ 29, 30; *Coye* v. *Leach*, 8 Met. 371, 41 Am. Dec. 518; *Russell* v. *Hallett*, 23 Kan. 276; *Ehle's Estate*, 73 Wis. 445, 41 N. W. 627; *Johnson* v. *Merithew*, 80 Me. 111, 13 Atl. 132; *Newell* v. *Nichols*, 12 Hun, 607, 75 N. Y. 78; *Cowman* v. *Rogers*, 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64.

*Messrs.* **William Henry Dennis** and **J. W. Smith** argued the cause and filed a brief for appellee:

The adjudicated cases fall into four classes:

1. Those prior to *Wing* v. *Angrave*, 8 H. L. Cas. 183, avowedly holding codemise to be presumptive.

2. Those like *Sillick* v. *Booth*, 1 Younge & & C. Ch. 117 and *Ommaney* v. *Stilwell*, 23 Beav. 330, holding that, for want of any other means of decision, the evidence must suffice where neither side has prima facie right to help, or the onus to hinder, at the start.

3. Those that hold that, though the evidence fails to show and the law to presume which happened of the happenings possible, the property is to be disposed of on the theory that the deaths occurred at the same time. *Johnson* v. *Merithew*, 80 Me. 111, 13 Atl. 132; *Russell* v. *Hallett*, 23 Kan. 276.

4. Those that hold that though no one of the sides has the onus at the start, because of any presumption as to which happened of the happenings possible, yet, for other reasons, the onus does rest, at the start, on some one of the sides, and that it is a fatal onus, since the evidence is not sufficient to shift it.

*Wing* v. *Angrave*, 8 H. L. Cas. 183; *Hartshorne* v. *Wilkins*, 6 N. S. 276; *Cowman* v. *Rogers*, 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64.

The common-law rule as to burden of proof between legatee and next of kin was unaffected by the will.

*Wing* v. *Angrave*, 8 H. L. Cas. 183.

The question of child or no child living at the parent's death is left to be found just like any other fact, the onus resting on remoter kin to prove that all nearer, once known to exist, had ceased to exist or had been absent, unheard of, for seven years, at the time of the ancestor's death.

*Emerson* v. *White*, 29 N. H. 482; *Schaub* v. *Griffin*, 84 Md. 557, 36 Atl. 443; *Posey* v. *Hanson*, 10 App. D. C. 496; Wharton, Ev. § 1280.

Whoever needs to prove that the death of an absentee took place on or before a specified date or event (testatrix's death, for instance) within the seven years, or that his life continued to or beyond a specified date or event after the seven years, has the onus to bear, such onus shifting from the death-affirmant to the life-affirmant at the expiry of the seven years. This is what the seven-year presumption means.

*Schaub* v. *Griffin*, 84 Md. 557, 36 Atl. 443.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The rule is that there is no presumption of survivorship in the case of persons who perish by a common disaster, in the absence of proof tending to show the order of dissolution, and that circumstances surrounding the calamity of the character appearing on this record are insufficient to create any presumption on which the courts can act. The question of actual survivorship is regarded as unascertainable, and descent and distribution take the same course as if the deaths had been simultaneous. *Underwood* v. *Wing*, 4 De G. M. & G. 633; *Wing* v. *Angrave*, 8 H. L. Cas. 183; *Newell* v. *Nichols*, 12 Hun, 604, 75 N. Y. 78, 31 Am. Rep. 424; *Johnson* v. *Merithew*, 80 Me. 111, 13 Atl. 132; *Cowman* v. *Rogers*, 73 Md. 403, 10 L. R. A. 550, 21 Atl. 64; *Russell* v. *Hallett*, 23 Kan. 276; *Re Willbor*, 20 R. I. 126, 51 L. R. A. 863, 37 Atl. 634; 1 Greenl. Ev. 15th ed. §§ 29, 30.

Conceding this to be so, the next of kin of Mrs. Rhodes contend that her estate has passed to them as in case of intestacy, because it does not appear that the son survived the mother, or that the mother survived the son, and the estate was given to the son only in the one event, and to the Young Women's Christian Home only in the other. This view was rejected by the District supreme court in holding that the intention of the testatrix was plain that the Young Women's Christian Home should take in the event that the husband and son did not survive her, and should be carried out; and the court of appeals rejected it in holding that the will by its terms vested the estate *in Eugene Rhodes immediately on [411] the testatrix's death, and that a prima facie right existed in the personal representatives

of the son, which was not displaced by proof of the mother's survival.

The cardinal rule is that the intention of the testator expressed in his will, or clearly deducible therefrom, must prevail if consistent with the rules of law. And another familiar rule is that the law prefers a construction which will prevent a partial intestacy to one that will permit it, if such a construction may reasonably be given. *Kenaday* v. *Sinnott*, 179 U. S. 616, 45 L. ed. 344, 21 Sup. Ct. Rep. 233.

In this case, we think it is apparent that Mrs. Rhodes designed to dispose of her entire property; to provide for her husband by securing to him for life an income from one half of her estate; to provide for her son by leaving him the estate absolutely, subject to the husband's income; and, if her son died before his father, that the husband should have the income of the whole estate for his life, and at his death the estate should go to the Young Women's Christian Home. But that if her husband and son should both be dead when she died, the estate should go at once to the charitable institution, that is to say, that if they did not survive her, the property on her death was immediately to take that destination.

But the argument is that the testatrix's wishes cannot be carried out, inasmuch as it is insisted each of the devises and bequests was on the express condition of survivorship, and to give effect to the alleged intention would require the interpolation of some phrase covering the contingency of inability to ascertain survivorship, which interpolation would be wholly inadmissible.

This, however, is matter of construction, and if the state of facts at the time of Mrs. Rhodes' death did not substantially differ from what the will shows she contemplated when it was executed, then no interpolation is required, and the property must go according to the intention necessarily deducible.

The applicable principle is well expressed [412] by Mr. Justice *Gray, then chief justice of Massachusetts, in *Metcalf* v. *Framingham*, 128 Mass. 370.

The case is stated in the headnotes thus: "A testator bequeathed personal property in trust for the benefit of his wife's sister and her husband during their lives, as follows: During her life, to pay the net income to her semi-annually; in case she should die before him, to transfer one half of the principal to a charitable institution, and to pay the income of the remainder to him during his life; in case he should die before her, then at her death to transfer the whole of the principal to the same institution. She died before her husband, and one half of the principal was paid to the institution and the other half kept in trust for him. *Held*, that on his death the institution was entitled to this part of the principal also, and that it did not pass to the residuary devisees; although a similar bequest for the benefit of another husband and wife contained an express direction for a transfer of the second half of the principal to the charitable institution upon the death of the survivor."

Gray, Ch. J., said: "The decision of this question doubtless depends upon the intention of the testator, as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared."

"It is a question in each case," said Mr. Justice Matthews in *Robison* v. *Female Orphan Asylum*, 123 U. S. 702, 31 L. ed. 293, 8 Sup. Ct. Rep. 327, "of the reasonable interpretation of the words of the particular will, with the view of ascertaining through their meaning the testator's intention." In that case Robison left a will providing, thirdly, that his widow should have the income of all his estate, with the right to spend it, but not to have it accumulate for her heirs; fourthly, that if his sisters, Ann Smith and *Eleonora Cummings Robison, "be [413] living at the death of myself and wife, Jane S. Robison aforesaid, that they or the one that may be then living shall have the income of all my estate so long as they may live, and at their death to be divided in three parts, one-third part of the income to go to the Portland Female Orphan Asylum" and one third to each of two other institutions. Both sisters died before the testator.

It was ruled that the fact that the sisters died before their brother, "whereby the legacy to them lapsed altogether, is not material, because if property be limited upon the death of one person to another, and the first donee happen to predecease the testator, the gift over would, of course, take effect, notwithstanding the failure, by lapse, of the prior gift;" that unless it appeared on the face of the will "that the gift to the defendants was not intended to take effect unless the prior gift to Ann Smith and Eleonora Cummings Robison took effect, the former must be considered as taking effect in place of and as a substitute for the prior gift, which, by reason of the contingency, has failed;" and that considering the third and fourth subdivisions together, the limitations were to be taken as a complete disposition of his estate, in the mind of the testator, who did not intend to die intestate as to any portion thereof, giving to the widow an estate for life, with an estate over for life to the sisters, contingent on surviving the widow, and with the ultimate remainder to the charitable institutions.

In *Newell* v. *Nichols*, 12 Hun, 604, Affirmed in 75 N. Y. 78, 31 Am. Rep. 424, a wife had died leaving a husband and two children, a son and a daughter. By her will she created three funds, one of $30,000, the

income of which was to go to her husband, and, on his death, the principal to the heirs of her body then living, and in default of such heirs to certain named remaindermen; another fund of $15,000, the income to be paid to the daughter during her life, the principal to be paid at her death to the heirs of her body then living; in default of such heirs, to her appointees by will; and in default of appointment, to the heirs of the body of the testatrix then living, and in default of such heirs, then to the same remaindermen; while a third sum of $15,000 was settled upon the son as to the income, [414]with the same provisions *as to the principal at his death as in respect of the daughter. The husband and children were lost at sea, and there was no evidence of survivorship between them. The case was decided at special term by Van Vorst, J., whose careful and elaborate opinion was adopted by the court in general term, and fully approved by the court of appeals. It was held that the intention of the testatrix plainly was that the limitation over to the remaindermen should be effectual if for any reason the children could not take, and that the death of the children without issue or appointment, under the circumstances, and in the absence of evidence of survivorship, entitled the remaindermen to have the limitation carried into effect.

It was observed by Van Vorst, J.: "Where a devise is limited to take effect upon a condition or contingency annexed to a preceding estate, if that preceding estate should not arise the remainder over will take place,—the first estate being considered as a preceding limitation and not as a preceding condition. . . . As when a testator meant to dispose of all his property, and uses the words, 'if the legatee should not survive,'—held to mean 'if the preceding legacy should from any cause fail.'"

*Underwood* v. *Wing* and *Wing* v. *Angrave* are relied on to the contrary. 19 Beav. 459, 4 De G. M. & G. 632, 8 H. L. Cas. 183.

The facts were these: Underwood and his wife had three children,—Catherine, Frederick, and Alfred. Being about to emigrate with their children, Mr. and Mrs. Underwood made mutual wills, dated October 4, 1853. Mr. Underwood by his will devised his real and personal estate to Wing, his heirs, etc., in trust for Mrs. Underwood, her heirs, etc., absolutely; and the will proceeded: "And in case my said wife shall die in my lifetime, then I direct that my said real and personal estate shall be held by my said trustee, upon trust for such of them, my three children, Catherine Underwood, Frederick Underwood, and Alfred Underwood, as, being sons or a son, shall attain the age of twenty-one years, and being a daughter, shall attain that age, or marry under that age, to be equally divided between or among them, share and share [415]alike; and in case all *of them my said children shall die under the age of twenty-one years, being sons, or under that age and unmarried, being a daughter, then I give, devise, and bequeath all my real and personal estate, as aforesaid, unto and to the use of the said William Wing, his heirs, executors, administrators, and assigns, to and for his and their absolute use and benefit." And the testator appointed his wife and defendant Wing executors. Mrs. Underwood by her will, made by virtue of a power, devised, bequeathed, and appointed all the real and personal estate subject to the power, to Mr. Underwood, his heirs, etc., absolutely; and the will proceeded: "(Subject to the estates and interests of my children therein, under or by virtue of the will of the said John Tulley, deceased.) And in case my said husband should die in my lifetime, then I devise, bequeath, and appoint the said hereditaments and premises, and sum and sums of money, and arrears of income aforesaid, unto and to the use of William Wing, his heirs, executors, administrators, and assigns, to and for his and their own absolute use and benefit." And she appointed her husband and William Wing executors.

Mr. and Mrs. Underwood and their three children embarked for Australia, their ship foundered, and all on board, with the exception of one sailor, perished. Both parents and the two boys were washed into the sea by the same wave, but the daughter survived for half an hour. All the children died under twenty-one and unmarried. Wing proved both wills and plaintiff obtained letters of administration of the estate of Catherine Underwood. 19 Beav. 459, 460.

The courts agreed in the conclusion that at common law there could be no presumption of prior decease in the absence of proof, although the evidence tended to show that the husband was in good health and an able swimmer, while his wife was in delicate health, and their children of tender age; and this ruling has ever since been accepted in the English courts and by the uniform current of authority in the United States.

Under the wills, the husband, wife, and children having practically died simultaneously, the intention of both testators that their estate should pass to Mr. Wing seemed plain, but *the House of Lords (and the [416] courts below) held otherwise, and that as Mr. Wing could not show, either that the death of the husband occurred in the wife's lifetime, or that the wife's death occurred in the husband's lifetime, he could receive neither estate. In the construction which produced this result it cannot be said that the courts of this country have generally concurred. Lord Campbell, then Lord Chancellor, dissented, and, referring to the wife's will, said: "Of course, I fully recognize all the cases where, there being in a will a gift really meant to be on condition, or the happening of a particular event, the court decided that it could not take effect unless the condition was performed, or the event had happened. But the present seems to me to be a case of substitution, to take effect on failure of the prior estate." Granting that effect is to be given to the expressed, not the conjectural

or probable, intention of testators, he thought that by this will the testatrix clearly expressed her intention that if her husband did not take the property, William Wing should take it. "The lapse of the bequest to her husband by his predecease being substantially the only event upon which the bequest to him could fail, when she says, 'In case my said husband should die in my lifetime,' does she not, in substance say, in case the bequest to my husband should fail, then William Wing is the object of my bounty, and all shall go to him? She has not provided for the event of there being an impossibility to determine whether she or her husband died first. But although she has not in terms provided for this event, she has clearly intimated her intention, that in case of the gift to her husband not taking effect, the ulterior gift to William Wing should take effect. And this seems to me not to be an interpolation into her will, but a necessary implication from what she has said. How can it be supposed that if she had foreseen the event of an uncertainty as to whether she or her husband died first, so that her husband could not take from that uncertainty, she would have altered the intention she had so plainly expressed in favor of William Wing? Can it be considered possible that William Wing would, in that event, have ceased to be the object of her bounty? What other destination of the [417] property, by her, can *be conjectured? If her husband should not take, William Wing was substituted for him. . . . It seems to me to be a fallacy to say that this was a gift merely on the happening of a particular event, unless that event is taken to be the failure of the prior gift to her husband." [8 H. L. Cas. 201.]

It will be perceived that it was held that for the purpose of giving effect to the wills, the husband was not to be assumed to have survived the wife, nor the wife to have survived the husband; and yet, the wills having been thus eliminated, it was declared that the heirs and next of kin of Mr. Underwood were entitled to his property as though he had been the survivor, and that the heirs and next of kin of Mrs. Underwood should take her property as though she had been the survivor.

Whether in a given case a condition precedent, a condition subsequent, or a conditional limitation, is prescribed, is, in the absence of unmistakable language, matter of construction. And conditions cannot be annexed from words capable of being interpreted as mere description of what must occur before the estate given can arise. *Edgeworth* v. *Edgeworth*, L. R. 4 H. L. 35.

As in all of these cases, so in this, we are remitted to the language of the will to ascertain the intention of the testatrix, and if that intention is clearly deducible from the terms used, taking the whole will together, then we are bound to give that construction which will effectuate, and not defeat, it. Reading this will from the standpoint of the testatrix, as we must, we think it not open to doubt that she intended to dispose of all her estate, and did not intend to die intestate as to any part of it; that she had in mind only three objects of her bounty, her husband, her son, and the home, and that her intention, failing husband and son, was that the home should take. If husband alone survived it was to go to the home at his death. If neither husband nor son survived it was to go to the home at once. Is her manifest intention to be defeated because, instead of saying, "If neither my husband nor my son should survive me, I give and bequeath my property to the home," she said: "In the event of my becoming the survivor of both my husband, Oliver Wheeler Rhodes, and of my son, Eugene Rhodes, I then give, devise, and *bequeath all my property . . . [418] to the Young Women's Christian Home?"

We do not feel compelled to so hold, and, by accepting so technical and literal a view, to reach an adverse result on the theory of a change in the burden of proof, or of an accidental omission to prevent it. This is not a case of supplying something omitted by oversight, but of intention sufficiently expressed to be carried out on the actual state of facts. And as the estates of persons perishing in a common disaster, intestate, notwithstanding the statutes of descent and distribution may not have made provision in respect thereof, are disposed of as if each survived as to his own property, we think, upon principle, that the property of Mrs. Rhodes should go as directed as if she survived her son, in the absence of proof to the contrary.

It necessarily follows that title did not prima facie vest in the son, who is not shown to have survived his mother, and must be taken to have died at the same time. The property remained where it was vested, there being no evidence to show that it had been devested.

The situation is illustrated by the case of *Re Willbor*, 20 R. I. 126, 51 L. R. A. 863, 37 Atl. 634. There Charlotte, Martha, and Eliza Willbor, three sisters, perished in the same calamity, and there was nothing from which it could be inferred that either survived the other. Each left a will devising all her real and personal property, excepting certain legacies, to her two sisters, or either of the survivors, and to their heirs and assigns forever. The supreme court of Rhode Island said: "As all three of the testatrices lost their lives in the same disaster, and no fact or circumstance appears from which it can be inferred that either survived the others, the question of survivorship must be regarded as unascertainable, and hence the rights of succession to their estates are to be determined as if death occurred to all at the same moment. . . . If all three of the testatrices are to be regarded as having died at the same moment, it follows that the bequest and devise in each of their wills to the two sisters or either of the survivors did not take effect,

there being no interval of time as between [419] the deaths of the three during which *titles to property could vest, and the wills therefore stand as if they contained only the bequests to the legatees subsequently named."

The result is that the property passed under the will to the home, and neither the next of kin of the mother nor the next of kin of the son can defeat its destination.

*The decree of the Court of Appeals is reversed*, and the cause remanded, with a direction to affirm the decree of the Supreme Court.

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WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,
*v.*
BOROUGH OF NEW HOPE.

(See S. C. Reporter's ed. 419-427.)

*Constitutional law—state regulation of interstate commerce—license on telegraph poles and wires.*

An ordinance imposing a license fee on telegraph poles and wires within the limits of the municipality is not obnoxious to the commerce clause of the Federal Constitution when applied to poles and wires used for interstate business, although it yields a return in excess of the amount necessary to reimburse the municipality for the cost of supervision and inspection.

[No. 101.]

*Argued December 2, 3, 1902. Decided January 5, 1903.*

IN ERROR to the Superior Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Bucks County rendered upon a verdict in favor of the plaintiff in an action to recover license fees for telegraph poles and wires. *Affirmed.*

See same case below, 16 Pa. Super. Ct. 306.

Statement by Mr. Chief Justice **Fuller:**

By an ordinance passed in 1894, the borough of New Hope, Pennsylvania, imposed an annual license fee of $1 per pole and $2.50 per mile of wire on the telegraph, telephone, and electric-light poles and wires within its limits. The Western Union Telegraph Company had constructed prior thereto, and had since maintained and operated, a line of telegraph poles and wires through the borough, and this was an action brought in the court of common pleas of Bucks *coun- [420] ty, in that state, against the company to recover license fees for the four years commencing with 1895. The case came on for trial before the court and a jury, and plaintiff put in evidence the ordinance in question, and it was agreed "between the parties that for the year beginning October 1, 1895, there were 75 poles and 20 miles of wire, and for the three succeeding years, beginning October 1, 1896, there were 36 poles and 12 miles of wire maintained by the defendant in said borough." Plaintiff then rested, and defendant offered evidence tending to show that the wires were used as through wires, for the transmission of messages between the different states, and the United States and foreign countries; that the company had no office at New Hope, which it operated itself, but that the Philadelphia & Reading Railroad Company handled the business there, and transferred it to the Western Union at Philadelphia; that no part of the business that went to or from New Hope went over these lines of wires and poles; and that the local business handed to the Western Union at Philadelphia amounted to from about $7 to $7.50 per month. The evidence further tended to

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NOTE.—*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. (Va.) 13 L. R. A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; and Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

*As to police power as affecting commerce*—see notes to People v. Budd (N. Y.) 5 L. R. A. 559; and State *ex rel.* Corwin v. Indiana & O. Oil, Gas & Min. Co. (Ind.) 6 L. R. A. 579.

*On license taxes as affecting interstate commerce*—see notes to Rothermel v. Meyerle (Pa.) 9 L. R. A. 366; and American Fertilizing Co. v. North Carolina Bd. of Agri. (C. C. E. D. N. C.) 11 L. R. A. 179.

*On the limit of amount of license fees*—see note to State *ex rel.* Toi v. French (Mont.) 30 L. R. A. 415.

*Validity of charges on telegraph and telephone poles and wires.*

A municipal corporation, being chargeable with the duty of supervising the construction and maintenance of telegraph and telephone lines within its streets and public places in order to prevent danger to the people from their defective condition, may impose upon such lines a reasonable charge to pay for such supervision.

A license tax of 25 cents on each telegraph, telephone, electric-light, and electric-railway pole within the limits of the municipality was sustained in Harrisburg City v. Pennsylvania Teleph. Co. 15 Pa. Co. Ct. 518.

A charge of $1 per annum for each pole was held not to be unreasonable in Chester City v. Western U. Teleg. Co. 154 Pa. 464, 25 Atl. 1134; Allentown v. Western U. Teleg. Co. 148 Pa. 117, 23 Atl. 1070.

And such a license fee was sustained in Bethlehem v. Pennsylvania Teleph. Co. 12 Lanc. L. Rev. 204; Norristown v. Keystone Teleg. & Teleph. Co. 15 Montg. Co. L. Rep. 9.

A charge of $1 per annum for each pole, and $2.50 per annum for each mile of wire, has also been held reasonable. Western U. Teleg. Co. v. Philadelphia (Pa.) 12 Atl. 144.

In Philadelphia v. Postal Teleg. Cable Co. 67 Hun, 21, 21 N. Y. Supp. 556, the charge for each pole and each mile of wire under the Philadelphia ordinance was regarded as not unreasonable.

And ordinances imposing this charge were sustained in Taylor v. Postal Teleg & Cable Co. 4 Lack. Legal News, 111; Taylor v. Central Pennsylvania Teleph. & Supply Co. 4 Pa. Dist. R. 92.

The same ordinance as is involved in WESTERN U. TELEG. CO. v. NEW HOPE, was also sus-

show that the cost value of its lines through New Hope was about $372, and that the cost of inspection, repairs, and maintenance of the plant of the company had averaged for thirteen years $1.49½ per wire per annum; that since October, 1894, the borough had not expended any money on account of the poles and wires of the company; that its expenditures were for repairing streets, street lamps, moderate sums in payment of official services, etc., and that when on holidays the burgess saw fit to appoint a policeman he often called on the constable, who was generally paid $2.50 per day. A lineman testified that during those years the borough never did anything, to his knowledge, "in the way of inspecting or repairing or removing or anything else in connection with the poles and wires of those telegraph companies." Defendant contended that the requirement of payment of the license fee in question amounted to a regulation of commerce, and that the ordinance was therefore void.

The court left it to the jury to find whether the license fee *exceeded what was reasonable under the circumstances. The jury returned a verdict in favor of the plaintiff, and judgment was rendered thereon, which on error to the superior court was affirmed. 16 Pa. Super. Ct. 306. The supreme court of Pennsylvania refused to allow an appeal to that court.

[421]

*Mr.* **Silas W. Pettit** argued the cause, and, with *Messrs. George H. Fearons, Brown & Wells, H. B. Gill,* and *Robert M. Yardley,* filed a brief for plaintiff in error:

The rule limiting the amount of a license tax imposed under and in aid of the police power is well established to be the amount of the cost of such supervision and regulation and the cost of issuing the license.

Cooley, Const. Lim. 4th ed. § 201; Cooley, Taxn. 4th ed. § 408; Dill. Mun. Corp. 4th ed. § 768; *Laundry License Case,* 22 Fed. 701; *State, North Hudson County R. Co., Prosecutors,* v. *Hoboken,* 41 N. J. L. 71; *Taylor* v. *Postal Teleg. Cable Co.* 202 Pa. 583, 52 Atl. 128.

Under the guise of the power to regulate, a city cannot exercise the power to tax.

*State, Benson, Prosecutor,* v. *Hoboken,* 33 N. J. L. 280; *New York* v. *Second Ave. R. Co.* 32 N. Y. 261; *Cincinnati* v. *Bryson,* 15 Ohio, 625, 45 Am. Dec. 593; *Mays* v. *Cincinnati,* 1 Ohio St. 268; *Dunham* v. *Rochester,* 5 Cow. 462.

In Pennsylvania there is no power in a municipality to impose any charge upon telegraph companies by way of rental for the use of its streets, because they are expressly authorized by the Constitution and laws of that state to occupy the highways with their poles and wires.

*O'Connor* v. *Pittsburgh,* 18 Pa. 187; *Stormfeltz* v. *Manor Turnp. Co.* 13 Pa. 555; *Millvale* v. *Evergreen R. Co.* 131 Pa. 1, 7 L. R. A. 369, 18 Atl. 993; *Com.* v. *Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471; *Philadelphia & T. R. Co.'s Case,* 6 Whart. 25, 36 Am. Dec. 202; *Northern Liberties* v. *Northern Liberties Gas Co.* 12 Pa. 318; *Mercer* v. *Pittsburgh, Ft. W. & C. R. Co.* 36 Pa. 99; *Danville, H. & W. R. Co.* v. *Com.* 73 Pa. 29; *Pittsburgh's Appeal,* 115 Pa. 4, 7 Atl. 778; *Williamsport Pass. R. Co.* v. *Williamsport,* 120 Pa. 1, 13 Atl. 496; *Homestead Street R. Co.* v. *Pittsburg & H. Electric Street R. Co.* 166 Pa. 162, 27 L. R. A. 383, 30 Atl. 950; 2 Dill. Mun. Corp. 3d ed. § 657.

The Western Union Telegraph Company is engaged in interstate commerce, and the business it transacts is in itself commerce.

*Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708.

The police power of a state and, *a fortiori,* of a municipality, cannot obstruct interstate commerce beyond the necessity for its exercise.

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tained by the Pennsylvania supreme court in New Hope v. Postal Teleg. Cable Co. 202 Pa. 532, 52 Atl. 127, and another ordinance imposing the same fees was sustained in Taylor v. Postal Teleg. Cable Co. 202 Pa. 583, 52 Atl. 128.

In Chester City v. Western U. Teleg. Co. 154 Pa. 464, 26 Atl. 1134, *supra,* the supreme court of Pennsylvania declared that the reasonableness of the charge for each pole maintained by a telegraph company may be measured partly by the liability of the city for injuries caused by defective poles and wires, as well as by the amount of actual expense for licenses.

And that a borough is not precluded from imposing a license fee on the poles and wires of telegraph and telephone companies because it maintains no inspection and has incurred no expense was held in North Braddock v. Central District & Printing Teleg. Co. 11 Pa. Super. Ct. 24.

And the fact that the revenue produced by an annual license tax on telegraph and telephone companies, of $1 per pole and $2.50 per mile of wire, is thirteen times the sum necessary to defray adequate inspection and supervision charges, has been held not to show such an abuse of discretion as to warrant the interference of the courts. North Braddock v. Central District & Printing Teleg. Co. 11 Pa. Super. Ct. 24.

And it has even been held that the fact that the charge was more than ten times the cost of regulation and of all outstanding expenses, including liability for damages, loss, and expenses of every nature, is not sufficient to defeat the right to collect the tax. Philadelphia v. American U. Teleg. Co. 167 Pa. 406, 31 Atl. 628.

A municipality may not justify the imposition of a tax on poles and wires of a telegraph company in excess of all expenses incurred by the municipality, as a means of coercing the company to place its wires under ground. Philadelphia v. Atlantic & P. Teleg. Co. 42 C. C. A. 325, 102 Fed. 254.

The expense incurred by a telegraph company in repairing its wires on notice of defects having occurred is of little importance in determining the reasonableness of an ordinance imposing a license tax on poles and wires. *Ibid.*

The fact that the amount of a license tax on the poles and wires of telegraph and telephone companies largely exceeds the cost of maintenance is not sufficient to defeat an action to enforce payment of such tax. North Braddock v. Central District & Printing Teleg. Co. 11 Pa. Super. Ct. 24.

The question of the reasonableness of a charge of $5 per pole for the privilege of using

*Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 36 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lyng* v. *Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States government created thereby.

*Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

A license tax, irrespective of whether the amount is much or little, where levied upon the occupation itself, or upon the means of carrying on the business, is, where the business carried on is interstate commerce, a direct burden upon interstate commerce.

*Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

Any charge upon the poles or wires of a telegraph company, which are the necessary means of carrying on the business, is as much a tax on that business as would be a license fee exacted from the agent of the company as a condition of his being permitted to exercise his function, or as an occupation tax.

*Postal Teleg. Cable Co.* v. *Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094.

*Mr.* **William C. Ryan** argued the cause and filed a brief for defendant in error:

The reasonableness of the fee is not to be measured by the value of the poles and wires, or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license, and the probable expense of such inspection, regulation, and police surveillance as the municipal authorities may lawfully give to

streets, alleys, and public places of the city of St. Louis was left undecided by the Supreme Court of the United States in St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, 149 U. S. 467, 37 L. ed. 812, 13 Sup. Ct. Rep. 990, that court deciding that such charge, being graduated by the amount of use, was not a privilege or license tax. The dissenting opinion in this case denied that the charge was reasonable, stating that it amounted to 44 per cent of the entire value of the property of the company in the city.

On the new trial ordered in this case the ordinance was held void for unreasonableness because enormously greater than the rental value of abutting property, and greatly disproportionate to the value of the poles and wires. St. Louis v. Western U. Teleg. Co. 63 Fed. 68.

In Michigan an ordinance making an inspection charge of 50 cents per annum for each pole used for stringing electric wires was held void for unreasonableness, where the actual cost of inspection was but about 5 cents a pole. Saginaw v. Swift Electric Light Co. 113 Mich. 660, 72 N. W. 6.

The general rule is that municipal charges for poles and wires of telegraph and telephone companies placed in the streets, when not unreasonable, are nor precluded by the interstate character of the business.

An ordinance imposing a tax of $2 on each telegraph, telephone, electric-light, or other pole, except trolley poles used exclusively for wires of street railways, does not violate the right of a telegraph company which has accepted the provisions of the act of Congress of July, 1866, giving it the privilege of operating a line over post roads. Postal Teleg. Cable Co. v. Baltimore, 79 Md. 502, 24 L. R. A. 161, 29 Atl. 819. Affirmed in 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356.

The question of the effect upon the validity of this ordinance, of the exception in favor of street railways, does not seem to have been raised in this controversy. See, *infra*, on this point, Athens v. New York & P. Teleg. & Teleph. Co. 9 Pa. Dist. R. 253.

The New York supreme court has refused to hold that the charge made by the Philadelphia ordinance for police regulation and supervision was unreasonable, and has held that it did not constitute a restraint upon interstate commerce. Philadelphia v. Postal Teleg. Cable Co. 67 Hun, 21, 21 N. Y. Supp. 556.

But the circuit court of the United States refused to uphold the Philadelphia ordinance, in Philadelphia v. Western U. Teleg. Co. 2 Inters. Com. Rep. 728, 40 Fed. 615, declaring that Philadelphia was not authorized to tax a telegraph company occupying its streets, and, further, that if it was engaged in interstate commerce the state could not confer such power. The opinion proceeds, however, to say that the city may charge for supervision of the telegraph lines what is reasonable, but cannot lay away any fund for imaginary future demands, and therefore that an ordinance which would impose a charge of about $16,000 per year, while experience shows that $3,000 or $3,500 per year is sufficient to pay the expenses, was unreasonable and invalid. Therefore the Federal court, while acknowledging that the state courts upheld the ordinance, refused to uphold it.

And the Philadelphia ordinance was again in Philadelphia v. Western U. Teleg. Co. 81 Fed. 948, 82 Fed. 797, held invalid as unreasonably

the erection and maintenance of the poles and wires.

*Taylor* v. *Postal Teleg. Cable Co.* 202 Pa. 583, 52 Atl. 128.

It is a mistake to measure the reasonableness of the charge by the amount actually expended by the city for a particular year.

*Chester City* v. *Western U. Teleg. Co.* 154 Pa. 466, 25 Atl. 1134.

Regulation under the police power is not an attempt to regulate the business of the telegraph company.

*State Freight Tax Case*, 15 Wall. 232, *sub nom. Philadelphia & R. R. Co.* v. *Pennsylvania*, 21 L. ed. 146; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067; *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

It is conceded that the borough had the right, in the exercise of its police power, to [425] impose a reasonable license fee upon telegraph poles and wires within its limits, and that an ordinance imposing such fee is to be taken as prima facie reasonable. But it is insisted that on the evidence in this case the presumption of reasonableness is rebutted, and that the ordinance as administered is void because a regulation of interstate commerce. While in the exercise of its control over its streets, it is admitted that the borough may supervise the location of the poles erected to sustain the wires of the plaintiff in error, may require them to be marked, may make such inspection of them as may be necessary to protect the public welfare, and may impose a reasonable license fee for the cost of such regulation and supervision, and of the issuing of such permits as may be required for the enforcement thereof, yet it is contended that if the license fee turned out to be in excess of the amount necessary to reimburse the municipality the ordinance became unreasonable and invalid. The superior court in its opinion referred to many decisions of the supreme court of Pennsylvania as definitely

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in excess of the cost of inspection and regulation.

But on writ of error from the circuit court of appeals, this judgment was reversed because the lower court had refused to admit, upon the question of the reasonableness of the ordinance, evidence of the additional expense for fire apparatus rendered necessary by the suspension of electric wires in the streets, and of the necessity of extra meetings of the council for the purpose of regulating the suspension of poles and wires. Philadelphia v. Western U. Teleg. Co. 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454. The court said that a wide scope should be given to the admission of evidence upon the question of the reasonableness of a license fee imposed by municipal ordinance upon poles and wires of a foreign telegraph company.

In Kentucky a tax by the state of $1 for each mile of the first line of wire within the state, and 50 cents per mile for each additional wire, with a penalty of $500 imposed on any agent of the company for failure to pay the tax, has been held unconstitutional as an attempted regulation of commerce, on the ground that it was not a tax on the property of the company within the state, but upon its business. Com v. Smith, 92 Ky. 38, 17 S. W. 187.

Considering the fact that a state tax like that in the case last cited can hardly be claimed to be a charge for police supervision of the poles and wires, it would seem that this decision is not in conflict with that of the Supreme Court of the United States in St. Louis v. Western U. Teleg. Co. 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, *supra*. If the tax is in fact on the business, rather than on the property of the company, it is clearly within the scope of the decisions denying the right of a state to impose license or privilege taxes upon telegraph or telephone companies doing interstate business. See, on this point, note to Postal Teleg. Cable Co. v. Baltimore (Md.) 24 L. R. A. 161.

A municipal ordinance which imposes a license fee upon each telegraph or telephone pole within its limits is unconstitutional and invalid as discriminating, where it excludes from its operation all poles maintained by electric-light and street-railway companies. Athens v. New York & P. Teleg. & Teleph. Co. 9 Pa. Dist. R. 253. See also, *supra*, Postal Teleg. Cable Co. v. Baltimore, 79 Md. 502, 24 L. R. A. 161, 29 Atl. 819.

The fact that the expense to a municipality by reason of the presence of telegraph poles and wires in its streets is caused by the wires of other telegraph companies than defendant is no objection to the validity of an ordinance imposing a license tax on such poles and wires. The license charged must be uniform as to all such users of the streets, and fixed with reference to the general aggregate amount of expenses to the municipality resulting from the presence of all the poles and wires. Philadelphia v. Atlantic & P. Teleg. Co. 42 C. C. A. 325, 102 Fed. 254.

The St. Louis board of public improvements was held in State ex rel. Bell Teleph. Co. v. Flad, 23 Mo. App. 185, to have no power to impose upon a telephone company other conditions for the use of streets than those imposed by statutes and ordinances; and the board must issue a permit for poles in the streets on compliance with these conditions.

establishing, among other propositions, "that in an action to recover the license fee for a particular year, the same being payable at the beginning of the year, the fact that the borough or city did not expend money for inspection, supervision, or police surveillance of the poles and wires in that year is not a defense," and "that the courts will not declare such ordinance void because of the alleged unreasonableness of the fee charged, unless the unreasonableness be so clearly apparent as to demonstrate an abuse of discretion on the part of the municipal authorities." And it was said that in many of the cases cited the license fee was the same as that imposed by this ordinance. 16 Pa. Super. Ct. 309. The supreme court affirmed the judgment in a similar case on the opinion given below in this. 202 Pa. 532, 52 Atl. 127.

In *Chester City* v. *Western U. Teleg. Co.* 154 Pa. 464, 25 Atl. 1734, in which it was averred in the affidavit of defense that the rates charged were at least five times the amount of the expense involved in the supervision exercised by the municipality, the supreme court said: "For the purposes of this case we must treat this averment as true, as far as it goes. The difficulty is it does not go far enough. It refers only to [426] the usual, ordinary, *or necessary expense of municipal officers, of issuing licenses and other expenses thereby imposed upon the municipality. It makes no reference to the liability imposed upon the city by the erection of telegraph poles. It is the duty of the city to see that the poles are safe, and properly maintained, and should a citizen be injured in person or property by reason of a neglect of such duty, an action might lie against the city for the consequences of such neglect. It is a mistake, therefore, to measure the reasonableness of the charge by the amount actually expended by the city for a particular year, to the particular purposes specified in the affidavit."

In *Taylor* v. *Postal Teleg. Cable Co.* 202 Pa. 583, 52 Atl. 128, the supreme court said: "Clearly the reasonableness of the fee is not to be measured by the value of the poles and wires or of the land occupied, nor by the profits of the business. The elements which enter into the charge are the necessary or probable expense incident to the issuing of the license and the probable expense of such inspection, regulation, and police surveillance as municipal authorities may lawfully give to the erection and maintenance of the poles and wires. . . . Whether or not the fee is so obviously excessive as to lead irresistibly to the conclusion that it is exacted as a return for the use of the streets, or is imposed for revenue purposes, is a question for the courts, and is to be determined upon a view of the facts, not upon evidence consisting of the opinions of witnesses as to the proper supervision that the municipal authorities might properly exercise and the expense of the same." And see *Philadelphia* v. *Western U. Teleg. Co.* 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454.

Concurring in these views in general, we think it would be going much too far for us to decide that the test set up by the plaintiff in error must be necessarily applied, and the ordinance held void because of failure to meet it. As the supreme court pointed out, the elements entering into the charge are various, and the court of common pleas, the superior court, and the supreme court of Pennsylvania have held it to be reasonable, and we cannot say that their conclusion is so manifestly wrong as to justify our interposition.

*This license fee was not a tax on the [427] property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and as such not in itself obnoxious to the clause of the Constitution relied on. *St. Louis* v. *Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990.

*Judgment affirmed.*

Mr. Justice **White**, Mr. Justice **Peckham**, and Mr. Justice **McKenna** dissented.

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## CARY MANUFACTURING COMPANY,
*Plff. in Err.,*
*v.*
## ACME FLEXIBLE CLASP COMPANY.

(See S. C. Reporter's ed. 427, 428.)

*Error to circuit court of appeals—case involving constitutional rights.*

A judgment of the circuit court of appeals which is made final by the judiciary act of March 3, 1891, § 6 (26 Stat. at L. 28, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550), is not reviewable by the Supreme Court of the United States on writ of error, although the suit involves constitutional rights, and therefore might have been brought directly from the circuit court to the Supreme Court.

[No. 122.]

*Submitted December 17, 1902. Decided January 5, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of New York, imposing a fine for contempt incurred by the violation of an injunction issued under a decree in favor of complainant in a suit for infringement of a patent. *Dismissed.*

See same case below, 48 C. C. A. 118, 108 Fed. 873.

The facts are stated in the opinion.

*Mr.* **A. G. N. Vermilya** submitted the cause for plaintiff in error.

No counsel for defendant in error.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The Acme Flexible Clasp Company brought suit in the circuit court of the United States for the southern district of [428] *New York against the Cary Manufacturing Company for alleged infringement of letters patent No. 314,204, granted to W. O. Swett, March 17, 1885, for a staple fastener for wooden vessels, which went to a decree sustaining the validity of the patent and adjudging the Cary Manufacturing Company to have infringed it. 96 Fed. 344. Defendant appealed to the circuit court of appeals for the second circuit, and the decree was affirmed. 41 C. C. A. 338, 101 Fed. 269. Proceedings in contempt were subsequently commenced by the Acme company to punish the alleged violation of the injunction issued under the decree, and the circuit court imposed a fine of $2,000 for contempt, to be paid to the clerk of the court, one half of the sum to be paid to the Acme company and one half to be paid to the United States. The Cary company sued out a writ of error from the circuit court of appeals to review this judgment, and the judgment was affirmed. 48 C. C. A. 118, 108 Fed. 873. Thereupon this writ of error was allowed.

It is apparent that the writ of error cannot be maintained, as the judgment of the circuit court of appeals was final. Judgments and decrees of those courts in all cases arising under the patent laws and under the criminal laws are made final by § 6 of the judiciary act of March 3, 1891. [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550.] Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under § 5 of that act; but it is settled that even if a party might be entitled to come directly to this court under that section, yet if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court. *Robinson* v. *Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *American Sugar Ref. Co.* v. *New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Ayres* v. *Polsdorfer*, 187 U. S. 585, *post* 314, 23 Sup. Ct. Rep. 196.

*Writ of error dismissed.*

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[429] *MEXICAN CENTRAL RAILWAY COMPANY, Limited, *Plff. in Err.*,

*v.*

J. W. ECKMAN, Guardian of Alfonso Huesselmann.

(See S. C. Reporter's ed. 429-436.)

*Federal courts—jurisdiction—diverse citizenship—suit by guardian in his own name.*

The guardian, and not the ward, is the party plaintiff, so far as Federal jurisdiction invoked solely on the ground of diverse citizenship is concerned, where the guardian has, under the state laws, the right to bring the suit in his own name.

[No. 124.]

*Submitted December 17, 1902. Decided January 5, 1903.*

IN ERROR to the Circuit Court of the United States for the Western District of Texas to review a judgment entered on a verdict in favor of plaintiff in an action brought by a guardian in his own name to recover damages for injuries sustained by the ward. *Affirmed.*

Statement by Mr. Chief Justice **Fuller**:

This was an action brought in the circuit court of the United States for the western district of Texas by J. W. Eckman, a citizen and resident of that district, as guardian of Alfonso Huesselmann, a minor, against the Mexican Central Railway Company, a corporation of Massachusetts, to recover damages for injuries sustained by him in the Republic of Mexico through the negligence of the company, in whose employment he then was. The complaint set out certain sections of the Constitution, of the Penal and Civil Codes, and acts of Congress and regulations thereunder, of Mexico, and averred that, "by virtue of the general principles of right and justice, and by virtue of the laws of Mexico hereinbefore set forth," *plaintiff had a right of action in Mexico, [430] and that the same existed in the United States; and also that the acts of negligence complained of were wrongful and actionable in the United States and in the state of Texas, as well as in the Republic of Mexico. Defendant filed a plea in abatement to the effect that Huesselmann was not then, or at the time of the infliction of the injuries, a citizen or resident of the state of Texas, but that he and his parents were citizens and residents of the state of Illinois; and that defendant was a resident and citizen of Massachusetts, and had not waived its right to be sued there, which right it pleaded, and asked that the action be dismissed. The plea was overruled, and defendant filed an answer containing seven exceptions or pleas to the jurisdiction, an exception to the complaint for insufficiency, and a general denial. All of the pleas were overruled, and the case was tried before a jury, a verdict rendered in plaintiff's favor, and judgment entered thereon. Thereupon a writ of error was allowed from this court on a certificate that the following questions of jurisdiction arose:

"First. That Alfonso Huesselmann, at the

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NOTE.—*As to diverse citizenship as ground of Federal jurisdiction*—see Shipp v. Williams, 10 C. C. A. 247, and note; Mason v. Dullagham, 27 C. C. A. 296, and note; Seddon v. Virginia, T. & C. Steel & I. Co. (C. C. W. D. Va.) 1 L. R. A. 108, and note; and Myers v. Murray, N. & Co. (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

time of the filing of this suit and now being a minor under twenty-one years of age, and his father and mother both being now alive, and at the time of the filing of this suit and now being residents, citizens, and inhabitants of the state of Illinois, and never having been residents, citizens, and inhabitants of the state of Texas, nor the western district of Texas, and the defendant, the Mexican Central Railway Company, Limited, being incorporated under and by virtue of the laws of the state of Massachusetts, and at the time of the filing of this suit, and now, being a resident, inhabitant, and citizen of said state of Massachusetts, and never having been incorporated under the laws of the state of Texas, and was not at the time of the filing of this suit a resident, inhabitant, or citizen of the state of Texas or of the western district of Texas; that said J. W. Eckman, being guardian of the person and estate of said Alfonso Huesselmann at the time of the filing of this suit, and being such now, and being a resident, inhabitant, and citizen of the state of Texas and [431] of the western district of Texas, now, *and at the time of the filing of this suit; has this court jurisdiction to try said cause, and does the citizenship of said guardian, J. W. Eckman, confer jurisdiction on this court, or does the citizenship of the minor and his parents control so as to defeat the jurisdiction of this court?

"Second. Whether or not this court has jurisdiction to try and determine said suit, where the minor, Alfonso Huesselmann, and defendant, Mexican Central Railway Company, Limited, are not citizens of this state and district, and where the cause of action arose in the Republic of Mexico, in which republic the contract of service was made and the services thereby contemplated were to be performed?

"Third. Whether or not this court has jurisdiction to try and determine this suit under the laws of Mexico as pleaded and proved in this case, in so far as such laws give rights that are to be determined by successive suits, give the right to extraordinary indemnity, considering the social position of the injured party, and in so far as the same are vague, indefinite, and dissimilar to the laws of our country and contrary to our policy?

"Fourth. Where plaintiff's cause of action arose in the Republic of Mexico, and the rights are to be determined by the laws of said republic, and where defendant has continuously kept its property and operated its road in said republic, has this court jurisdiction to hear and determine this cause in the absence of any reason shown in the pleading or proof why plaintiff did not bring his suit in the Republic of Mexico?

"Fifth. Where, according to the laws of the Republic of Mexico, no civil liability exists unless the acts that give rise to the civil liability must be found to be a violation of the criminal laws of Mexico, is the enforcement of such liability penal in its nature, and can this court determine the guilt of defendant thereunder, and adjudicate the rights of the parties based upon the criminal laws of said republic?"

*Messrs.* **Aldis B. Browne, Alexander Britton,** and **Eben Richards** submitted the cause for plaintiff in error:

An infant cannot change his own domicil, but his domicil remains that of his parents.

*Lamar* v. *Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221; *Hardy* v. *De Leon*, 5 Tex. 211; *Trammell* v. *Trammell*, 20 Tex. 406; *Franks* v. *Hancock*, 1 Posey, Unrep. Cas. 554; *Kennedy* v. *Ryall*, 67 N. Y. 379; *Potinger* v. *Wightman*, 3 Meriv. 67; *Dedham* v. *Natick*, 16 Mass. 135; *Dresser* v. *Edison Illuminating Co.* 49 Fed. 257; Dicey, Domicil, 97, 99.

It is equally settled that the guardian has no power to change the domicil of the ward.

*Lamar* v. *Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221. See also *Trammell* v. *Trammell*, 20 Tex. 406; *Daniel* v. *Hill*, 52 Ala. 430; *Wynn* v. *Bryce*, 59 Ga. 529; *Vennard's Succession*, 44 La. Ann. 1076, 11 So. 705; *Mears* v. *Sinclair*, 1 W. Va. 185; *Marheineke* v. *Grothaus*, 72 Mo. 204; *Garrison* v. *Lyle*, 38 Mo. App. 558.

Where the citizenship of the parties is the jurisdictional ground, the court in determining the question of jurisdiction looks to the citizenship of the real parties in interest, not to that of merely nominal parties.

*Huff* v. *Hutchinson*, 14 How. 586, 14 L. ed 553; *Browne* v. *Strode*, 5 Cr. 303, 3 L. ed. 108; *McNutt* v. *Bland*, 2 How. 9, 11 L. ed. 159; *Maryland use of Markley* v. *Baldwin*, 112 U. S. 490, 28 L. ed. 822, 5 Sup. Ct. Rep. 278; *Indiana ex rel. Stanton* v. *Glover*, 155 U. S. 513, 39 L. ed. 243, 15 Sup. Ct. Rep. 186; *Williams* v. *Ritchey*, 3 Dill. 406, Fed. Cas. No. 17,734; *Ruckman* v. *Palisade Land Co.* 1 Fed. 367; *Woolridge* v. *McKenna*, 8 Fed. 650; *Wiggins* v. *Bethune*, 29 Fed. 51; *Voss* v. *Neineber*, 68 Fed. 947; *Blumenthal* v. *Craig*, 26 C. C. A. 427, 55 U. S. App. 8, 81 Fed. 320.

In the case of a guardian, the title to the property is not in him, but in his ward.

*Lamar* v. *Micou*, 112 U. S. 452, 28 L. ed. 751, 5 Sup. Ct. Rep. 221; *Dodd* v. *Ghiselin*, 27 Fed. 405; *Wilcoxen* v. *Chicago, B. & Q. R. Co.* 116 Fed. 444.

*Mr.* **Millard Patterson** submitted the cause for defendant in error:

The citizenship of the guardian, and not that of his ward, controls the question of jurisdiction.

*Susquehanna & W. Valley R. & Coal Co.* v. *Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Continental L. Ins. Co.* v. *Rhoads*, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; *Pennington* v. *Smith*, 24 C. C. A. 145, 45 U. S. App. 409, 78 Fed. 399; *Harper* v. *Norfolk & W. R. Co.* 36 Fed. 102; *Popp* v. *Cincinnati, H. & D. R. Co.* 96 Fed. 465; *Seccomb* v. *Wurster*, 83 Fed. 860.

*Mr. Chief Justice **Fuller** delivered the [432] opinion of the court:

This case is brought directly from the circuit court to this court under the 1st

subdivision of the 5th section of the judiciary act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], providing that that may be done "in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision." It must be regarded as settled that the jurisdiction here referred to is the jurisdiction of the circuit or district courts of the United States as such (*Smith* v. *McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Blythe* v. *Hinckley*, 173 U. S. 501, 43 L. ed. 783, 19 Sup. Ct. Rep. 497); that the whole case is not open to us, but only the question of jurisdiction (*Horner* v. *United States*, 143 U. S. 570, 576, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *United States* v. *Jahn*, 155 U. S. 112, 39 L. ed. 89, 15 Sup. Ct. Rep. 39); and that review by certificate is limited to the certificates by the circuit or district courts, made after final judgment, of questions made as to their own jurisdiction, and to the certificates by the circuit court of appeals of questions of law in relation to which the advice of this court is sought as therein provided. *United States* v. *Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983.

Defendant's counsel condenses the propositions relied on into these: (1) That "the citizenship of the ward, the actual plaintiff, not that of the guardian, the nominal plaintiff, controls;" (2) that "the laws of Mexico as pleaded and proved, and which are relied on to support this case, are so vague and indefinite, and so dissimilar to the laws of Texas, as to be incapable of enforcement in our courts, and are inconsistent with the statutes and public policy of Texas;" and (3) that these laws "are penal in their character, and such as should be given no extra-territorial effect."

But, apart from the question of jurisdiction in respect of citizenship, it is apparent that the jurisdiction of the circuit court as a court of the United States was not put in issue, for the other contentions were matters on the merits, and this judgment to the contrary is not void, but is only open to be attacked for error, while, in any aspect, the objections applied to all courts of this country, and not particularly to the Federal courts.

[433] *And if the jurisdiction of the circuit court was invoked solely on the ground of diverse citizenship, the case should have been taken to the circuit court of appeals for the fifth circuit, to which court previous similar cases have been carried, and by which the questions suggested here have been dealt with. *Evey* v. *Mexican C. R. Co.* 38 L. R. A. 387, 26 C. C. A. 407, 52 U. S. App. 118, 81 Fed. 294; *Mexican C. R. Co.* v. *Marshall*, 34 C. C. A. 133, 91 Fed. 933.

These matters, however, are not properly before us in this case, and we intimate no opinion upon them.

The question for us to determine is whether the jurisdiction of the circuit court can be sustained through the citizenship of the guardian.

It is admitted that Eckman was duly appointed guardian of both the person and estate of Huesselmann by the proper court of Texas thereto empowered, and that he was a citizen and resident of the western district of Texas.

Under the act of March 3, 1887, 24 Stat. at L. 552, chap. 373 [U. S. Comp. Stat. 1901, p. 514], as corrected by that of August 13, 1888, 25 Stat. at L. 433, chap. 866, actions may be brought in any district in which either the plaintiff or the defendant resides. We have held that a corporation incorporated in one state only cannot be compelled to answer in a circuit court of the United States held in another state, to a civil suit, at law or in equity, brought by a citizen of a different state. *Shaw* v. *Quincy Min. Co.* 145 U. S. 444, *sub nom. Ex parte Shaw*, 36 L. ed. 768, 12 Sup. Ct. Rep. 935. But that is not this case, as here the action was brought by a citizen of Texas in the district of his residence.

The question is whether under the laws of Texas a guardian can sue in his own name to recover damages for injuries sustained by the ward, and it is unaffected by the permanent domicil of the ward. *Hoyt* v. *Sprague*, 103 U. S. 613, 26 L. ed. 585; *New Orleans* v. *Gaines*, 138 U. S. 595, 606, *sub nom. New Orleans* v. *Whitney*, 34 L. ed. 1102, 1106, 11 Sup. Ct. Rep. 428, 431; *Delaware County* v. *Diebold Safe & Lock Co.* 133 U. S. 473, 488, 33 L. ed. 674, 680, 10 Sup. Ct. Rep. 399.

It is true that where a state or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of a United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, notwithstanding *the general rule[434] that the jurisdiction of the Federal courts depends, not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record. But those are instances of merely formal parties, whose names are used from necessity, and, as said in *New Orleans* v. *Gaines*, by Mr. Justice Bradley, "we have repeatedly held that representatives may stand upon their own citizenship in the Federal courts irrespectively of the citizenship of the persons whom they represent,—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of Federal jurisdiction by simulated assignments. But assignments by operation of law, creating legal representatives, are not within the mischief or reason of the law."

If in the state of the forum the general guardian has the right to bring suit in his own name as such guardian, and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is concerned, even though suit might have been instituted in the name of the ward by guardian *ad litem* or next friend. He is liable for costs in the event of failure to recover and for attor-

neys' fees to those he employs to bring the suit, and in the event of success, the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond.

The Revised Statutes of Texas provide:

"Art. 2623. The guardian of the estate is entitled to the possession and management of all property belonging to the ward; to collect all debts, rents, or claims due such ward; to enforce all obligations in his favor; to bring and defend suits by or against him; but in the management of the estate the guardian shall be governed by the provisions of this title.

"Art. 2624. The guardian of both person and estate has all the rights and powers, and shall perform all the duties, of the guardian of the person and of the guardian of the estate."

"Art. 2627. The guardian of the estate shall use due diligence to collect all claims [435] or debts owing to the ward, and to *recover possession of all property to which the ward has a title or claim; provided, there is a reasonable prospect of collecting such claims or debts, or of recovering such property; and if he neglects to use such diligence he and his sureties shall be liable for all damages occasioned by such neglect."

In *Roberts* v. *Sacra*, 38 Tex. 580, it was ruled that the guardian for minor heirs might sue in his own name on a promissory note payable to the ancestor of his wards on showing that they were the only heirs of the payee, and that there was no administration on the estate.

In *Houston & T. C. R. Co.* v. *Bradley*, 45 Tex. 171, 176, it was held that under a law authorizing suit for death by wrongful act, which provided that actions thereunder should be "for the sole and exclusive benefit of the surviving husband, wife, child, or children, and parents of the person whose death shall have been so caused, and may be brought by such entitled parties, or any of them," the suit might properly be brought in his own name by the guardian of the estate of minor children of the person whose death was caused by such act; and the court said: "It is not regarded as material whether the suit is brought in the name of the guardian for his ward or in the name of the ward by his guardian. By the laws of Texas, the guardian of the person is entitled to the charge and control of the person of the ward, and the guardian of the estate is entitled to the possession and management of the property belonging to the ward, and to collect all claims and debts due him, to enforce all obligations in his favor, and to bring and defend suits by or against him."

And see *March* v. *Walker*, 48 Tex. 372, where Walker sued as guardian of one of three children, and as next friend of the two others, and attention was called in respect of the two to the then statute, subsequently repealed, providing for the appointment of a special guardian to prosecute suits; and *Gulf, C. & S. F. R. Co.* v. *Styron*, 66 Tex. 421, 1 S. W. 161, in which the action had been brought "by W. W. Styron, next friend of Millie Styron, a minor," and it was decided that it was not necessary "that the pleadings must *show, in so many words, [436] that the action is brought by the minor by next friend," although cases so ruling could be found.

We are unable to hold that the circuit court erred in assuming that this guardian had the legal right to bring the action in his own name, and it is on his citizenship, and not on the citizenship of the ward, that the jurisdiction of the circuit court depended.

*Judgment affirmed.*

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UNITED STATES, *Appt.*,
*v.*
WILLIAM T. SAMPSON, Rear Admiral, U. S. Navy, *et al.*

(See S. C. Reporter's ed. 436, 437.)

*Action—parties — substitution — death of party.*

The exigency presented by the death of Rear Admiral Sampson pending an appeal from a decree of condemnation in a libel in prize, filed in his own behalf and in behalf of other officers and enlisted men of the United States Navy, will be satisfactorily met by the substitution, to carry on the proceedings in the interest of all, of Rear Admiral Taylor who is among those represented in the litigation by counsel, and is within the jurisdiction of the court.

[No. 273.]

*Submitted October 29, 1902. Decided January 5, 1903.*

APPEAL from the Supreme Court of the District of Columbia to review a decree of condemnation in a libel in prize filed by Rear Admiral Sampson in his own behalf and in behalf of officers and enlisted men of the United States Navy.

On motions arising out of the death of Rear Admiral Sampson, substitution of Rear Admiral Taylor ordered.

*Attorney General Knox* and *Assistant Attorney General Hoyt* for United States.

*Messrs.* **James H. Hayden**, *Joseph K. McCammon, George A. King, William B. King, William E. Harvey*, and *John Sidney Webb* for appellees.

**The Chief Justice:**

This libel in prize was filed by Rear Admiral Sampson in his own behalf and also in behalf of all of the officers and enlisted men of the United States Navy, who took part in the engagement off Santiago de Cuba on July 3, 1898, in the supreme court of the District of Columbia, and went to a decree of condemnation from which this appeal was prosecuted.

On May 19, 1902, the death of Rear Admiral Sampson was suggested by the Attorney General, and a motion made that *the [437]

cause proceed under its then caption and without the substitution of any other individual as a party, which was postponed to the hearing of the case on its merits.

That hearing has been had, and counsel, in aid of the court, have made application for the substitution of the administratrix of Admiral Sampson, and submitted considerations in respect of the substitution also of one or more officers, as, and if, deemed necessary.

We think someone to carry on the proceedings in the interest of all should be substituted, but that it is not necessary that the personal representatives of those who may have deceased should come in, or that any person should *ex officio* be designated. The matter is merely one of convenience and without significance in itself.

Rear Admiral Evans, Rear Admiral Taylor, Captain French E. Chadwick, and others are represented in the litigation by counsel; but Rear Admiral Schley and others are not. Of those so represented, Rear Admiral Evans is absent on a foreign station, while Rear Admiral Taylor is within the jurisdiction. It seems to us that the substitution of Rear Admiral Taylor will satisfactorily meet the exigency, and *it will be ordered accordingly.*

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## OSHKOSH WATERWORKS COMPANY, *Plff. in Err.,* *v.* CITY OF OSHKOSH.

(See S. C. Reporter's ed. 437–447.)

*Contracts—impairment of obligation—change in remedy.*

The obligation of contracts with a municipality is not impaired by subsequent changes in its charter, which protect it from suit upon claims against it which have not first been presented to the city council and wholly or partly disallowed, either by affirmative action or by the failure of that body for more than sixty days to pass thereon, and provide that disallowance is final and conclusive unless within twenty days an appeal therefrom be perfected to the proper circuit court, in which the case is to be tried as though originally commenced therein.

[No. 75.]

*Argued November 6, 1902. Decided January 5, 1903.*

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which affirmed a judgment of the trial court sustaining a demurrer to and dismissing a complaint in an action against a municipal corporation on its contract with a waterworks company. *Affirmed.*

See same case below, 109 Wis. 208, 85 N. W. 376.

The facts are stated in the opinion.

*Mr.* **Moses Hooper** argued the cause and filed a brief for plaintiff in error:

It is well settled that legislation simply modifying the remedy does not "impair the obligation of the contract;" but where the subsequent legislation limits to a remedy not "substantially equivalent," then it does "impair the obligation of the contract" within the meaning of the Constitution of the United States.

*Oatman* v. *Bond*, 15 Wis. 20; *Hasbrouck* v. *Shipman*, 16 Wis. 296; *Nelson* v. *Rountree*, 23 Wis. 367; *Green* v. *Biddle*, 8 Wheat. 15, 5 L. ed. 551; *Bronson* v. *Kinzie*, 1 How. 311, 11 L. ed. 143; *McCracken* v. *Hayward*, 2 How. 608, 11 L. ed. 397; *Howard* v. *Bugbee*, 24 How. 461, 16 L. ed. 753; *Walker* v. *Whitehead*, 16 Wall. 314, 21 L. ed. 357; *Tennessee* v. *Sneed*, 96 U. S. 69, 24 L. ed. 610; *Edwards* v. *Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Brine* v. *Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858; *Seibert* v. *Lewis*, 122 U. S. 284, *sub nom. Seibert* v. *United States*, 30 L. ed. 1161, 7 Sup. Ct. Rep. 1190; *McGahey* v. *Virginia*, 135 U. S. 662, 30 L. ed. 304, 10 Sup. Ct. Rep. 972; *Barnitz* v. *Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; *Shapleigh* v. *San Angelo*, 167 U. S. 646, 42 L. ed. 310, 17 Sup. Ct. Rep. 957.

When we attempt the process of "filtering" the claim through the common council we are met with an entirely different policy from that relating to ordinary actions.

*Telford* v. *Ashland*, 100 Wis. 238, 75 N. W. 1006; *Plano Mfg. Co.* v. *Rasey*, 69 Wis. 246, 34 N. W. 85; *Mason* v. *Ashland*, 98 Wis. 540, 74 N. W. 357; *Gutta Percha & R. Mfg. Co.* v. *Ashland*, 100 Wis. 232, 75 N. W. 1007; *Oshkosh Waterworks Co.* v. *Oshkosh*, 106 Wis. 83, 81 N. W. 1040.

This is a special law suspending action for 60 days and thereafter indefinitely, on these claims against this defendant city. As to this existing contract, it is unconstitutional for that reason.

*Tennessee* v. *Sneed*, 96 U. S. 69, 24 L. ed. 610.

*Mr.* **John F. Kluwin** argued the cause and filed a brief for defendant in error:

The right of a creditor to any particular remedy is not a vested right in the continuance of any special mode of procedure, or the perpetuation of any remedy or remedial process which can be modified or abolished without impairing or taking away the right itself.

2 Beach, Modern Law of Contracts, § 1667; *Bird* v. *Keller*, 77 Me. 270; *Chaffe* v. *Aaron*, 62 Miss. 29; *Rich* v. *Flanders*, 39 N. H. 304.

Changes in the forms of actions and modes of proceedings do not amount to an impairment of the obligations of the contract, if any adequate and efficacious remedy be left.

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NOTE.—*As to what laws are void as impairing obligation of contracts*—see notes to Franklin County Grammar School v. Bailey (Vt.) 10 L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

*That impairing the remedy impairs the obligation of contract*—see notes to Best v. Baumgardner (Pa.) 1 L. R. A. 356; Louisiana *ex rel.* Ranger v. New Orleans, 26 L. ed. U. S. 132; and Phinney v. Phinney (Me.) 4 L. R. A. 348.

2 Beach, Modern Law of Contracts, 1667–1668; *New Orleans City & Lake R. Co.* v. *Louisiana*, 157 U. S. 219, 39 L. ed. 679, 15 Sup. Ct. Rep. 581; *Connecticut Mut. L. Ins. Co.* v. *Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236; *McGahey* v. *Virginia*, 135 U. S. 693, 34 L. ed. 314, 10 Sup. Ct. Rep. 972; Cooley, Const. Lim. 285, 286; *Lightfoot* v. *Cole*, 1 Wis. 26; *Von Baumbach* v. *Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Starkweather* v. *Hawes*, 10 Wis. 125; *Cornell* v. *Hichens*, 11 Wis. 368; *Streubel* v. *Milwaukee & M. R. Co.* 12 Wis. 67; *Oatman* v. *Bond*, 15 Wis. 20; *State ex rel. Soutter* v. *Madison*, 15 Wis. 30; *Paine* v. *Woodworth*, 15 Wis. 298; *Hasbrouck* v. *Shipman*, 16 Wis. 296; *Selsby* v. *Redlon*, 19 Wis. 17; *Nelson* v. *Rountree*, 23 Wis. 367; *Sydnor* v. *Palmer*, 32 Wis. 406; *Northwestern Mut. L. Ins. Co.* v. *Neeves*, 46 Wis. 147, 49 N. W. 832; *Lee* v. *Buckheit*, 49 Wis. 54, 4 N. W. 1077; *Rosenthal* v. *Wehe*, 58 Wis. 621, 17 N. W. 318; *Hall* v. *Banks*, 79 Wis. 229, 48 N. W. 385; *Second Ward Sav. Bank* v. *Schrank*, 97 Wis. 250, 39 L. R. A. 569, 73 N. W. 31, 37; *Eau Claire Nat. Bank* v. *Macauley*, 101 Wis. 304, 77 N. W. 176; *Peninsular Lead & Color Works* v. *Union Oil & Paint Co.* 100 Wis. 488, 42 L. R. A. 331, 76 N. W. 359; *Bronson* v. *Kinzie*, 1 How. 311, 11 L. ed. 143; *McCullough* v. *Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

Where the charter of a corporation required service of process on its president, a subsequent statute authorizing service on other officers did not impair the contract.

*Cairo & F. R. Co.* v. *Hecht*, 95 U. S. 168, 24 L. ed. 423.

A law authorizing service of process on the mayor or clerk may be changed to require service on the mayor, without impairing the obligation of a contract.

*Perkins* v. *Watertown*, 5 Biss. 320, Fed. Cas. No. 10,991.

Modifications of proceedings, imposing either increased burdens or increased time, have been recognized as a legitimate exercise of the legislative power over remedies and procedure.

*Von Baumbach*, v. *Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Starkweather* v. *Hawes*, 10 Wis. 125; *Lee* v. *Buckheit*, 49 Wis. 54, 4 N. W. 1077; *Relyea* v. *Tomahawk Paper & Pulp Co.* 102 Wis. 301, 78 N. W. 412; *Vance* v. *Vance*, 108 U. S. 514, 27 L. ed. 808, 2 Sup. Ct. Rep. 854; *Clark* v. *Martin*, 49 Pa. 299.

[438] *Mr. Justice **Harlan** delivered the opinion of the court:

This case presents a question under the clause of the Constitution of the United States which prohibits a state from passing a law impairing the obligation of contracts.

The question arose upon demurrer by the defendant, the city of Oshkosh, to the complaint filed against it on the 16th day of June, 1900, by the Oshkosh Waterworks Company, a municipal corporation of Wisconsin. The principal ground of demurrer was that the complaint did not state facts sufficient to constitute a cause of action.

The complaint set forth two causes of action, on the first one of which the company claimed a judgment for $4,085, which was alleged to be due from the city under an agreement made between it and the company on June 18th, 1883, in reference to the building and maintaining by the company of a waterworks plant for supplying water for domestic and fire purposes, and the renting of public fire hydrants.

On the second cause of action the company asked a judgment for $1,060, which amount was claimed under an agreement of the 31st day of August, 1891, having reference to the company's extensions of its then-existing mains, and the rentals to be paid by the city for hydrants to be located on such extensions.

After the contract of 1883 was made, the charter of the city was amended and revised,—the revision taking effect March 23d, 1891. *The revised charter contained [439] certain provisions as to suits against the city, imposing on suitors conditions or restrictions that did not previously exist.

The company insisted that the revised charter could not be applied to this suit without impairing the obligation of its contracts with the city. This view was rejected by the state court, the demurrer was sustained, and the suit dismissed.

The general principles which must control in determining whether a state enactment impairs the obligation of contracts have become so firmly established by the decisions of this court that any further discussion of their soundness would be inappropriate. It is only necessary to recall them, and then ascertain their applicability to the particular state legislation now alleged to be repugnant to the Constitution of the United States.

It is well settled that while, in a general sense, the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing. It is true the legislature may not withdraw all remedies, and thus, in effect, destroy the contract; nor may it impose such new restrictions or conditions as would materially delay or embarrass the enforcement of rights under the contract according to the usual course of justice as established when the contract was made. Neither could be done without impairing the obligation of the contract. But it is equally well settled that the legislature may modify or change existing remedies, or prescribe new modes of procedure, without impairing the obligation of contracts, provided a substantial or efficacious remedy remains or is given, by means of which a party can enforce his rights under the contract. *Green* v. *Biddle*, 8 Wheat. 1, 85, 5 L. ed. 547, 568; *Bronson* v. *Kinzie*, 1 How. 311, 317, 11 L. ed. 143, 145; *Planters' Bank* v. *Sharp*, 6 How. 301, 327, 12 L. ed. 447, 458; *Walker* v. *Whitehead*, 16 Wall. 314, 317, 21 L. ed. 357; *Murray* v. *Charleston*, 96 U. S. 432, 438, 24 L. ed. 760; *Edwards* v. *Kearzey*, 96 U. S. 595, 601, 24 L. ed. 793, 796; *Vance* v.

*Vance*, 108 U. S. 514, 518, 27 L. ed. 808, 810, 2 Sup. Ct. Rep. 854; *McGahey* v. *Virginia*, 135 U. S. 685, 693, 34 L. ed. 312, 314, 10 Sup. Ct. Rep. 972; *Barnitz* v. *Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; *McCullough* v. *Virginia*, 172 U. S. 102, 104, 43 L. ed. 382, 383, 19 Sup. Ct. Rep. 134. The decisions of the supreme court of Wisconsin as to what are to be deemed [440] laws impairing the obligations *of contracts are in harmony with the decisions of this court. *Lightfoot* v. *Cole*, 1 Wis. 26, 34; *Von Baumbach* v. *Bade*, 9 Wis. 559, 76 Am. Dec. 283; *Paine* v. *Woodworth*, 15 Wis. 298; *Northwestern Mut. L. Ins. Co.* v. *Neeves*, 46 Wis. 147, 49 N. W. 832; *Lee* v. *Buckheit*, 49 Wis. 54, 4 N. W. 1077; *Rosenthal* v. *Wehe*, 58 Wis. 621, 17 N. W. 348.

Having these principles in view, we proceed to inquire whether the revised charter of Oshkosh so changed existing remedies for the enforcement of contract rights against municipal corporations as to impair the obligation of the contract made in 1883 between the waterworks company and the city.

By the act of the Wisconsin legislature revising and amending the charter of the city of Oshkosh, that municipal corporation was made capable of suing and being sued in all courts of law and equity. 2 Wis. Laws 1883, p. 687, chap. 1, § 1. The same act provided that all moneys, credits, and demands of the city should be under the control of the common council, and "be drawn out only upon the order of the mayor and city clerk, duly authorized by the vote of the common council." 2 Wis. Laws 1883, p. 724, chap. 7, § 1. It was further provided that "any account or demand against the city, before acted on or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law, and any person who shall falsely swear to any such amount or demand shall be deemed guilty of perjury, and shall be punished according to law." 2 Wis. Laws 1883, p. 726, chap. 7, § 10.

The supreme court of Wisconsin, in its opinion, states that, except for the above restrictions upon the payment of money, the city of Oshkosh was, in 1883, subject to be sued upon contract liability like any private person or corporation.

But by the city's amended charter of 1891 certain changes were made, and the question is whether those changes, if applied to the contract of 1883, would impair its obligation. 2 Wis. Laws 1891, p. 321, chap. 59.

The revised charter retained substantially the above provisions in the charter of 1883, and the following, among other, additions, were made:

[441] *"Sec. 4. No action shall be maintained by any person against the city, upon any claim or demand, until such person shall first have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part: *Provided*, That the failure of such common council to pass upon such claim within sixty days after the presentation thereof shall be deemed a disallowance thereof.

"Sec. 5. The determination by the common council, disallowing in whole or in part any claim, shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision of such common council, as in this act provided.

"Sec. 6. Whenever any claim against the city shall be disallowed in whole or in part by the common council, such person may appeal from the decision of such common council, disallowing said claim, to the circuit court of the county in which the city is situated, by causing a written notice of such appeal to be served on the clerk of the city within twenty days after making the decision disallowing such claim; and by executing a bond to the city in the sum of $150, with two sureties, to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of such appeal, and the payment of all costs that shall be adjudged against the appellant in the circuit court. The clerk, in case such appeal is taken, shall make a brief statement of the proceedings had in the case before the common council, with its decision thereon, and shall transmit the same, together with all the papers in the case, to the clerk of the circuit [court] of the county. Such case shall be entered, tried, and determined in the same manner as cases originally commenced in such court: *Provided, however*, That whenever an appeal is taken from the allowance made by the common council upon any claim, and the recovery upon such appeal shall not exceed the amount allowed by the common council, exclusive of interest upon such allowance, the appellant shall pay the costs of appeal, which shall be deducted from the amount of the recovery; and when the amount of costs exceeds the amount recovered, judgment *shall be rendered against [442] the appellant for the amount of such excess." 2 Wis. Laws 1891, p. 412, chap. 21, § 6.

It is not alleged in the complaint that the waterworks company, before commencing this action, presented its claims to the common council for allowance.

The company contends that, if the above provisions are construed to mean what the supreme court of Wisconsin have declared similar provisions in other municipal charters to mean, then such burdens and restrictions have been imposed upon the enforcement of its contract with the city of Oshkosh as to impair its obligation. This suggestion renders it necessary to ascertain the import of those decisions.

In *Drinkwine* v. *Eau Claire*, 83 Wis. 428, 430, 53 N. W. 673, it appeared that Drinkwine preferred a claim against the city of Eau Claire, which was disallowed by the common council. He appealed from that action of the council, and executed a bond which recited that he had appealed to *the circuit court of Eau Claire county*, and

conditioned for the payment of all costs that should be adjudged against him by *the court aforesaid*, and not generally by *the court*, as prescribed by the statute. It was contended that the bond was insufficient, since, in the event of a change of venue in the case, the surety would not be bound by a judgment for costs in the court that actually tried the case. After referring to prior cases in that and in other courts, particularly to *Sharp* v. *Bedell*, 10 Ill. 88, in which it had been held that if an appellant failed to comply substantially with the requirements of the statute in relation to the perfecting of appeals, the circuit court did not acquire jurisdiction of the person of the opposite party or of the subject-matter, and should dismiss the appeal, the supreme court of Wisconsin said: "The liability of a surety is *strictissimi juris*, and cannot be extended by implication. He has a right to stand on the exact words of his contract. . . . The deviation from the statutory requirement is one of substance. The surety may have been quite willing to enter into the engagement to pay the costs, if the appellant should be defeated on a trial in Eau Claire county, in the city where the alleged cause of action arose, and quite unwilling to undertake for the [443] payment *of the costs, in like event, of a trial in a distant county, greatly increased by the travel of witnesses and the costs of subpœnaing them. A similar ruling in *Myres* v. *Parker*, 6 Ohio St. 502-504, sustains the conclusion at which we have arrived, that the bond under consideration is not a substantial compliance with the statute." The ruling in the *Drinkwine Case* was reaffirmed in *Oshkosh Waterworks Co.* v. *Oshkosh*, 106 Wis. 85, 81 N. W. 1040, and in other cases.

In *Mason* v. *Ashland*, 98 Wis. 540-547, 74 N. W. 357, 359, it was held that, under the charter of the city of Ashland, the right of appeal from the disallowance of a claim by the common council was perfect at the expiration of sixty days from the filing of the claim with its clerk, and that the claimant "was obliged to exercise it within the twenty days allowed by statute, or be forever barred from thereafter prosecuting his claim in any court,"—citing *Fleming* v. *Appleton*, 55 Wis. 90, 12 N. W. 462, and *Koch* v. *Ashland*, 83 Wis. 361, 53 N. W. 674.

In *Telford* v. *Ashland*, 100 Wis. 238, 75 N. W. 1006, it was adjudged that, as the objection that the appeal was not taken within twenty days after the adverse action of the council goes to the jurisdiction of the subject-matter, it may be raised for the first time in the appellate court.

In *Seegar* v. *Ashland*, 101 Wis. 515, 77 N. W. 880, it was held that under a provision in a city charter to the effect that in case any person presented his claim or demand against the city, which the common council disallowed in whole or in part, the council "shall not again consider or allow such claim," its failure to act upon a claim within sixty days after being presented was equivalent to a disallowance,—the right to appeal therefrom expiring in twenty days after such disallowance.

Accepting these decisions as our guide in determining the meaning and effect of the provisions in the revised charter of Oshkosh, we perceive no reason for holding that the change in remedies made by that charter impair, in the constitutional sense, the obligation of the contract of 1883 between the waterworks company and the city.

The requirement that a claim or demand against the city should be presented to the common council and be disallowed, *in whole [444] or in part, before the city can be subjected to suit upon it, is a reasonable regulation for the protection of the city against the cost of unnecessary litigation. It does not affect the substance of the creditor's right, without being unreasonably delayed, to institute an action against the city. It only stays his hand until the city has full opportunity to look into his claim before paying or refusing to pay it. Nor does the above regulation unduly obstruct the creditor; for by it the city is, in effect, allowed only sixty days for such examination, and the creditor is protected against a vexatious or indefinite delay by the provision that the failure of the council, for sixty days, to pass upon the claim shall be deemed a disallowance thereof, and the creditor may at once appeal to the circuit court of the county. In that court the necessary issues can be framed, under the direction of the court, and according to the usual modes of pleading, and the rights of the parties judicially ascertained and enforced.

Equally without merit is the objection to that clause of the revised charter making the disallowance of a claim, in whole or in part, by the council, final and conclusive unless an appeal be taken to the circuit court of the county within a prescribed time. We take it that the purpose of that provision was to protect the public against the dangers attending persistent and frequent applications to the common council after it had once acted, and to compel claimants to proceed with promptness while all the facts connected with their demands were fresh in the minds of the members of the council. This is a wholesome regulation, of which no creditor can justly complain, since the charter enables him, without serious delay, after the disallowance of his claim, to invoke the jurisdiction of a court of general jurisdiction for the enforcement of such claim.

But it is earnestly insisted by the waterworks company that the provision requiring an appeal from the disallowance of a claim to be perfected within twenty days thereafter is so unreasonable, in the matter of time, as, by its necessary operation, to impair the obligation of its contracts with the city. We cannot assent to this view. The time within which the creditor must perfect his appeal is undoubtedly short. But it is *sufficient for the purpose of ena- [445] bling him to get his case, with reasonable despatch, into the circuit court and have its judgment as to his claim against the city,

with the same right that other litigants have to take the case to the highest court of the state. Here again is disclosed the purpose of the legislature to bring to a speedy conclusion all disputes as to claims against the city. It surely was competent for the legislature to effect such an object, and it cannot be said, as matter of law, that a provision requiring the creditor, within twenty days after the disallowance of his claim, to serve notice of appeal on the city clerk, materially affects or obstructs the presentation of his claim to the proper circuit court.

Objection is also made to the requirement in the new charter that the appeal bond shall be approved by both the city attorney and comptroller. In support of that objection it is said that one or the other or both of those officers *might* be absent from the city at the time the bond is tendered by the creditor; also, that one or both of them *might* object to the bond when he ought to accept it as sufficient. But these contingencies may never arise. They certainly have not arisen in respect of the claim of the waterworks company, for it is not alleged that the company ever presented its claim to the common council for allowance, and consequently had no occasion to tender the city attorney and comptroller an appeal bond. Besides, it is not at all clear that the revised charter requires, as a condition of the right to appeal, that a bond be executed by the creditor within twenty days after the disallowance of his claim by the common council. It does expressly require that the notice of appeal shall be served within that time on the clerk of the city, but no such absolute requirement is made as to the time within which the appeal bond must be executed. It may be that a construction that would defeat the creditor's appeal, because of the absence of the city attorney and comptroller, or either of them, at the time a bond is tendered for their approval, or a refusal to approve a bond that was sufficient, would make the revised charter, in its application to such a case, repugnant to the contract clause of the Constitution. But no such case is now pre-[446]sented, and no such question *as that suggested need be now decided. It should not be assumed that the right of appeal will be lost where the creditor has done all that was required in order to perfect his appeal. As the waterworks company does not allege that it presented its claim to the common council for allowance, it is not in a position to ask a judicial determination of a question that cannot arise in this case.

Another objection remains to be noticed. It is founded on the decision in *Drinkwine* v. *Eau Claire*, 83 Wis. 428, 430, 53 N. W. 673, in which it was held that the appeal bond provided in the charter of Eau Claire must relate to costs as adjudged by the circuit court, and not by the circuit court of any named county. We have seen what were the reasons that governed the supreme court of Wisconsin in so interpreting a provision similar to the one here in question in the revised charter of the city of Oshkosh. If that interpretation was, as suggested, too technical, it would not follow that the charter thus construed would impair the obligation of contracts. It would be extraordinary if this court should hold the new remedies and modes of procedure provided by the revised charter to be illegal because of the possibility that a creditor might, by mistake or carelessness, execute a bond not conditioned, as required by that charter, for the payment of the costs adjudged by the circuit court, generally, but by a named circuit court.

As to the contention that the obligation of the contract of August 31st, 1891, was impaired by the revised charter, it is sufficient to say that that charter went into operation March 23d, 1891. The contract of 1891 was a new contract, independent of that of 1883, and the waterworks company could not, therefore, say that its obligation was impaired by a statute in force at the time the contract was made. The contract clause of the Constitution of the United States has reference only to a statute of a state enacted after the making of the contract whose obligation is alleged to have been impaired. *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 391, 30 L. ed. 1059, 1060, 7 Sup. Ct. Rep. 916; *Pinney* v. *Nelson*, 183 U. S. 144, 147, 46 L. ed. 125, 127, 22 Sup. Ct. Rep. 52; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 351, 46 L. ed. 936, 943, 22 Sup. Ct. Rep. 691. If, however, the agreement of 1891 had such connection with that of 1883 that they may be regarded as one agreement, *then what has [447] been said as to the application of the revised charter to the contract of 1883 applies, in all respects, to that of 1891. The obligation of neither contract was impaired by the charter of 1891.

We have noticed all the points that require consideration, and adjudge, therefore, that the changes made by the revised charter of Oshkosh, in respect of remedies for the enforcement of claims against that city, provided for its creditors a substantial and adequate remedy, and therefore did not impair the obligation of contracts with that municipal corporation.

*The judgment of the Supreme Court of Wisconsin must be affirmed.*

It is so ordered.

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PACIFIC STEAM WHALING COMPANY,
*Appt.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 447-454.)

*Appeal—from order granting license.*

A proceeding to obtain from the district court of the United States for the district of Alaska the license for ocean and coastwise vessels plying in Alaskan waters prescribed by the act of Congress of March 3, 1899, § 460 (30 Stat. at L. 1253, 1336, chap. 429), is not

an action or suit in which a final judgment can be rendered from which petitioners can appeal to the Supreme Court of the United States, although their petition is coupled with a protest against being compelled to take out such a license.

[No. 26.]

*Argued December 8, 1902. Decided January 5, 1903.*

APPEAL from the District Court of the United States for the District of Alaska to review an order entered in a proceeding to obtain a license for ocean and coastwise vessels plying in Alaskan waters. *Affirmed.*

See same case below, 99 Fed. 334.

Statement by Mr. Justice **Brewer:**

Section 460 of the act of March 3, 1899 (30 Stat. at L. 1253, 1336, chap. 429), entitled "An Act to Define and Punish Crimes in the District of Alaska, and to Provide a Code of Criminal Procedure for Said District," reads:

[448] *"That any person or persons, corporation or company, prosecuting, or attempting to prosecute, any of the following lines of business within the district of Alaska shall first apply for and obtain license so to do from a district court, or a subdivision thereof in said district, and pay for said license for the respective lines of business and trade as follows, to wit:"

Then follows a list of forty-two callings and occupations, among which, applicable to the present case, are the following:

"Fisheries: Salmon canneries, four cents per case; salmon salteries, ten cents per barrel; fish-oil works, ten cents per barrel; fertilizer works, twenty cents per ton.

. . . . . .

"Ships and shipping: Ocean and coastwise vessels doing local business for hire plying in Alaskan waters, one dollar per ton per annum on net tonnage, custom-house measurement of each vessel."

Section 461 makes it a misdemeanor to engage in any of the occupations referred to without first obtaining a license. Section 463 reads:

"That the licenses provided for in this act shall be issued by the clerk of the district court or any subdivision thereof, in compliance with the order of the court or judge thereof duly made and entered; and the clerk of the court shall keep a full record of all applications for license, and of all recommendations for and remonstrances against the granting of licenses and of the action of the court thereon. The clerk of the court shall be entitled to receive from each applicant for a license a fee of five dollars, and no other or additional compensation shall be paid such clerk for his services in connection with such license or the issue thereof: *And provided*, That the clerk of said court and each division thereof shall give bond or bonds in such amount as the Secretary of the Treasury may require, and in such form as the Attorney General may approve, and all moneys received for licenses by him or them under this act shall be covered into the Treasury of the United States, under such rules and regulations as the Secretary of the Treasury may prescribe."

On July 6, 1899, the Pacific Steam Whaling Company filed in *the district court of [449] the United States for the district of Alaska a petition entitled:

"In the Matter of the Application of the Pacific Steam Whaling Company for a license for the steamship Wolcott, the steamship Excelsior, the steamship Newport, and the steamer Golden Gate, and canneries, and protest thereon."

It alleged that the petitioner was the owner of the steamships Wolcott, Excelsior, Newport, and Golden Gate, engaged in doing a local business for hire in Alaskan waters, and was also engaged in the business of carrying on salmon canneries at certain named points in the district. It denied that it was subject to any license for the prosecution of either business, notwithstanding the provisions of the statute referred to; that, in view of the stringent penalties provided in that statute for carrying on business without the required license, it made the following protest: That the steamships were taxed as its property in the port of San Francisco, California, of which state the petitioner was a corporation, and was therefore not subject to a license tax in the district of Alaska; that a license fee at the rate of $1 per ton, together with the tax charged in California against the petitioner, made a double tax, and was unreasonable, exorbitant, oppressive, and amounted to the taking of petitioner's property without due process of law; that the title of the act under which this license section was found had no reference to the granting of a license for the prosecution of a lawful business, and the provisions of the act, so far as they purport to require the payment of license fees, are vague, unintelligible, and doubtful, so that it cannot be reasonably inferred that Congress intended to require their payment, and that §§ 460 and 461 of the act were contrary to the provisions of §§ 8 and 9 of article 1 of the Constitution of the United States, and therefore null and void. The prayer of the petitioner was as follows:

"1. That the said court first try and determine the matter as to whether or not it is necessary for the said petitioner to pay into court any license or sum of money whatsoever as provided under said act.

"2. That if said court shall determine that your petitioner *with respect to said [450] steamships Wolcott, Excelsior, Newport, and Golden Gate should first pay the said license fee required under said act in your court, before the trial and determination of said cause and matters herein set out, that the same be held by the clerk until the trial and determination of the matters and facts set forth herein.

"3. That if the court determines that a license in the meantime should be granted to the said steamships, or either of them, as ocean and coastwise vessels, and doing local business for hire, plying in Alaskan waters,

that such license be so granted and said money so held by the clerk of the court under protest as aforesaid, subject to the further action of this honorable court."

This petition was verified by the oath of the attorney of the petitioner. A copy of the petition was served upon the United States district attorney for the district of Alaska, the amount of the license fees was deposited with the clerk of the court, and a final order entered on January 2, 1900, which directed the clerk to issue the license and turn the money deposited into the Treasury of the United States, adding: "So far as said protestants seek relief against the payment of a license on the several businesses therein described, the same is overruled, denied, and ignored in each case of protest." An appeal was allowed by the district judge, and a transcript of the record filed in this court on August 15, 1900.

*Mr.* **S. M. Stockslager** argued the cause, and, with *Messrs. George C. Heard, John R. Winn,* and *John G. Heid,* filed a brief for appellant.

*Solicitor General* **Richards** argued the cause and filed a brief for appellee. *Assistant Attorney General Beck* also filed a brief for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

The proceeding in this case is a novel one, [451] and the first question *is whether there was any action or suit—any case within the constitutional provision, art. 3, § 2, extending the judicial power of the United States "to all cases, in law and equity, arising under this Constitution"—in which was entered a final judgment or decree such as entitled the petitioner to an appeal. "A case is a suit in law or equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the Constitution, laws, or treaties of the United States, it is within the judicial power confided to the Union." 2 Story, Const. § 1646; *Osborn* v. *Bank of United States,* 9 Wheat. 738, 819, 6 L. ed. 204, 223. Here a petition was filed, which was in form an application for a license, with a protest that the petitioner ought not to be compelled to take one out. The application was granted, and the petitioner could certainly not appeal from an order granting that which he asked for. The application, it is true, was coupled with a protest, but who ever heard of an appeal being sustained from a protest? There was no suit against the clerk to restrain him from receiving the license money. He was not made a party, entered no appearance and no decree was rendered for or against him.

The power to grant licenses was by the statute vested in the district court, or a judge thereof. Giving an interpretation to the petition the most favorable to the petitioner, it was an application to a tribunal having judicial functions to restrain itself from the discharge of administrative duties. It is contended that the nature of the proceeding is not changed by uniting judicial functions and administrative duties in the same tribunal; that it is the same as though such functions and duties were exercised by different bodies or officers, and that it is to be treated as though it was an application to a judicial tribunal to restrain a different and administrative officer from the discharge of administrative duties. Congress, it is said, cannot, by imposing both sets of duties upon the same tribunal, deprive a party of a right which he would have if those duties were intrusted to different officials. If we are justified in giving this interpretation to the proceeding we meet the familiar doctrine that an injunction will not lie to *re- [452] strain the collection of a tax on the mere ground of its illegality. *Dows* v. *Chicago,* 11 Wall. 108, 20 L. ed. 65; *Hannewinkle* v. *Georgetown,* 15 Wall. 547, 21 L. ed. 231; *State Railroad Tax Cases,* 92 U. S. 575, *sub nom. Taylor* v. *Secor,* 23 L. ed. 663; *Milwaukee* v. *Koeffler,* 116 U. S. 219, 29 L. ed. 612, 6 Sup. Ct. Rep. 372. And this is true whether these taxes are local or general, or, if general, whether internal revenue or direct taxes. Indeed, in respect to internal revenue taxes § 3224, Revised Statutes [U. S. Comp. Stat. 1901, p. 2088], specifically provides: "No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Something more than mere illegality is necessary to justify the interference of a court of equity. But it does not appear that the tax if unpaid would cast a cloud upon the title to any real estate, or work irreparable injury. While it may be that the failure to pay the tax would expose the petitioner to a multiplicity of prosecutions for misdemeanor, yet neither the district court, nor the judge, nor the clerk, initiates criminal proceedings, and the district attorney—the prosecuting officer—was not made a party to the suit. True, an order was entered that he be notified of the pendency of the application, and he appeared as *amicus curiæ.* Even had he been made a party, would equity entertain a bill to restrain criminal prosecutions? *Re Sawyer,* 124 U. S. 200, 31 L. ed. 417, 8 Sup. Ct. Rep. 482; *Harkrader* v. *Wadley,* 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; *Fitts* v. *McGhee,* 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

It is said that unless this application can be sustained the petitioner is without remedy, and that there is no wrong without a remedy. While, as a general statement, this may be true, it does not follow that it is without exceptions, and especially does it not follow that such remedy must always be obtainable in the courts. Indeed, as the government cannot be sued without its consent, it may happen that the only remedy a party has for a wrong done by one of its officers is an application to the sense of justice of the legislative department. Still, we must not be understood as deciding that the only remedy in this case was an appeal to Congress. It was held in *Elliott* v. *Swartwout,* 10 Pet. 137, 157, 9 L. ed. 373, 381, that, under the law as it stood at that time, Congress having made no special pro-

vision, where a collector had charged excessive duties, and the party paying them, in order to get possession of his goods, accom-
[453] panied the *payment by a declaration to the collector that he intended to sue him to recover back the amount erroneously paid and by a notice not to pay it over to the Treasury, an action could be maintained against the collector for the excessive charge. The court said that the question as to the right to recover must be answered in the affirmative, "unless the broad proposition can be maintained that no action will lie against a collector to recover back an excess of duties paid him; but that recourse must be had to the government for redress. Such a principle would be carrying an exemption to a public officer beyond any protection sanctioned by any principles of law or sound public policy." See also *Cary* v. *Curtis*, 3 How. 236, 11 L. ed. 576; *Curtis* v. *Fiedler*, 2 Black, 461, 17 L. ed. 273. In *Erskine* v. *Van Arsdale*, 15 Wall. 75, 21 L. ed. 63, a case of internal revenue taxes, it was said by Chief Justice Chase (p. 77, L. ed. p. 64): "Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them." And in *State Railroad Tax Cases*, 92 U. S. 613, *sub nom. Taylor* v. *Secor*, 23 L. ed. 673, Mr. Justice Miller observed: "The government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the general government, which in both branches is founded upon the idea of appeals within the executive departments. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid." *Patton* v. *Brady*, 184 U. S. 614, 46 L. ed. 717, 23 Sup. Ct. Rep. 493. By the statute the clerk is made the collector of the license taxes, and if this tax was illegal and paid under protest, and nothing in this or other legislation of Congress restricts such an action, very likely under these authorities an action would lie against him for the money thus wrongfully taken from the petitioner.

It may be, also, that an action could be maintained in the court of claims, or in one of the circuit or district courts of the United States, under the Tucker act, to recover di-
[454] rectly *from the United States. *Doolcy* v. *United States*, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762. But we are not called upon to decide what remedy by suit or action, if any, the petitioner may have. It is enough now to hold, as we do, that this novel proceeding was not a suit or action in which a final decree or judgment was rendered from which the petitioner could take an appeal to this court.

*The order of the District Court is affirmed.*

The CHIEF JUSTICE took no part in the decision of this case.

PACIFIC COAST STEAMSHIP COMPANY, *Appt.*,
*v.*
UNITED STATES. (No. 29)

PACIFIC COAST STEAMSHIP COMPANY, *Appt.*,
*v*
UNITED STATES. (No. 30)

PACIFIC COAST STEAMSHIP COMPANY, *Appt.*,
*v.*
UNITED STATES. (No. 31)

(See S. C. Reporter's ed. 454.)

*Appeal—from order granting license.*

These cases are governed by the decision in *Pacific Steam Whaling Co* v. *United States*, *ante*, 253.

[Nos. 29, 30, 31.]

*Argued December 8, 1902. Decided January 5, 1903.*

APPEALS from the District Court of the United States for the District of Alaska to review orders entered in proceedings to obtain licenses for ocean and coastwise vessels plying in Alaskan waters. *Affirmed.*

See same case below, 99 Fed. 334.

*Mr.* **S. M. Stockslager** argued the cause, and, with *Messrs. George C. Heard, John R. Winn*, and *John G. Heid*, filed a brief for appellant.

*Solicitor General* **Richards** argued the cause and filed a brief for appellee. *Assistant Attorney General Beck* also filed a brief for appellee.

Mr. Justice **Brewer** delivered the opinion of the court:

These three cases are substantially similar to the one just decided, and for the reasons stated in the opinion therein *the orders of the District Court in each are affirmed.*

The CHIEF JUSTICE took no part in the decision of these cases.

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*A. W. CORBUS, *Appt.*, [455]
*v.*
ALASKA TREADWELL GOLD MINING COMPANY.

(See S. C. Reporter's ed. 455-465.)

*Equity—suit by stockholder against corporation—collusion — irreparable injury—demand on directors.*

A suit in equity by a stockholder against the corporation to restrain it from paying an Alaskan license tax was properly dismissed,

NOTE.—*As to the right of stockholders to sue on right of action existing in the corporation*—see note to Mack v. De Bardeleben Coal & I. Co. (Ala.) 9 L. R. A. 650.

where the corporation made no serious defense, and there was no showing of irreparable injury or of any effort to secure action by the corporation or its directors, as is required by equity rule 94, other than a demand on the resident managing agent, the distance of such directors from the place where plaintiff resides and in which the court is held being relied upon as an excuse for not making any further effort.

[No. 10.]

*Argued April 25, 1901. Ordered for reargument April 29, 1901. Reargued December 8, 1902. Decided January 5, 1903.*

APPEAL from the District Court of the United States for the District of Alaska to review a decree dismissing a suit by a stockholder against the corporation to restrain it from paying a tax. *Affirmed.*

See same case below, 99 Fed. 334.

Statement by Mr. Justice **Brewer:**

This, like the preceding cases, was brought to prevent the payment of an Alaskan license tax. The method pursued was, however, different. It is a suit in equity brought by a stockholder against a corporation—the stockholder and the corporation being the sole parties plaintiff and defendant—to restrain it from paying the tax. Notice was given to the United States district attorney of the pendency of the suit, who appeared as *amicus curiæ*, and, disclaiming any intention of, in any manner, representing or binding the United States, [456] denied the jurisdiction *of the court, its right to enjoin the defendant from paying the license, and argued in favor of the constitutionality of the law.

The bill alleged that the defendant was incorporated under the laws of the state of Minnesota, and engaged in mining and milling ore in the district of Alaska, with an office and manager in the district; that "the general control of the affairs of said company is intrusted to a board of directors who reside in San Francisco, state of California, and are nonresidents of the district of Alaska; that the complete control and management of the affairs of said company in Alaska are under the supervision and control of its general superintendent and manager. J. P. Corbus."

It is further averred that the company by its general superintendent in Alaska is intending to pay the license tax which, for the year beginning July 1, 1899, amounted, with the clerk's fee, to the sum of $1,875. After denying the legality of the tax the bill proceeds:

"Your orator further shows that this suit is not a collusive one, brought to confer jurisdiction of the case upon this court, of which it would not otherwise have cognizance; that your orator has not been able, because of the great distance at which the directors of said company reside, to request them to refuse to pay said tax and to apply for said license, but has made such request of the officers or agents of said company controlling its business in Alaska, but they have failed and refused not to make such application and pay such tax, for the reason that, though they doubt the constitutionality of said law, the pains and penalties imposed by said act for the omission so to do are so severe that said company and its said officers and agents fear, and have reason to fear, the great loss and injury in defending prosecution that might be brought against it for the failure to comply with said law; that they deem it better to submit to the legal tax than to incur the consequences of the failure to comply with it; that your orator is advised that there is no procedure provided by law whereby said company could test the validity of said law and the constitutionality of said tax without incurring the pains and penalties therein provided for *the violation thereof, inasmuch as [457] the said act requires the voluntary payment of the tax imposed under a penalty of heavy forfeiture and fines for the failure to make such voluntary payment; that the said company, in view of the foregoing, has refused and still refuses and intends omitting to comply with complainant's demand to refuse to pay said tax, and has resolved and determined and intends to comply with all and singular the provisions of said chapter 44 of said act of Congress, and to pay said tax upon its stamps and upon its said mercantile establishment, amounting to the said sum of $1,875 for the said year, and to continue the payment of a like or greater sum for each year hereafter.

"Your orator further shows that if said company and its officers, as they have proposed and declared their intention to do, shall pay said tax, the assets of the said company will be thereby diminished and lessened, as well as the dividends to be declared upon the stock thereof, and the value of the shares of said company, including the shares owned by your orator and all others in whose behalf this suit is brought; and your orator further shows that this involves more than the sum of $5,000; that, unless the company should comply with said act, or this court grant the relief herein prayed for, the said company would be exposed to a multiplicity of suits and prosecutions for the violation of said act, and would be put to great expense and suffer irreparable injury in defending said suits and avoiding the fines and forfeitures provided by the said act, and its assets and the value of its shares would be thereby greatly lessened, to the great and irreparable injury and damage to your orator and other shareholders in said company."

A demurrer to the bill was sustained, and a decree entered dismissing the suit. A single opinion was filed by the district judge in disposing of all of these tax cases. In that opinion, and with special reference to the present case, he said:

"In the cases at bar the district attorney, so far as he had the right to do so, the government not being a party to the suits, raised, not only the question of the jurisdiction of the court because the plaintiffs had a plain, speedy, and adequate remedy *at [458] law, but insisted that the suits were of a

friendly nature, collusive in character, and brought for the sole purpose of conferring jurisdiction upon the court, to the end that the defendants might escape paying the license fee imposed by law. And when all the facts are taken together, as disclosed by the record, some color is lent to the latter contention. Take the case of *Corbus* v. *Alaska Treadwell Gold Min. Co.* The bill was filed July 17, the subpœna served July 19, commanding the defendant to answer the bill within twenty days. No appearance was made by defendant, however, and no pleading filed until November 15, nearly four months after the filing of the bill, and not until about the time the matter was called up for hearing, when a demurrer was interposed. Counsel for defendant did not contend for his demurrer, made no argument, and filed no brief in support of the same, and in the very nature of the case the interests of the plaintiff and defendant are identical. Then, if the object and purpose of the suit is solely to test the constitutionality of the law without first paying into the United States Treasury the amount of the license tax (and there can be no other object), and if the court will sustain the plaintiff and enjoin the defendant as prayed, how is the private citizen to avail himself of a similar remedy? Who shall enjoin him and save him from paying his tax until the constitutionality of the law is determined? And if he cannot avail himself of this manner of suit, why should corporations or copartnerships be permitted to do so? Why should not corporations and individuals have and be permitted to exercise identically the same legal rights and remedies under the law?" [99 Fed. 338.]

From the decree of dismissal the plaintiff appealed to this court.

*Mr.* **L. T. Michener** for appellant on original argument. *Messrs. W. W. Dudley, J. T. Malony,* and *J. H. Cobb* were with him on the brief.

No counsel for appellee.

*Mr.* **S. M. Stockslager** for appellant on reargument. *Messrs. George C. Heard, John R. Winn,* and *John G. Heid* were with him on the brief.

*Solicitor General* **Richards** for the United States on reargument. *Assistant Attorney General Beck* also filed a brief for the United States.

[459] *Mr. Justice **Brewer** delivered the opinion of the court:

The thought suggested by the quotation from the opinion of the district judge impresses us forcibly. Evidently the plaintiff patterned his proceeding upon *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673. But that case does not determine to what extent a court of equity will permit a stockholder to maintain a suit nominally against the corporation but really for its benefit. *Hawes* v. *Oakland,* 104 U. S. 450, *sub nom. Hawes* v. *Contra Costa Water Co.* 26 L. ed. 827, is pertinent in this direction. In that case a citizen of New York, a stockholder in the Contra Costa Waterworks Company, a California corporation, filed his bill in the circuit court of the United States for the district of California against the city of Oakland, the waterworks company, and its directors. The gravamen of the bill was that the city claimed and received from the company without compensation a supply of water for all municipal purposes whatever; that the claim had no legal foundation, and that such supply without compensation resulted in a diminution of the dividends which should come to the plaintiff and other stockholders, and a decrease in the value of their stock. The bill further alleged that the plaintiff applied to the directors to desist from such illegal practice and take immediate proceedings to prevent the city from taking water from the waterworks without compensation, but that they declined to do so, and threatened to continue to furnish water to the city of Oakland free of charge for all municipal purposes, as had theretofore been done. To this bill the company and its directors failed to make answer or other defense. The city of Oakland filed a demurrer, which was sustained and the bill dismissed, and from such decree the case was appealed to this court. The opinion, which is too long to quote in full, opens with these observations (pp. 452, 453, L. ed. p. 829):

"Since the decision of this court in *Dodge* v. *Woolsey,* 18 How. 331, 15 L. ed. 401, the principles of which have received more than once the approval of this court, the frequency with which the most ordinary and usual chancery remedies are sought in the Federal courts by a single stockholder of a corporation who *possesses the requisite citi- [460] zenship, in cases where the corporation whose rights are to be enforced cannot sue in those courts, seems to justify a consideration of the grounds on which that case was decided, and of the just limitations of the exercise of those principles.

"This practice has grown until the corporations created by the laws of the states bring a large part of their controversies with their neighbors and fellow citizens into the courts of the United States for adjudication, instead of resorting to the state courts, which are their natural, their lawful, and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another state. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enforce or to protect. He instantly demands of them to do their duty in this regard, which, of course, they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a court of chancery; namely, one against his own company

of which he is a corporator, for refusing to do what he has requested them to do, and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the circuit court of the United States, because he is a citizen of a different state, though the real parties to the controversy could have no standing in that court. If no nonresident stockholder exists, a transfer of a few shares is made to some citizen of another state, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference, at the same time that he answers to the merits. In either event the whole case is prepared [461] for hearing *on the merits, the right of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction."

After a full discussion, with the citation of many authorities, the conclusion is summed up in these words (pp. 460, 461, L. ed. p. 832):

"We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—

"Some action, or threatened action, of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the *shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances; or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." See also *Detroit* v. *Dean*, 106 U. S. 537-542, 27 L. ed. 300, 302, 1 Sup. Ct. Rep. 560; *Quincy* v. *Steel*, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520.

While this case is unlike that in that it does not attempt to transfer from a state to a Federal court a controversy which really belongs in the former,—there being none other than Federal courts in the territory,—yet the principle is the same, for it is an effort to secure for the benefit of the corporation an injunction which it could not itself obtain, and which no individual similarly situated can obtain.

Immediately after announcing the decision in *Hawes* v. *Oakland*, 104 U. S. 450, *sub nom. Hawes* v. *Contra Costa Water Co.* 26 L. ed. 827, this court promulgated an additional equity rule (rule 94):

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action."

*It must not be understood that a mere [463] technical compliance with the foregoing rule is sufficient, and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation. This court will examine the bill in its entirety, and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit. The directors represent all the stockholders, and are presumed to act honestly and according to

their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs. As said in *Dodge v. Woolsey*, 18 How. 344, 15 L. ed. 400: "The circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought."

It appears from the bill that the capital stock of the corporation is divided into 200,000 shares of the par value of $25 each, of which the plaintiff is the owner of 100 shares; that the total annual tax, including fees, amounts to $1,875, which results in a charge upon the plaintiff's interest of less than $1 a year. This would scarcely be a case of "irremediable injury or a total failure of justice," as indicated in next to the last paragraph of the quotation from the opinion of this court in *Hawes v. Oakland*. Indeed, the tax upon the company of $3 a stamp for each of the 540 stamps used by it in the crushing and reduction of ore does not [464] appear to be such as threatens *ruin to the company. It does not appear from the bill that any other stockholder shares with the plaintiff his belief in the illegality of the tax, or objects to its payment by the corporation, although, of course, it may be assumed that every person is willing to be relieved from the payment of a tax if other parties will bring about that relief without any trouble to himself.

Again, as suggested by the district judge in his opinion, the plaintiff could not maintain an injunction suit to restrain a similar tax upon himself, and why should he be permitted to secure a relief to the corporation (of which he is a minor stockholder) which he could not secure for himself individually? Are corporations the favored parties in respect to the enforcement of taxes? And when the assistance of a court of equity is invoked, the purpose of the suit and the object which is sought to be accomplished are frequently matters which may properly be considered. Not only is it the general rule that equity will not restrain the collection of a tax on the mere ground of its illegality, but also, as appears by its legislation, Congress has attempted to enforce that rule and to require payment of a tax by the party charged therewith before inquiry as to its validity will be permitted. See *Pacific Steam Whaling Co. v. United States*, 187 U. S. 447, *ante*, 253, 23 Sup. Ct. Rep. 154. Now, before a court of equity will in any way help a party to thwart this intent of Congress, it should affirmatively and clearly appear that there is an absolute necessity for its interference in order to prevent irreparable injury. No considerations of mere convenience are sufficient. And if the party primarily and directly charged with a tax is unable to make a case for the interference of a court of equity, no one subordinately and indirectly affected by the tax should be given relief unless he shows, not merely irreparable injury to the tax debtor as well as to himself, but also that he has taken every essential preliminary step to justify his claim of a right to act in behalf of such tax debtor. We have seen how small the burden of this tax is upon the plaintiff, and how comparatively light it is upon the corporation,—how far short it comes of anything like irretrievable ruin. It is clearly an attempt to thwart, in behalf of this corporation, the obvious purpose of Congress, that a tax must be paid before its validity is *challenged. Under those circumstances, [465] a court of equity should scrutinize with the utmost care the conduct of the plaintiff, and see that he has done everything which ought to have been done to secure action by the corporation and its directors, and justify under the assumption of a controversy between himself and the corporation his prosecution of a litigation for its benefit.

It appears affirmatively that no demand has been made on the directors to protect the corporation against this alleged illegal tax. The only demand shown is that upon the managing agent of the corporation in charge of the business in Alaska, and the excuse is that the directors (living in San Francisco) are too far away to be reached by notice. The act went into effect March 3, 1899, and this bill was filed July 17, 1899. The rule requires that the plaintiff must set forth with particularity the efforts made by him to secure action by the directors. It does not appear that he made any effort to secure such action, but he relies simply on the distance of the directors from the place where he resides and in which the court is held, as an excuse for not applying to them. We are of opinion that the excuse is not sufficient. He should at least have shown some effort. If he had made an effort, and obtained no satisfactory result, either by reason of the distance of the directors, or by their dilatoriness or unwillingness to act, a different case would have been presented, but to do nothing is not sufficient. For aught that the bill discloses, he may have been in San Francisco from the time of the passage of the act until he left to come to Alaska for the purpose of bringing this suit. The district judge, in his opinion, said that the facts disclosed by the record lend color to the contention that the suit was collusive. In addition to the matters pointed out by him, it may also be stated that since the case was brought to this court the company has

not appeared by counsel in either brief or argument.

Putting all these things together, we are of opinion that the action of the District Court in dismissing the suit was right, and *it is affirmed.*

The CHIEF JUSTICE took no part in the decision of this case.

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[466] *CHARLES STEWART, *Appt.*,
*v.*
WASHINGTON & ALASKA STEAMSHIP COMPANY *et al.*

(See S. C. Reporter's ed. 466.)

*Equity—suit by stockholder against corporation—demand on directors.*

A stockholder cannot maintain an equitable suit against the corporation, its president, and treasurer, to restrain it from paying certain taxes, where no showing of the residence of the directors, or of any application to them or to such president and treasurer to take action to relieve from the burden of the taxes, is made.

[No. 13.]

*Argued December 8, 1902. Decided January 5, 1903.*

APPEAL from the District Court of the United States for the District of Alaska to review a decree dismissing a suit by a stockholder to restrain a corporation from paying certain taxes. *Affirmed.*

See same case below, 99 Fed. 334.

*Mr.* **S. M. Stockslager** argued the cause, and, with *Messrs. George C. Heard, John R. Winn,* and *John G. Heid,* filed a brief for appellant.

No counsel for appellee.

*Solicitor General* **Richards** argued the cause and filed a brief for the United States. *Assistant Attorney General Beck* also filed a brief for the United States.

Mr. Justice **Brewer** delivered the opinion of the court:

This case resembles the preceding, in that it was a suit by a stockholder to restrain a corporation from paying certain taxes. The corporation, its president, and treasurer, were made defendants. The bill alleges that the two officers reside in the city of Tacoma, in the state of Washington; that to them is intrusted the general control and management of the business of the corporation. Where the directors reside is not shown and there is no averment of any application to the directors, or to the president and treasurer, to take action to relieve from the burden of the taxes. Under these circumstances, *the District Court properly dismissed the suit, and its judgment is affirmed.*

The CHIEF JUSTICE took no part in the decision of this case.

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*HARTFORD FIRE INSURANCE COMPANY, *Petitioner*, [467]
*v.*
ALBERT A. WILSON and JOHN B. LARNER, Trustees.

(See S. C. Reporter's ed. 467-479.)

*Fire insurance—conditional delivery of policy.*

The operative effect of a policy of fire insurance may, by oral agreement, between the agents respectively of the insurance company and the insured, made at the time the policy was issued, be made to depend upon the company's acceptance of the risk, notwithstanding various provisions of the policy restricting the powers of agents to alter its terms, and requiring all additional terms and conditions to be indorsed thereon in writing, as such provisions apply only when the contract has been completed by an absolute delivery.

[No. 79.]

*Argued November 10, 1902. Decided January 5, 1903.*

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which reversed a judgment of the Supreme Court of the District in favor of defendant in an action upon policies of fire insurance, and remanded the cause, with directions to enter judgment for the plaintiffs. *Reversed* and remanded, with instructions to enter a judgment affirming the judgment of the trial court.

See same case below, 17 App. D. C. 14.

Statement by Mr. Justice **Brewer:**

This case was commenced in the supreme court of the District of Columbia by Albert A. Wilson and John B. Larner, trustees, against the Hartford Fire Insurance Company to recover upon two policies of insurance, charged to have been executed and delivered by the company to the plaintiffs on April 17, 1895, and insuring certain property of the Ivy City Brick Company, for the benefit of the trustees, the plaintiffs. The declaration alleged the destruction by fire of the property on May 17, 1895, notice of the loss to the company, and its refusal to pay. After the pleadings had been completed the case was submitted to the court upon an agreed statement of facts. The facts agreed upon, so far as they are perti-

NOTE.—*As to the right of stockholders to sue on right of action existing in the corporation*—see note to Mack v De Bardeleben Coal & I. Co. (Ala.) 9 L. R. A. 650.

NOTE.—*On conditional delivery of policy of insurance*—see Harnickell v. New York L. Ins. Co. (N. Y.) 2 L. R. A. 150, and note.

nent to the questions presented, are as follows:

"1. Prior to April 17, 1895, C. C. Duncanson, treasurer of the Ivy City Brick Company of the city of Washington, D. C., authorized the firm of Tyler & Rutherford, of [468] said city, at their *request, to place insurance for the company, loss, if any, payable to Albert A. Wilson *et al.*, trustees under a deed of trust given by said company, as interest might appear, said Duncanson averring the amount to be placed to be the sum of ten thousand dollars ($10,000), and Tyler & Rutherford averring a much larger sum.

"On said April 17, 1895, said Tyler & Rutherford, under the aforesaid authority, proposed to one Barrett, an agent, at said city of Washington, of the Hartford Fire Insurance Company, of Hartford, Connecticut, for insurance on properties of the said Ivy City Brick Company.

"2. Said Barrett stated to said Tyler & Rutherford that the proposed risk was a special hazard, and that he doubted his authority to accept it before reference to his principal, but that he would issue policies amounting to $2,000, equally divided on the buildings and machinery, upon the condition that the same should be held by said Tyler & Rutherford, and not delivered to their principals until the decision of the Hartford Fire Insurance Company on the acceptance of the risk was duly had, and should be subject to immediate cancelation (the five-days' notice in the policy conditions being waived) by notice that said company rejected the risk.

"3. This condition was accepted by said Tyler & Rutherford, and the two policies of insurance in the declaration set forth were thereupon written and placed in their hands.

"4. A short time thereafter, to wit, on the 27th day of April ensuing on the first inspection visit to Washington after the issue of said policies, William R. Royce, the special agent of the Hartford Fire Insurance Company, known by said Tyler & Rutherford to be the representative of the company, having authority to inspect, confirm, or cancel risks for and in behalf of said company, went to the office of said Tyler & Rutherford and informed them that the Hartford Fire Insurance Company refused to carry the risk, and ordered the cancelation of the said policies, and on the same day the said Barrett, being on his way to the office of Tyler & Rutherford, met R. K. Tyler, a member of that firm, who had made the negotiation for the policies, had the same in his custody, and had exclusive [469] charge *of the matter, and announced to him that the company ordered their cancelation; to which the said Tyler responded, 'All right; send up and get them.'

"5. The said Barrett sent three times to the office of Tyler & Rutherford for the policies. Each time his employee was informed by one of the clerks of Tyler & Rutherford that Mr. R. K. Tyler, who had charge of the policies, was absent from the office, and they would have to see him.

"6. Said Barrett was taken sick and did not appear at his office for some days, but had immediately ordered the entry clerk to make the customary entry in such cases on the register where the policies were noted, 'Canceled by order of the company,' which was accordingly done.

"7. On the 1st day of May ensuing the customary mutual accounts of business between the offices of said Barrett and said Tyler & Rutherford were settled, and the two policies were treated as dead, no charge for their premiums being presented on the one hand or asked for on the other.

"8. The existence of the two policies was never reported to the said Duncanson, nor to anyone connected with said Ivy City Brick Company by mortgage or otherwise, nor did he or they have any knowledge of or connection with said policies until they came into the hands of said Duncanson on May 16, 1895, and at no time prior to the fire had any party connected with or interested, by mortgage or otherwise, in the Ivy City Brick Company, any knowledge of the transaction between said Barrett and said Tyler & Rutherford hereinbefore set forth.

"9. The two policies had been overlooked by Tyler & Rutherford, and lay in the drawer along with a number of other policies issued by other insurance companies which had been secured by said Tyler & Rutherford for the purpose of filling the above order. Of this fact no one connected with the Ivy City Brick Company in any interest whatever was informed until after the fire.

"10. Tyler & Rutherford had found great difficulty in procuring the desired insurance, and aver that the entire amount proposed was never secured. Some of the agencies insisted on the same conditions as to cancelations as those fixed between *said [470] Barrett and said Tyler & Rutherford, and cancelations by orders of the different companies were so frequent that said Tyler & Rutherford could not at any time before May 16 know how much of binding insurance was in hand. Of all these facts the said R. K. Tyler avers that he informed the said Duncanson in the progress of the effort to secure insurance and some time prior to the fire. The said Duncanson denies that he had information as to any of these facts at any time prior to the fire, except the fact that there was difficulty in procuring the desired insurance. No specific mention, however, of the two policies of the defendant was made to said Duncanson or anyone connected in any interest with the Ivy City Brick Company.

"11. On the 16th of May, 1895, a clerk of Tyler & Rutherford was directed to make up the account of the policies on hand and put them in a package for delivery. The two policies of the Hartford Fire Insurance Company, which had been overlooked and were then lying in the same drawer with the other policies, taken in fulfilment of this order, were included in the account and placed in the package with said other policies by said clerk of Tyler & Rutherford without the personal knowledge of said Tyler &

Rutherford, and both were handed to said Duncanson by said R. K. Tyler, said Tyler not examining the same. Said Duncanson took the package and engaged to pay the account on the Monday week following, to wit, May 27, 1895.

"12. On the morning of May 17, after the fire, which occurred about 1 o'clock A. M., on that day, said R. K. Tyler came to said Duncanson and asked for the return of the two policies, stating that they had been handed him by mistake and the fact of their previous cancelation, said Tyler averring that he did not know that the property described as insured had been destroyed. Later, on that day, when the fact was known that the property described in the policies was destroyed, Tyler & Rutherford, by telephone, informed the Washington Loan & Trust Company, the beneficiary of the trust held by Wilson *et al.*, trustees, that the Hartford policies had been delivered by mistake, and requested it to send back the two policies, and were answered that they were locked up, but would be returned the next morning.

[471] *"Of this request and answer by the telephone it is agreed that the Ivy City Brick Company knew nothing at the time, and when informed of said request directed that the policies be not returned. The policies were not returned, and sundry correspondence followed between said Tyler & Rutherford, said Duncanson, and the Washington Loan & Trust Company, in the course of which said Duncanson sent a check to Tyler & Rutherford for the settlement of the account above referred to. Tyler & Rutherford refused said settlement, stating that the two policies of the Hartford were void and had been sent in by mistake, and returned the check, with a corrected account, excluding these policies. The correspondence between said Duncanson, said Tyler & Rutherford, and said Washington Loan & Trust Company and the policies sued on may be filed with this statement and considered as part of this agreed case."

The policies, which are alike, contained the following provisions:

Underwriters' Policy.

No. 20,229. $1,000.

By this policy of insurance the Hartford Fire Insurance Company, of the city of Hartford, in the state of Connecticut, in consideration of the stipulations herein named and of seventeen and 50-100 dollars premium, does insure Ivy City Brick Company for the term of one year from the 17th day of April, 1895, at noon, to the 17th day of April, 1896, at noon, against all direct loss or damage by fire, except as hereinafter provided, to an amount not exceeding one thousand dollars, to the following described property, while located and contained as described herein, and not elsewhere, to wit: Ivy City Brick Company. $1,000. On machinery of every description, dryers, cars, apparatus, equipments, and tools, contained in their one-story brick and frame structure with metal roof (about 118x165 feet) and one-story frame and brick addition with metal roof. Situate on their tract known as "Ivy City," about one mile northeast of Washington, D. C. Other concurrent insurance permitted without notice until required. Loss, if any, payable as interest may appear to Albert A. Wilson and John B. Larner, trustees. (Mortgagees' clause with full contribution attached.) *Attached to and made a part of [472] policy No. 20,229 of the N. Y. Underwriters' agency.

Thos. F. Barrett, Agent.

. . . . .

This policy shall be canceled at any time at the request of the insured, or by the company, by giving five days' notice of such cancelation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium.

. . . . .

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have the power to waive any provision or condition of this policy except such as by the terms of this policy may be subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached.

In witness whereof, this company has executed and attested these presents this seventeenth day of April, 1895.

This policy shall not be valid until countersigned by the duly authorized agent of the company at Washington, D. C.

Geo. L. Chase, President.
P. C. Royce, Secretary.
Thos. Turnbull,
Ass't Secretary.
Chas. E. Chase,
2d Ass't Secretary.

Countersigned by—
Thos. F. Barrett, Agent.

*Upon these facts, judgment was, on De- [473] cember 13, 1899, entered in favor of the defendant. This judgment was taken on appeal to the court of appeals of the District and by that court on June 12, 1900, reversed, and the case remanded with directions to enter judgment for the plaintiffs. 17 D. C. App. 14. Thereupon the case was brought here upon certiorari. 181 U. S. 617, 45 L. ed. 1030, 22 Sup. Ct. Rep. 945.

*Mr.* **Samuel B. Paul** argued the cause, and, with *Mr. Alexander Wolf*, filed a brief for petitioner:

The manual delivery of an instrument may always be proved to be on a condition which has not been fulfilled, in order to avoid its effect.

*Burke* v. *Dulaney*, 153 U. S. 228, 38 L. ed. 698, 14 Sup. Ct. Rep. 816.

This rule applies to policies of insurance. *Millville Mut. M. & F. Ins. Co.* v. *Collerd*, 38 N. J. L. 480.

Restrictions and limitations of the power of insurance agents, contained in a policy of insurance, operate only after the policy has been delivered and accepted.

*Harnickell* v. *New York L. Ins. Co.* 111 N. Y. 390, 2 L. R. A. 150, 18 N. E. 632.

*Mr.* **Henry P. Blair** argued the cause and filed a brief for respondents:

The condition connected with the nondelivery to the principals was an attempted modification which, by the terms of the policy, was a provision, agreement, or condition to be indorsed thereon or added thereto, but which could in no way affect their rights under valid subsisting contracts.

The possession of the policies by parties whose agency was limited to procuring the insurance does not relieve the company from its obligations, under the terms of the policies, to the assured named therein.

*Grace* v. *American Cent. Ins. Co.* 109 U. S. 278, 27 L. ed. 932, 3 Sup. Ct. Rep. 207.

Mr. Justice **Brewer** delivered the opinion of the court:

The question is whether at the time of the fire there was a valid and subsisting contract of insurance. The negotiations in respect to the policies were not between the insurer and the insured directly, but between agents of each. As shown by paragraphs 2 and 3 of the agreed statement of facts, the agent of the insurer delivered the policies to the agent of the insured upon a condition, which was agreed to by both. That condition failed, notice of which was given by the former to the latter, accepted by the latter as putting an end to the policies, and the former notified to come and get the policies. Several times the former went to the office of the latter to receive the policies, but failed to obtain them owing to the absence of the latter from his office. Both agents treated the policies as dead, and no charge for premiums was presented on the one hand or asked for on the other. Unintentionally the policies were on the day before the fire handed in a package with other papers to the treasurer of the Ivy City Brick Company.

In view of these facts thus agreed upon, the question, broadly stated above, narrows itself to one whether there can be a conditional delivery of a policy of insurance. If there can be, then (as there is no question of estoppel and as there was a failure of the condition) these policies had no binding [474]force at *the time of the fire. That as to contracts generally there can be a conditional delivery, and that the failure of the condition prevents the contract from taking effect, is not doubted. In this court the question is at rest. *Burke* v. *Dulaney*, 153 U. S. 228, 238, 38 L. ed. 698, 701, 14 Sup. Ct. Rep. 816, 820. That was an action brought on a promissory note executed and delivered by the defendant to the plaintiff, and it was held, reversing the trial court, competent to show a parol agreement between the parties made at the time of the delivery of the note that it should not become operative as a note until the maker could examine the property for which it was given and determine whether he would purchase it. Mr. Justice Harlan, delivering the opinion, reviewed several authorities and summed up by stating that, "according to the evidence so offered and excluded, the writing in question never became, as between Burke and Dulaney, the absolute obligation of the former, but was delivered and accepted only as a memorandum of what Burke was to pay in the event of his electing to become interested in the property, and from the time he so elected, or could be deemed to have so elected, it was to take effect as his promissory note, payable according to its terms. His election, within a reasonable time, to take such interest, was made a condition precedent to his liability to pay the stipulated price. The minds of the parties never met upon any other basis, and a refusal to give effect to their oral agreement would make for them a contract which they did not choose to make for themselves." See also *Quebec Bank* v. *Hellman*, 110 U. S. 178, 28 L. ed. 111, 4 Sup. Ct. Rep. 76.

If an instrument containing an absolute promise to pay may be conditionally delivered it is difficult to perceive any good reason why an instrument containing a promise to pay upon a contingency may not likewise be conditionally delivered. If the failure of the condition in the one case prevents the instrument from becoming definitely operative, why not in the other? The rule as to conditional delivery and the effect of a failure of the condition has not been limited to promissory notes, but has often been applied to other instruments, as, for instance, a deed of land, *Leppoc* v. *National Union Bank*, 32 Md. 136; *Clark* v. *Gifford*, 10 Wend. 310; a *sight draft, *Benton* v. *Martin*, 52 N. Y. 570; a guaranty, *Belleville Sav. Bank* v. *Bornman*, 124 Ill. 200, 16 N. E. 210; *Merchants' Exch. Bank* v. *Luckow*, 37 Minn. 542, 35 N. W. 434. [475]

But, coming closer to the case at bar, let us see what has been decided in respect to insurance policies. In *Brown* v. *American Cent. Ins. Co.* 70 Iowa, 390, 30 N. W. 647, the plaintiff applied to an agent of the defendant for a policy of fire insurance. The agent doubted his authority to insure the particular property, but executed a policy therefor, and, with the consent of the plaintiff, placed it, after receiving the premium, in the hands of a third party to hold until he could communicate with his principal and ascertain whether the risk would be accepted. The defendant refused to accept the risk. The property was destroyed by

fire before the notice of its refusal had been received. The court held that there was no delivery of the policy save upon the condition that the insurance company accepted the risk, and that, as it did not accept it, the policy never became operative.

In *Millville Mut. M. & F. Ins. Co.* v. *Collerd*, 38 N. J. L. 480, Perrin, the lessee of Collerd, the owner of a mill, applied for fire insurance, as required by his lease. Three policies, each in a different company, were sent him by the insurance agent to whom he had applied. He retained the policies, paying the premium on two, and sent word to the agent to the effect that he would look into the standing of the other company, and if satisfied about that would pay the premium on its policy. The property having been destroyed by fire before any notice or other action by him, he went to the agent and offered to pay the premium, which the latter declined to accept. In an action on the policy it was held that the company was not liable. In the course of the opinion the court said (p. 483) that Perrin "merely held the policy in his possession until he could examine it; or, to use his own expression, 'look into the standing of the company.' He distinctly refused to accept the policy and settle for it, until he was satisfied. This was, in effect, postponing the delivery, the acceptance, and the payment of the premium until a future time, and to this the company, by their agent, Buckley, [476] assented. *The condition for prepayment remained, and the company was entitled to notice of acceptance and prepayment of the premium before the contract for insurance was complete. After Perrin had rejected the policy it remained in his hands, not as an executed contract of insurance, but as a proposal to insure which he must accept by payment of the premium, before the company would be bound."

In *Harnickell* v. *New York L. Ins. Co.* 111 N. Y. 390, 2 L. R. A. 150, 18 N. E. 632, the plaintiff, who was the owner of several policies of life insurance issued by different companies, was applied to by the agent of the defendant to take out policies in his company. The result of the negotiations between the plaintiff and the agent was an agreement to take out policies in the defendant company, providing he could surrender the policies he already had to the companies issuing them and obtain satisfactory surrender values thereof. In pursuance of an application duly prepared by the agent and signed by the plaintiff, the defendant company issued two policies, and sent them to its agent. The latter, under the agreement, delivered them to the plaintiff, who gave two notes and a check in payment therefor, which were returned by the agent of the company. The plaintiff, having after some effort failed to make any satisfactory arrangement with the other companies, returned the policies to the defendant and demanded a surrender of his notes and the check. The company declining to make such surrender, this action was brought, and it was held that the policies were delivered only conditionally, that the condition had failed, and that, therefore, the plaintiff could rightfully surrender the policies and obtain a return of his notes and check. The opinion of the court in that case was delivered by Judge Peckham, now a justice of this court, and in it, after referring to the agreement, it was said (p. 398, L. R. A. p. 153, N. E. p. 635):

"This, we think, was clearly a condition precedent to the full delivery and acceptance of these policies issued by the defendant, and until such condition precedent was complied with or waived, no fully executed and valid contract of insurance existed between these parties."

See also *Nutting* v. *Minnesota F. Ins. Co.* 98 Wis. 26, 73 N. W. 432.

*In the case at bar the learned justice of [477] the court of appeals, who delivered the opinion of the majority, after referring to other cases of conditional delivery (some of which we have noticed in this opinion), stated as a reason for distinguishing this case:

"The contracts and instruments involved in those cases are very different from the policies of insurance sued upon. These are elaborate instruments and abound in stipulations and conditions. Among these, note the following, that is embraced in the general clause recited in the preliminary statement: 'This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto."

"This and other clauses, limiting the powers of agents and requiring all additional terms and conditions to be indorsed in writing upon the policies, were devised by the insurance company, itself, to prevent questions concerning the conditions upon which its policies shall be 'made and accepted' from being left to the vagueness and uncertainty of oral proof.

. . . . . .

"The condition in this case was one in addition to those contained in the policies and upon which they were 'made and accepted,' and was not in writing indorsed upon them or executed simultaneously therewith.

"Our conclusion is that, by reason of the nature and terms of the policies, it is not competent to show their delivery to the insured upon a verbal condition, making their existence as contracts depend upon the subsequent ratification of another agent."

The argument is that because the policies contained various stipulations restricting the power of the agent, it is incompetent to prove that the contract never came into operative force by a final unconditional delivery. But these stipulations apply only to a contract which has become executed, and do not apply where the contract has not been completed by an absolute delivery of the instrument. No instrument could be more absolute than a promissory note, yet it is clear from the *authorities that parol [478] evidence is admissible to explain its possession by the payee, and show that that possession was not the result of a final delivery, but only of one upon condition, and also that the condition failed. Possession

cannot be conclusive upon the question of delivery. Otherwise, a possession wrongfully, even feloniously, obtained would bind a party to a contract when, perchance, much remained to be done before the maker was ready to assume the obligations of the contract. There is no stipulation in this policy which either in terms or by implication forbids such a transaction as was in fact had between these two agents. There is no attempt, by parol testimony, to contradict any stipulations of the policy, something which we have recently held cannot be done. *Northern Assur. Co.* v. *Grand View Bldg. Asso.* 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133. With reference to this question, we quote approvingly from *Harnickell* v. *New York L. Ins. Co.* 111 N. Y. 398, 399, 400, 2 L. R. A. 153, 18 N. E. 635, 636:

"The provisions contained in the policies, which are above quoted, relate to the policies themselves after they should become executed instruments between the parties. All negotiations had before such event, and all parol agreements between the assured and the agent of the defendant, would have been merged in the contract evidenced by the policies themselves had the negotiations been carried out as intended, and such policies been absolutely delivered to and accepted by the plaintiff. Hence, any oral representation or statements made by the agent of the company, and not contained in the contract of insurance, would have formed no part thereof, and could not have been insisted upon by the plaintiff as against the defendant company. . . . Insurance companies may, with entire propriety, provide in the same manner as the defendant provided in the policies in question, in cases where the contract of insurance becomes executed. There it is highly necessary and important for the company to know exactly how far they are bound and the entire nature of the contract which has been made between them and the assured. But an agreement between an individual and the agent of a company, by which the policy is accepted only upon [479] conditions relating to the same, *and an agreement to hold the policy until the performance of those conditions, or a failure to perform, cannot, as we think, result in any serious inconvenience to the company. But whether that is so or not cannot alter the right of an individual to refuse to be bound by a policy of insurance until he has absolutely received and accepted it."

For these reasons we are of opinion that the facts found show that there was no final and absolute delivery of the policies; that the condition upon which they were deposited with the agent of the insured failed, and, therefore, that at the time of the fire there was no subsisting contract of indemnity between the company and the insured.

*The judgment of the Court of Appeals is reversed,* and the case remanded to that court with instructions to set aside its judgment and enter one affirming the judgment of the trial court.

Mr. Justice **Brown** concurred in the result.

## MOBILE TRANSPORTATION COMPANY,
*Plff. in Err.,*
*v.*
## CITY OF MOBILE.

(See S. C. Reporter's ed. 479–491.)

*Error to state court — Federal question — vested rights—impairment of obligation of contract—Spanish land grants—evidence of grant—report of land commissioner.*

1. A writ of error to review a judgment of a state court adverse to a title claimed under a Spanish grant alleged to have been perfected under the treaty with Spain of February 22, 1819 (8 Stat. at L. 252), and a patent from the United States in alleged confirmation of such claim, will not be dismissed where the Federal questions so raised cannot be considered as frivolous and undeserving of notice.
2. The state of Alabama when admitted into the Union became entitled to the soil below high-water mark, under the navigable waters within the limits of the state, where it had not been previously granted.
3. No vested rights of owners of land adjacent to a tidal stream were disturbed by the Alabama act of January 31, 1867, granting to the city of Mobile so much of the shore and soil under such stream as is within the city boundaries, since such act amounts to no more than a declaration that the rights possessed by the state in such shore and soil were granted to such city.
4. A change of view by the highest court of a state with respect to the limit of private ownership upon tide waters does not raise a case under the contract clause of the Federal Constitution, which can be reviewed in the Supreme Court of the United States.
5. A supposition of a claimant under an alleged Spanish land grant, that such grant once existed and has been lost by time or accident, is no evidence of an actual grant.
6. A report of the Commissioner of Public Lands in favor of a claim under an alleged Spanish land grant is insufficient to render applicable the provisions of the treaty with Spain of February 22, 1819 (8 Stat. at L. 252), for the confirmation of such grants, where it contains no other description of the land granted than its area in arpents and the statement that it is situated on the Mobile river, but that no survey of the land existed.
7. Defenses, in an action in ejectment brought by a municipality in a state court, of estoppel, license, payment of taxes, the unconstitutionality of a state statute because the title does not describe its subject, want of power in the state to convey its title to the municipality, and the statute of limitations, —are of a local nature, and present no Fed-

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin. 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*As to title to land under water*—see note to Goff v. Cougle (Mich.) 42 L. R. A. 161.

*On the question of the title to land between high and low water marks*—see note to Waverly Water Front Improv. & Development Co. v. White (Va.) 45 L. R. A. 227.

eral question for review in the Supreme Court of the United States.

[No. 62.]

*Argued November 3, 1902. Decided January 5, 1903.*

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of a Circuit Court of that State in favor of the city of Mobile in an action in ejectment. *Affirmed.*

See same case below, 128 Ala. 335, 30 So. 645.

Statement by Mr. Justice **Brown:**

This was an action in ejectment brought in the state circuit court by the city of Mobile against the Mobile Transportation Company, to recover a portion of the shore and bed of the Mobile river in the city of Mobile, between high-water mark and the channel line or point of practical navigability.

In support of its title the city relied upon the following acts:

1. An act of Congress approved March 2, 1819, entitled "An Act to Enable the People of the Alabama Territory to Form a Constitution and State Government, and for the Admission of Such State into the Union on an Equal Footing with the Original States." 3 Stat. at L. 489, chap. 47.

2. An ordinance of the convention of Alabama adopted August 2, 1819, accepting the proposition offered by Congress. Ala. Code 1876, p. 68.

3. A resolution of Congress of December [481] 14, 1819, declaring *the admission of the state into the Union, with a Constitution which had been adopted by the state. 3 Stat. at L. 608.

4. An act of the general assembly of Alabama, approved January 31, 1867, entitled "An Act Granting the City of Mobile the Riparian Rights in the River Front." Acts of 1866–67, p. 307.

5. An act of the assembly, approved February 18, 1895, entitled "An Act to fix the Right of the City of Mobile to Certain Real Estate." Acts of 1894–95, p. 815.

6. An act approved December 5, 1896 (Acts 1896, p. 49), amending the last act.

Several acts respecting the incorporation of the city of Mobile, unnecessary to be considered, were also offered in evidence. It was admitted that defendant was in possession of the lands.

Defendant pleaded the statute of limitations, and offered in evidence certain "documents, legislative and executive, of the Congress of the United States, in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress," and particularly that relating to the claim of one Regis Bernoudy, who claimed under a Spanish grant made March 3, 1792, to Joseph Munora, together with evidence of the report of the Land Commissioner in favor of his claim, and a patent of the United States dated December 28, 1836, to the assignees of Bernoudy, wherein it was recited that the claim of Bernoudy (entered as No. 11) was affirmed, had been surveyed, and was by such title granted unto his assignees. The defendant also offered an unbroken chain of deeds from these assignees to the transportation company, as well as proof of an adverse possession of the lands described in the complaint, under a color of right, for twenty years before bringing suit.

All this evidence was excluded by the circuit court, whose action in that particular was affirmed by the supreme court of the state. 128 Ala. 335, 30 So. 645.

*Mr.* **Frederick G. Bromberg** argued the cause, and, with *Mr. Eugene H. Lewis*, filed a brief for plaintiff in error:

There is a line of decisions in the Alabama reports relating to the river front of Mobile, all of which have recognized private ownership of said front.

*Hagan* v. *Campbell*, 8 Port. (Ala.) 9, 33 Am. Dec. 267; *Mobile* v. *Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325; *Magee* v. *Doe ex dem. Hallett*, 22 Ala. 699; *Sullivan* v. *Spotswood*, 82 Ala. 163, 2 So. 716.

The general rule in Alabama has always been that the owner of lands bordering on a navigable river owned to the line of low-water mark.

*Webb* v. *Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289, 87 Ala. 670, 6 So. 408; *Williams* v. *Glover*, 66 Ala. 189; *Bullock* v. *Wilson*, 2 Port. (Ala.) 436; 3 Kent's Com. ed. 1854, note b, *430.

These decisions certainly constitute a rule of property in the nature of a contract with the owners of lands adjacent to the Mobile river, which is impaired by the recent rulings of the supreme court of Alabama, complained of in these proceedings.

*New Jersey* v. *Wilson*, 7 Cranch, 164, 3 L. ed. 303; *Fletcher* v. *Peck*, 6 Cranch, 87, 135, 3 L. ed. 162, 177; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

The test of a "tide" such as the law recognizes is a daily, regular rise and fall of the water, such as can be predicted with certainty.

*San Francisco* v. *Le Roy*, 138 U. S. 656, 34 L. ed. 1096, 11 Sup. Ct. Rep. 364.

The "bank" of a river is that space of rising ground above low-water mark, which is usually covered by ordinary high water.

3 Am. & Eng. Enc. Law, 2d ed. p. 784; *Howard* v. *Ingersoll*, 17 Ala. 780.

The "shore" is "that space of land on the borders of the sea, which is alternately covered and left dry by the rising and falling of the tide; or, in other words, that space between high and low water mark."

22 Am. & Eng. Enc. Law, 1st ed. p. 778; *Howard* v. *Ingersoll*, 17 Ala. 780.

A contract is impaired so as to give this court jurisdiction of a writ of error to a state court, when rights acquired under it are impaired by some subsequent statute which has been upheld or effect given to it by the state court.

*Bacon* v. *Texas*, 163 U. S. 216, 41 L. ed. 135, 16 Sup. Ct. Rep. 1023; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

The settled judicial construction of the Alabama act of January 31, 1867, and of the statute of limitations of that state, so far as rights were acquired thereunder by the plaintiff in error, is as much a part of the statute as the act itself; and the change of decision complained of in this proceeding is the same in its effect on the rights of plaintiff in error as a repeal or amendment by legislative enactment.

*Douglass* v. *Pike County*, 101 U. S. 677, 25 L. ed. 968; *Ohio Life Ins. & Trust Co.* v. *Debolt*, 16 How. 416, 14 L. ed. 997.

Proceedings under such statute, which, if taken before the adoption of U. S. Const. Amend. 14, would not have violated the Constitution, taken after the adoption, violate the Constitution if prohibited by the amendment.

*Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

This court is not bound to follow the construction of state statutes by state courts, where the question before it is the alleged impairment of a contract.

*McCullough* v. *Virginia*, 172 U. S. 109, 43 L. ed. 384, 19 Sup. Ct. Rep. 134; *Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199; *Orr* v. *Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213; *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. Rep. 643; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep 609.

A decision of a state court affecting riparian rights, which is opposed to the entire course of previous decisions in that state, will be disregarded by this court.

*Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

This court can look into the title, in arriving at the conclusion as to whether the Federal Constitution has been violated or not.

*Martin* v. *Hunter*, 1 Wheat. 357, 4 L. ed. 110; *Smith* v. *Maryland*, 6 Cranch, 291, 3 L. ed. 227.

Under the 8th article of the treaty between the United States and Spain, of February 22, 1819 (8 Stat. at L. 252), the title to lands which had been granted by the King of Spain was confirmed by force of the instrument itself.

*United States* v. *Percheman*, 7 Pet. 81, 8 L. ed. 615.

This article does not avoid surveys made after January 24, 1818, to locate grants before that time, although such grants contained no description of the place where they were to be located.

*United States* v. *Domingo Acosta*, 1 How. 24, 11 L. ed. 33.

The volumes of state papers are evidence to establish a chain of title to land.

*Watkins* v. *Holman*, 16 Pet. 55, 10 L. ed. 885; *Hall* v. *Doe ex dem. Root*, 19 Ala. 386; *Stewart* v. *Trenier*, 49 Ala. 492, 55 Ala. 458; *Doe ex dem. Pollard* v. *Greit*, 8 Ala. 932.

When the state was admitted into the Union, it agreed to treat the navigable waters of the state as its property; never to claim absolute ownership of them, but merely to assert the right of jurisdiction and control over them.

*Kemp ex dem. Pollard* v. *Thorp*, 3 Ala. 294; *Mobile* v. *Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325; *Stearns* v. *Minnesota*, 179 U. S. 223, 45 L. ed. 162, 21 Sup. Ct. Rep. 73.

The state only claims property in the shore as the representative of the public, for purposes entirely conservative of the usufruct therein, never destructive of it. This being the case it would seem necessarily to follow that the sovereign power can make no disposition of the shore, by grant or otherwise, prejudicial to the rights of those for whom it holds it in trust.

*Abbott* v. *Doe ex dem. Kennedy*, 5 Ala. 395; *Mobile* v. *Moog*, 53 Ala. 561; *People ex rel. Loomis* v. *Canal Appraisers*, 33 N. Y. 500; *Arnold* v. *Mundy*, 6 N. J. L. 1, 10 Am. Dec. 356.

The state does not hold land under navigable water in fee.

*Stockton* v. *Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 20; *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 452, 36 L. ed. 1018, 1042, 13 Sup. Ct. Rep. 110, 184 U. S. 77, 46 L. ed. 440, 22 Sup. Ct. Rep. 306.

*Messrs. Frederick G. Bromberg* and *William B. Putney* filed a brief for plaintiff in error in opposition to the motion to dismiss.

*Mr.* **Harry T. Smith** argued the cause, and, with *Mr. Gregory L. Smith*, filed a brief for defendant in error:

The report of Commissioner Crawford established that the commissioner made the report, but it did not establish the truth of any fact stated in the report, nor did the report set forth the existence of such a grant.

*Watkins* v. *Holman*, 16 Pet. 25, 10 L. ed. 873.

Such an alleged grant does not in any manner or to any extent strengthen the title of the patentee.

*Goodtitle* v. *Kibbe*, 9 How. 478, 13 L. ed. 223; *Shively* v. *Bowlby*, 152 U. S. 28, 38 L. ed. 341, 14 Sup. Ct. Rep. 548.

The alleged title of plaintiff in error is founded upon the report of the commissioner and act of Congress confirmatory thereof, and not upon any Spanish grant.

*Doe ex dem. Chastang*, v. *Dill*, 19 Ala. 421; *Hall* v. *Doe ex dem. Root*, 19 Ala. 378; *Menard* v. *Massey*, 8 How. 308, 12 L. ed. 1091; *Chastang* v. *Armstrong*, 20 Ala. 609.

A confirmation act passed by Congress in 1836 does not reach back to the original concession, and exclude grants of the same land made in the intermediate time, either by Congress itself, or a board of commissioners

or the district court acting under its authority.

*Les Bois* v. *Bramell*, 4 How. 449, 11 L. ed. 1051.

The treaty of 1819 with Spain confirms by its own language all grants of Spain theretofore made of lands in the territory which confessedly belonged to Spain,—that is, east of the Perdido river. As to lands west of that river, the treaty does not operate, for the United States has always resisted Spain's claim, and the treaty itself declares that Spain's claim was not valid.

*Garcia* v. *Lee*, 12 Pet. 511, 9 L. ed. 1176; *Pollard* v. *Files*, 2 How. 602, 11 L. ed. 395.

When a party has a complete title under the Spanish grant, no confirmation by the United States can add any strength to the title.

*Doe ex dem. Barbarie* v. *Eslava*, 9 How. 445, 13 L. ed. 209.

Perfect titles made by Spain before January 24, 1818, are intrinsically valid and exempt from the provision of the treaty between Spain and the United States ceding Florida; and they need no sanction from the legislature or judicial departments of this country.

*United States* v. *Wiggins*, 14 Pet. 350, 10 L. ed. 489.

The shores and beds of all navigable streams within the limits of the state became the property of the state by virtue of the act of its admission into the Union.

*Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565; *Goodtitle* v. *Kibbe*, 9 How. 471, 13 L. ed. 220; *Doe ex dem. Hallett* v. *Beebe*, 13 How. 25, 14 L. ed. 35; *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 688, 31 L. ed. 551, 8 Sup. Ct. Rep. 643; *Shively* v. *Bowlby*, 152 U. S. 55, 38 L. ed. 351, 14 Sup. Ct. Rep. 548; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* 168 U. S. 357, 42 L. ed. 500, 18 Sup. Ct. Rep. 157.

The supreme court of Alabama may take judicial knowledge of the fact that the tide ebbs and flows in the Mobile river throughout the city front.

12 Am. & Eng. Enc. Law, p. 169; *Walker* v. *Allen*, 72 Ala. 456; *Metzger* v. *Post*, 44 N. J. L. 77, 43 Am. Rep. 341; *Cash* v. *Clark County Auditor*, 7 Ind. 227.

The Federal court will not construe a grant bounded by a navigable stream as conferring any title below high-water mark, although the state may allow riparian rights below this.

*Packer* v. *Bird*, 137 U. S. 669, 34 L. ed. 820, 11 Sup. Ct. Rep. 210; *Shively* v. *Bowlby*, 152 U. S. 43, 38 L. ed. 347, 14 Sup. Ct. Rep. 548.

The modification of the common law has been a restriction, and not an extension, of the right of the riparian owner.

*Packer* v. *Bird*, 137 U. S. 666, 34 L. ed. 820, 11 Sup. Ct. Rep. 210; *Wright* v. *Seymour*, 69 Cal. 126, 10 Pac. 323.

Following the common law, all the authorities, except in states controlled by statutes, agree that the riparian ownership on tide waters extends only to high-water mark.

*Mobile* v. *Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325; *Goodtitle* v. *Kibbe*, 1 Ala. 403; *Kennedy* v. *Beebe*, 8 Ala. 914; *Doe ex dem. Pollard* v. *Greit*, 8 Ala. 941; *People* v. *Morrill*, 26 Cal. 357; *More* v. *Massini*, 37 Cal. 432; *Wright* v. *Seymour*, 69 Cal. 122, 10 Pac. 323; *Long Beach Land & Water Co.* v. *Richardson*, 70 Cal. 209, 11 Pac. 695; *Kimball* v. *Macpherson*, 46 Cal. 108; *East Haven* v. *Hemingway*, 7 Conn. 202; *Simons* v. *French*, 25 Conn. 352; *Middletown* v. *Sage*, 8 Conn. 221; *Chapman* v. *Kimball*, 9 Conn. 40, 21 Am. Dec. 707; *State* v. *Sargent & Co.* 45 Conn. 373; *Sullivan* v. *Moreno*, 19 Fla. 219; *Rivas* v. *Solary*, 18 Fla. 126; *Day* v. *Day*, 22 Md. 537; *Garitee* v. *Baltimore*, 53 Md. 432; *Martin* v. *O'Brien*, 34 Miss. 22; *Gough* v. *Bell*, 21 N. J. L. 157, 23 N. J. L. 624; *State, Roberts, Prosecutor*, v. *Jersey City*, 25 N. J. L. 525; *Stevens* v. *Paterson & N. R. Co.* 34 N. J. L. 532, 3 Am. Rep. 269; *Wheeler* v. *Spinola*, 54 N. Y. 385; *East Hampton* v. *Kirk*, 68 N. Y. 460; *Gould* v. *Hudson River R. Co.* 6 N. Y. 522; *People* v. *Tibbetts*, 19 N. Y. 523; *Roberts* v. *Baumgarten*, 110 N. Y. 380, 18 N. E. 96; *Bowlby* v. *Shively*, 22 Or. 410, 30 Pac. 154; *Parker* v. *Taylor*, 7 Or. 445; *Bailey* v. *Burges*, 11 R. I. 331; *Aborn* v. *Smith*, 12 R. I. 373; *Brown* v. *Goddard*, 13 R. I. 76; *Galveston* v. *Menard*, 23 Tex. 349; *Eisenback* v. *Hatfield*, 2 Wash. 236, 26 Pac. 539; *Harbor Line Comrs.* v. *State*, 2 Wash. 531, 27 Pac. 550; *Morse* v. *O'Connell*, 7 Wash. 117, 34 Pac. 426; *Allen* v. *Forrest*, 8 Wash. 702, 24 L. R. A. 606, 36 Pac. 971.

*Webb* v. *Demopolis*, 95 Ala. 125, 21 L. R. A. 62, 13 So. 289, is clearly distinguishable on the ground that there the land in question was upon a navigable river above the ebb and flow of the tide.

*Howard* v. *Ingersoll*, 17 Ala. 790.

To restrict the owner to high-water mark wherever there is such and the river is actually navigable is the logical rule and that which is approved by the Supreme Court of the United States.

*Barney* v. *Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Packer* v. *Bird*, 137 U. S. 671, 34 L. ed. 821, 11 Sup. Ct. Rep. 210.

*Mr. Justice **Brown** delivered the opin- [482] ion of the court:

1. Motion was made to dismiss this writ of error for the want of a Federal question, but in view of the fact that defendant's title depends upon a Spanish grant claimed to have been perfected under the treaty of 1819 between the United States and the King of Spain (8 Stat. at L. 252), and a patent of the United States dated December 28, 1836, in alleged confirmation of such claim, we do not see how such motion can be sustained, unless upon the theory that the Federal questions so raised are frivolous and undeserving of further notice. We are of opinion that they cannot be so considered, and the motion to dismiss must therefore be denied.

There are fifty-eight assignments of error, none of which require separate consideration, since all turn upon the respective titles of the parties to the land in question.

As the plaintiff in an action of ejectment is bound to recover upon the strength of his own title, we shall first consider the several objections made to the title of the city.

2. That the state of Alabama, when admitted into the Union, became entitled to the soil under the navigable waters, below high-water mark within the limits of the state, not previously granted, was so conclusively settled by this court in *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565, as to need no further consideration. This was also an action of ejectment for lands below high-water mark in the city of Mobile. The plaintiffs insisted that, by the compact between the United States and Alabama, on her admission into the Union, it was agreed that the people of Alabama forever disclaimed all right or title to the waste or unappropriated lands lying within the state, that the same should remain at the sole disposal of the United States, and that all the navigable waters within the state should forever remain public highways; and hence, that the lands under the navigable waters, and the public domain above high water, were alike reserved to the United States, and alike subject to be sold by them; and that to give any other construction to these compacts [483] would be to yield up to Alabama, *and the other new states, all the public land within their limits. This court, however, held that, when Alabama was admitted into the Union, on an equal footing with the original states, she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the time she ceded the territory of Alabama to the United States, and that nothing remained to the latter, according to the terms of the agreement, but the public lands. In summing up its conclusions the court held: "First, the shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively. Secondly, the new states have the same rights, sovereignty, and jurisdiction over this subject as the original states. Thirdly, the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof, conferred no power to grant to the plaintiffs the land in controversy in this case."

The supreme court of Alabama having approved a charge to the jury that "if they believed the premises sued for were below the usual high-water mark, at the time Alabama was admitted into the Union, then the act of Congress" (passed in July, 1836, confirming the title of the plaintiff), "and the patent in pursuance thereof, could give the plaintiffs no title," its judgment was affirmed. The opinion of the court was pronounced in 1844.

Prior to this time, however, and in 1839, the supreme court of Alabama in the case of *Mobile* v. *Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325, had also held that the navigable waters within that state, having been dedicated to the use of the citizens of the United States, it was not competent for Congress to grant a right of property in the same, and that the navigable waters extended, not only to low water, but embraced all the soil within the limits of high-water mark. This case was also affirmed by this court (16 Pet. 234, 10 L. ed. 948), though the case as here presented did not turn upon the rights of the state to land beneath its navigable waters below high-water mark.

This was also declared to be the doctrine of the supreme court of Alabama as late as 1853, when in *Magee* v. *Doe ex dem. Hallett*, *22 Ala. 699, it was held that, if the Mo- [484] bile river were the eastern boundary of the grants in question, the lines could not, under the decisions of that court, as well as those of the Supreme Court of the United States, extend beyond high-water mark at that time, citing *Pollard* v. *Hagan*, 3 Ala. 291, Affirmed, as above stated, in 3 How. 212, 11 L. ed. 565; *Abbot* v. *Doe ex dem. Kennedy*, 5 Ala. 393, and *Goodtitle* v. *Kibbe*, 9 How. 471, 13 L. ed. 220. This last case was little more than an affirmance of *Pollard* v. *Hagan*.

On January 31, 1867, the general assembly of Alabama passed "An Act Granting the City of Mobile the Riparian Rights in the River Front," the first section of which enacted that "the shore and the soil under Mobile river, situated within the boundary lines of the city of Mobile, as defined and set forth in § 2 of an act to incorporate the city of Mobile, approved February 2, 1866, be and the same is hereby granted and delivered to the city of Mobile."

"Sec. 2. *Be it further enacted*, That the mayor, aldermen, and common council of the city of Mobile be and they are hereby created and declared trustees to hold, possess, direct, control, and manage the shore and soil herein granted, in such manner as they may deem best for the public good."

In *Boulo* v. *New Orleans, N. & T. R. Co.* 55 Ala. 480, decided in 1875, it was also held that the title to the shore of all tide-water streams resides in the state, for the benefit of the public, and its use by the public for the purpose of commerce was not only permissible, but in accordance with the trust annexed to the title. The place in controversy was a slip beneath two wharves, but whether it was covered at high tide by the water of the river was a fact about which the evidence conflicted, though the court inclined to the opinion that land had been formed which was not usually covered by water at high tide. It was held the title was in the state.

In *Williams* v. *Glover*, 66 Ala. 189, part of the land in controversy was an island in the Tennessee river. Some 12 acres of the tract lay between high and low water marks, and was covered with water in high floods. The court held that the ownership of the plaintiff extended to the margin *of [485] the water at its ordinary stage, and hence embraced the land between high and low water marks. As the Tennessee river is not a tidal stream, but empties into the Mississippi far to the north of Alabama, the court in using the words "between high and low

water marks" must have had reference to the difference between the river at floods and at its ordinary stage. No reference was made to the prior authorities respecting tide waters.

In *Demopolis* v. *Webb*, 87 Ala. 659, 6 So. 408, the case did not turn upon the ownership of land below high-water mark, although the court, in delivering the opinion, said: "Under our decisions, when a person owns lands on a navigable river his ownership is held to extend so far as to embrace the land between high and low water marks," citing *Williams* v. *Glover*, 66 Ala. 189, which, as before stated, related to land upon an island in the Tennessee river, and not upon a tidal stream. The land in question was in the city of Demopolis, on the Tombigbee river, a navigable stream emptying into the Bay of Mobile, and at this point apparently far above the tidal effect. In the same case afterwards before the court on its merits (*Webb* v. *Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289), the court held that whether a grant of the United States to land lying on a navigable stream within the limits of a state extends to high or to low water mark, or to the middle thread of the stream, was not a Federal, but a local, question, citing *Barney* v. *Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Packer* v. *Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *St. Louis* v. *Rutz*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 835, and *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 255, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173, and also held that "the rule which this state has adopted and declared through this court is that a grant by the United States to land bordering on a navigable river includes the shore or bank of such river, and extends to the water line thereof at low water." In none of the above cases cited from our reports were the lands situated within tide waters.

Relying upon these cases from the supreme court of Alabama, the transportation company attack the constitutionality of the act of January 31, 1867, conveying to the city of Mobile the shore and soil under [486] Mobile river, because the act impairs *vested rights, because riparian rights are property, and because the rule in Alabama is that a grant by the United States of lands bordering on a navigable river includes the shore or bank of such river, and extends to the water line at low water." In this connection the company insists that the decisions above cited constitute a rule of property in the nature of a contract with the owners of land adjacent to the Mobile river, which have been impaired by the construction given to the act of January 31, 1867; but, as we have already noticed, none of the cases related to tidal streams.

In its opinion in this case the supreme court of Alabama seems to admit that in *Webb* v. *Demopolis*, and one or two other cases relating to the shore line of streams *above the ebb and flow of tide waters*, the defendant was correct in supposing that the title of the riparian proprietor extended to low-water mark, but, said the court, "these cases in nowise conflict with the common-law rule, so often approved by this court and other jurisdictions, that on streams where the tide ebbs and flows, grants of adjoining lands only extend to the ordinary high-tide line along the shore. The law is definitely settled as to this point, and it could hardly have been the purpose of the decision in *Webb* v. *Demopolis* to disturb this rule of property, supported by a vast array of authorities, without making reference to them."

But we are of opinion that there is no conflict between the cases in Alabama, inasmuch as the cases which hold that the rights of the riparian proprietor extend only to high-water mark are cases arising upon navigable *tide* waters, where the rise and fall are of daily occurrence, and not usually subject to much variation in height. In regard to this class of cases the rule laid down by the supreme court of Alabama in *Mobile* v. *Eslava*, 9 Port. (Ala.) 577, 33 Am. Dec. 325, that private ownership extends only to high-water mark, has been consistently adhered to ever since, and notably so in *Doe ex dem. Kennedy* v. *Beebe*, 8 Ala. 909, 914; *Doe ex dem. Pollard* v. *Greit*, 8 Ala. 930, 941; *Magee* v. *Doe ex dem. Hallett*, 22 Ala. 699, 719; *Abbot* v. *Kennedy*, 5 Ala. 393; *Boulo* v. *New Orleans, M. & T. R. Co.* 55 Ala. 480; while, upon the other hand, in the cases which *hold that private ownership [487] extends to low-water mark (*Bullook* v. *Wilson*, 2 Port. (Ala.) 436; *Williams* v. *Glover*, 66 Ala. 189; *Demopolis* v. *Webb*, 87 Ala. 659, 6 So. 408, and *Webb* v. *Demopolis*, 95 Ala. 116, 21 L. R. A. 62, 13 So. 289), the lands were situated upon a navigable river far above the tidal influence, and high and low water marks were determined, not by the action of the tides, but by the actual rise and fall of the river at different seasons of the year. With regard to this latter class of cases there is a great conflict of authority in the state courts, some holding that the rights of the riparian proprietor are bounded by high-water mark, others by low-water mark, and still others by the thread of the stream. Some of these cases are mentioned in the opinion of Mr. Justice Bradley, in *Hardin* v. *Jordan*, 140 U. S. 371, 382, 35 L. ed. 428, 433, 11 Sup. Ct. Rep. 808, 838, and a large number of them are reviewed in part 1, chap. 3, of Gould on Waters, where nearly all the cases seem to be collected.

But even if it were conceded that there had been a change of opinion in Alabama with respect to riparian rights upon tide waters, such change by no means raises a case under the contract clause of the Constitution. The status of real estate within a particular jurisdiction is not so much one of contract as of policy, which may be changed at any time by the legislature, provided no vested rights are disturbed. Of course, if riparian proprietors have acquired the title to the property below high-water mark by a grant or prior possession, good

against the state, they could only be dispossessed by proceedings in eminent domain. The act of 1867 declared no more than that the rights possessed by the state in the shore and soil under Mobile river were granted to the city. We see nothing objectionable in this act. What the state held it held as trustee for the public, and it had a right to devolve this trust upon the city of Mobile. What it had not it could not grant, and the rights of the riparian proprietors were neither enlarged nor restricted by the act. If subsequent cases have given any construction at all to that act, of which there seems to be some doubt, such construction would not present a Federal question, and if the supreme court of Alabama had changed its views with respect to the limit of private [488] ownership *upon tide waters, its decision in that regard cannot be reviewed by this court. *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Hanford* v. *Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051. Upon the whole, we are of opinion that there is no defect upon the face of the title of the city of which the transportation company was entitled to avail itself.

3. We are next to consider whether the defendant has a vested right in these lands which could not be taken from it without compensation or proceedings in eminent domain.

By the eighth article of the treaty between the United States and Spain of February 22, 1819 (8 Stat. at L. 252), "all the grants of land made before the 24th of January, 1818, by His Catholic Majesty, or by his lawful authorities, in the said territories ceded by His Majesty to the United States, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty." In support of this alleged grant from the King of Spain, defendant offered in evidence volume 3 of the American State Papers, entitled "Documents, legislative and executive, of the Congress of the United States in relation to the public lands, from the first session of the First Congress to the first session of the Twenty-third Congress,—March 4, 1789, to June 15, 1834." That part of it relating to the claim of Regis Bernoudy of the land in question is printed in the mar- [489] gin.† The difficulty *with this report is that it contains no grant, but merely a supposition of the claimant that a grant once existed, and had been lost by time or accident. It is needless to say that this is no evidence of an actual grant; but a further, and even more serious, objection to the document, is that it contains no other description of the land granted than that it was 600 arpents in area, and was situated on the Mobile river, but that no survey of the land existed.

*Apparently in confirmation of this claim, [490] defendant also offered in evidence a patent of the United States, dated December 28, 1836, wherein it was recited that this claim had been confirmed by acts of Congress passed in 1819 and 1822 [3 Stat. at L. 707, chap. 128], and that it had been surveyed. Referring to these acts of Congress, we find that both contain a proviso that the confirmations and grants provided to be made by the acts "shall amount only to a relinquishment forever, on the part of the United States, of all right and title whatever to the lots of land so confirmed and granted." Had this patent been issued before the admission of Alabama into the Union, it would be difficult to see why it did not convey a perfect title; but it was fully settled by this court with respect to these titles, in *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565; *Goodtitle* v. *Kibbe*, 9 How. 471, 13 L. ed. 220, and *Doe ex dem. Hallett* v. *Beebe*, 13 How. 25, 14 L. ed. 35, that, inasmuch as all lands below high-water mark had passed to the state of Alabama upon her admission into the Union in 1819, there was nothing left upon which a subsequent patent of the United States could operate.

There are other defenses presented by the record in this case, such as that of estoppel, by reason of improvements made upon this land with the acquiescence of the city, license to build a wharf, and payment of taxes; the unconstitutionality of the act of 1867, because the title of the act does not describe its subject; want of power in the state to convey its title to *the city, and the [491] statute of limitations. These, however, are all of a local nature, and present no Federal question.

In connection with the power of the state to convey its interest in these lands to the city, as it attempted to do by the act of 1867, much reliance is placed by the transportation company upon the case of *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110. This case, however, is inapplicable for two reasons: First, it turns upon the power of the state to convey its right to the soil beneath the *navigable* waters of the state, and, of course, below low-water mark, not to a municipal corporation "created and declared trustees to hold, possess, direct, control, and manage the shore and soil herein granted in such

†Register of claims to land in the district east of Pearl river, in Louisiana, founded on private conveyances, which have passed through the office of the commandant, but founded, as the claimant supposes, on grants lost by time or accident.

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(Page 30.)

Number —, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph Munora.
Where situated, Mobile river.
Quantity claimed, area in arpens, 600.
Cultivation and inhabitation, from 1809 to 1813.

. . . . . .

(Page 31.)

(Signed) William Crawford,
Commissioner.

Remarks.—Though the original grants upon which the preceding claims are founded have been lost, yet it is conceived that the claims to such lands, not exceeding a reasonable quanti-

manner as they may deem best for the public good," but to a private railroad corporation to hold and control for its own purposes; second, that case came to this court from the circuit court of the United States, which was called upon to declare as an original question what power the state of Illinois had to convey the property in question to the Illinois Central Railroad Company; while this case comes up by writ of error to the supreme court of a state, which has itself put a construction upon an act of its own legislature and upon its conformity to the Constitution of the state. The decision of that court upon these questions is obligatory upon us.

*The judgment of the Supreme Court of Alabama is affirmed.*

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JANE JOHNSON, *Plff. in Err.*,
*v.*
NEW YORK LIFE INSURANCE COMPANY.

(See S. C. Reporter's ed. 491–496.)

*Error to state court—Federal question—when raised in time—full faith and credit.*

1. The claim that a state court denied full faith and credit to a statute of another state is not raised in time to bring the case within the appellate jurisdiction of the Supreme Court of the United States, where it first appears in the petition for a writ of error from that court to the state court.
2. A decision of a state court, which merely construes a statute of another state as inapplicable to the case before it, and does not deny the validity of such statute, is not reviewable in the Supreme Court of the United States as a decision denying full faith and credit to such statute.

[No. 87.]

*Argued and Submitted November 12, 1902. Decided January 5, 1903.*

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a judgment of the trial court in favor of defendant in an action on a policy of life insurance. *Dismissed.*

See same case below, 109 Iowa, 708, 50 L. R. A. 99, 78 N. W. 905.

Statement by Mr. Justice **Brown:**

*This was an action upon a policy of insurance upon the life of Frank C. Johnson, dated December 27, 1890, whereby the defendant insured his life in the sum of $25,000 for the benefit of his executors, administrators, or assigns. This policy was assigned to the plaintiff in 1895, and on September 28, 1896; Johnson died. The annual premium was fixed at $1,060, payable in advance on November 11 of each year. There was the usual provision for forfeiture in case of nonpayment of premiums. The premium was paid on November 11, 1892, but no payments were made thereafter. After Johnson's death, and on February 20, 1897, plaintiff tendered the past-due premiums with interest thereon, which defendant refused to accept, and this action was begun. [492]

The insurance company was incorporated under the laws of the state of New York,

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

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ty, as were inhabited and cultivated under the Spanish government, ought to be confirmed.

(Signed) William Crawford,
Commissioner.

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(Page 400.)

No. 9.

Report on the conflicting claims of Joseph McCandless and Regis Bernody, both of whom claim the same tract of land, and in relation to whose claims the former commissioner reported favorably.

Former Commis.'s Report.

No. of report, 10.
No. of claim, 11.
By whom claimed, Regis Bernody.
Original claimant, Joseph S. Murona.
Nature of claim and from what authority derived, spa. pert. or cert. from commandant; grant lost by time or accident.
Date of claim, 3 March, 1792.
Quantity claimed, area in arpens, 600.
Where situated, Mobile river.
By whom issued, Carondelet.
Surveyed, no survey.
Cultivation and inhabitation, from 1809 to 1813.

. . . . . .

Report 10, claim 11.—The claim of Regis Bernody is founded on a conveyance made to him by Joseph Gaspar Munora, at Pensacola, which passed through the office of the commandant, as all authentic conveyances must have done in the Spanish posts of the intendancy, and recognizes the original grant or concession of the same made by the Baron de Carondelet in favor of said Munora on the 3d March, 1792, which grant was produced by Munora on the day of the execution of the conveyance to Bernody. The proof of the inhabitation and cultivation by Bernody (until forcibly expelled by McCandless) is complete, and the inference is strong that Munora, the grantee, did comply with the essential conditions of the grant, inasmuch as the instructions of Morales expressly charge the "notaries and commandants not to pass any conveyance of lands where the conditions of the grant were not previously proven to have been complied with; and, independently of this consideration, the declaration of Munora, in the conveyance to Bernody, that it was 'the same land that Antonio Espejo worked with his permission,' made, too, at a time when it could not be imagined that any rival claim would arise, furnishes a violent presumption that the land was inhabited or cultivated by or for Munora agreeably to the Spanish regulations. A full report of all the evidence presented by the conflicting claimants is herewith presented. Upon the best view we have been able to take of the relative merits of these claims, we are decidedly of opinion that the claim of Joseph McCandless ought to be rejected, and that of Regis Bernody confirmed."

W. Barton, Register.

the policy was issued in that state, and the application contained an agreement that the contract contained in such policy and in the application should be construed according to the laws of the state of New York,—the place of said contract being agreed to be the home office of the company in the city of New York.

Plaintiff, in reply to the defense of nonpayment of premiums, relied upon the statute of 1877 of the state of New York, which we have heretofore had occasion to consider in several cases, and which provided that [chap. 321] "no life insurance company doing business in the state of New York shall have power to declare *forfeited or lapsed* any policy hereafter issued or renewed, by reason of nonpayment of any annual premium or interest, or any portion thereof," except upon a written notice to the insured stating the amount of the premium due on the policy, [493] the *place where it should be paid, and the person to whom the same was payable, with the further proviso that "no such policy shall in any case be forfeited . . . or lapsed, until the expiration of thirty days after the mailing of such notice."

There was, however, in the state of New York another statute, commonly known as the net reserve law, giving to holders of life insurance which had been in force three full years the benefit of the net reserve on their lapsed or forfeited policies, by extending the life of the policy beyond the time of the default.

The policy in question contained a stipulation that "if this policy shall lapse, or become forfeited for the nonpayment of any premium, after there have been paid thereon three full premiums, . . . a paid-up policy will be issued, on demand made, within six months after such lapse with surrender of this policy, under the same conditions as this policy, except as to payment of premiums . . . for such an amount as the net reserve on this policy at the time of lapse, computed by the American table of mortality, and interest at 4½ per cent, after deducting all indebtedness to the company, will purchase as a single premium, at the present published rates of the company, at the age of the insured, at the time of lapse"

On December 10, 1892, about two years after the policy was issued, Johnson requested the defendant, in writing, to extend to his policy "the benefits of its accumulation policy." In reply, the company issued a policy or certificate, extending to his policy the benefits of the accumulation policy plan, and providing that "after this policy shall have been in force three full years, in case of nonpayment of any premium subsequently due, and upon the payment within thirty days thereafter to the company of any indebtedness to the company on account of this policy: 1, the insurance will be extended for the face amount, as provided in the table below; or, 2, on demand made within six months after such nonpayment of such premium dues with surrender of this policy, paid-up insurance will be issued for the reduced amount provided in said table; or, 3, the policy will be reinstated within the said six months upon payment of the overdue premium, with interest at the rate of *5 [494] per cent per annum, if the insured is shown to the company to be in good health, by a letter from a physician in good standing." By the "table" above mentioned it was provided that if the premiums were paid to November 11, 1893, the insurance would be extended to May 11, 1896.

In this connection, the company insisted that the thirty days' notice law of New York had no application to the contract involved, because the policy sued upon was, at the request of the assured, converted into a paid-up policy for a fixed term, which term expired before the assured died.

Construing the certificate which extended to the original policy the benefits of the accumulation policy plan of the company, the supreme court held "that the clause of the original policy providing for its forfeiture for the nonpayment of premiums was so far modified and changed that upon such failure the policy became a paid-up contract for the amount of the original insurance for a certain and definite time. On demand of the assured within a fixed period after default, he was given certain other options; but in default of such demand the term insurance, as stated, took effect. No such demand was made by Johnson. There was no forfeiture of Johnson's life contract, as appellee insists. By the terms of the agreement which he made, his life contract, upon his default in the payment of the premium due November 11, 1893, "became transmuted into a paid-up policy for a term ending May 11, 1896. . . . The benefits of that statute" (for thirty days' notice) "were given only to policies which had *lapsed or been forfeited* for nonpayment of premium, debt or interest; and the notice had to be given, to effect this forfeiture or fix such lapse. Afer the default the life contract continued in force until it was determined according to the statute. . . . In the case at bar, under the modified contract, immediately on default in payment of the premium of 1893, the policy became a paid-up contract for a term; and, if the assured had died within such term, plaintiff could recover without payment of the defaulted premiums. Here the life contract did not run beyond the default day. No act of the company was necessary to put the term insurance in force. It went into effect by reason of the contract. . . . *Adopting an illustration of the [495] learned trial judge, if Johnson had died on May 10, 1896, plaintiff could have recovered the full face of this policy without any further payment being required of her. . . . The notice is required only when it is sought to declare the contract *forfeited or lapsed*. Our conclusion is that this was a policy for a term that expired before Johnson's death, and therefore plaintiff has no right of recovery." 109 Iowa, 708, 50 L. R. A. 99, 78 N. W. 905.

*Mr.* **Constantine J. Smyth** submitted the cause for plaintiff in error:

A right or immunity set up or claimed under the Constitution or laws of the United

States may be denied as well by evading a direct decision thereon as by positive action.

*Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.* 123 U. S. 555, 31 L. ed. 203, 8 Sup. Ct. Rep. 217; *Chapman* v. *Goodnow*, 123 U. S. 548, *sub nom. Chapman* v. *Crane*, 31 L. ed. 238, 8 Sup. Ct. Rep. 211.

Where a foreign statute has been given an explicit interpretation and construction by the courts of the state from whence it came, and such construction is pleaded and proved, then, whether or not the state court gave the foreign statute that faith and credit which it was thus shown to have in the courts of the state from whence it came presents a Federal question for review here.

*Mr.* **James H. McIntosh** argued the cause, and, with *Mr. George W. Hubbell*, filed a brief for defendant in error:

This court does not acquire jurisdiction on writ of error to the highest court of a state, for the purpose of passing upon the question as to whether or not the state court correctly construed the laws of another state.

*Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Glenn* v. *Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd* v. *Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Banholzer* v. *New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

*Messrs. George W. Hubbell, James H. McIntosh*, and *Frederic D. McKenney* filed a brief for defendant in error on the merits.

Mr. Justice **Brown** delivered the opinion of the court:

This case must be dismissed for two reasons.

1. Plaintiff relies for a reversal upon the fact that full faith and credit was not given to the law of the state of New York requiring a notice of thirty days before the forfeiture of any insurance policy, which was pleaded in the case. This, however, is a title, right, privilege, or immunity claimed under the Constitution of the United States, within the 3d clause of Rev. Stat. § 709 [U. S. Comp. Stat. 1901, p. 575], which must be "specially set up and claimed" by the party seeking to take advantage of it. Conceding that it was unnecessary to set it up in any pleading anterior to the trial, since it could not be claimed that the right had been denied to her until the trial took place, it was clearly her duty to make the claim either on the motion for a new trial, or in the assignments of error filed in the supreme court of the state. In neither does it appear, nor is there any allusion to it in the opinion of the supreme court. It first appears in the petition for a writ of error from this court. This is clearly insufficient.

2. The supreme court of Iowa did not fail to give due faith and credit to the notice [496] law of New York, since it was fully *considered, and the decision of the state courts of New York were called to its attention and cited in its opinion. The court held that notice is required by that statute only as a basis for declaring a forfeiture or lapse of a policy for nonpayment of premium or interest, and that the law had no application, because it was a non forfeitable policy of term insurance, which had expired by limitation before the insured died. Whether the supreme court of Iowa was correct in its construction of the applicability of the New York notice statute to this policy was immaterial, since it did not deny the full faith and credit due to the New York law, but construed it as not applying to the policy in this case. The case is covered by that of *Banholzer* v. *New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972, and in principle by *Glenn* v. *Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd* v. *Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70. To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment.

The validity of the New York statute was not called in question. The case turned upon its construction. This was not a Federal question. *Commercial Bank* v. *Buckingham*, 5 How. 317, 12 L. ed. 169; *Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503.

*The writ of error is dismissed.*

Mr. Justice **White** and Mr. Justice **McKenna** dissented.

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ROBERT E. DOWNS, *Petitioner*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 496–516.)

*Tariff act—additional duties on imports from countries paying export bounty.*

The Russian laws regulating the production and exportation of sugar, under which an exporter of sugar is remitted the excise tax imposed on sugar sold in Russia, and obtains a certificate because of such exportation, which has a substantial market value, allow a bounty upon the exportation of sugar which, under the act of Congress of July 24, 1897, § 5 (30 Stat. at L. 205, chap. 11, U. S. Comp. Stat. 1901, p. 1693), subjects such sugar upon its importation into the United States to an additional duty equal to the entire amount of such bounty as ascertained and determined by the Secretary of the Treasury.

[No. 318.]

*Argued October 29, 1902. Decided January 5, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Maryland affirming the action of the board of general appraisers holding an importation of sugar from Russia subject to the additional duty leviable upon merchan-

dise upon which a bounty is paid upon exportation. *Affirmed.*

See same case below, 51 C. C. A. 100, 113 Fed. 144.

Statement by Mr. Justice **Brown:**

[497] *This was a writ of certiorari to review a decree of the circuit court of appeals, affirming a decree of the circuit court for the district of Maryland, which itself affirmed the action of the board of general appraisers, holding a cargo of refined sugar imported into Baltimore from Russia subject to a countervailing duty leviable upon merchandise upon which a bounty is paid upon exportation.

The proceedings were instituted by a petition filed in the circuit court setting up the importation of sugar on the steamship Assyria July 6, 1899, the imposition of a countervailing duty by the collector of customs at Baltimore, and the payment of the same under protest, and the fact that the decision of the collector had been affirmed by the board of general appraisers. The grounds stated in the petition for a review are, generally, that the country from which the sugar was exported did not pay or bestow, directly or indirectly, any bounty or grant upon the exportation of said sugar.

The return of the general appraisers contained a copy of the proceedings before them, including a copy of the Russian law and regulations, a stipulation of facts, a copy of certain reports from the United States consul at Odessa, and their opinion overruling the protest, and affirming the decision of the collector. The circuit court affirmed the action of the general appraisers, and upon appeal to the circuit court of appeals that court in turn affirmed the decree of the circuit court. 51 C. C. A. 100, 113 Fed. 144.

*Mr.* **Ernest A. Bigelow** argued the cause and filed a brief for petitioner:

It is evident that "bounties on exportation" must, as the name implies, be conditioned on exportation, and that exportation furnishes the consideration therefor.

*Allen* v. *Smith*, 173 U. S. 402, 43 L. ed. 746, 19 Sup. Ct. Rep. 446.

By specifying only "bounties upon exportation," Congress must have intended to exclude bounties on production.

It is a contradiction in terms to call that a bounty on exportation which is received, in one form or another, by all manufacturers alike whether they export or do not export.

A drawback, or the remission of an excise tax, does not tend to lower the natural cost of production.

*United States* v. *Passavant*, 169 U. S. 23, 42 L. ed. 646, 18 Sup. Ct. Rep. 219.

If the question is one of doubt, the doubt must be resolved in favor of the importer.

*Hartranft* v. *Wiegmann*, 121 U. S. 609, 30 L. ed. 1012, 7 Sup. Ct. Rep. 1240.

*Assistant Attorney General* **Hoyt** argued the cause and filed a brief for respondent:

The doctrine of reasonable interpretation should be chosen as the guide.

*Henderson* v. *New York*, 92 U. S. 259, *sub nom. Henderson* v. *Wickham*, 23 L. ed. 543.

This court does not accept a foreign remission of internal tax as conclusive in its effect with respect to our own laws.

*United States* v. *Passavant*, 169 U. S. 16, 42 L. ed. 644, 18 Sup. Ct. Rep. 219.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the single question whether, under the laws and regulations of Russia, a bounty is allowed upon the export of sugar, which subjects such sugar, upon its importation into the United States, to an additional duty equal to the entire amount of such bounty, under the act of Congress of July 24, 1897 (30 Stat. at L. 205, chap. 11, U. S. Comp. Stat. 1901, p. 1693), which reads as follows:

*"Sec. 5. That whenever any country, de- [501] pendency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article or merchandise is dutiable under the provisions of this act, then upon the importation of any such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such articles and merchandise and for the assessment and collection of such additional duties."

A bounty is defined by Webster as "a premium offered or given to induce men to enlist into the public service; or to encourage any branch of industry, as husbandry or manufactures." And by Bouvier as "an additional benefit conferred upon or a compensation paid to a class of persons." In a conference of representatives of the principal European powers, specially convened at Brussels in 1898 for the purpose of considering the question of sugar bounties, the definition of bounty was examined by the conference sitting in committee, who made the following report:

"The conference, while reserving the question of mitigations and provisional disposition that may be authorized, if need be by reason of exceptional situations, is of opinion that bounties whose abolition is desirable are understood to be all the advantages conceded to manufactures and refiners by the fiscal legislation of the states, and that, directly or indirectly, are borne by the public treasury."

"There should be classified as such, *notably:*

"(*a*) The direct advantages granted in case of exportation.

[502] *"(*b*) The direct advantages granted to production.

"(*c*) The total or partial exemptions from taxation granted to a portion of the manufactured products.

"(d) The indirect advantages growing out of surplus or allowance in manufacturing effected beyond the legal estimates.

"(*e*) The profit that may be derived from an excessive drawback.

"In addition, the conference is of opinion that advantages similar to those resulting from the bounties hereinbefore defined may be derived from the disproportion between the rate of customs duties and that of consumption dues (surtaxes), especially when the public powers impose, incite, or encourage combinations among sugar producers.

"It would be desirable to regulate surtaxes in such manner as to confine their operation to the protection of home markets."

A bounty may be direct, as where a certain amount is paid upon the production or exportation of particular articles, of which the act of Congress of 1895, allowing a bounty upon the production of sugar, and Rev. Stat. §§ 3015-3027 [U. S. Comp. Stat. 1901, pp. 1989-1994], allowing a drawback upon certain articles exported, are examples; or indirect, by the remission of taxes upon the exportation of articles which are subjected to a tax when sold or consumed in the country of their production, of which our laws, permitting distillers of spirits to export the same without payment of an internal revenue tax or other burden, is an example. *United States* v. *Passavant*, 169 U. S. 16, 42 L. ed. 644, 18 Sup. Ct. Rep. 219.

The laws of Russia, regulating the production and exportation of sugar, are very complicated, not easily understood, and too long to justify their full incorporation in this opinion. Such, however, as bear upon the question of bounty are reproduced from a translation of the Russian law of November 20, 1895, and regulations thereunder, the accuracy of which is stipulated by the parties, together with certain statements also stipulated to be read as evidence.

The objects of the Russian law are stated in the words of a recent note delivered to the representatives of the powers at St. Petersburg, as follows: "The Russian govern-
[503] ment only *regulates the distribution of sugar on its home market, its purpose being, on the one hand, to antagonize overproduction of sugar, and, on the other, gradually to bring about lower prices and greater consumption for that product in this country. It protects home consumption against rises in the prices, and production against sudden and considerable falls." Counsel for petitioner insists that the chief object of the government is to prevent, or at least to discourage, over-production with its attendant evils, and, to accomplish this, the law penalizes over-production by imposing thereon double the regular excise tax.

From the stipulation of facts it appears that at the opening of each sugar campaign a committee of ministers, upon a report of the Minister of Finance—

"(1) Estimates the total consumption and the total production of sugar, and the total amount which may be put upon the market at the normal excise of one and three-fourths rubles (a current ruble being equal to about 51 cents) per pood (of 36 pounds) is definitely fixed at the total amount required for consumption." (This excise amounts to about 2½ cents per pound.) "This is known as free sugar."

"(2) The first 60,000 poods produced by each factory is free sugar. The balance of the production is divided into free sugar, obligatory reserve, and free surplus or free reserve."

"(3) The amount of free sugar in each factory is proportioned to its total production, as the estimated consumption is to the total production of the country. This percentage is fixed by the government according to the estimates of production and consumption."

For instance, if the ministers estimate the home consumption at 35,000,000 poods, and the probable production at 50,000,000 poods, $\frac{35}{50}$ of the daily production of each factory will be set apart as "free sugar" by the inspector, and $\frac{15}{50}$ (less a certain portion of "indivertible reserve") will be set apart as surplus.

"(4) Under the Russian law therefore all sugar is divided into the three following classes:

*"*a*. 'Free sugar,' which consists of a cer- [504]
tain quantity of sugar which the Russian government permits a factory or refinery to sell for home consumption under an excise tax of 1.75 rubles per pood."

"*b*. An 'obligatory or indivertible reserve' of sugar, which consists of a certain quantity kept at each factory or refinery by order of the government, and which may not be sold or removed without the special permission of the government."

The object of this reserve is to enable the Minister of Finance, in case the price in the home market exceeds the price fixed as a maximum, to authorize the issue of sugar from this reserve upon payment of the usual tax in quantities sufficient to bring about a reduction in prices.

"*c*. 'Free reserve or free surplus,' which consists of such sugar as is manufactured over and above the quantity of 'free sugar' and 'obligatory or indivertible reserve.' This sugar cannot be sold for home consumption except upon payment of the regular tax of 1.75 rubles and an additional tax of 1.75 rubles, or 3.50 rubles in all."

The Russian government also fixes and determines (*a*) the total quantity of sugar required for home consumption from all the factories and refineries, that is, free sugar; (*b*) the quantity of sugar to be kept by each factory as an obligatory reserve; (*c*) the maximum of prices during the prevalence whereof such reserve must remain intact in the factories, as well as the conditions under which the sugar in reserve can be put on the market.

2. The quantity of sugar produced in excess of the amount for home consumption (free sugar) is considered as an excess of production, and when sold is subject to a double tax.

3. This excess is distributed among the factories in proportion to the quantity of sugar produced by each of them over and above 60,000 poods.

4. The obligatory reserve of sugar to be kept by each factory is derived and completed from the quantity of sugar in excess of the normal quantity, by taking from such excess the necessary percentage to constitute the prescribed reserve.

5. Sugar in excess of the normal produc-[505]tion cannot be put *on the home market otherwise than upon payment of an additional tax, the normal tax being payable according to the general regulation. However, it is allowed to the manufacturers to keep this excess of sugar as free reserve, and in such case, so long as the sugar does not leave the factory, they are not required to pay either the additional or regular excise.

6. The sugar in the obligatory reserve is not liable to the payment of tax until it is withdrawn by permission under the conditions indicated in § 7.

"7. In cases where the prices in the home market exceed the normal prices fixed, the Minister of Finance authorizes the issuance of sugar from the obligatory reserve and from the free reserve (if necessary) in sufficient quantities to cause a decrease of price without payment of the additional tax, but with payment of the normal excise."

"8. In case of loss without the fault of the manufacturer, of sugar comprised in the obligatory or free reserve, the Minister of Finance is authorized to strike the lost sugar from the factory's account, without exacting the excise and additional tax charged against it."

"9. Upon the exportation from the factories of the excess of sugar the same is exempted from the excise and additional tax in full measure."

For the purpose of insuring to the domestic manufacturer a profitable home market, the Russian government imposes a duty of 3 rubles per pood (practically prohibitive) upon imported sugar. Upon the other hand, and to insure to the consumer a reasonable price, it fixes a maximum price, during the prevalence of which the obligatory reserve must remain intact. This reserve is set aside from the production of each mill, so that when the prices in the home market rise beyond the maximum fixed, the Minister of Finance authorizes the sale of sugar from the obligatory reserve, and from the free reserve if necessary, in sufficient quantities to reduce the price, upon payment only of the normal excise. The amount of free sugar to which each factory is entitled is determined by the ministry upon the basis of the probable national consumption and the probable production, the product of every factory be-[506]ing divided *according to the ratio between these estimates. Each manufacturer can sell his quota of free sugar upon the home market upon the payment of the normal excise of 1.75 rubles per pood. He can only place his surplus upon the home market by paying a double excise; but he may leave it in the mill where it is not subject to the tax; or he may have it transferred to the production account of the next campaign, where it will serve him to increase the amount on which his percentage of free sugar is estimated; or he may export it free from excise. The last alternative is the one usually adopted.

It frequently happens, however, that a manufacturer located near a seaport town is unable to find a market for his free sugar at home, but by a remission of the excise may export his sugar to some foreign country at a profit, while the manufacturer in an interior town may be able to dispose of a much larger amount of "free sugar" than he is entitled to put upon the market, but is located too far from the seaboard to export at a profit. As the government is interested only in the amount of free sugar produced, and not in the particular person producing it,—the allotment to each factory being merely to do equal justice to all,—it permits the seaboard manufacturer to export his free sugar without tax, and to assign his right to the interior manufacturer to sell as much additional free sugar as is represented by the amount exported, or convert his "surplus" into "free sugar," thus saving the additional tax.

The method by which this assignment is effected is shown by the following regulations of the government "on transfers of free sugar from one mill to another in order to facilitate the exportation of the surpluses to foreign countries:"

"Sec. 39. A manufacturer may cede to another manufacturer his right to place on the home market free, *i. e.*, without the payment of an additional tax, his allotted quota of sugar.

"Sec. 40. In relation to such cession the following rules may be observed:

"(1) The manufacturer who assigns to another manufacturer his right to dispose of a certain quantity of sugar free must give notice thereof to the local excise board, which first orders to be held at the mill a quantity of free sugar equal to that *about[507] to be assigned, and immediately thereupon duly communicates with the excise board having jurisdiction of the mill in whose favor the assignment is being made.

"(2) If the assignment is accepted by the latter mill, the quantity of free sugar in said mill is correspondingly increased by transfer from the free surplus (not from the indivertible reserve), of which a memorandum is made by the excise officers in charge; thereupon the excise board, from which the communication in relation to the assignment of free sugar has been received, is notified of the acceptance of said assignment.

"(3) Upon receipt of the notification that the assignment has actually been accepted, the quantity of 'free sugar' at the factory by which the assignment has been made is correspondingly reduced by transferring the same into the free surplus (or free reserve),

of which a memorandum is made by the excise officer in charge.

"(4) The reduction of the quantity of free sugar at one mill and the increase thereof by assignment at another mill are entered in the proper books of the mill."

It thus appears that, by a series of book entries carried on under the direction of the local excise board having jurisdiction of the mill of the assignor, and the corresponding board having jurisdiction over the mill of the assignee, and without any actual transfer of sugar from one mill to the other, or the issue of a certificate, the "surplus" sugar of the assignee manufacturer is converted into "free sugar," which he can sell at the normal excise, and the "free sugar" of the assignor manufacturer has become "surplus," which he can place on the home market by paying the double tax (practically prohibitory), leave in the mill where it is not subject to the tax, have transferred to the production account of the next year, or export to a foreign country.

Should the assignor manufacturer deem it best to adopt the last alternative of exporting, he will obtain in a foreign market a price somewhat less than he would have obtained had he sold his sugar as free in the local market. Hence, the consideration which the interior manufacturer must pay to induce the other to transfer his rights to [508] free sugar to him is measured by the *difference between the home-market price and that prevailing in the foreign market. With regard to this, we quote from the report of the American consul appearing in the record:

"As the first and second methods of disposing of his sugar (by selling under the double tax or exporting) are less advantageous than placing the article on the home market as free sugar, the manufacturer who ceded his right received from the manufacturer who acquired the right the price per pood agreed upon between them, which is usually determined by the differences existing at the moment between the price obtainable for the sugar on the home market and the price obtainable by sale abroad. This is what is termed a *transfer*. Dependent upon the fluctuations in the price of sand sugar in Russia and abroad, the price for these transfers also varies; therefore, the person who sells or transfers the right of issue in the home market charges several copecks more than the difference mentioned above. This is done on account of the risk that is taken that sugar prices abroad may fall, and also for the trouble involved in exporting, etc. Example: The price of sand sugar at a station in the southwestern region (*a*) for the home market, Rs. 4.25 per pood, or without excise Rs. 2.50; (*b*) for abroad, Rs. 1.25. Consequently, the difference or value of transfer is Rs. 1.25; but in that case, for the reasons given, Rs. 1.28 to 1.30 is paid for the transfer."

While it is true that this transfer of the right of issuing free sugar does not involve as a condition thereto the export of any sugar whatever, the only condition being that the assignor's free sugar shall diminish *pari passu* with the increase of the assignee's, yet, as a matter of practice, the object of making such transfer appears to be to increase the amount which the assignor *may* export, although he may, as a matter of fact, find it more profitable to leave his surplus in the mill to be transferred to the production account of the following year. If his factory be located far inland, he will be likely to do this, while if he be near a seaport town, he will probably prefer to export his surplus, even at the lower prices obtainable abroad.

Provision is made for the manner of exporting sugar to foreign countries by the following regulations, the first of which *(§ [509] 37) applies to free sugar, and the second of which (§ 38) applies to the free surplus:

I.—On the Manner of Exporting Sugar to Foreign Countries.

Sec. 37. *Free sugar*, exempt from the additional tax, may be exported to foreign countries in compliance with the rules heretofore existing; the exportation of such sugar requires, however, a permit from the excise office, which must be duly indorsed on the bill of lading, as set forth in sections 31 and 34 of these instructions.

Note.—The mill owner is allowed to export free sugar (this rule does not apply to purchased sand or refined sugar produced from purchased sands) on account of his surplus for the same campaign. For this purpose the export is made in the manner hereinafter, in subdivisions 1 to 4 of section 38, set forth, except that the excise office notes on the certificate "free sugar," and requires no security for the *additional* tax. Upon the return of the certificate with the customhouse export mark, the excise office credits the exported quantity of sugar to the free surplus of the mill, if such there be, and increases by a like quantity the allowance of free sugar, of which a memorandum and an entry in the book must be made.

Sec. 38. In relation to exports of the *free surplus* (free reserve) of sugar from the mills, the following special order must be observed, in addition to the rules now in force.

(1) The transport of sugar from the *free reserves* intended for export to foreign countries must be shipped in the presence of the excise authorities, who, after examining the transport, indorse on the bill of lading accompanying the same that said sugar has been removed from the free reserve for exportation abroad, and issue a separate certificate to the mill owner, setting forth the name of the mill, the bill of lading accompanying the transportation, and the statement of the weight of the sugar contained therein.

(2) The *additional tax*, at the rate of rubles 1.75 per pood, chargeable to the exported sugar, must first be secured in full by *cash*, excise credit vouchers, or such funds as are accepted as security for the tobacco excise, or by the stock of sugar, free *or of [510] the free reserve, on hand in the factory, as set forth in section 30 of these instructions.

(The 75 copeck portion of the excise due on the exported sugar is to be paid or secured in accordance with the rules now in force.)

(3) The customhouse duly examines the exported shipment of the free surplus, the tare previously certified by the excise office being accepted at its actual weight as per bill of lading annexed to the export certificate. After forwarding the transport across the border, the customhouse delivers to the shipper, in lieu of refunding the *excise* (not the *additional* tax, however), a voucher crediting the same on his sugar excise account, and marks down by indorsement on the certificate of the excise office presented by him (subdivision 1) the time of export, the net weight of the exported sugar, and the credit voucher issued stating the amount of excise allowed.

(4) The certificate with the indorsement of the customhouse must be returned by the mill owner to the excise office within six months from the date the sugar was shipped from the mill, whereupon the *additional* tax charged upon the exported sugar is remitted by the excise office, by a corresponding credit in proportion to the quantity of sugar exported, and the deposits securing the same are released. If the certificate is not returned within said time, or does not account for the full quantity of sugar which was to have been exported, then, upon the failure of the mill owner to pay within two weeks the additional tax due, the excise office must proceed with the collection thereof in regular manner.

It thus appears that free sugar, which may be sold in Russia, at the normal excise of R. 1.75 per pood, may be exported under a permit from the excise office, and upon the return of the free sugar certificate with the customhouse export mark, the excise office credits the exported quantity of sugar to the free surplus of the mill. With the free surplus, however, which is subject, not only to the normal excise of R. 1.75 per pood, but to an additional tax of the same amount, a somewhat different course is pursued. The *additional* tax chargeable to the exported sugar must first be secured in full by cash or its equivalent, and an export certificate delivered, which must be returned by [511] the *mill owner to the excise office within six months, whereupon the additional tax is remitted by the excise office by a corresponding credit in proportion to the quantity of sugar exported. For the *normal* excise, a voucher crediting the same on the sugar excise account is delivered, as in the case of free sugar.

The following facts were stipulated:

"5. That the sugar which was imported in this case, and which is covered by this protest, consists of free sugar as above defined, and would have been subject to an excise tax of 1.75 rubles per pood if sold in Russia."

"6. That upon the exportation of said sugar from Russia the Russian government, under its laws and regulations, released said sugar from said tax of 1.75 rubles either by a refund of the tax or a cancelation of the indebtedness, or otherwise."

"7. That, in addition to remitting said excise tax, the government issued to the exporter a certificate certifying that he had exported such a quantity of so-called free sugar; that the said certificates have a substantial market value, and are transferable, and that the price thereof is usually determined by the difference existing at the time between the price obtainable for sugar on the home market and the price abroad."

8. That said certificates are sold to and used by sugar manufacturers or refiners, who are thereby enabled to transfer from their "free reserve," or "free surplus," to their "free sugar" an amount of sugar equal to the amount shown by said certificates to have been exported, which amount may then be sold for domestic consumption on paying the ordinary tax of 1.75 rubles per pood (to which free sugar is regularly subject) instead of a tax of 3.50 rubles per pood.

This appears to be the real function of the free-sugar export certificate,—to obtain a transfer of sugar from "surplus" to "free sugar" account. This free-sugar export certificate being negotiable, any holder of the same is at liberty to call for the transfer of a like amount of sugar from surplus to free sugar account, and is thereby enabled to put his sugar upon the market at the normal excise instead of the double tax imposed upon surplus.

*By this arrangement neither the total [512] amount of free sugar allowed to the two manufacturers, nor the total export, has been increased, since what the assignor exports the assignee sells as free sugar. The assignee, however, has secured the large profits of the sale of his sugar at home and saved his freight to the coast, while, on the other hand, the seaport merchant has sacrificed those profits by exporting his sugar at a less remunerative price. It follows that the price which the seaport manufacturer receives for his export certificate is the difference between what he would have received had he sold his free sugar at home and the price he would have obtained on the foreign market. For instance, if the price in the home market is R. 2.50 per pood, and in the foreign market R. 1.25, the certificate will be worth the difference between these two, and the exporter will receive the same gross amount as if he had not exported his free sugar, but had sold in the home market. Thus:

By sale at home he obtains the market price . . . . . R. 2.50
By sale abroad he obtains the foreign market price . . . . . R. 1.25
Also the price of certificate . . . R. 1.25
——— R. 2.50

In practice, of course, as in the case of all commodities, the market value of these certificates must vary according to the demand and supply, but the theory underlying the transaction is always this, that the exporter shall suffer no loss because he has exported his free sugar instead of selling it in the home market.

It is practically admitted in this case that a bounty equal to the value of these certificates is paid by the Russian government, and the main argument of the petitioner is addressed to the proposition that this bounty is paid, not upon exportation, but upon production. The answer to this is that every bounty upon exportation must, to a certain extent, operate as a bounty upon production, since nothing can be exported which is not produced, and hence a bounty upon exportation, by creating a foreign demand, stimulates an increased production to [513] the extent *of such demand. Conversely, a bounty upon production operates to a certain extent as a bounty upon exportation, since it opens to the manufacturer a foreign market for his merchandise produced in excess of the demand at home. A protective tariff is the most familiar instance of this, since it enables the manufacturer to export the surplus for which there is no demand at home. If there were no tariff at all, and the expense of producing a certain article at home were materially greater than the expense of producing the same article abroad, there would be none produced, and, of course, none to export. But with the aid of such tariff, production would be stimulated, and might become so much greater than the home demand that a manufacturer would look to foreign markets for his surplus. In the case of Russian sugar the effect of the import duties is much enhanced by the fact that, the supply of free sugar from the home market being limited, the selling price is very remunerative, and each producer has therefore an interest in placing as much sugar as he can on the home market; and as the total amount of free sugar is distributed among all the manufactories in proportion to their entire production, it may become to their interest to export their surplus even at a loss, if such loss can be compensated by the profits on sugar sold in the home market. This would not make the tariff a bounty upon exportation, but a mere incident to its operation upon production. But, if a preference be given to merchandise exported over that sold in the home market, by the remission of an excise tax, the effect would be the same as if all such merchandise were taxed, and a drawback repaid to the manufacturer upon so much as he exported. If the additional bounty paid by Russia upon exported sugar were the result of a high protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; but where, in addition to that, these regulations exempt sugar exported from excise taxation altogether, we think it clearly falls within the definition of an indirect bounty upon exportation.

[514] *The argument of the petitioner in this connection is that, if a manufacturer sell his free sugar on the home market, he receives the home market price of, say, R. 2.50 per pood; whereas if he export his "free sugar," he receives the foreign price, say, R. 1.25 and R. 1.25, the price of his export certificate. "In other words, by exporting his 'free sugar' and selling his export certificate, the exporter receives exactly the same amount he would have received had he sold his 'free sugar' on the home market. All producers fare equally well before the law. Those who sell at home receive the high prices insured on the home market, while those who export what is the equivalent thereto,—the foreign market price plus the price of the export certificate. Hence there is no bounty on exportation, for the reward of the manufacturer is not conditioned on exportation, nor is it greater than it would have been had he not exported. Bounty on production this reward may be, but certainly not bounty on exportation, for it is a contradiction in terms to call that a bounty on exportation which is received in one form or another by all manufacturers alike, whether they export or do not export."

It is true that when a manufacturer exports free sugar for account of surplus, and thereby avoids the necessity of giving security for the additional tax, he obtains an export certificate which he may use to obtain the transfer of an equal amount of "surplus" sugar to "free sugar" account. This right of issue of free sugar into the home market at the normal tax he transfers when he sells his export certificate. The certificate, however, none the less represents a bounty upon exportation, although it *may* be used for the purpose of obtaining a transfer of a certain amount of surplus sugar to the free-sugar account for the home market.

But the fact that he receives the same amount, whether the goods are exported or sold at home, is not the proper test whether a bounty is paid upon exportation. If no bounty at all were paid, all sugar, or at least all "free sugar," would pay the same tax, whether sold at home or exported abroad; and in this case the free sugar upon which the tax is remitted when exported would go abroad burdened with an excise tax of R. 1.75 *per pood, which would pre- [515] vent the manufacturer from selling it at such a price abroad as would enable him to realize a profit. The amount he receives for his export certificate, say, R. 1.25, is the exact amount of the bounty he receives upon exportation, and this enables him to sell at a profit in a foreign market. All manufacturers would prefer to sell at home if they could realize a greater price than by selling abroad, but if by being paid a drawback, or by a remission of taxes, they can find a profitable market in a foreign country, so much sugar as is not needed at home will be sent abroad.

The details of this elaborate procedure for the production, sale, taxation, and exporta-

tion of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, *viz.*: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all. The mere imposition of an import duty of 3 rubles per pood, paid upon foreign sugar, is, like all protective duties, a bounty, but is a bounty upon production, and not upon exportation. When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name, it is disguised, it is a bounty upon exportation.

The difference in price between Russian sugar sold at home and abroad is thus shown by the delegate of Austria-Hungary at the Sugar Conference of 1898 by the following quotations from the Odessa exchange under date of June 10, 1898:

| | Francs per 100 kilos. | Cents per pound. |
|---|---|---|
| For Russia: 5.8 rubles per pood, say..... | 82.70 | 7.25 |
| For export: 1.73 rubles per pood, say..... | 28.16 | 2.47 |
| Hence a difference: 3.35 rubles per pood, say.. | 54.54 | 4.78 |
| Deducting the tax: 1.75 rubles per pood, say... | 28.49 | 2.50 |
| There remains a discrepancy of 1.60 per pood, say..... | 26.05 | 2.28 |

"The same merchandise, on the same date, and at the same place, thus commanded a different price according to its destination, [516] *and the difference amounted to 26.05 francs per 100 kilos (2.28 cents per pound).

"If we are to investigate the reasons which may impel Russian manufacturers to produce more sugar than is needed for home consumption, and to bring the surplus for exportation down to a comparatively much lower price, we shall find the explanation of this strange phenomenon in the legislative system of Russia. Such is our intimate conviction."

The object of issuing certificates of sugar exported seems to have been merely to enable the exporting manufacturer to obtain the best price for the privilege he assigns to the interior manufacturer of putting an equal amount of free sugar upon the market by assigning the certificates to the one who would offer the best price. In this connection the circuit court of appeals found: "That the Russian exporter of sugar obtains from his government a certificate, solely because of such exportation, which is worth in the open markets of that country from R. 1.25 to R. 1.64 per pood, or from 1.8 to 2.35 cents per pound. Therefore we hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia." We all concur in this expression of opinion.

*The decree of the Circuit Court of Appeals is, therefore, affirmed.*

CLINTON E. WORDEN & COMPANY, *Petitioner,*
*v.*
CALIFORNIA FIG SYRUP COMPANY, *Respondent.*

(See S. C. Reporter's ed. 516–540.)

*Trade-marks—infringement —unfair competition—deceptive use as bar to relief.*

The use of the term "Syrup of Figs" to designate a laxative medicinal preparation, together with printed statements and designs upon the bottles containing the compound and on the cartons and wrappers, calculated to induce the public falsely to believe that fig juice is an important element in the composition of such preparation, whose operative laxative element is senna, involves such deceit and misrepresentation as will deprive the manufacturer of equitable relief against the sale by another of a medicinal preparation named, marked, and packed in imitation of the older medicine, for the purpose and with the design and intent of deceiving purchasers and inducing them to buy the new preparation instead of the old one.

[No. 36.]

*Argued March 18, 19, 1902. Decided January 5, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California enjoining the infringement of a trade-mark. *Reversed* and remanded, with directions to dismiss the bill.

See same case below, 42 C. C. A. 383, 102 Fed. 334.

Statement by Mr. Justice **Shiras:**

*On June 1, 1897, the California Fig Syrup [517] Company, created under the laws of the state of Nevada, and having its principal place of business in San Francisco, California, filed a bill in equity in the circuit court

NOTE.—*Deception as a bar to relief for infringement of a trade-mark.*

The doctrine that protection will not be given by a court of equity against the infringement of a fraudulent or deceptive trade-mark is shown by a note to Joseph v. Macowsky (Cal.) 19 L. R. A. 53, to be established by a uniform current of decisions.

From the cases there discussed it appears that such relief will be barred by misrepresentation as to the identity of the manufacturer (Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Siegert v. Abbott, 61 Md. 276, 48 Am. Rep. 101; Leather Cloth Co. v. American Leather Cloth Co. 4 De Gex, J. & S. 136, 33 L. J. Ch. N. S. 199, 10 Jur. N. S. 81, 9 L. T. N. S. 558, 12 Week. Rep. 289; Pidding v. How, 8 Sim. 477, 6 L. J. Ch. N. S. 345), the place of manufacture (Connell v. Reed, 128 Mass. 477, 35 Am. Rep. 397; Hobbs v. Francais, 19 How. Pr. 567; Prince Mfg. Co. v. Prince's Metallic Paint Co. 135 N. Y. 24, 17 L. R. A. 129, 31 N. E. 990; Siegret v. Abbott, 61 Md. 276, 48 Am. Rep. 101; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; Wood

of the United States for the northern district of California, against Clinton E. Worden & Company, a corporation of the state of California, and against J. A. Bright, T. F. Bacon, C. J. Schmelz, and Lucius Little, citizens of the state of California.

The bill alleged that, in the year 1879, one Richard E. Queen invented "a certain medical preparation or remedy for constipation and to act upon the kidneys, liver, stomach, and bowels, which medical compound is a combination in solution of plants known to be beneficial to the human system, forming an agreeable and effective laxative to cure habitual constipation and many ills, depending upon a weak and inactive condition of the liver, kidneys, stomach, and bowels;" that shortly after the said invention the said Queen sold and transferred all his right, title, and interest in and to said medical compound, and in and to the trade name, trade-marks, and good will of said company to the complainant company, which has ever since been engaged in the manufacture and sale of said medical preparation or remedy; that said medical preparation has always been marked, named, and called by the complainant "Syrup of Figs," that name being printed or otherwise marked upon every bottle, and also printed upon the boxes, packages, or wrappers in which the bottles of the preparation were packed for shipment and sale; that the complainant and its said predecessor in interest were the first to pack and dress or mark a liquid laxative preparation in the manner illustrated by exhibits "A" and "B" attached to the bill,—that is to say, in an oblong, rectangular box or carton, with statements of the virtues of the preparation printed in different languages upon the back and sides of the *carton, and on the border [518] within which, at the top, is a representation of a branch of a fig tree, bearing fruit and leaves, surrounded by the words "Fig Syrup Company," or "California Fig Syrup Company," and below which appear, in large let-

v. Lambert, L. R. 32 Ch. Div. 247, 54 L. T. N. S. 314, 55 L. J. Ch. N. S. 377. See also as to misrepresentation as to place of manufacture, note to Elgin Nat. Watch Co. v. Illinois Watch Case Co. 45 L. ed. U. S. 365), or the nature of the article (Solis Cigar Co. v. Pozo, 16 Colo. 388, 26 Pac. 556; Wolfe v. Burke, 56 N. Y. 122; Laird v. Wilder, 9 Bush, 131, 15 Am. Rep. 707; Phalon v. Wright, 5 Phila. 464; Fetridge v. Wells, 4 Abb. Pr. 144; Alden v. Gross, 25 Mo. App. 123; Seabury v. Grosvenor, 53 How. Pr. 192; Leather Cloth Co. v. American Leather Cloth Co. 4 De Gex, J. & S. 136, 33 L. J. Ch. N. S. 199, 10 Jur. N. S. 81, 9 L. T. N. S. 558, 12 Week. Rep. 289). For other cases see the note referred to *supra*.

The more recent cases evidence no disposition to modify the rule.

Equity will not interfere to protect a person in deluding the public as to the identity of the maker of his product. Hence, where a reputation has been acquired for a product because of the skill and care exercised by its maker, the continued use of the old labels by the successor to the business, with nothing to indicate a change of ownership, is such false representation as will defeat the right to enjoin infringement. Alaska Packers' Asso. v. Alaska Improv. Co. 60 Fed. 103.

And the correction of such misstatements after action to enjoin infringement is commenced, by attaching an additional label, will not cure the defect. Alaska Packers' Asso. v. Alaska Improv. Co. 60 Fed. 103.

The transferee of the right to use a trademark in connection with a different article is not entitled to be protected in a court of equity against infringement. Macmahan Pharmacal Co. v. Denver Chemical Mfg. Co. 51 C. C. A. 302, 113 Fed. 468.

But to defeat the right to relief, such misrepresentations must have the effect of deceiving and therefore defrauding the public. Within this rule the junior member of a firm, doing business under the firm name of father and son, who becomes sole successor to the business, is not guilty of such false representation in continuing to use the name of such firm as a trademark as will deprive him of the right to restrain its infringement. Feder v. Benkert, 18 C. C. A. 549, 44 U. S. App. 99, 70 Fed. 613.

And the purchasers of a distillery who were given the exclusive privilege of continuing to use the firm name of the original owners as the name of a brand of whisky produced at such distillery are not deprived of their right to enjoin infringement by their addition of the word "distillers" to the words of such brand, as such use is not at all calculated to deceive. Frazier v. Dowling, 18 Ky. L. Rep. 1109, 39 S. W. 45.

And this principle was recognized in Jose Morales & Co. v. The Fair (Ill.) 31 Chicago Legal News, 317, which was a suit to restrain infringement of a cigar label, the court saying: "The complainant has the right to set forth on its boxes the entire history of his cigar. If a fact, once true, by a change of circumstances becomes inaccurate, the complainant is not required to drop out that fact under the penalty of being refused relief in this court. It may display all that precedes its ownership, provided it also shows that ownership."

And if there is any false representation as to the origin of a product in the use of the monogram of a partnership by a corporation which succeeded it and was managed by a former member of such partnership, such conduct will not deprive the corporation of the right to enjoin infringement of its brands, where prior to such suit it had begun to stamp its product with its own name as "successor" to such partnership. Pillsbury v. Pillsbury-Washburn Flour Mills Co. 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841.

So, immaterial statements on a label for malt extract, which are survivals from older labels and are not now strictly accurate, such as the designation of a certain person as sole agent for the United States, do not disentitle a manufacturer to relief against infringement. Tarrant v. Hoff, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959.

And the use by a corporation, on its labels for thread, of the name of a person as "sole agent" who never was such in fact, will not defeat its right to protection against infringement, where, by so doing, it was using the trade-mark, which had been assigned to it, to indicate the fact that it was the successor in business of the assignor, whose representative in this country was the person so designated. Clark Thread Co. v. Armitage, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936.

And statements in a label for thread, as to the age of the business, which, when applied to the owner's manufacture, are not strictly accurate, are not such false representations as to bar relief for infringement, where they were merely intended to represent the commercial origin of the business. Clark Thread Co. v. Armitage, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936.

ters, the words "Syrup of Figs," and below these last-named words appears a brief statement of the virtues of this preparation, together with the words "Manufactured only by the California Fig Syrup Company;" that the complainant has spent more than one million dollars in advertising said preparation, always under the name of "Syrup of Figs," or "Fig Syrup," throughout the United States and other countries, and that millions of bottles of said preparation have been sold; that, by virtue of the premises, the complainant has acquired the exclusive right to the name, "Syrup of Figs," or "Fig Syrup," as it is indifferently called by the public, or any colorable imitation of the same, as applied to a liquid laxative medical preparation irrespective of the form of bottle or package in which it may be sold to the public; that, by virtue of the premises, the complainant has acquired the exclusive right to the manner and form of packing the same for sale, in connection with the words "Syrup of Figs" or "Fig Syrup," or any colorable imitation of the same, as a part of the business name of a concern making a liquid laxative medical compound.

The bill charges that the defendant, wishing to trade to its own profit and advantage upon the reputation of the complainant's preparation, and desiring to impose a worthless production upon the public, has caused to be made, put up, and sold, and offered for sale, a liquid laxative medical compound, resembling complainant's preparation, under the name "Syrup of Figs" and "Fig Syrup," and marking the boxes and packages containing the same with the name "Fig Syrup" or "Syrup of Figs," and has put the preparation, under said name, in bottles and packages or cartons, so closely in imitation of the complainant's bottles and packages, as to be likely to deceive purchasers, and so as to enable unscrupulous retail dealers to palm off defendant's preparation on the consumers as and for the complainant's prep-

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A suit to restrain the infringement of labels and packages for a medicine is not barred by reason of the issuance, in one particular year and eight years before suit was brought, of a large number of copies of an advertising circular containing a false statement as to the identity of the discoverer of the medicine or formula. C. F. Simmons Medicine Co. v. Mansfield Drug Co. 93 Tenn. 84, 23 S. W. 165.

The exclusive use of a trade-mark which seeks to convey the false impression that the product is an imported article will not be protected in a court of equity. Joseph v. Macowsky, 96 Cal. 518, 19 L. R. A. 53, 31 Pac. 914.

A cigar label was, however, protected against infringement, in Jose Morales & Co. v. The Fair (Ill.) 31 Chicago Legal News, 317, over the objection that it falsely represented the cigars to be imported, where a customer would not be misled if he used reasonable and ordinary care in making his purchase. See also Hilson Co. v. Foster, 80 Fed. 896, *infra*.

Representations by a manufacturer of scythe stones that his various brands were from quarries of certain names, which are in fact but nominal subdivisions of the same quarries, will not defeat his right to restrain infringement, where the stones are the identical article demanded by the preference of his customers. Cleveland Stone Co. v. Wallace, 52 Fed. 431.

A person cannot hope to be protected in a court of equity against the infringement of a trade-mark which is calculated to deceive the public as to the nature of the article to which it is applied.

For this reason a trade-mark in the word "Trommer" for malt extract will be denied protection in equity, where such word was used for the purpose of misleading the public into the belief that the extract was prepared in accordance with the method of a person of that name, which was commended by standard medical authorities. Buckland v. Rice, 40 Ohio St. 526.

This principle was also applied prior to WORDEN & Co. v. CALIFORNIA FIG SYRUP Co., with the result of defeating suits to enjoin the infringement of a trade-mark in the words "Syrup of Figs" for a laxative preparation in which fig juice is a very small and nonessential element. California Fig Syrup Co. v. Putnam, 16 C. C. A. 376, 33 U. S. App. 283, 69 Fed. 740; California Fig Syrup Co. v. Stearns, 33 L. R. A. 56, 20 C. C. A. 22, 43 U. S. App. 234, 73 Fed. 813. The decision to the contrary in Improved Fig Syrup Co. v. California Fig Syrup Co. 4 C. C. A. 264, 7 U. S. App. 588, 54 Fed. 175, is based upon the condition of the evidence, which the court thought was insufficient to establish any fraud or imposition upon or damage to the public.

The denial of a preliminary injunction to restrain the infringement of a label for "Bromo-Quinine," on the ground that by the use of the word "Bromo" the manufacturer intended to delude the public into the false belief that bromine was a material element in the compound, will not be disturbed on appeal, where such action was based in large part on conflicting *ex parte* affidavits. Paris Medicine Co. v. W. H. Hill Co. 42 C. C. A. 227, 102 Fed. 148.

Representations that cigars which were made with Havana fillers, seed binders, and Sumatra wrappers, and sometimes with mixed Havana and seed fillers, and even wholly of seed tobacco except the wrapper, are genuine Havana cigars, will bar relief. Hilson Co. v. Foster, 80 Fed. 896.

In Feder v. Brundo, 5 Ohio N. P. 275, however, the court granted a temporary restraining order against the infringement of a label for stogies, although the makers advertised them as "Havanas" or "straight Havanas," while they were in fact made of tobacco not grown in Cuba. The court reached this conclusion from the unsatisfactory condition of the evidence, from which it could not be definitely determined whether the word "Havana" as applied to tobacco refers to the place where it is grown, or has reference to its quality. See also Jose Morales & Co. v. The Fair (Ill.) 31 Chicago Legal News, 317, *supra*.

A distiller who mixes 35 per cent of other whiskies with his own, and sells it under labels which represent it to be his own product "pure and unadulterated," and cautions the consumer to avoid imitation, is guilty of such misrepresentation as to defeat his right to enjoin infringement. Krauss v. Jos. R. Peebles Sons Co. 58 Fed. 585.

The owner of a trade-mark in the name "Darlington" for butter is not deprived of his right to enjoin infringement because at rare intervals he has purchased milk or cream from others to enable him to supply his customers, and in yet rarer instances purchased small amounts of butter for the same purpose. Pratt's Appeal, 117 Pa. 401, 11 Atl. 878.

Representations that scythe stones are made from "selected" or "the best blue Huron grit" will not defeat the right to enjoin infringement.

aration; and that purchasers frequently have been deceived and induced to buy the [519] compound prepared *by the defendant: that the complainant has been greatly injured in the business in the manufacture of its liquid laxative preparation "Syrup of Figs" or "Fig Syrup," and believes that it has suffered damage and injury by reason of defendant's acts to the extent of at least $10,000; that this is a continuing wrong, and one which it is impossible to exactly calculate, and one which, if permitted to continue, will work irreparable injury to the complainant.

Wherefore the complainant prayed, in its said bill, for an injunction restraining the defendant and its agents, servants, etc., from manufacturing, selling, or offering for sale, directly or indirectly, any liquid laxative medical preparation, marked with the words "Syrup of Figs" or "Fig Syrup," or marked with any words which may be a colorable imitation of the name of "Syrup of Figs" or "Fig Syrup," and from putting up, selling, or dealing in any liquid laxative medical preparation which shall have a tendency to deceive the public and induce buyers to purchase defendant's preparation, believing the same to be complainant's preparation, and that defendant be perpetually enjoined from using the words "Fig Syrup Company" as a business name, or from using the words "Fig Syrup" or "Syrup of Figs" as part of its business name, in connection with the manufacture and sale of a liquid laxative preparation. The complainant also prayed for an account for damages to complainant and for gains and profits derived by the defendant company, and for such other and further relief as may be agreeable to equity and good conscience.

The defendant company and the other defendants filed a joint and several answer, admitting many of the allegations of the bill, but denying and putting the complainant on proof of those which alleged any in-

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of trade-marks and labels for such stones, if the material used is not inferior to that which the trade has accepted as of that grade. Cleveland Stone Co. v. Wallace, 52 Fed. 431.

The right of the city of Carlsbad to restrain the use of the word "Carlsbad" on artificial salts not the product of the Carlsbad spring is not defeated because it sells Carlsbad Sprudel lozenges, which contain but 10 per cent of the ingredients which are found in Carlsbad water, the balance being cane sugar. Carlsbad v. Kutnow, 18 C. C. A. 24, 35 U. S. App. 750, 71 Fed. 167.

Mere boasting or harmless exaggeration is not such fraud or misrepresentation as will bar relief.

Thus, the use of the words "The only high grade," on a trade-mark for oleomargarine or butterine, will not defeat the right to enjoin infringement. William J. Moxley Co. v. Braum & F. Co. 93 Ill. App. 183.

And a statement by the owner of a trade-mark for thread, that his thread is sold "everywhere," will not prevent relief in equity for an infringement of his trade-mark. Clark Thread Co. v. Armitage, 67 Fed. 896.

But statements upon labels of bottles of medicine, that it is "The great smallpox and diptheria cure and preventive, Cures the worst cases without marking unless already scabbed," —are so manifestly untrue and calculated to deceive the public as to deprive the owner of any right to protection in the words "The Family Physician," as the trade-mark for such medicine. Houchens v. Houchens, 95 Md. 37, 51 Atl. 822.

"We do not think," said the court in Siegert v. Abbott, 72 Hun, 243, 25 N. Y. Supp. 590, that "courts of equity should be swift or vigilant to protect the manufacturer of a compound advertised and sold as a valuable medicine, which is not shown to contain a single medical ingredient, or to possess a single merit claimed for it, as against another manufacturer producing and selling a like compound."

So, in a suit to restrain infringement of an alleged trade-mark in the words "One Night Cough Cure," the court, in refusing the relief sought, suggested that such words asserted a manifest falsehood or physical impossibility, but placed its decision on other grounds. Kohler Mfg. Co. v. Beeshore, 8 C. C. A. 215, 17 U. S. App. 352, 59 Fed. 572.

And in Piso Co. v. Voight, 4 Ohio N. P. 347, the court said that a court of equity would be justified in refusing to interfere in behalf of persons who claim property in a trade-mark acquired by advertising their wares under representations which are false.

But a claim that a medicine will permanently cure habitual constipation is not so fraudulent or deceptive as to deprive the proprietor of his right to protection against unfair competition. California Fig Syrup Co. v. Worden, 95 Fed. 132.

And a statement on a medicine label, that "this is the only genuine Simmons liver medicine," will not defeat the right to restrain infringement of labels and packages, although there are other preparations from the original formula, if they are known under a different name. C. F. Simmons Medicine Co. v. Mansfield Drug Co. 93 Tenn. 84, 23 S. W. 165.

And the therapeutic merits of a widely known and commercially valuable preparation for the various ailments for which the labels declare it to be adapted will not be investigated by the court in a suit to restrain the sale of a simulated article as and for the genuine. Samuel Bros. v. Hostetter Co. 118 Fed. 257.

No right to a trade-mark which includes the word "patent," and which describes the article as patented, can arise where there is and has been no patent. Nor is the claim a valid one for the other words used, where it is based upon their use in connection with that word. Holzapfel's Compositions Co. v. Rahtjen's American Composition Co. 183 U. S. 1, 46 L. ed. 49, 22 Sup. Ct. Rep. 6.

The use in trade circulars and advertisements of language clearly implying that the advertised article is protected by letters patent, while in fact such patent has expired, is a bar to equitable relief, although the objectionable language does not appear upon the product itself or in connection with the trade-mark. Preservaline Mfg. Co. v. Heller Chemical Co. 118 Fed. 103.

But a trade-mark in the words "Club Soda" is not deprived of protection because the label contains the statement, "Manufactured in Ireland by H. M. royal letters patent," as these words are not calculated to represent that the composition or ingredients of the article were protected by an existing patent, being intended to mean that the product was manufactured in Ireland by means of patented machinery. Cochrane v. Macnish [1896] A. C. 225, 65 L. J. P. C. N. S. 20, 74 L. T. N. S. 109.

So, the use of the word "patented" on a label

tentional or actual appropriation by the defendant company of proprietory or business rights of the complainant. The answer proceeded to make the following allegations:

"And for a separate and further defense these defendants aver, upon their information and belief, that the preparation made and sold by complainant under the name of 'Syrup of Figs' does not and never did contain any syrup of figs or any fig syrup; or [520] any *juice of figs or any part or portion or quantity of figs in any form; and that the name 'Syrup of Figs' and 'Fig Syrup' and the name of the company, 'The California Fig Company,' and the form and appearance of the labels and the pictures on the labels, and the statements on the labels adopted and used by complainant in connection with its liquid laxative medicine, were all designed, adopted, and used with the deliberate intent and purpose to deceive the public and the user of the medicine, and to perpetrate a fraud upon them by inducing them to believe that the preparation contained figs in some form, and that by reason thereof the said medicine derived its laxative properties and also a pleasant and agreeable taste; that the complainant has been successful in perpetrating the said fraud upon the public, and for years last past has perpetrated said fraud by wholesale, and have induced the public generally throughout the world to believe the statements aforesaid concerning the said medicine and its connection with figs, and thereby complainant has made and realized large profits, gains, and advantages from the sale of said medicine, all of which was caused and which accrued and were made by reason of said false, fraudulent, and deceptive statements; that, as a matter of fact, the said so-called 'Syrup of Figs,' sold by complainant, consists of the ordinary and well-known laxative called senna as a basis, together with certain aromatic carminatives added for the purpose of giving it a pleasant and agreeable taste, as a cure to the naturally griping effect of senna when taken alone; that in order to sell such a compound complainant made the false, fraudulent, and fictitious statements hereinabove charged against it, and was enabled to sell the same solely by virtue of said false, fraudulent, and fictitious statements, and said complainant has built up its business and its trade upon the strength of, and by virtue of, the said false, fraudulent, and fictitious statements, for which reason complainant is not entitled to relief in a court of equity."

The cause was put at issue by a replication filed by the complainant company. Pending the trial an application for a preliminary injunction was made, which was allowed upon the ground that the complainant had made such a showing by the *plead- [521] ings and affidavits that it was entitled to an injunction against the sales of "Fig Syrup" by the defendant. 86 Fed. 212.

A large amount of evidence was taken, and, on June 7, 1899, a decree was entered by the circuit court perpetually enjoining the defendant company and the other defendants from making, selling, or offering to sell any liquid laxative medicine or preparation under the name of "Syrup of Figs" or "Fig Syrup," or under any name in colorable imitation of the name "Syrup of Figs," and from making, selling, or offering to sell any medical liquid laxative preparation, put up in bottles, boxes, or packages similar in form or arrangement to the bottles or packages used by the complainant in the manufacture and sale of its said liquid laxative preparation, or so closely resembling the same as to be calculated to deceive the public, and from using the name "Fig Syrup Company,"

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for illuminating oil, intended to denote registration in the Patent Office, and not for the purpose of deluding the public into the belief that the article itself was patented, will not bar relief for infringement. Insurance Oil Tank Co. v. Scott, 33 La. Ann. 946, 39 Am. Rep. 286.

The statement on a package of medicine, that the trade-mark was registered in a designated year, in which there was no provision for registration of a trade-mark, is not such misrepresentation as will defeat the right to enjoin imitation. C. F. Simmons Medicine Co. v. Mansfield Drug Co. 93 Tenn. 84, 23 S. W. 165.

The use of the word "trade-mark" in connection with a particular mark used as a trade-mark, but which has not been registered, does not necessarily imply that registration has been obtained, so as to deprive the manufacturer of a right to an interlocutory injunction against infringement. Sen Sen Co. v. Britten [1899] 1 Ch. 692, 68 L. J. Ch. N. S. 250.

In a case in the New York supreme court it was held on an appeal from an order denying a preliminary injunction to restrain the imitation of a soap wrapper, that an untrue statement on the wrapper, that the form of cake and wrapper "were protected by a trade-mark secured," was sufficient to bar the right to relief. Brown v. Doscher, 49 N. Y. S. R. 196, 20 N. Y. Supp. 900. This case subsequently reached the court of appeals on an appeal from a judgment dismissing the complaint. The latter court, in affirming the judgment on the ground that no infringement was shown, said: "If we had reached the conclusion that the plaintiffs were entitled to judgment, then the legal question presented by this false statement would have required careful examination, but as the case stands we prefer to rest our decision upon the merits." 147 N. Y. 647, 42 N. E. 268.

A person cannot claim present protection for a trade-mark on a theory which presupposes that the previous conduct of the business has been characterized by fraud and misrepresentation.

Thus, one who has built up a business upon representations that the name under which his product was sold was descriptive of the article cannot be protected in the use of such name as a trade-mark, on the theory that such product is a new article of manufacture. Dadirrian v. Yacubian, 39 C. C. A. 321, 98 Fed. 872.

And a patentee of a proprietary medicine who has claimed under the patent the exclusive right to manufacture or sell the same cannot, after the expiration of the patent, claim to have a trade-mark right in the name given to such medicine because he did not use one ingredient called for by the patent. Centaur Co. v. Marshall, 92 Fed. 605.

The falsity of a statement in a trade-mark will not be assumed for the purpose of defeating the owner's right to enjoin infringement, but the fraud or deceit necessary to bar relief must be pleaded and proved. Fleischmann v. Fleischmann, 7 App. Div. 280, 39 N. Y. Supp. 1002.

and from using a name whereof the words "Fig Syrup" or "Syrup of Figs Company," form a part as a business name in connection with the manufacture of a liquid laxative preparation. 95 Fed. 132.

There was an appeal to the circuit court of appeals for the ninth circuit, where the decree of the circuit court was affirmed, Ross, C. J., dissenting. 42 C. C. A. 383, 102 Fed. 334.

The cause was then brought to this court by a writ of certiorari allowed on November 20, 1900.

*Mr.* **John H. Miller** argued the cause, and, with *Mr. Purcell Rowe*, filed a brief for petitioner:

No words can be adopted as a valid trademark which relate only to the name, quality, or description of the thing or business or place where the thing is produced or the business is carried on.

*Choynski* v. *Cohen*, 39 Cal. 501, 2 Am. Rep. 476; *Burke* v. *Cassin*, 45 Cal. 467, 13 Am. Rep. 204; *Schmidt* v. *Brieg*, 100 Cal. 673, 22 L. R. A. 790, 35 Pac. 623; *Delaware & H. Canal Co.* v. *Clark*, 13 Wall. 311, 20 L. ed. 581; *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540, 35 L. ed. 247, 11 Sup. Ct. Rep. 625; *Town* v. *Stetson*, 5 Abb. Pr. N. S. 218; *Caswell* v. *Davis*, 58 N. Y. 223, 17 Am. Rep. 233; *Ayer* v. *Rushton*, Coddington's Digest, 229; *Re Dick*, 9 Off. Gaz. 538; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Fetridge* v. *Wells*, 4 Abb. Pr. 144; *Corwin* v. *Daly*, 7 Bosw. 222; *Phalon* v. *Wright*, 5 Phila. 464; *Liebigs Extract of Meat Co.* v. *Hanbury*, 17 L. T. N. S. 298; *Re Hauthaway*, Com. Dec. '71, p. 97; *Re Palmer*, Com. Dec. '71, p. 289; *Re Roberts*, Com. Dec. '71, p. 100; *Gray* v. *Koch*. 2 Mich. N. P. 119; *Re Johnson Co.* 2 Off. Gaz. 315; *Re Goodyear Rubber Co.* 11 Off. Gaz. 1062; *Re Roach*, 10 Off. Gaz. 333; *Gilman* v. *Hunnewell*, 122 Mass. 139; *Re Rader*, 13 Off. Gaz. 596; *Raggett* v. *Findlater*, L. R. 17 Eq. 29; *Siegert* v. *Findlater*, L. R. 7 Ch. Div. 801; *Godillot* v. *Hazard*, 49 How. Pr. 5; *Young* v. *Macrae*, 9 Jur. N. S. 322; *Delaware & H. Canal Co.* v. *Clark*, 13 Wall. 311, 20 L. ed. 581; *Re Sardine Co.* 2 Off. Gaz. 495; *Ginter* v. *Kinney Tobacco Co.* 12 Fed. 782; *Humphrey's Specific Homeopathic Medicine Co.* v. *Wenz*, 14 Fed. 250; *L. H. Harris Drug Co.* v. *Stucky*, 46 Fed. 624.

A symbol or label claimed as a trade-mark, so constituted or worded as to make or contain a distinct assertion which is false, will not be recognized; nor can any right to its exclusive use be maintained.

*Leather Cloth Co.* v. *American Leather Cloth Co.* 4 DeG., J. & S. 137, Affirmed 11 H. L. Cas. 523; *Holzapfel's Compositions Co.* v. *Rahtjen's American Composition Co.* 183 U. S. 1, 46 L. ed. 49, 22 Sup. Ct. Rep. 6; *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; *Allan B. Wrisley Co.* v. *Iowa Soap Co.* 104 Fed. 548; *Clotworthy* v. *Schepp*, 42 Fed. 62; *Alden* v. *Gross*, 25 Mo. App. 123; *Connell* v. *Reed*, 128 Mass. 477, 35 Am. Rep. 397; *Siegert* v. *Abbott*, 61 Md. 276, 48 Am. Rep. 101; *Seabury* v. *Grosvenor*, 14 Blatchf. 262, Fed. Cas. No. 12,576; *Krauss* v. *Jos. R. Peebles' Sons Co.* 58 Fed. 585; *Kohler Mfg. Co.* v. *Beeshore*, 8 C. C. A. 215, 17 U. S. App. 352, 59 Fed. 572; *Fetridge* v. *Wells*, 13 How. Pr. 385; *Schmidt* v. *Brieg*, 100 Cal. 672, 22 L. R. A. 790, 35 Pac. 623; *Phalon* v. *Wright*, 5 Phila. 464; *Prince Mfg. Co.* v. *Prince's Metallic Paint Co.* 135 N. Y. 24, 17 L. R. A. 129, 31 N. E. 990.

It is no answer to say that the medicine is a good laxative, whether it has in it figs or not.

*Krauss* v. *Jos. R. Peebles' Sons Co.* 58 Fed. 585; *Fetridge* v. *Wells*, 13 How. Pr. 385; *Prince Mfg. Co.* v. *Prince's Metallic Paint Co.* 135 N. Y. 24, 17 L. R. A. 129, 31 N. E. 990.

If there be fraud on the part of a complainant, he is not entitled to protection for his label any more than for his trade-mark. In that respect, trade-marks and labels stand on the same footing.

*Messrs.* **Warren Olney** and **John G. Carlisle** argued the cause and filed a brief for respondent:

Where a man has an established business which he is seeking to protect from unfair competition, he will be given relief if he can make any reasonable explanation of statements claimed to be false.

*Cochrane* v. *Macnish* [1896] A. C. 225; *Insurance Oil Tank Co.* v. *Scott*, 33 La. Ann. 946, 39 Am. Rep. 286; *Siegert* v. *Findlater*, L. R. 7 Ch. Div. 801; *Fetridge* v. *Merchant*, 4 Abb. Pr. 156; *Ford* v. *Foster*, L. R. 7 Ch. Div. 611; *Bardou* v. *Lacroix*, 27 Annales, 214; Brown, Trademarks, p. 83; *Meriden Britannia Co.* v. *Parker*, 39 Conn. 450, 12 Am. Rep. 401; *C. F. Simmons Medicine Co.* v. *Mansfield Drug Co.* 93 Tenn. 84, 23 S. W. 169; *Smith* v. *Sixbury*, 25 Hun, 232; *Tarrant Co.* v. *Hoff*, 22 C. C. A. 644, 45 U. S. App. 143, 76 Fed. 959; *Conrad* v. *Joseph Uhrig Brew. Co.* 8 Mo. App. 277; *Funke* v. *Dreyfus*, 34 La. Ann. 80, 44 Am. Rep. 413; *Moxie Nerve Food* v. *Baumbach*, 32 Fed. 205; *William Rogers Mfg. Co.* v. *Rogers & S. Mfg. Co.* 11 Fed. 495; *Price Baking-Powder Co.* v. *Fyfe*, 45 Fed. 799; *Societe Anonyme* v. *Western Distilling Co.* 43 Fed. 416; *Selchow* v. *Baker*, 93 N. Y. 63, 45 Am. Rep. 169; *Cleveland Stone Co.* v. *Wallace*, 52 Fed. 431; *Metzler* v. *Wood*, L. R. 8 Ch. Div. 606; *Alexander* v. *Morse*, 14 R. I. 153, 51 Am. Rep. 369; *Chappell* v. *Sheard*, 2 Kay & J. 117; *Chappell* v. *Davidson*, 2 Kay & J. 123; *Clark Thread Co.* v. *Armitage*, 21 C. C. A. 178, 45 U. S. App. 62, 74 Fed. 936; *Comstock* v. *White*, 18 How. Pr. 421; *Block* v. *Standard Distilling & Distributing Co.* 95 Fed. 978; *Hoxie* v. *Chaney*, 143 Mass. 592, 58 Am. Rep. 149, 10 N. E. 713; *Curtis* v. *Bryan*, 36 How. Pr. 33; *Dale* v. *Smithson*, 12 Abbott's Pr. 237; *Joseph Dixon Crucible Co.* v. *Guggenheim*, 2 Brewst. 321; *Electro-Silicon Co.* v. *Hazard*, 29 Hun, 369; *Edleston* v. *Vick*, 18 Jur. 7; *Feder* v. *Benkert*, 18 C. C. A. 549, 44 U. S. App. 99, 70 Fed. 613; *Holloway* v.

*Holloway*, 13 Bev. 209; *Keasbey* v. *Brooklyn Chemical Works*, 142 N. Y. 467, 37 N. E. 476; *Lee* v. *Haley*, L. R. 5 Ch. 155; *Marshall* v. *Ross*, L. R. 8 Eq. 651; *Pillsbury* v. *Pillsbury-Washburn Flour Mills Co.* 12 C. C. A. 432, 24 U. S. App. 395, 64 Fed. 841; *Sen Sen Co.* v. *Britten* [1899] 1 Ch. 692; *Shaver* v. *Heller & M. Co.* 48 C. C. A. 48, 108 Fed. 821.

The statements on the carton carry the "antidote with the bane."

*Centaur Co.* v. *Robinson*, 91 Fed. 889.

Mr. Justice **Shiras** delivered the opinion of the court:

[527] *The courts below concluded, upon the evidence, that the defendants sold a medical preparation named, marked, and packed. in imitation of the complainant's medicine, for the purpose and with the design and intent of deceiving purchasers and inducing them to buy defendant's preparation instead of the complainant's. We see no reason to dissent from that conclusion, and if there were no other questions in the case, we should be ready to affirm the decree, awarding a perpetual injunction and an account of the profits and gains derived from such unfair and dishonest practices.

Another ground, however, is urged against the complainant's right to invoke the aid of a court of equity, in that the California Fig Syrup Company, the complainant, has so fraudulently represented to the public the nature of its medical preparation that it is not entitled to equitable relief.

Some courts have gone so far as to hold that courts of equity will not interfere by injunction in controversies between rival manufacturers and dealers in so-called quack medicines. *Fowle* v. *Spear*, 4 Clark (Pa.) 145, Fed. Cas. No. 4,996; *Heath* v. *Wright*, 3 Wall. Jr. 141, Fed. Cas. No. 6,310; *Fetridge* v. *Wells*, 4 Abb. Pr. 144.

It may be said, in support of such a view, that most, if not all, the states of this Union have enactments forbidding and making penal the practice of medicine by persons who have not gone through a course of appropriate study, and obtained a license from a board of examiners; and there is similar legislation in respect to pharmacists. And it would seem to be inconsistent, and to tend to defeat such salutary laws, if medical preparations, often and usually containing powerful and poisonous drugs, are permitted to be widely advertised and sold to all who are willing to purchase. Laws might properly be passed limiting and controlling such traffic by restraining retail dealers from selling such medical preparations, except when prescribed by regular medical practitioners.

But we think that, in the absence of such legislation, courts cannot declare dealing in such preparations to be illegal, nor the articles themselves to be not entitled, as property, to the protection of the law.

[528] *We find, however, more solidity in the contention, on behalf of the appellants, that when the owner of a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in his advertisements and business, be himself guilty of any false or misleading representation; that if the plaintiff makes any material false statement in connection with the property which he seeks to protect, he loses his right to claim the assistance of a court of equity; that where any symbol or label claimed as a trade-mark is so constructed or worded as to make or contain a distinct assertion which is false, no property can be claimed on it, or, in other words, the right to the exclusive use of it cannot be maintained.

Among the cases cited to sustain this contention are the following:

In *Connell* v. *Reed*, 128 Mass. 477, 35 Am. Rep. 397, the plaintiff sought to establish the exclusive right to the words "East Indian," as applied to his remedy, and the court, through Gray, Ch. J., said:

"The conclusive answer to this suit is . . . that the plaintiffs have adopted and used these words to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public."

In *Siegert* v. *Abbott*, 61 Md. 276, 48 Am. Rep. 101, where the subject-matter of the trade-mark was "Angostura Bitters," which purported to have been prepared by Dr. Siegert, at Angostura, Trinidad, and where it appeared that Dr. Siegert was dead, and had never lived at Angostura, the bill was dismissed, the court saying: "It is a general rule of law, in cases of this kind, that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade-mark or labels."

In *Alden* v. *Gross*, 25 Mo. App. 123, a trade-mark was claimed in the words "fruit vinegar," and the court said:

[529] *"The vinegar thus branded was not manufactured out of fruit, in the plain, ordinary, usual sense of that term, but out of low wines distilled from cereals, and fruit enters into its composition only to a very insignificant extent. . . . It would be a novel application of the rule governing the subject of trade-marks if one who manufactures vinegar out of cereals could appropriate for the article thus manufactured the word 'fruit,' and thereby exclude another from using the word as descriptive of an article which is, in point of fact, manufactured out of fruit. . . . But whether the word 'fruit' in this connection is purely indicative of the character or quality of the article or not, the plaintiff's exclusive claim to it must fail on the further ground that the use of the word, in that connection, is clearly deceptive."

In *Prince Mfg. Co.* v. *Prince's Metallic Paint Co.* 135 N. Y. 24, 17 L. R. A. 129, 31 N. E. 990, an injunction to protect a trade-mark was refused, by reason of a false representation as to the place from which the

ore was obtained, and the court of appeals used the following language:

"Any material misrepresentation in a label or trade-mark as to the person by whom the article is manufactured, or as to the place where manufactured, or as to the materials composing it, or any other material false representation, deprives a party of the right to relief in equity. The courts do not, in such cases, take into consideration the attitude of the defendant. . . . And, although the false article is as good as the true one, 'the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce.'"

English cases are to the same effect. Thus, in *Pidding* v. *How*, 8 Sim. 477, where it appeared that the plaintiff had made a new sort of mixed tea, and sold it under the name of "Howqua's Mixture," but, as he had made false statements to the public, as to the teas, of which his mixture was composed, and as to the mode in which they were procured, the court refused to restrain the defendant from selling tea under the same name, and said:

"As between the plaintiff and the defendant, the course pursued by the defendant has [530] not been a proper one; but it is a *clear rule laid down by courts of equity, not to extend their protection to persons whose case is not founded in truth. And, as the plaintiff, in this case, has thought fit to mix up that which may be true with that which is false, in introducing his tea to the public, my opinion is, that, unless he establish his title at law, the court cannot interfere on his behalf."

The English case of *Leather Cloth Co.* v. *American Leather Cloth Co.* is a leading one on this subject, and in which the nature of false representations that will defeat the right of the owner of a trade-mark to protection in equity was much considered.

A bill, asking for an injunction against defendants, who were charged with using stamps and trade-marks so similar to those of the complainant as to deceive purchasers, was sustained by Vice Chancellor Wood, who granted the injunction prayed for. 1 Hem. & M. 271. On appeal the decree of the vice chancellor was reversed by the lord chancellor, and the complainant's bill was dismissed. 4 De G. J. & S. 136.

The conclusions reached by Lord Chancellor Westbury were that there is a right of property in a trade-mark, name, or symbol in connection with a particular manufacture or vendible commodity, but that where the owner of such a trade-mark applies for an injunction to restrain the defendant from injuring his property by making false representations to the public, it is essential that the plaintiff should not in his trade-mark, or in the business connected with it, be himself guilty of any false or misleading representation. In considering what constitutes a material false representation, the chancellor observed that he could not receive it as a rule, either of morality or equity, that a plaintiff is not answerable for a falsehood, because it may be so gross and palpable as that no one is likely to be deceived by it; that if there be a wilful false statement, he would not stop to inquire whether it be too gross to mislead.

This decision was affirmed by the House of Lords. 11 H. L. Cas. 523. In that tribunal, in the several opinions of the law lords, the views of the lord chancellor as to the effect of false representations were approved, but it was thought that, independently of that question, the plaintiff was not entitled to an *injunction, because the rival or an- [531] tagonistic trade-mark of the defendants did not sufficiently resemble that of the plaintiff's as to be calculated to deceive the public.

In *Fetridge* v. *Wells*, 13 How. Pr. 385, the plaintiff sold a soap under the name of "Balm of a Thousand Flowers," and, in denying the plaintiff's right to the exclusive use of these words as a trade-mark, Judge Duer said:

"I am fully convinced that the name 'Balm of a Thousand Flowers' was invented, and is now used, to convey to the minds of purchasers the assurance that the highly scented liquid to which the name is given is, in truth, an extract or distillation from flowers, and therefore not merely an innocent, but a pleasant and salutary, preparation. Not only is this the meaning that the words used naturally suggest, but in my opinion it is that which they actually and plainly express and were designed to convey. . . . Let it not be said that it is of little consequence whether this representation be true or false. No representation can be more material than that of the ingredients of a compound which is recommended and sold as a medicine. There is none that is so likely to induce confidence in the application and use of the compound, and none that, when false, will more probably be attended with injurious, and perhaps fatal, consequences. . . . Those who come into a court of equity, seeking equity, must come with pure hands and a pure conscience. If they claim relief against the frauds of others, they must be free themselves from the imputation. If the sales made by the plaintiff and his firm are effected, or sought to be, by misrepresentation and falsehood, they cannot be listened to when they complain that, by the fraudulent rivalry of others, their own fraudulent profits are diminished. An exclusive privilege for deceiving the public is assuredly not one that a court of equity can be required to aid or sanction. To do so would be to forfeit its name and character."

In *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436, the case of *Fetridge* v. *Wells* was cited with approval, and likewise the English cases of *Pidding* v. *How*, 8 Sim. 477, and *Leather Cloth Co.* v. *American Leather Co.* 4 De G. J. & S. 137. In *Manhattan Medicine Co.* v. *Wood* *the complainant claimed to be the [532] owner of a patent medicine and of a trade-mark to distinguish it. The medicine was manufactured by the complainant in New York; the trade-mark declared that it was manufactured by another person in Massachusetts. The circuit court of the United

States for the district of Maine, per Mr. Justice Clifford, held that the complainant, owing to false statements in his trade-mark, was entitled to no relief against a person using the same trade-mark in Maine, and dismissed the bill. On appeal this decree was affirmed, this court saying: "A court of equity will extend no aid to sustain a claim to a trade-mark of an article which is put forth with a misrepresentation to the public as to the manufacturer of the article, and as to the place where it is manufactured, both of which particulars were originally circumstances to guide the purchaser of the medicine."

In *Clotworthy* v. *Schepp*, 42 Fed. 62, the right to a trade-mark was claimed in the word "Puddine," in connection with the words "Rose" and "Vanilla," but Circuit Judge Lacombe refused an injunction, and in his opinion said: "The complainant himself is engaged in deceiving the very public whom he claims to protect from the deception of others. He calls his preparation 'fruit' puddine. In nine different places on his package this word 'fruit' is repeated as descriptive of the article, and a dish of fruit (pears, grapes, etc.) is most prominently depicted on one face of each packet. His packages plainly suggest that fruit of some kind enters in some shape into his compound. A chemical analysis produced by defendant, the substantial accuracy of which is not disputed, discloses the fact that his 'puddine' is composed exclusively of corn starch, a small amount of saccharine matter, and a flavoring extract, with a little carmine added to give it color. It contains no fruit in any form."

*Krauss* v. *Jos. R. Peebles' Sons Co.* 58 Fed. 585, was a case in which it was shown that the liquor sold as "Pepper Whisky" was in fact a mixture of Pepper whisky and other whiskies, and an injunction to prevent infringement was refused by Circuit Judge Taft, who, in his opinion, said: "To bottle such a mixture, and sell it, under the [533] trade label and caution notices above *referred to, is a false representation, and a fraud upon the purchasing public. A court of equity cannot protect property in a trade-mark thus fraudulently used."

And this doctrine of the English and American cases above referred to has been applied in the Federal circuit courts and circuit courts of appeals in cases in which the California Syrup Company, the complainant in the present case, was a party.

In the circuit court of the United States for the district of Massachusetts, March 6, 1895, the California Fig Syrup Company, the complainant in the present case, filed a bill against Kate Gardner Putnam, and others to restrain the infringement of the plaintiff's trade-mark. The facts of the case were thus stated by Circuit Judge Colt in his opinion, reported in 66 Fed. 750:

"The plaintiff is the proprietor and manufacturer of a liquid laxative compound called 'Syrup of Figs.' The defendants manufacture and sell a laxative medicine which they term 'Fig Syrup.' . . . There is no evidence that the defendants have imitated the plaintiff's labels or packages except in this particular. If this preparation is in fact a syrup of figs, the words are clearly descriptive, and not the proper subject of a trade-mark. Upon this point the contention of the plaintiff is that its preparation is not a syrup of figs, since it contains only a very small percentage of the juice of the fig; that the laxative ingredient in it is senna; that while the fig in the form of fruit may have laxative properties arising from the seeds and skin, the fig in the form of syrup is no more laxative than any other fruit syrup; that it follows from these facts that these words, as applied to this compound, are not descriptive, but purely fanciful, and therefore constitute a valid trade-mark. The evidence shows that the compound is not a syrup of figs. It might more properly be termed a 'Syrup of Senna,' if the words were intended to be descriptive of the article. But, assuming this is not a syrup of figs, we are met with the inquiry whether these words, as applied to this preparation, are not deceptive. The label on every bottle reads as follows: 'Syrup of Figs. The California Liquid Fruit Remedy, Gentle and Effective.' On the sides of each bottle are blown the words 'Syrup of Figs,' *and on the back the words 'California Fig Syrup Co., San Francisco, Cal.' On [534] the face of every package is a picture of a branch of a fig tree with the hanging fruit, surrounded with the words 'California Fig Syrup, San Francisco, Cal.;' and beneath this the words 'Syrup of Figs presents in the most elegant form the laxative and nutritious juice of the figs of California.' . . . Thus we see that the leading representation on the labels, packages, and in the advertisements of this preparation is that it is a laxative fruit syrup made from the juice of the California fig. . . . The popularity of this medicine arises from the belief in the mind of the ordinary purchaser that he is buying a laxative compound, the essential ingredient of which is the California fig, whereas, in fact, he is buying a medicine the active property of which is senna. The ethical principle on which the law of trade-marks is based will not permit of such deception. It may be true, as a scientific fact known to physicians and pharmacists, that the syrup of figs has little or no laxative property; but this is not the belief of the general public. They purchase this preparation on the faith that it is a laxative compound made from the fruit of the fig, which is false. This is not an immaterial representation the effect of which is harmless, but it is a representation which goes to the very essence of the plaintiff's right to a trade-mark in these words. The cases are numerous where the courts have refused to grant relief under these circumstances."

Accordingly, the circuit court dismissed the bill with costs. On appeal to the circuit court of appeals for the first circuit the decree of the circuit court was affirmed. [16 C. C. A. 376, 33 U. S. App. 283, 69 Fed. 740.]

In the circuit court of the United States

for the eastern district of Michigan, April 1, 1895, the California Fig Syrup Company filed a bill, seeking to restrain Frederick Stearns & Company from infringing complainant's trade-mark. [67 Fed. 1008.] The court declined to grant an injunction, and dismissed the bill with costs, holding that the words "syrup of figs" or "fig syrup," if descriptive of a syrup, one of the characteristic ingredients of which is the juice of the fig, cannot be sustained as a valid trade-mark or trade name, and that, under the facts of the case, the use of the name " 'Syrup of Figs,' in connection with a de-[535]scription *of the preparation as a fruit remedy, nature's pleasant laxative," applied to a compound, whose active ingredient is senna, and containing but a small proportion of fig juice, which has no considerable laxative properties, is deceptive, and deprives one so using it of any claim to equitable relief.

On appeal to the circuit court of appeals of the sixth circuit the decree of the circuit court was affirmed. 33 L. R. A. 56, 20 C. C. A. 22, 43 U. S. App. 234, 73 Fed. 812. In his opinion Circuit Judge Taft, after stating that the term "syrup of figs," if intended to describe the character of the article considered, could not be used as a trade-mark, proceeded to say:

"But the second ground presented, and that upon which the court below rested its decision, prevents the complainant from having any relief at all. That ground is that the complainant has built up its business and made it valuable by an intentional deceit of the public. It has intended the public to understand that the preparation which it sells has, as an important medicinal agent in its composition, the juice of California figs. This has undoubtedly led the public into the purchase of the preparation. The statement is wholly untrue. Just a suspicion of fig juice has been put into the preparation, not for the purpose of changing its medicinal character, or even its flavor, but merely to give a weak support to the statement that the article sold is syrup of figs. This is a fraud upon the public. It is true it may be a harmless humbug to palm off upon the public as syrup of figs what is syrup of senna, but it is nevertheless of such a character that a court of equity will not encourage it by extending any relief to the person who seeks to protect a business which has grown out of and is dependent upon such deceit.

"It is well settled that if a person wishes his trade-mark property to be protected by a court of equity, he must come into court with clean hands, and if it appears that the trade-mark for which he seeks protection is itself a misrepresentation to the public, and has acquired a value with the public by fraudulent misrepresentations in advertisements, all relief will be denied to him. This is the doctrine of the highest court of England, and no court has laid it down with any greater stringency than the Supreme Court of the United States. *Manhattan* [536]*Medicine Co.* v. **Wood*, 108 U. S. 218, 27 L. ed. 706, 2 Sup. Ct. Rep. 436; *Leather Cloth Co.* v. *American Leather Cloth Co.* 4 De G. J. & S. 137. . . .

"The argument for complainant is, that because fig juice or syrup has no laxative property everybody ought to understand that when the term is used to designate a laxative medicine it must have only a fanciful meaning. But the fact is admitted that the public believe that fig juice or syrup has laxative medicinal properties. It is to them that the complainant seeks to sell its preparation, and it is with respect to their knowledge and impressions that the character, whether descriptive or fanciful, of the term used, is to be determined."

The counsel of the appellee in the present case do not contend that the courts of the second and sixth circuits were wrong in denying the complainant any relief upon the cases as presented in those courts. They do contend that those cases were argued upon a wrong theory by the counsel of the complainant. The language of the brief in this regard is as follows:

"Here was where complainant made a mistake. Acting under advice of able counsel, it claimed the name 'Syrup of Figs' to be a technical *trade-mark*, when all that was necessary to claim was that it constituted a *trade name*. Able counsel in the second and sixth circuits pressed injunction suits against infringers on the theory that complainant had a trade-mark in the name, and that the statement on the cartons and bottles was immaterial. He did not address himself to showing that the name 'Syrup of Figs' came to be honestly and properly applied to the product as largely descriptive of the ingredients of the medicine. He was so afraid of ruining his case as a case of trade-marks, by showing that it was descriptive, that he did not prove what was proved in the case now at bar, *viz.*, that figs were at the time the name was given an important part of the composition."

We are not much impressed with the force of this attempted distinction. Even if it were true that, at the time the medicine in question was first made and put upon the market, the juice of figs was so largely used as one of the ingredients, as to have warranted the adoption of the name "Syrup of Figs" as descriptive of the nature of the medicine, that would be no justification *for[537] continuing the use of the term after the manufacturers and vendors of the medicine ceased to use fig juice as a material ingredient. Even if the term was honestly applied in the first instance, as descriptive, it would none the less be deceptive and misleading when, as is shown in the present case, it ceased to be a truthful statement of the nature of the compound. Nor are we disposed to concede that, under the evidence in the present case, the term "Syrup of Figs" or "Fig Syrup" was properly used as descriptive of the nature of the medicine when it was first made. Then, as now, the operative laxative element was senna, and the addition of fig juice was, at the best, experimental, and apparently was intended to attract the patronage of the public by holding out the name of the medicine as "Syrup of Figs."

However that may be, it is now admitted that the use of figs was found to be deleterious, and their use, as a substantial or material ingredient, was abandoned. The following extracts are taken from the testimony of the inventor of the medicine now made and sold by the California Fig Syrup Company:

"During the year 1878 I made many experiments with the idea of producing a pleasant, effective, liquid laxative, having observed that many people dislike to take pills, oils, and other disagreeable medicines; and, after many experiments and study of laxatives in general, came to the conclusion that senna was the best general laxative known, but that the preparations then on the market were either weak in effect or griping in their nature, and I thought that if I could make a liquid preparation of senna which would be really pleasant to the taste and free from griping qualities that it would answer the purpose. And at that time I also thought that certain other medicinal agents should be combined with the senna, and some of those medicinal agents were not very pleasant to the taste. And I thought of figs as a fruit that would afford me a considerable quantity of sugar and mucilaginous substance to counteract the unpleasant taste of the medicinal agents. And I used figs freely in my experiments for that purpose. As I progressed with my experiments I found or determined as a result of my experiments and studies that a uniformity and stability of product were of [538] great importance, *and that the fig substance was not conducive to those qualities, and that it had a strong tendency to ferment, and therefore it would be better to use a small quantity. I also found that those medicinal agents which were unpleasant to the taste were better adapted to special cases than to general use, and concluded to omit them, and therefore did not need as large a quantity of fig substance as formerly. As finally prepared I had a new and original compound, of which the fig syrup formed a very small but pleasant part, although not an essential part of the combination; that is, I might have used an equal quantity of honey, or some other substance, instead of the fig substance, without changing the character and effect of the combination. . . . I desired to give a name which would be new and original to distinguish my product from all the laxative medicines, and which would be pleasantly suggestive, and, after thinking over a number of names, I decided to use the name 'Syrup of Figs.' I knew that I was not using the name generically, because figs did not give character and effect to the combination."

On cross-examination this witness further stated that "we still use figs when we might use some other pleasant substance, because we first started to use figs; and the fig substance, while it is used, is not an essential part of the compound or what I would call an essential part of the compound. That is, not a part of the compound which gives to it its distinctive aromatic and medicinal qualities."

That the complainant company, years after it had established a popular demand for its product, issued statements in medical journals and newspapers and circulars, that the medical properties of their compound were derived from senna, does not relieve it from the charge of deceit and misrepresentation to the public. Such publications went only to giving information to wholesale dealers. The company by the use of the terms of its so-called trade-mark on its bottles, wrappers, and cartons continued to appeal to the consumers, out of whose credulity came the profits of their business. And, indeed, it was the imitation by the defendants of such false and misleading representations that led to the present suit.

*The bill in the present case contains the [539] following allegations:

"Your orator further states that this laxative medical compound, or preparation, made and put up as aforesaid by your orator, has always been marked, named, and called by your orator 'Syrup of Figs,' being advertised by your orator under that name, the name 'Syrup of Figs' printed or otherwise marked upon every bottle of this preparation made and sold by your orator,—this name being also printed upon the boxes, packages or wrappers in which the bottles of this preparation are packed for shipment and sale; that it has been the practice of your orator to put the bottles containing this preparation in oblong pasteboard boxes or cartons, so that they will reach the consumer in that form; that in all instances, not only the bottle which contains this preparation, but the box or carton which contain the bottles of this preparation, is marked with the words 'Syrup of Figs' and also contains printed matter stating that this preparation is a medical laxative preparation, and also giving a general idea of its uses and purposes. . . . Your orator further states, that it and its said predecessor in interest were the first to pack and dress or mark a liquid laxative preparation or medicine in the manner illustrated by exhibits 'A' and 'B'—that is to say, in an oblong, rectangular box or carton, with statements of the virtues of this preparation printed in different languages upon the back and sides of the carton, and having on the front of the carton and on the border within which, at the top, is a representation of a branch of a fig tree, bearing fruit and leaves, surrounded by the words 'Fig Syrup Company,' or 'California Fig Syrup Company,' and below which appear, in large letters, the words 'Syrup of Figs.'"

Upon such allegations and the admissions of the complainant's principal witness, some of which are hereinbefore quoted, and upon the entire evidence in the case, and in the light of the authorities cited by the counsel of the respective parties, our conclusions are that the name "Syrup of Figs" does not, in fact, properly designate or describe the preparation made and sold by the California Fig Syrup Company, so as to be *susceptible of [540] appropriation as a trade-mark, and that the marks and names, used upon the bottles containing complainant's preparation, and upon

the cartons and wrappers containing the bottles, are so plainly deceptive as to deprive the complainant company of a right to a remedy by way of an injunction by a court of equity.

*Accordingly, the decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed,* and the cause is remanded to that court, with directions to dismiss the bill of complaint.

Mr. Justice **McKenna** dissented.

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EDMUND H. CHADWICK, *Plff. in Err.*,
*v.*
JOHN M. KELLY.

(See S. C. Reporter's ed. 540-547.)

*Constitutional law—validity of frontage rule of assessment for public improvements—defenses to suit to enforce lien of assessment—ordinance confining work to resident citizens.*

1. A state statute under which three fourths of the cost of paving a city street may be assessed upon abutting property in proportion to foot frontage, such assessment to be a lien thereon, is not obnoxious to the 14th Amendment to the Federal Constitution.
2. The objection that the privileges and immunities of citizens of the several states, secured to the citizens of each state by the Federal Constitution, are infringed by a municipal ordinance confining the right to labor on works of municipal improvement to resident citizens, is not available as a defense to a suit to enforce the payment of a lien on abutting property for its proportion of the cost of the improvement.
3. The conjectural effect upon the property rights of an owner of property abutting on a street improvement, of an ordinance confining the right to labor on such improvement to resident citizens, is too remote and uncertain to be available as a defense to a suit to enforce payment of a lien on such property for its proportion of the cost of the improvement.

[No. 63.]

*Submitted November 3, 1902. Decided January 5, 1903.*

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in an action to enforce payment of a lien for the cost of a public improvement. *Affirmed.*

NOTE.—*On constitutionality of frontage rule of assessment*—see Raleigh v. Peace (N. C.) 17 L. R. A. 330, and note.

*As to the validity of class legislation*—see State v. Goodwill (W. Va.) 6 L. R. A. 621, and note; and State v. Loomis (Mo.) 21 L. R. A. 789, and note.

*As to constitutional equality of privileges, immunities, and protection*—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, and note.

See same case below, 104 La. 719, 29 So. 295.

Statement by Mr. Justice **Shiras:**

In April, 1897, John M. Kelly filed his petition in the civil district court for the parish of Orleans against Edmund H. Chadwick, to enforce payment of a lien on a certain square of ground in the city of New Orleans, created and arising out of a contract between one A. J. Christopher and said city for paving Hagan avenue. The petition alleged due completion of the work, an assignment or transfer by Christopher, of all his rights and claims under the contract, to the petitioner, and a liability of Chadwick for the amount of $638.80, with interest thereon from September 24, 1896; and also alleged that for the payment of said sum he had by law a lien and pledge upon said property.

Chadwick answered this petition, wherein he pleaded the general issue and certain special pleas, in one of which he denied that his property was benefited by the paving, and alleged that, if it was so benefited, he could only be made to pay the amount of benefit to an increased value of property, and that no personal judgment should be rendered against him. He also filed, in September, 1899, a supplemental answer in which, among other things, he alleged that the ordinance under which the work was done required the contractor to employ only bona fide resident citizens of the city of New Orleans as laborers on the work, thus depriving the citizens of the state and of each and every state of the privileges and immunities of citizens in the several states, secured to them by the Constitution of the United States, which, by the 2d section of its 4th article, provides that the citizens of each state shall be entitled to all privileges and immunities of the citizens of the several states; and he also alleged that the ordinance was likewise illegal and unconstitutional because it imposed a liability on the property owner, irrespective of the question whether or not his was benefited or damaged by the pavement; and he alleges that the paving of the street in front of his property had been of no benefit to it, and that the rendition of any judgment against him would be taking his private property for public purposes, *contrary to the Constitu- [542] tion of the state of Louisiana and to that of the United States.

Evidence was taken, and the cause was so proceeded in that on March 5, 1900, judgment was rendered against the defendant, Chadwick, in the sum of $638.80, with interest from September 24, 1896, with costs of suit, with recognition of plaintiff's lien and privilege for the payment thereof on the said property, the same to be sold and the proceeds to be applied to the payment of plaintiff's claim.

A suspensive appeal was thereupon allowed to the supreme court of Louisiana, and that court, on February 4, 1901, affirmed the judgment of the trial court, and subsequently allowed a writ of error to bring the cause to this court.

*Mr.* **George L. Bright** submitted the cause for plaintiff in error:

The protection of the Federal Constitution extends to foreign-born unnaturalized citizens.

*Juniata Limestone Co.* v. *Fagley*, 187 Pa. 193, 42 L. R. A. 442, 40 Atl. 977; *Barbier* v. *Connelly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Fraser* v. *McConway & T. Co.* 6 Pa. Dist. R. 555.

The ordinance deprives every person not a bona fide resident citizen of the city of New Orleans of the right to labor on the contemplated improvements, and is therefore unconstitutional.

*Blake* v. *McClung*, 176 U. S. 59, 44 L. ed. 371, 20 Sup. Ct. Rep. 307; *Fiske* v. *People*, 188 Ill. 206, 52 L. R. A. 291, 58 N. E. 985; *Juniata Limestone Co.* v. *Fagley*, 187 Pa. 193, 42 L. R. A. 442, 40 Atl. 977; *Shirk* v. *La Fayette*, 52 Fed. 857.

No person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under the same circumstances.

*Steed* v. *Harvey*, 18 Utah, 367, 54 Pac. 1011; *Apex Transp. Co.* v. *Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882; Brannon, 14th Amend. p. 315.

Acts done under the authority of a statute embrace all ordinances of municipal corporations, as well as acts of state legislation.

Simonton, Federal Courts, p. 79; *Weston* v. *Charleston*, 2 Pet. 463, 7 L. ed. 486; *Home Ins. Co.* v. *Augusta*, 93 U. S. 120, 23 L. ed. 825.

When a case of peculiar and extraordinary hardships is presented, amounting to actual confiscation, the principles established in *Norwood* v. *Baker*, 172 U. S. 270, 43 L. ed. 444, 19 Sup. Ct. Rep. 187, will be enforced.

*Tonawanda* v. *Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609.

A statute authorizing a personal judgment against the owner of abutting property for the amount assessed against his property for the cost of widening a street is unconstitutional.

*Meyer* v. *Covington*, 103 Ky. 546, 45 S. W. 769.

No brief was filed for defendant in error.

Mr. Justice **Shiras** delivered the opinion of the court:

In this record, Chadwick, the plaintiff in error, complains of the judgment of the supreme court of Louisiana in two particulars: First, in upholding as valid the statutes of Louisiana and the ordinances of the city of New Orleans, which provide and regulate the method for the paving of streets at the cost of the owners of abutting lots; and, second, in upholding as valid the ordinance of the council of the city of New Orleans, which provides that, in all the contracts let by the city for public works, of any kind and nature, the contractor shall not employ any other but bona fide resident citizens of the city as laborers on such public works.

Of course, this court is restricted to a consideration of these questions in their Federal aspect.

The brief of the counsel of the plaintiff in error contends that, by the statutes of the state of Louisiana, the property owner is made to pay the cost of the improvement irrespective of the *question of benefit, is [543] made personally responsible for the cost of the improvement, although it may largely exceed, not only the benefit to his property, but the value thereof, and his property is made subject to a lien to secure the payment.

So far as it is complained that by the statutes the property owner is made personally responsible for the cost of the improvement, we learn from the opinions of the supreme court in the present case and in the case of *Barber Asphalt Paving Co.* v. *Watt*, reported in 51 La. Ann. 1345, 26 So. 70, that "for the sum assessed against their property no personal liability attached to the abutting owners beyond the value of the property affected, that the proceeding was purely one *in rem*, acting on the property benefited, and none other," and that "the property owner's proportion of the cost of paving a street should be determined by ascertaining the entire cost of the work assessable to the property fronting thereon, and apportioning the same to said property in proportion to foot frontage." [104 La. 725, 726, 29 So. 297.]

This construction of the state statutes by the supreme court of the state must, of course, in a case like the present, be accepted by us; and we have only to consider, in this branch of the case, whether the statutes of Louisiana, so construed, which provide and regulate a method of improving and paving streets in the city of New Orleans, and apportioning the cost thereof by assessment upon the abutting property, are obnoxious, under the facts of the present case, to the provisions of the 14th Amendment to the Constitution of the United States.

We do not feel constrained to enter at large upon a subject which has received such frequent and recent consideration by this court. It is, perhaps, sufficient to say that we do not perceive in the statutes of Louisiana, as construed and applied in this case by the supreme court of that state, any provisions which we must condemn as being in disregard of the constitutional rights of the plaintiff in error. In view of our decisions, we certainly cannot say that, as matter of law, a state statute which makes the cost of paving a street in a city assessable upon the abutting properties and a lien thereon is unconstitutional. *Willard* v. *Presbury*, 14 Wall. 676, 20 L. ed. 719; *Mattingly* v. *District of Columbia*, 97 U. S. 687, 24 L. ed. 1098; *Spencer* v. *Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Bauman v. [544] *Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Parsons* v. *District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *Wight* v. *Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *French*

v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

In the opinion of the supreme court of Louisiana, which we find in this record, it is said:

"There can be no question, and in fact it is conceded, that by act No. 119 of 1886, and by that act as amended by act No. 142 of 1894, the council of the city of New Orleans was authorized, 'in its discretion, to provide for the paving or banqueting of any street, or portion thereof, at the expense of the whole city, and to thereupon force, impose, and collect of the front proprietors of lots fronting on said street a special assessment in proportion to frontage of three quarters of the cost of said improvement,' and that by said acts it was enacted that such local assessment should have a first privilege, superior to vendor's privilege and all other privileges and mortgages.

"The constitutionality of those acts is not attacked directly, but the exercise by the city of authority, under the powers so granted, is called in question as being illegal and unconstitutional. . . . It is too late to question the right of the general assembly to establish particular districts for the attainment of special local public good, through works of a particular character, and to order itself, or authorize some political body to order, special assessments to be made, within the district, for the purpose of meeting the cost and expenses of such works. *George* v. *Young*, 45 La. Ann. 1232, 14 So. 137. . . . It is true that in some instances almost the whole benefit accrues to a few, but there can be no universal rule of justice, upon which such assessments can be made. An apportionment of the cost that would be just in one case would be oppressive in another. For this reason the power to determine when a special assessment shall be made, and on what basis it shall be apportioned, rests in the legislature or some political body to which it has delegated that authority. . . . The city has simply exercised its unquestionable right and power of paving an existing public street in the interest of the special local public benefit, and demanded of owners of property abutting and fronting on the street, that they contribute to the cost of the im-
[545] provement in a manner and form *and to an extent fixed by the general assembly. The object of the paving of the street was to benefit parties owning property upon it by the improvement of the access to their properties. It is not pretended that this particular purpose was not accomplished even as to appellant's property. It cannot be exacted for the purpose of sustaining the constitutionality of a statute or ordinance authorizing a work of local public improvement, at the cost of abutting owners, that it be shown there is benefit in every possible respect to the particular owners, nor that the benefit be direct and immediate. . . . The general assembly has, in act No. 119 of 1886, conferred upon the common council the right and power, by a two-thirds vote, to constitute any particular street which it proposes to pave a special taxing district for the purpose of meeting the cost of making such paving. It has exercised this right and power in the matter of the paving of Hagan avenue. Having done so, the legislature itself has designated how, in what proportion, and by what standard this cost is to be met. The council was not at liberty to depart from this apportionment. The judiciary is not authorized to alter it and to substitute for a fixed legislative standard a fluctuating judicial standard based upon actual benefits received and measured by values or enhanced values to be established by evidence and proof."

We think these views are consonant with the great weight of authority, both state and Federal. As expressed by Cooley in his work on Taxation, page 429:

The matter "is wisely confided to the legislature, and could not, without the introduction of some new principle in representative government, be placed elsewhere. With the wisdom or unwisdom of special assessments when ordered in cases in which they are admissible, the courts have no concern, unless there is plainly and manifestly such an abuse of power as takes the case beyond the just limits of legislative discretion."

No such case is presented by the facts in the present case as would justify an intervention by the Federal courts with a system of special assessments prescribed by the legislature and approved by the courts of a state.

*Because the ordinance and specifications, [546] under which the paving in this case was done, require the contractor to employ only bona fide resident citizens of the city of New Orleans as laborers on the work, it is contended, on behalf of the plaintiff in error, that thereby citizens of the state of Louisiana, and of each and every state and the inhabitants thereof, are deprived of their privileges and immunities under article 4, § 2, and under the 14th Amendment to the Constitution of the United States. It is said that such an ordinance deprives every person, not a bona fide resident of the city of New Orleans, of the right to labor on the contemplated improvements, and also is prejudicial to the property owners, because, by restricting the number of workmen, the price of the work is increased.

Such questions are of the gravest possible importance, and, if and when actually presented, would demand most careful consideration; but we are not now called upon to determine them.

In so far as the provisions of the city ordinance may be claimed to affect the rights and privileges of citizens of Louisiana and of the other states, the plaintiff in error is in no position to raise the question. It is not alleged, nor does it appear, that he is one of the laborers excluded by the ordinance from employment, or that he occupies any representative relation to them. Apparently he is one of the preferred class of resident citizens of the city of New Orleans.

It is further argued that the ordinance is prejudicial to the property rights of the

plaintiff in error, because by confining the right to labor on works of municipal improvement to resident citizens, the cost of such works might thus be increased.

But we think such a consequence is too far fetched and uncertain on which to base judicial action. The plaintiff in error did not raise such a question in time to stay the work *in limine*. He awaited the completion of the work, and until his property had received the benefits, whatever they were, of the improvement. Nor did he, on the trial, adduce any evidence from which the court might have found that the actual cost in the present case was increased by the operation of the ordinance. Possibly the effect of [547] the ordinance in preferring the labor of *resident citizens might tend to increase the cost of the work, or it might have the opposite effect by inducing outside laborers to become resident citizens. But, as we have said, such conjectural results are too remote and uncertain to furnish materials for judicial determination. The serious duty of condemning state legislation as unconstitutional and void cannot be thrown upon this court, except at the suit of parties directly and certainly affected thereby.

*The judgment of the Supreme Court of Louisiana is affirmed.*

Mr. Justice **Harlan** and Mr. Justice **White** dissent.

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REUBEN M. MANLEY, Executor of the Estate of George Manley, Deceased, *Plff. in Err.*,

*v.*

ANNA O. PARK, Substituted for Richard A. Park, Deceased.

(See S. C. Reporter's ed. 547–553.)

*Error to state court—Federal question—questions of local law—judgments—defense cannot be first raised on motion to set aside.*

1. A decision of a state court adverse to a claim under the Federal Constitution, specially made in a motion to set aside the judgment, raises a Federal question, for the purpose of a review in the Supreme Court of the United States.
2. The ruling of the highest court of a state, that, under the state Constitution and laws, property situated in that state, the title to which is vested in a nonresident executor to whom letters testamentary have been issued by a court of another jurisdiction, may be attached and sold in an action of debt against such nonresident executor, is binding upon the Supreme Court of the United States on writ of error to the state court.
3. The repugnancy of a state statute to the Federal Constitution cannot be successfully invoked in support of a motion to set aside a judgment as void, where the invalidity of such statute would have been available to defeat the recovery of a valid judgment, if it had been pleaded or otherwise presented in the state court as a defense in the proceedings in the original action.

[No. 120.]

*Argued December 17, 1902. Decided January 5, 1903.*

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Atchison County denying a motion to set aside a judgment because of the repugnancy of a state statute to the Federal Constitution. *Affirmed.*

See same case below, 62 Kan. 553, 64 Pac. 28.

Statement by Mr. Justice **White:**

*Richard A. Park was plaintiff in the [548] original action, brought in the district court of Atchison county, Kansas, against William H. Risk, executor of the estate of George Manley, deceased. It was alleged in the petition, in substance, that the decedent was at the time of his death the owner of stock of the par value of $27,500, in a Kansas corporation, known as the Kansas Trust & Banking Company; that said corporation, subsequent to the death of Manley, became indebted to plaintiff; that the corporation was insolvent and had no property from which such indebtedness could be realized; that the defendant, as executor of the estate of Manley, became seised and possessed of all the property of the decedent within the state of Kansas, including the shares of stock referred to, and, by reason of a contractual liability imposed on the stockholders of said corporation, defendant was liable to plaintiff for the indebtedness in question. There was filed with the petition an affidavit for attachment, because of the nonresidence of the defendant, and after the return of the summons an attachment was levied on certain real estate in Atchison county, Kansas, "as the property of said defendant William H. Risk, executor of the estate of George Manley, deceased." Publication of notice of the pendency of the action was made, as required by laws of Kansas. Within the time limited for answering the defendant appeared generally by filing a demurrer to the petition on the grounds of a want of jurisdiction over the person of the defendant and the subject of the action, because several causes of action were improperly joined, and because the petition did not state facts sufficient to constitute a cause of action. Thereafter, Reuben A. Manley, successor to William H. Risk, as executor and trustee of the estate of George Manley, deceased, was substituted as defendant in the stead of Risk. An answer was thereupon filed, in which most of the

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*As to when United States Supreme Court follows decisions of state courts*—see notes to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508; United States *ex rel.* Butz v. Muscatine, 19 L. ed. U. S. 490; and Elmendorf v. Taylor, 6 L. ed. U. S. 290.

material averments of the petition were admitted, such as the ownership by George Manley in his lifetime of the stock in question; the execution of his last will and testament; its admission to probate and the grant of letters testamentary to Risk and to his successor by a New Jersey orphans' court; that Risk and his successor "became seised and possessed of all the property of [549] the late George Manley, deceased, *lying and being situated in the state of Kansas," and that the substituted defendant (Reuben M. Manley) "became and is now a stockholder of the said, the Kansas Trust & Banking Company, and as such executor of said estate is the owner and holder of said shares of stock of said corporation, amounting to the sum of $27,500." Separate defenses were interposed to defeat recovery, such as that plaintiff had not reduced his claim against the Kansas corporation to judgment, that there was a defect of parties plaintiff, that a special fund created by the Kansas corporation for the payment of the indebtedness in question existed, and should first be exhausted, and that various actions were pending in which recovery was sought by judgment creditors of said Kansas corporation, upon the liability of defendant as a stockholder in said corporation.

Issue was joined by the filing of a reply, the cause was tried by the court, judgment for the amount claimed was rendered against the defendant, and the attached real estate was ordered sold. The cause was taken to the supreme court of Kansas, and that court dismissed the petition in error because of an informality in the proceedings and without passing on the merits. 61 Kan. 857, 58 Pac. 961. After the mandate had been filed in the lower court separate motions were made on behalf of defendant, to set aside the judgment and to withdraw the order for the sale of the attached property. The same grounds were assigned in support of each motion, and the claim of the protection of the Constitution of the United States was embodied in the third ground, by the assertion that a statute of Kansas, upon which the judgment complained of was based, violated the 1st and 2d sections of the 4th article of, and the provisions of, the 14th Amendment to the Constitution of the United States. The motions were overruled, and the "decision and judgment" was subsequently affirmed by the supreme court of Kansas. 62 Kan. 553, 64 Pac. 28. By writ of error the cause was then brought to this court. The original defendant in error having died, Anna O. Park has been substituted as defendant in error.

*Mr.* **L. F. Bird** argued the cause, and, with *Mr. C. F. Hutchings*, filed a brief for plaintiff in error:

The claim of Federal right was raised in the supreme court of the state, if not before that, and was decided by that court, and that is all that is required.

*Sully* v. *American Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935; *St. Louis Consolidated Coal Co.* v. *Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; *Endowment & Benev. Asso.* v. *Kansas*, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; *Clark* v. *Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 2, 113; *Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 14 Wall. 23, 20 L. ed. 850; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Rothschild* v. *Knight*, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391; *Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Green Bay & M. Canal Co.* v. *Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Blythe* v. *Hinckley*, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390; *Crapo* v. *Kelly*, 16 Wall. 610, 21 L. ed. 430; *New York C. & H. R. R. Co.* v. *New York*, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

A Federal question is presented by a contention that due effect to a decree of a Federal court was denied by the action of the court below in sustaining a plea of *res judicata* predicated on a decree of such Federal court, where a determination whether the court correctly applied the plea necessitates deciding whether by sustaining such plea rights were denied which were vested under another decree of the Federal court.

*National Foundry & Pipe Works* v. *Oconto City Water Supply Co.* 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111.

A writ of error to review a judgment of a state court ousting a corporation from its franchise for violation of the statutes of the state relating to the manufacture and sale of oleomargarine will not be dismissed on the ground that adequate support for the judgment, irrespective of any substantial Federal question, is afforded by the finding of the state court that the corporation had violated a statute in refusing to furnish samples as therein required, where the judgment of the court was based upon the consideration given by it to all the asserted violations of the statutes jointly, which statutes were contended to be repugnant to the Constitution of the United States.

*Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

The fact that a state court in deciding a Federal question erroneously declares that no Federal question exists does not preclude a review of its decision on writ of error from the Supreme Court of the United States.

*Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 695, 46 L. ed. 763, 22 Sup. Ct. Rep. 937; *Anderson* v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 16 Sup. Ct. Rep. 905; *Columbia Water Power Co.* v. *Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *First Nat. Bank* v. *Anderson*, 172 U. S. 573, 43 L. ed. 558, 19 Sup. Ct. Rep. 284; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

*Mr.* **J. F. Tufts** argued the cause, and, with *Messrs. Jackson & Jackson*, filed a brief for defendant in error:

The attempt to raise the claimed Federal question was made too late.

*Scudder* v. *Coler*, 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26.

When first raised on petition for rehearing it is too late.

*Turner* v. *Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Boston Bldg. & L. Asso.* v. *Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *Meyer* v. *Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106.

When raised on second appeal it is too late.

*Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *Union Mut. L. Ins. Co.* v. *Kirchoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260.

A definite issue as to the validity of the statute must be distinctly deducible from the record, before it can be held that a Federal question was disposed of by the decision.

*Powell* v. *Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

To authorize the review of a state judgment it must appear that the decision of a Federal question was necessary to the determination of the case, and was actually decided.

*Endowment & Benev. Asso.* v. *Kansas*, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; *Church* v. *Kelsey*, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897; *Clark* v. *Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 2, 113; *New Orleans Water Works Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741.

To give this court jurisdiction of a writ of error to a state court it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, or was decided, or that the judgment as rendered could not have been rendered without deciding it.

*Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Klinger* v. *Missouri*, 13 Wall. 257, 20 L. ed. 635; *Jenkins* v. *Lowenthal*, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Castillo* v. *McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

Even though a Federal question was presented and decided, this court will not entertain jurisdiction of a state judgment if, besides the Federal question decided by the state court, there is another and distinct ground on which the judgment can be sustained.

*Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 14 Wall. 23, 20 L. ed. 850; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 723; *Gibson* v. *Chouteau*, 8 Wall. 314, 19 L. ed. 317; *Johnson* v. *Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Hopkins* v. *McLure*, 133 U. S. 380, 33 L. ed. 660, 10 Sup. Ct. Rep. 407: *Hale* v. *Akers*, 132 U. S. 554, 33 L. ed. 442, 10 Sup. Ct. Rep. 171; *Hale* v. *Lewis*, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677; *New York C. & H. R. R. Co.* v. *New York*, 186 U. S. 269, 46 L. ed. 1158, 22 Sup. Ct. Rep. 916.

When the state court has rendered its decision on a local or state question or a general law, the logical course for this court is to dismiss the writ of error.

*St. Louis, C. G. & Ft. S. R. Co.* v. *Missouri*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443.

A decision of a state court based on estoppel involves no Federal question.

*Weyerhaueser* v. *Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485.

Nor when based on laches.

*Pittsburgh & L. A. Iron Co.* v. *Cleveland Iron Min. Co.* 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931; *Moran* v. *Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856.

The decision of the state court having been upon the state statute and general law, and being sustained thereby, this court will not review the decision, even though there was an attempt to raise a Federal question.

*Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *De Saussure* v. *Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

A motion has been made to dismiss the writ of error upon the ground that no Federal question is presented by the record, it being claimed that the decision and judgment of the supreme court of Kansas sought to be reviewed was based solely upon a consideration of local statutes and the determination of a question of general law, *viz.*, the effect as *res judicata* of a judgment of a court of Kansas. But as the claim of the benefit of the Constitution of the United States was specially made in the motions, and was passed upon adversely to the moving party, it follows that a Federal question exists in this record, and the motion to dismiss is therefore overruled. *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 534, 46 L. ed. 676, 22 Sup. Ct. Rep. 446.

The specifications of error now relied upon are thus stated in the brief of counsel for plaintiff in error:

"First. Under the Constitution and laws of the state of Kansas, an executor, resident in the state of Kansas, could be sued in a district court of the state, but the property in his charge could not be attached, nor sold on execution.

"Second. Under the Constitution and statutes of the state of Kansas, no authority exists for attaching the property in charge of a nonresident executor.

"Third. Section 203 of the executors' and administrators' act (Kan. Gen. Stat. 1889, ¶ 2989), as construed and upheld in this case, is in violation of § 2, art. 4, of the Constitution of the United States, in that it does not accord to the plaintiff in error and his predecessor, citizens of the state of New Jersey, all the privileges and immunities of

an executor resident in the state of Kansas. U. S. Const. art. 4, § 2.

"Fourth. Section 203 of the executors' and administrators' act (Kan. Gen. Stat. 1889, ¶ 2989), as construed and upheld in this case, is in violation of the 14th Amendment to the Constitution of the United [551] States, in that it abridges the privileges *of the plaintiff in error and his predecessor, citizens of the United States, and their immunity from suit by attachment, and deprives them of their property without due process of law, and denies them the equal protection of the laws.

"Fifth. The right of the plaintiff in error, and his predecessors, citizens of the state of New Jersey, to act as executors of the estate of George Manley, deceased, is a privilege, and the exemption of an executor, not a resident in the state of Kansas, from suits by attachment, is an immunity which is guaranteed by § 2, art. 4, Constitution of the United States, and the same were denied by the decision of the supreme court of Kansas in this case."

The first and second propositions, it is manifest, simply invite a consideration of the Constitution and laws of the state of Kansas; and, consequently, the construction adopted by the supreme court of Kansas of the pertinent provisions of such Constitution and laws, is binding upon this court as a decision upon a matter of purely local law, not presenting a Federal question. We must accept, then, as undeniable the ruling of the highest court of Kansas, that under the Constitution and statutes of Kansas real estate situated in that state, the title to which was vested in a nonresident executor, to whom letters testamentary had been issued by a court of another jurisdiction, might be attached and sold, in an action of debt against the nonresident executor.

The remaining propositions assail the validity, under the Constitution of the United States, of the statute of Kansas (Kan. Gen. Stat. 1889, ¶ 2989; Kan. Gen. Stat. 1897, chap. 107, § 147), as thus construed by the supreme court of Kansas. The section in question upon which the judgment complained of was based is as follows:

"An executor or administrator duly appointed in any other state or county may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a nonresident may sue or be sued."

This section was held to authorize an attachment of property in an action against a nonresident executor, precisely as in ordinary actions against nonresidents.

[552] *Now, the claimed nullity of the judgment assailed was based upon the alleged invalidity of the Kansas statute above quoted, as respected the Constitution of the United States, in this, that as an executor resident in Kansas possessed the privilege or immunity of not being subject to suit by attachment of property, a like privilege or immunity within the state of Kansas was vested by the Constitution of the United States in executors who were not residents of Kansas, and the refusal of the state of Kansas to accord such privilege or immunity to a nonresident executor, and the subjecting him to the operation of attachment laws, deprived the foreign executor of his property without due process of law, and denied him the equal protection of the laws. But it is obvious, we think, under the circumstances disclosed in this record, that the protection of the Constitution of the United States could not be successfully invoked to annul the judgment here complained of on the theory that such judgment was absolutely void and of no effect under the Constitution of the United States. This results from the consideration that no claim to the protection of the Constitution of the United States was set up in any form in the proceedings had in the state court which resulted in the judgment complained of, and for such reason, if that judgment had been brought to this court for review, it would have been its duty—having in mind the provisions of § 709 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 575]—to affirm the judgment and recognize its binding force, because no Federal question was raised. A domestic judgment of a state court whose validity it would have been the duty of this court to uphold, on direct proceedings to obtain a reversal of such judgment, manifestly should be treated by courts of the United States, so far as relates to Federal questions which existed at the time the action was commenced in which the judgment was rendered, as valid between the parties to such judgment. We could not hold to the contrary without saying that a Federal defense which could not be availed of unless raised before judgment was yet efficacious, although not raised, to avoid the judgment when rendered. This would necessarily declare a plain contradiction in terms. As the authority conferred by Kansas upon her courts was to set aside *void judgments, [553] provisions of the Constitution of the United States which would have been available if pleaded or otherwise presented in the state courts as a defense in the proceedings in the original action to defeat the recovery of a valid judgment cannot, when the opportunity has not been availed of and the judgment has become a finality, be resorted to as establishing that in fact the judgment possessed no binding force or efficacy whatever.

*Judgment affirmed.*

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LONE WOLF, Principal Chief of the Kiowas, *et al.*, *Appts.*,

*v.*

ETHAN A. HITCHCOCK, Secretary of the Interior, *et al.*

(See S. C. Reporter's ed. 553-568.)

*Indians—power of Congress over tribal relations and lands—effect of prior treaty.*

The plenary power of Congress over the tribal relations and lands of the confed-

NOTE.—*On Federal control over the Indians*—see note to Worcester v. Georgia, 8 L. ed. U. S. 484.

*On the construction and operation of treaties*—see note to United States v. The Amistad, 10 L. ed. U. S. 826.

erated tribes of Kiowa, Comanche, and Apache Indians could not be so limited by any of the provisions of a treaty with such Indians as to preclude the enactment by Congress of the act of June 6, 1900 (31 Stat. at L. 677, chap. 813), providing for allotments to the Indians in severalty out of the lands held in common within the reservation, and purporting to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit.

[No. 275.]

*Argued October 23, 1902. Decided January 5, 1903.*

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District in favor of defendants in a suit to enjoin the carrying into effect of the act of Congress of June 6, 1900 (31 Stat. at L. 677, chap. 813), dealing with the disposition of tribal property of the Kiowa, Comanche, and Apache Indians. *Affirmed.*

See same case below, 19 App. D. C. 315.

Statement by Mr. Justice **White:**

In 1867 a treaty was concluded with the Kiowa and Comanche tribes of Indians, and such other friendly tribes as might be united with them, setting apart a reservation for the use of such Indians. By a separate treaty the Apache tribe of Indians was incorporated with the two former-named, and became entitled to share in the benefits of the reservation. 15 Stat. at L. 581, 589.

The first-named treaty is usually called the Medicine Lodge treaty. By the sixth article thereof it was provided that heads of families might select a tract of land within the reservation, not exceeding 320 acres in extent, which should thereafter cease to be held in common, and should be for the exclusive possession of the Indian making the selection, so long as he or his family might continue to cultivate the land. The twelfth article of the treaty was as follows:

"Article 12. No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article 3 [6] of this treaty."

The three tribes settled under the treaties upon the described land. On October 6, 1892, 456 male adult members of the confederated tribes signed, with three commissioners representing the United States, an agreement concerning the reservation. The Indian agent, in a certificate appended to the agreement, represented that there were then 562 male adults in the three tribes. Senate Ex. Doc. No. 27, 52d Congress, sec-[555]ond session, *page 17. Four hundred and fifty-six male adults therefore constituted more than three fourths of the certified number of total male adults in the three tribes. In form the agreement was a proposed treaty, the terms of which, in substance, provided for a surrender to the United States of the rights of the tribes in the reservation, for allotments out of such lands to the Indians in severalty, the fee simple title to be conveyed to the allottees or their heirs after the expiration of twenty-five years; and the payment or setting apart for the benefit of the tribes of $2,000,000 as the consideration for the surplus of land over and above the allotments which might be made to the Indians. It was provided that sundry named friends of the Indians (among such persons being the Indian agent and an army officer) "should each be entitled to all the benefits, in land only conferred under this agreement, the same as if members of said tribes." Eliminating 350,000 acres of mountainous land, the quantity of surplus lands suitable for farming and grazing purposes was estimated at 2,150,000 acres. Concerning the payment to be made for these surplus lands, the commission, in their report to the President announcing the termination of the negotiations, said (Senate Ex. Doc. No. 17, second session, 52d Congress):

"In this connection it is proper to add that the commission agreed with the Indians to incorporate the following in their report, which is now done:

"The Indians upon this reservation seem to believe (but whether from an exercise of their own judgment or from the advice of others the commission cannot determine) that their surplus land is worth two and one-half million dollars, and Congress may be induced to give them that much for it. Therefore, in compliance with their request, we report that they desire to be heard through an attorney and a delegation to Washington upon that question, the agreement signed, however, to be effective upon ratification no matter what Congress may do with their appeal for the extra half million dollars."

In transmitting the agreement to the Secretary of the Interior, the Commissioner of Indian Affairs said:

"The price paid, while considerably in excess of that paid *to the Cheyennes and Ara-[556]pahoes, seems to be fair and reasonable, both to the government and the Indians, the land being doubtless of better quality than that in the Cheyenne and Arapahoe reservation."

Attention was directed to the provision in the agreement in favor of the Indian agent and an army officer, and it was suggested that to permit them to avail thereof would establish a bad precedent.

Soon after the signing of the foregoing agreement it was claimed by the Indians that their assent had been obtained by fraudulent misrepresentations of its terms by the interpreters, and it was asserted that the agreement should not be held binding upon the tribes because three fourths of the

adult male members had not assented thereto, as was required by the twelfth article of the Medicine Lodge treaty.

Obviously, in consequence of the policy embodied in § 2079 of the Revised Statutes, departing from the former custom of dealing with Indian affairs by treaty and providing for legislative action on such subjects, various bills were introduced in both Houses of Congress designed to give legal effect to the agreement made by the Indians in 1892. These bills were referred to the proper committee, and before such committees the Indians presented their objections to the propriety of giving effect to the agreement. H. R. Doc. No. 431, 55th Congress, second session. In 1898 the Committee on Indian Affairs of the House of Representatives unanimously reported a bill for the execution of the agreement made with the Indians. The report of the committee recited that a favorable conclusion had been reached by the committee "after the fullest hearings from delegations of the Indian tribes and all parties at interest." H. R. Doc. No. 419, first session, 56th Congress, p. 5.

The bill thus reported did not exactly conform to the agreement as signed by the Indians. It modified the agreement by changing the time for making the allotments, and it also provided that the proceeds of the surplus lands remaining after allotments to the Indians should be held to await the judicial decision of a claim as-
[557] serted by the Choctaw and Chickasaw *tribes of Indians to the surplus lands. This claim was based upon a treaty made in 1866, by which the two tribes ceded the reservation in question, it being contended that the lands were impressed with a trust in favor of the ceding tribes, and that whenever the reservation was abandoned, so much of it as was not allotted to the confederated Indians of the Comanche, Kiowa, and Apache tribes reverted to the Choctaws and Chickasaws.

The bill just referred to passed the House of Representatives on May 16, 1898. 31st Cong. Rec. p. 4947. When the bill reached the Senate that body, on January 25, 1899, adopted a resolution calling upon the Secretary of the Interior for information as to whether the signatures attached to the agreement comprised three fourths of the male adults of the tribes. In response the Secretary of the Interior informed the Senate, under date of January 28, 1899, that the records of the department "failed to show a census of these Indians for the year 1892," but that "from a roll used in making a payment to them in January and February, 1893, it appeared that there were 725 males over eighteen years of age, of whom 639 were twenty-one years and over." The Secretary further called attention to the fact that by the agreement of 1892 a right of selection was conferred upon each member of the tribes over eighteen years of age, and observed:

"If eighteen years and over be held to be the legal age of those who were authorized to sign the agreement, the number of persons who actually signed was 87 less than three fourths of the adult male membership of the tribes; and if twenty-one years be held to be the minimum age, then 23 less than three fourths signed the agreement. In either event, less than three fourths of the male adults appear to have so signed."

With this information before it the bill was favorably reported by the Committee on Indian Affairs of the Senate, but did not pass that body.

At the first session of the following Congress (the Fifty-sixth) bills were introduced in both the Senate and House of Representatives substantially like that which has just been noticed. Senate, 1352; H. R. 905.

*In the meanwhile, about October, 1899, [558] the Indians had, at a general council at which 571 male adults of the tribes purported to be present, protested against the execution of the provisions of the agreement of 1892, and adopted a memorial to Congress, praying that that body should not give effect to the agreement. This memorial was forwarded to the Secretary of the Interior by the Commissioner of Indian Affairs with lengthy comments, pointing out the fact that the Indians claimed that their signatures to the agreement had been procured by fraud, and that the legal number of Indians had not signed the agreement, and that the previous bills and bills then pending contemplated modification of the agreement in important particulars without the consent of the Indians. This communication from the Commissioner of Indian Affairs, together with the memorial of the Indians, were transmitted by the Secretary of the Interior to Congress. Senate Doc. No. 76; H. R. Doc. No. 333; first session, Fifty-sixth Congress. Attention was called to the fact that although by the agreement of October 6, 1892, one half of each allotment was contemplated to be agricultural land, there was only sufficient agricultural land in the entire reservation to average 30 acres per Indian. After setting out the charges of fraud and complaints respecting the proposed amendments designed to be made to the agreement, as above stated, particular complaint was made of the provision in the agreement of 1892 as to allotments in severalty among the Indians of lands for agricultural purposes. After reciting that the tribal lands were not adapted to such purposes, but were suitable for grazing, the memorial proceeded as follows:

"We submit that the provision for lands to be allotted to us under this treaty are insufficient, because it is evident we cannot, on account of the climate of our section, which renders the maturity of crops uncertain, become a successful farming community; that we, or whoever else occupies these lands, will have to depend upon the cattle industry for revenue and support. And we therefore pray, if we cannot be granted the privilege of keeping our reservation under

the treaty made with us in 1868, and known as the Medicine Lodge treaty, that authority [559] *be granted for the consideration of a new treaty that will make the allowance of land to be allotted to us sufficient for us to graze upon it enough stock cattle, the increase from which we can market for support of ourselves and families."

With the papers just referred to before it, the House Committee on Indian Affairs, in February, 1900, favorably reported a bill to give effect to the agreement of 1892.

On January 19, 1900, an act was passed by the Senate, entitled "An Act to Ratify an Agreement Made with the Indians of the Fort Hall Indian Reservation in Idaho, and Making an Appropriation to Carry the Same into Effect." In February, 1900, the House Committee on Indian Affairs, having before it the memorial of the Indians transmitted by the Secretary of the Interior, and also having for consideration the Senate bill just alluded to, reported that bill back to the House favorably, with certain amendments. H. R. Doc. No. 419, 56th Congress, first session. One of such amendments consisted in adding to the bill in question, as § 6, a provision to execute the agreement made with the Kiowa, Comanche, and Apache Indians in 1892. Although the bill thus reported embodied the execution of the agreement last referred to, the title of the bill was not changed, and consequently referred only to the execution of the agreement made with the Indians of the Fort Hall reservation in Idaho. The provisions thus embodied in § 6 of the bill in question substantially conformed to those contained in the bill which had previously passed the House, except that the previous enactment on this subject was changed so as to do away with the necessity for making to each Indian one half of his allotment in agricultural land and the other half in grazing land. In addition, a clause was inserted in the bill providing for the setting apart of a large amount of grazing land to be used in common by the Indians. The provision in question was as follows:

"That in addition to the allotment of lands to said Indians as provided for in this agreement, the Secretary of the Interior shall set aside for the use in common for said Indian tribes 480,000 acres of grazing [560] lands, to be *selected by the Secretary of the Interior, either in one or more tracts as will best subserve the interest of said Indians."

The provision of the agreement in favor of the Indian agent and army officer was also eliminated.

The bill, moreover, exempted the money consideration for the surplus lands from all claims for Indian depredations, and expressly provided that in the event the claim of the Choctaws and Chickasaws was ultimately sustained, the consideration referred to should be subject to the further action of Congress. In this bill, as in previous ones, provision was made for allotments to the Indians, the opening of the surplus land for settlement, etc. The bill became a law by concurrence of the Senate in the amendments adopted by the House as just stated.

Thereafter, by acts approved on January 4, 1901 (31 Stat. at L. 727, chap. 8), March 3, 1901 (31 Stat. at L. 1078, chap. 832), and March 3, 1901 (31 Stat. at L. 1093, chap. 846), authority was given to extend the time for making allotments and opening of the surplus land for settlement for a period not exceeding eight months from December 6, 1900; appropriations were made for surveys in connection with allotments and setting apart of grazing lands; and authority was conferred to establish counties and county seats, townsites, etc., and proclaim the surplus lands open for settlement by white people.

On June 6, 1901, a bill was filed on the equity side of the supreme court of the District of Columbia, wherein Lone Wolf (one of the appellants herein) was named as complainant, suing for himself as well as for all other members of the confederated tribes of the Kiowa, Comanche, and Apache Indians, residing in the territory of Oklahoma. The present appellees (the Secretary of the Interior, the Commissioner of Indian Affairs, and the Commissioner of the General Land Office) were made respondents to the bill. Subsequently, by an amendment to the bill, members of the Kiowa, Comanche, and Apache tribes were joined with Lone Wolf as parties complainant.

The bill recited the establishing and occupancy of the reservation in Oklahoma by the confederated tribes of Kiowas, Comanches, and Apaches, the signing of the agreement of October 6, 1892, and the subsequent proceedings which have been detailed, *culminating in the passage of the [561] act of June 6, 1900 [31 Stat. at L. 677, chap. 813], and the act of Congress supplementary to said act. In substance it was further charged in the bill that the agreement had not been signed as required by the Medicine Lodge treaty, that is, by three fourths of the male adult members of the tribe, and that the signatures thereto had been obtained by fraudulent misrepresentations and concealment, similar to those recited in the memorial signed at the 1899 council. In addition to the grievance previously stated in the memorial, the charge was made that the interpreters falsely represented, when the said treaty was being considered by the Indians, that the treaty provided "for the sale of their surplus lands at some time in the future at the price of $2.50 per acre;" whereas, in truth and in fact, "by the terms of said treaty, only $1.00 an acre is allowed for said surplus lands," which sum, it was charged, was an amount far below the real value of said lands. It was also averred that portions of the signed agreement had been changed by Congress without submitting such changes to the Indians for their consideration. Based upon the foregoing allegations, it was alleged that so much of said act of Congress of June 6, 1900, and so much of said acts sup-

plementary thereto and amendatory thereof as provided for the taking effect of said agreement, the allotment of certain lands mentioned therein to members of said Indian tribes, the surveying, laying out, and platting townsites and locating county seats on said lands, and the ceding to the United States and the opening to settlement by white men of 2,000,000 acres of said lands, were enacted in violation of the property rights of the said Kiowa, Comanche, and Apache Indians, and if carried into effect would deprive said Indians of their lands without due process of law, and that said parts of said acts were contrary to the Constitution of the United States, and were void, and conferred no right, power, or duty upon the respondents to do or perform any of the acts or things enjoined or required by the acts of Congress in question. Alleging the intention of the respondents to carry into effect the aforesaid claimed unconstitutional and void acts, and asking discovery by answers to interrogatories propounded to the respondents, the allowance of a temporary restraining order, [562] and a final decree *awarding a perpetual injunction, was prayed, to restrain the commission by the respondents of the alleged unlawful acts by them threatened to be done. General relief was also prayed.

On January 6, 1901, a rule to show cause why a temporary injunction should not be granted was issued. In response to this rule an affidavit of the Secretary of the Interior was filed, in which, in substance, it was averred that the complainant (Lone Wolf) and his wife and daughter had selected allotments under the act of June 6, 1900, and the same had been approved by the Secretary of the Interior and that all other members of the tribes, excepting twelve, had also accepted and retained allotments in severalty, and that the greater part thereof had been approved before the bringing of this suit. It was also averred that the 480,000 acres of grazing land provided to be set apart, in the act of June 6, 1900, for the use by the Indians in common, had been so set apart prior to the institution of the suit, "with the approval of a council composed of chiefs and headmen of said Indians." Thereupon an affidavit verified by Lone Wolf was filed, in which in effect he denied that he had accepted an allotment of lands under the act of June 6, 1900, and the acts supplementary to and amendatory thereof. Thereafter, on June 17, 1901, leave was given to amend the bill and the same was amended, as heretofore stated, by adding additional parties complainant and by providing a substituted first paragraph of the bill, in which was set forth, among other things, that the three tribes, at a general council held on June 7, 1901, had voted to institute all legal and other proceedings necessary to be taken, to prevent the carrying into effect of the legislation complained of.

The supreme court of the District on June 21, 1901, denied the application for a temporary injunction. The cause was thereafter submitted to the court on a demurrer to the bill as amended. The demurrer was sustained, and the complainants electing not to plead further, on June 26, 1901, a decree was entered in favor of the respondents. An appeal was thereupon taken to the court of appeals of the District. While this appeal was pending, the President issued a proclamation, dated July 4, 1901 (32 Stat. at L. Appx. Proclamations, 11), in which it was *ordered that the surplus lands ceded [563] by the Comanche, Kiowa, and Apache and other tribes of Indians should be opened to entry and settlement on August 6, 1901. Among other things, it was recited in the proclamation that all the conditions required by law to be performed prior to the opening of the lands to settlement and entry had been performed. It was also therein recited that, in pursuance of the act of Congress ratifying the agreement, allotments of land in severalty had been regularly made to each member of the Comanche, Kiowa, and Apache tribes of Indians; the lands occupied by religious societies or other organizations for religious or educational work among the Indians had been regularly allotted and confirmed to such societies and organizations, respectively; and the Secretary of the Interior, out of the lands ceded by the agreement, had regularly selected and set aside for the use in common for said Comanche, Kiowa, and Apache tribes of Indians, 480,000 acres of grazing lands.

The court of appeals (without passing on a motion which had been made to dismiss the appeal) affirmed the decree of the court below, and overruled a motion for reargument. 19 App. D. C. 315. An appeal was allowed, and the decree of affirmance is now here for review.

*Messrs.* **William M. Springer** and **Hampton L. Carson** argued the cause and filed a brief for appellants:

Before the Revolutionary War the Indian occupancy was always respected by the British government and the colonial governments, and the original right of occupancy was never surrendered, except by treaties with the Indians.

16 Am. & Eng. Enc. Law, 2d ed. pp. 229, 230, 232; *Strong* v. *Waterman*, 11 Paige, 607.

The right of Indian occupancy is as sacred as a fee-simple title.

*United States* v. *Cook*, 19 Wall. 592, 22 L. ed. 211; *Holden* v. *Joy*, 17 Wall. 247, 21 L. ed. 535; *Wilson* v. *Wall*, 6 Wall. 89, 18 L. ed. 729; *Chinese Exclusion Cases*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634; 16 Am. & Eng. Enc. Law, 2d ed. pp. 229-233; *Society for Propagation of Gospel* v. *New Haven*, 8 Wheat. 484, 5 L. ed. 667; *Mitchel* v. *United States*, 9 Pet. 745, 9 L. ed. 295; *Worcester* v. *Georgia*, 6 Pet. 581, 8 L. ed. 508; *Beecher* v. *Wetherby*, 95 U. S. 525, 24 L. ed. 441.

The minds of contracting parties must agree upon all parts of the contract.

*La Compania Bilbaina de Navegacion de Bilbao* v. *Spanish-American Light & Power Co.* 146 U. S. 497, 36 L. ed. 1058, 13 Sup. Ct. Rep. 142; *Sibley* v. *Felton*, 156 Mass. 273, 31 N. E. 10.

There is something which shocks the conscience in the idea that a treaty can be put forth as embodying the terms of an arrangement with an Indian tribe, a material provision of which is unknown to one of the contracting parties, and is kept in the background, to be used by the other only when the exigencies of a particular case may demand it.

*New York Indians* v. *United States*, 170 U. S. 23, 42 L. ed. 935, 18 Sup. Ct. Rep. 531.

The Indians have a vested right of property.

*St. Louis* v. *Dorr*, 145 Mo. 466, 42 L. R. A. 686, 41 S. W. 1099, 46 S. W. 976; 4 Kent, Com. 202; *Calder* v. *Bull*, 3 Dall. 386, 1 L. ed. 648.

Legislative acts impairing vested rights are void.

6 Am. & Eng. Enc. Law, 2d ed. p. 955.

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.

*Marbury* v. *Madison*, 1 Cranch, 163, 2 L. ed. 69.

Indian title is a tenancy for life.

*United States* v. *Cook*, 19 Wall. 594, 22 L. ed. 211; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634.

Due process of law implies, in all cases, a course of proceeding according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. It is imperative that there be a court of competent jurisdiction, a hearing, and a fair trial.

10 Am. & Eng. Enc. Law, 2d ed. p. 293; 6 Am. & Eng. Enc. Law, 1st ed. p. 43.

The Constitution is in force in Oklahoma.

*Downes* v. *Bidwell*, 182 U. S. 271, 45 L. ed. 1100, 21 Sup. Ct. Rep. 770.

An Indian is a person.

*United States ex rel. Standing Bear* v. *Crook*, 5 Dill. 453, Fed. Cas. No. 14,891; 10 Am. & Eng. Enc. Law, 1st ed. p. 440.

Where adequate compensation cannot be had at law, any person who will sustain injury by acts of an official may have an injunction to prevent such injury; and such officer cannot plead the authority of an unconstitutional law in justification of his acts.

*Louisiana Bd. of Liquidation* v. *McComb*, 92 U. S. 541, 23 L. ed. 628; *Osborn* v. *Bank of United States*, 9 Wheat. 859, 6 L. ed. 233; *Davis* v. *Gray*, 16 Wall. 220, 21 L. ed. 453.

Heads of departments in Washington, and other public officials, may be compelled by mandamus to perform purely ministerial acts, and prevented by injunction from the performance of acts which are *ultra vires*, or which they have no lawful authority to perform.

*Marbury* v. *Madison*, 1 Cranch, 163, 2 L. ed. 69; *United States ex rel. Stokes* v. *Kendall*, 5 Cranch, C. C. 163, Fed. Cas. No. 15,517; *Kendall* v. *United States*, 12 Pet. 524, 9 L. ed. 1181; *Decatur* v. *Paulding*, 14 Pet. 497, 10 L. ed. 559; *United States* v. *Schurz*, 102 U. S. 378, 26 L. ed. 167; *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Hoover* v. *McChesney*, 81 Fed. 472; *Smith* v. *Reynolds*, 9 App. D. C. 261; *Kirwan* v. *Murphy*, 28 C. C. A. 348, 49 U. S. App. 658, 83 Fed. 275. See also the following cases: *Dinsmore* v. *Southern Exp. Co.* 92 Fed. 714; *Webster* v. *Douglas County*, 102 Wis. 181, 77 N. W. 885, 78 N. W. 451; *Minneapolis Brewing Co.* v. *McGillivray*, 104 Fed. 258.

Indians may sue in the courts.

*Strong* v. *Waterman*, 11 Paige, 607; *The Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket* v. *Johnson County*, 18 L. ed. 667; *Seneca Nation of Indians* v. *Christy*, 162 U. S. 288, 40 L. ed. 971, 16 Sup. Ct. Rep. 828.

*Assistant Attorney General* **Van Devanter** argued the cause and filed a brief for appellees:

This court will resolve every doubt in favor of the validity of the statute.

*Fletcher* v. *Peck*, 6 Cranch, 87, 3 L. ed. 162; *Sinking Fund Cases*, 99 U. S. 700, *sub nom. Union P. R. Co.* v. *United States*, 25 L. ed. 496; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *United States* v. *Old Settlers*, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650; *Nicol* v. *Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; Cooley, Const. Lim. 6th ed. p. 217.

Courts have no authority to inquire into the motives of the legislators, or as to the expediency of the legislation, the inquiry being limited to the question of power.

*M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308; *Angle* v. *Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240; *Lindsay & P. Co.* v. *Mullen*, 176 U. S. 126, 44 L. ed. 400, 20 Sup. Ct. Rep. 325.

The Indians are wards of the United States, and as such are under the care and control of the political branch of the government.

*United States* v. *Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109; *Choctaw Nation* v. *United States*, 119 U. S. 1, 30 L. ed. 306, 7 Sup. Ct. Rep. 75; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Johnson* v. *M'Intosh*, 8 Wheat. 543, 5 L. ed. 681; *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 8 L. ed. 25.

The failure of Congress to exercise any

legislative power vested in that body, or to exercise it in any specified manner, does not destroy the power or foreclose resort to the specified manner when occasion arises for its use.

*Chicago, B. & Q. R. Co.* v. *Iowa*, 94 U. S. 155, *sub nom. Chicago, B. & Q. R. Co.* v. *Cutts*, 24 L. ed. 94.

Nor is the power of the general government over the persons and property of its Indian wards one which can be surrendered or contracted away.

*Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

The making of treaties is a political function.

*The Amiable Isabella*, 6 Wheat. 1, 5 L. ed. 191; *Doe ex dem. Clark* v. *Braden*, 16 How. 635, 14 L. ed. 1090; *United States* v. *Brooks*, 10 How. 442, 13 L. ed. 489; *Fellows* v. *Blacksmith*, 19 How. 366, 15 L. ed. 684; *United States* v. *Old Settlers*, 148 U. S. 427, 37 L. ed. 509, 13 Sup. Ct. Rep. 650; *United States* v. *Arredondo*, 6 Pet. 691, 8 L. ed. 547; *United States* v. *Choctaw Nation*, 179 U. S. 494, 45 L. ed. 291, 21 Sup. Ct. Rep. 149.

An act of Congress may supersede a treaty.

*Head Money Cases*, 112 U. S. 580, *sub nom. Edye* v. *Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Whitney* v. *Robertson*, 124 U. S. 190, 31 L. ed. 386, 8 Sup. Ct. Rep. 456; *Botiller* v. *Dominguez*, 130 U. S. 238, 32 L. ed. 926, 9 Sup. Ct. Rep. 525; *Chinese Exclusion Cases*, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; *Horner* v. *United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Barker* v. *Harvey*, 181 U. S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690; *The Cherokee Tobacco*, 11 Wall. 616, *sub nom. 207 Half Pound Papers Smoking Tobacco* v. *United States*, 20 L. ed. 227; *Ward* v. *Race Horse*, 163 U. S. 504, 41 L. ed. 244, 16 Sup. Ct. Rep. 1076; *Thomas* v. *Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340.

The United States has full power and control over the Indians, both as to persons and property; and this control is to be administered through the political branch of the government.

*Stephens* v. *Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Tuttle* v. *Moore* (Ind. Terr.) 64 S. W. 585; *Barker* v. *Harvey*, 181 U. S. 481, 45 L. ed. 963, 21 Sup. Ct. Rep. 690.

Indians are the wards of the Nation; and the management and care of their property, like that of minors, incompetents, or other persons not *sui juris*, is one of the subjects which the legislature may or may not submit to the courts, as it may deem proper.

Cooley, Const. Lim. 6th ed. pp. 117 *et seq.*; *Hoyt* v. *Sprague*, 103 U. S. 613, 26 L. ed. 585; *Rice* v. *Parkman*, 16 Mass. 326; *Louisville, N. O. & T. R. Co.* v. *Blythe*, 69 Miss. 939, 16 L. R. A. 251, 11 So. 111; *Henderson* v. *Dowd*, 116 N. C. 795, 21 S. E. 962; *Davison* v. *Johonnot*, 7 Met. 388, 41 Am. Dec. 448; *Cochran* v. *Van Surlay*, 20 Wend. 365, 32 Am. Dec. 570; *Wheeler* v. *Smith*, 9 How. 55, 13 L. ed. 44; *Fontain* v. *Ravenel*, 17 How. 369, 15 L. ed. 80; *Late Church of Jesus Christ, L. D. S.* v. *United States*, 136 U. S. 4, 34 L. ed. 481, 10 Sup. Ct. Rep. 792.

These Indians are living within one of the territories over which Congress has full power of legislation.

*First Nat. Bank* v. *Yankton County*, 101 U. S. 129, 25 L. ed. 1046; *Murphy* v. *Ramsey*, 114 U. S. 15, 29 L. ed. 47, 5 Sup. Ct. Rep. 747; *Church of Jesus Christ, L. D. S.* v. *United States*, 136 U. S. 1, 34 L. ed. 481, 10 Sup. Ct. Rep. 792; *Utter* v. *Franklin*, 172 U. S. 416, 43 L. ed. 498, 19 Sup. Ct. Rep. 183; *De Lima* v. *Bidwell*, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; *Downes* v. *Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

Whether the Indians gave their consent to the cession of these lands was a matter for Congress to determine, and which that body did determine in the affirmative. All discussion of that question before the courts was thereby effectually and absolutely foreclosed.

Cooley, Const. Lim. 5th ed. p. 222; *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510, 35 L. ed. 1099, 12 Sup. Ct. Rep. 308.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

By the sixth article of the first of the two treaties referred to in the preceding statement, proclaimed on August 25, 1868 (15 Stat. at L. 581), it was provided that heads of families of the tribes affected by the treaty might select, within the reservation, a tract of land of not exceeding 320 acres in extent, which should thereafter cease to be held in common, and should be for the exclusive possession of the Indian making the selection *so long as he or his [564] family might continue to cultivate the land. The twelfth article reads as follows:

"Article 12. No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force, as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians occupying the same, and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article 3 [6] of this treaty."

The appellants base their right to relief on the proposition that by the effect of the article just quoted the confederated tribes of Kiowas, Comanches, and Apaches were vested with an interest in the lands held in common within the reservation, which interest could not be devested by Congress in any other mode than that specified in the said twelfth article, and that as a result of the said stipulation the interest of the Indians in the common lands fell within the protection of the 5th Amendment to the

Constitution of the United States, and such interest—indirectly at least—came under the control of the judicial branch of the government. We are unable to yield our assent to this view.

The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the government of the United States. To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.

Now, it is true that in decisions of this court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands. *Johnson* v. *M'Intosh* (1823) [565]8 Wheat. 543, 574, 5 L. ed. 681, 688; **Cherokee Nation* v. *Georgia* (1831) 5 Pet. 1, 48, 8 L. ed. 25, 42; *Worcester* v. *Georgia* (1832) 6 Pet. 515, 581, 8 L. ed. 483, 508; *United States* v. *Cook* (1873) 19 Wall. 591, 592, 22 L. ed. 210, 211; *Leavenworth, L. & G. R. Co.* v. *United States* (1875) 92 U. S. 733, 755, 23 L. ed. 634, 643; *Beecher* v. *Wetherby* (1877) 95 U. S. 525, 24 L. ed. 441. But in none of these cases was there involved a controversy between Indians and the government respecting the power of Congress to administer the property of the Indians. The questions considered in the cases referred to, which either directly or indirectly had relation to the nature of the property rights of the Indians, concerned the character and extent of such rights as respected states or individuals. In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians. Thus, in *Beecher* v. *Wetherby*, 95 U. S. 525, 24 L. ed. 441, discussing the claim that there had been a prior reservation of land by treaty to the use of a certain tribe of Indians, the court said (p. 525, L. ed. p. 441):

"But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians."

Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government. Until the year 1871 the policy was pursued of dealing with the *Indian tribes by means of [566] treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations (*Chinese Exclusion Case*, 130 U. S. 581, 600, 32 L. ed. 1068, 1073, 9 Sup. Ct. Rep. 623), the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas* v. *Gay*, 169 U. S. 264, 270, 42 L. ed. 740, 743, 18 Sup. Ct. Rep. 340; *Ward* v. *Race Horse*, 163 U. S. 504, 511, 41 L. ed. 244, 246, 16 Sup. Ct. Rep. 1076; *Spalding* v. *Chandler*, 160 U. S. 394, 405, 40 L. ed. 469, 473, 16 Sup. Ct. Rep. 360; *Missouri, K. & T. R. Co.* v. *Roberts*, 152 U. S. 114, 117, 38 L. ed. 377, 379, 14 Sup. Ct. Rep. 496; *Cherokee Tobacco*, 11 Wall. 616, *sub nom. 207 Half Pound Papers of Smoking Tobacco* v. *United States*, 20 L. ed. 227.

The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians. In *United States* v. *Kagama* (1885) 118 U. S. 375, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109, speaking of the Indians, the court said (p. 382, L. ed. p. 230, Sup. Ct. Rep. p. 1113):

"After an experience of a hundred years of the treaty-making system of government Congress has determined upon a new departure,—to govern them by acts of Congress. This is seen in the act of March 3, 1871, embodied in § 2079 of the Revised Statutes: 'No Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3d, 1871, shall be hereby invalidated or impaired.'"

In upholding the validity of an act of

Congress which conferred jurisdiction upon the courts of the United States for certain crimes committed on an Indian reservation within a state, the court said (p. 383, L. ed. p. 231, Sup. Ct. Rep. p. 1114):

[567] "'It seems to us that this is within the competency of Congress. These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive and by Congress, and by this court, whenever the question has arisen.

. . . . . .

"The power of the general government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."

That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 30 L. ed. 306, 314, 7 Sup. Ct. Rep. 75, and *Stephens* v. *Choctaw Nation*, 174 U. S. 445, 483, 43 L. ed. 1041, 1054, 19 Sup. Ct. Rep. 722.

In view of the legislative power possessed by Congress over treaties with the Indians and Indian tribal property, we may not specially consider the contentions pressed upon our notice, that the signing by the Indians of the agreement of October 6, 1892, was obtained by fraudulent misrepresentations, and concealment, that the requisite three fourths of adult male Indians had not signed, as required by the twelfth article of the treaty of 1867, and that the treaty as signed had been amended by Congress without submitting such amendments [568] to the action of the Indians, since all these matters, in any event, were solely within the domain of the legislative authority, and its action is conclusive upon the courts.

The act of June 6, 1900, which is complained of in the bill, was enacted at a time when the tribal relations between the confederated tribes of Kiowas, Comanches, and Apaches still existed, and that statute and the statutes supplementary thereto dealt with the disposition of tribal property, and purported to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, *ante*, 183, 23 Sup. Ct. Rep. 115, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress, and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained.

The motion to dismiss does not challenge jurisdiction over the subject-matter. Without expressly referring to the propositions of fact upon which it proceeds, suffice it to say that we think it need not be further adverted to, since, for the reasons previously given and the nature of the controversy, we think the decree below should be affirmed.

*And it is so ordered.*

Mr. Justice **Harlan** concurs in the result.

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## TELLURIDE POWER TRANSMISSION [569] COMPANY *et al.*, *Plffs. in Err.*, *v.* RIO GRANDE WESTERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 569-585.)

*Error to state court—Federal question—when raised in time—findings of fact—questions of local law.*

1. The repugnancy to the Federal Constitution of a state statute under which the trial court assumed to try without a jury the questions of fact upon which the rights in controversy depended is not reviewable in the Supreme Court of the United States on writ of error

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois *ex rel.* Akin, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

to a state court, where the question first appears in the petition for such writ of error, and the state supreme court did not pass upon the action of the trial court in view of its unconstitutionality.

2. Findings of fact or questions of local law upon which depends a party's right, under U. S. Rev. Stat. § 2339 (U. S. Comp. Stat. 1901, p. 1437), to the protection of vested water rights, are not reviewable in the Supreme Court of the United States on writ of error to a state court.

[No. 72.]

*Argued November 10, 1902. Decided January 5, 1903.*

IN ERROR to the Supreme Court of the State of Utah to review a judgment which affirmed a judgment of condemnation rendered by the District Court of the Fourth Judicial District of that State in a suit to condemn land in the exercise of the right of eminent domain. *Dismissed.*

See same case below, 23 Utah, 22, 63 Pac. 995.

Statement by Mr. Justice **McKenna:**

This is a suit to condemn land in the exercise of the right of eminent domain, under the laws of Utah, and was brought in the district court of the fourth judicial district of that state. The complainant in the suit, defendant in error here, was a corporation of Utah. The plaintiff in error was a Colorado corporation. Ferguson and Holbrook were citizens of Utah; Nunn was a citizen of Colorado. The bill alleged the corporate character of the complainant, and the necessity of the land for the use of the railroad. The route of the road was set out, and that it would pass over a tract of unsurveyed [570] lands *of the United States which could not be accurately described, but which, when surveyed, would proximately be parts of the S.W. ¼ of section 27, W. ½ of S.W. ¼ of 26, N.E. ¼ of the S.W. ¼ section 26, and N.W. ¼ of the S.E. ¼ of section 26, T. 5, S. R. 3, east Salt Lake meridian, and lying in Provo cañon, and along and near Provo river. That prior to plaintiff's survey Ferguson had or claimed some possessory right by occupation of said land or some part thereof, but on account of the land being unsurveyed the number of acres claimed by Ferguson could not be given, but the lands he claimed to occupy, it was alleged on information and belief, commenced at a fence between them and lands below and southeasterly, occupied by A. L. Murphy, and extends northeasterly up the cañon and river, a distance of about 4,800 feet, to a point which by estimation would be the northeast corner of the northwest quarter of the southeast quarter of section 26, when the land should be surveyed. It was alleged that the line of the railroad was on and over said lands, and that plaintiff had appropriated for railroad purposes a strip of land 200 feet wide, containing 22 acres, more or less; that such strip was necessary for the construction and operation of the road. A map of the line of road was attached to the bill.

The following were the allegations of the bill as to the other defendants:

"And on information and belief the plaintiff alleges that the defendants the Telluride Power Transmission Company, L. L. Nunn, and L. Holbrook assert and claim some interest in or to said land appropriated by the plaintiff, or in the possessory right to the same or to some easement therein.

"That the defendants are the only persons and parties in possession of said land or any part thereof, or claiming any right or title therein or thereto, so far as is known to the plaintiff.

"And the plaintiff alleges that it cannot contract for the purchase of said tract of land required for its railroad as aforesaid. That the defendant W. W. Ferguson refuses to sell, alleging that he has contracted to sell to the other defendants *or some of [571] them; that the other defendants refuse to sell the same or any easement therein or possessory right thereto on the pretense that they want said land and propose to flow the same for power purposes. And on information and belief the plaintiff alleges that the claimed interest of the defendant Holbrook, if any, is held by him as trustee for the defendants, the Telluride Power Transmission Company and L. L. Nunn."

The prayer was for the ascertainment of the extent of occupation by defendants and their damages and the condemnation of a right of way of 100 feet wide on each side of the center line of plaintiff's survey, on and over the land occupied by defendants, or any of them, and for general relief.

The Telluride Power Transmission Company and the defendant Nunn petitioned for the removal of the cause to the circuit court of the United States for the district of Utah on the ground of separable controversy. The petition alleged that they were citizens and residents of Colorado, and the plaintiff was a resident and citizen of Utah; that Holbrook had no interest in the controversy, and that Ferguson had contracted to sell to them the lands involved. The petition was denied. Subsequently said corporation and Nunn filed a certified transcript of the proceedings in the circuit court of the United States for the district of Utah, but on motion of plaintiff's attorney the cause was remanded to the district court of the state. The order remanding was made on the 29th of March, 1897, and a copy thereof filed in the district court, April 29, 1898, the day the trial commenced.

In that court the defendants answered,—Ferguson separately, the other defendants uniting. The answers need not be quoted. It is enough to say that they put in issue the allegations of the bill as to the organization and existence of the plaintiff corporation, its authority to build a railroad up Provo cañon, the survey of its line in March, 1896, and its location. It was alleged "that certain persons claiming to be the agents of said alleged plaintiff had, during the summer and fall of 1896, run uncertain and irregular lines up said Provo cañon, cut brush and made slight and unimportant excavations, which, from their character, gave no

evidence of any purpose or design upon the [572] *part of any person to survey or construct any line of railroad;" and that such line "passed over and into certain tracts of unsurveyed land." Ferguson's location upon certain unsurveyed lands was alleged, with the view of obtaining title thereto as soon as the lands could be entered, and that he had erected improvements thereon and had contracted to sell the same to the power company and Nunn for the purpose of enabling them to "use the same for a reservoir upon which to store water for electrical power, manufacture and agricultural purposes."

It was alleged that the power company was a Colorado corporation and its stockholders citizens of the United States, and that it was organized, among other things, "for the purpose of acquiring by purchase, or otherwise, water rights, ways, and power, and to work, develop, and utilize water rights, power, ways, mills, etc., for such business and enterprises as appertain to the same."

The adaptability of Provo cañon for supplying and storing water was alleged, and the utility of furnishing light and electrical power and heat to neighboring industries. That said defendants have been engaged for years in acquiring water rights, and in the year 1894 entered Provo cañon, and had extensive surveys made, and prosecuted the same with diligence; that the greater part of the lands in the cañon were unoccupied and unsurveyed, and of little or no value except for the purposes designed by the defendants; "that defendants began the construction of a flume and made the necessary excavations therefor in order to obtain power with which to aid in the construction of a large dam by which to reservoir and hold back the waters of said river for power and irrigation purposes; that said defendants made the necessary surveys for canals for the purposes aforesaid and surveyed a reservoir, and showed upon the surveys the contour of the line thereof, and prosecuted with due diligence the work necessary for the consummation of the enterprise entered upon; that in the winter and early spring of 1896 the said defendants vigorously prosecuted said work and expended large sums of money in the execution of said design and purpose; that long prior to 1896 in good faith they entered upon said public unsur- [573] veyed lands *of the United States with the design and specific purpose of constructing in said cañon at a point at or near what will be, when surveyed, as nearly as defendants can determine, the southwest quarter of the southeast quarter of section 27, township 5 south, range 3 east, a dam by which to reservoir and store said surplus waters of Provo river; that they surveyed said reservoir, extending the lines of survey up said river from said point to a point at or near the northeast corner of the northeast quarter of the southwest quarter of section 7, township 5 south, range 4 east, in Wasatch county, Utah; and said defendants have further located and surveyed the necessary canals connected with said reservoir for the purpose of carrying into effect the enterprise and business entered upon by them; that since the year 1894 as aforesaid, the said defendants have been in the actual possession and occupation of the land in said cañon between said points, and which is intended by them as a reservoir, and also other portions of the public domain lying west of said reservoir and in said cañon, except that the claim of defendant Ferguson, lying within said reservoir, has been occupied by said Ferguson as a residence, but defendants allege having paid said Ferguson a large sum of money, and have obtained a contract from him by which he covenants and agrees to convey all his interest in the premises so occupied by him to the said defendants."

The good faith of the defendants was alleged, and that their possession was open and notorious, and that they with like faith prosecuted their enterprise, and expended therein $50,000, and by reason of their dam they would be able to obtain more than 8,000-horse power, which would be sufficient to supply said Utah county and the towns and cities therein with power for heating, lighting, and manufacturing purposes, and would also be able to supply water for irrigation purposes.

The acts of the plaintiff were averred as follows:

"Defendants further aver that said plaintiff some time in the summer of 1896 wrongfully, and for the purpose of annoying the said defendants and interfering with their project and enterprise, came into Provo cañon and ran irregular, indefinite, and devious lines through a portion of said cañon, pretending *that it was the purpose to estab- [574] lish a railroad therein, and defendants allege that said lines so run were so irregular and uncertain, so shifting and changing, as to indicate no such purpose; that in two or three points in said cañon various persons claiming to represent plaintiff made slight excavations, but the character of the same was such as to indicate no purpose to construct a railroad or to perform intelligently and with a fixed or settled purpose any work or enterprise.

"Defendants allege upon information and belief that said plaintiff has no purpose or design to construct any railroad, but that what has been done has been with a view to annoy defendants and to prevent said defendants from constructing their reservoir and canals and obtaining electrical power for the purpose aforesaid, and for the purpose of preventing any legitimate railroad undertaking from being consummated, if the operation of a line through said cañon was essential.

"Defendants allege that the construction of a railroad along the bottom of said cañon would be destructive of their enterprise and reservoir and power, and would prevent them from carrying out the work in which they have been engaged long prior to the spasmodic, uncertain, and *mala fides* entry of said plaintiff into said cañon, and in which they are still engaged."

It was alleged that plaintiff knew of the intention and character of defendants' work,

and to permit it to condemn the land and to deprive defendants of its possession would be a "grievous wrong and fraud upon their rights."

It was averred that Holbrook had no interest in the controversy.

The allegations of defendants were not only set up in their answers, but were also made the subject of cross bills.

A jury was impaneled, and under the instructions of the court they were confined to the consideration of compensation and damages. They returned a verdict assessing the value of the strip of land taken by the railroad at $575; damages to the remaining land, $500; cost of fencing, $525.30, and cost of cattle guards, $42.53. Benefits were assessed at nothing.

There were many instructions asked by defendants which the court refused. They [575] also objected to the instructions which *the court gave. Subsequently the court rendered its judgment, in which it found and adjudged as follows:

"This action having come on for hearing before the court, and a jury impaneled to assess compensation and damages, on the 18th day of April, 1898, and having been heard on that and the succeeding day, it is now found and determined that the plaintiff is a railroad corporation as alleged in the complaint and with a franchise to construct and operate lines of railway and telegraph as alleged, including a franchise to construct a line of railroad and telegraph on and over lands described in the complaint and sought to be condemned.

"That the plaintiff filed a copy of its articles of incorporation and due proof of its organization with the Secretary of the Interior, and the same were duly approved by the Secretary on the 27th day of May, 1890, under the act of Congress of March 3, 1875, granting the right of way to railroad companies.

"That the lands sought to be condemned and the adjoining lands are unsurveyed public lands of the United States, and at the time of the beginning of the suit were occupied by William W. Ferguson, who has since died.

"That the plaintiff on the 8th day of July, 1896, completed the survey and location of its line of railroad on and over the lands sought to be condemned and hereinafter described.

"That the said defendant L. Holbrook has disclaimed any interest in the lands.

"That neither on or before or since the 8th day of July, 1896, has the defendants, the Telluride Power Transmission Company and L. L. Nunn, or either of them, had any possession of the lands sought to be condemned, or by appropriation or otherwise any right to raise the waters of Provo river so as to flow the same or any part thereof, or any right to the said lands or possession thereof as part of a reservoir site, and to raise the waters of said river so as to flow the same would be an unreasonable use of said waters and the public lands and easements in the cañon adjacent to said river.

"And it is now adjudged by the court:

"That the use to which the land sought to be acquired by plaintiff is to be applied in the construction and operation of a *line [576] of railroad and telegraph for which the lands are to be used for a right of way, and that it is a public use authorized by law; and that the taking and condemnation thereof is necessary to such use. That said lands have not already been appropriated to any other public use.

"That none of the defendants by pleadings or otherwise is seeking condemnation of said lands for a reservoir or other public use, and the lands cannot be used both as a reservoir site as claimed and a railroad, and there is no common use, either public or private, to be adjusted."

The judgment then recited the findings of the jury, and directed the money to be paid into court for subsequent distribution among those who should be entitled thereto. This judgment was afterwards set aside, at the request of defendants, to enable them to present findings, which they subsequently did. The court, however, refused to find as requested, and reinstated its former judgment and findings. The findings requested presented the allegations of the answers as established by the evidence, and also presented, as established, the feasibility of building the railroad upon lines which would not interfere with the projected works of the defendants.

The plaintiff paid into court the award of the jury, and a final order of condemnation was made. The case was taken to the supreme court of the state, and the judgment of condemnation was there affirmed. 23 Utah, 22, 63 Pac. 995. The chief justice of the state allowed this writ of error.

On appeal to the supreme court of the state there were eighty-three assignments of error, two of which were based on rulings in regard to the jury and forty-five of which were based upon instructions to the jury or refusals to instruct the jury. The rest of the assignments except three were based on the findings, and refusals to find, as requested by defendants. The last three assignments were as follows:

"81. The court erred in denying defendants' petition to remove said cause to the Federal court.

"82. The court erred in assuming to retain jurisdiction over said cause and proceeding to try the same after the filing of the petition on the part of the defendants to remove said cause *to the circuit court of [577] the United States for the district of Utah.

"83. The court erred in holding and deciding that it had jurisdiction to hear, try, and determine said cause."

In the petition for writ of error it was alleged that errors were committed by the supreme court of Utah, in that "the final judgment and decision of the supreme court of the state of Utah the said court erred in holding and deciding and determining that these defendants, both citizens of the state of Colorado, one a corporation existing under the laws of the said state of Colorado and the other a natural person, did not have

the authority or the right to locate and appropriate public lands of the United States upon the Provo river flowing through said public lands of the United States for the purpose of maintaining a dam with which to generate power to create electricity, and such decision was contrary to the protection afforded these defendants by the 14th Amendment of the Constitution of the United States. The decision likewise violated the rights of the said defendants under § 2, article 4, of the Constitution of the United States: 'The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.'

"And the petitioners further say that in the final judgment and decree of the said supreme court of the state of Utah and of the district court of the fourth judicial district in and for the county of Utah, state of Utah, a decision was had against a right and privilege of these defendants claimed under a statute of the United States, which right and privilege was specially set up and claimed by these said defendants in said cause. That by the answer in said cause the defendants allege that they had the right and authority from the United States, and were exercising it, to erect a dam in Provo cañon for the purpose of creating power to transmit electricity. That said right and authority existed under the mining laws of the United States originally enacted in 1868 and amended in 1872, Revised Statutes, § 2339 [U. S. Comp. Stat. 1901, p. 1437], and the said right was denied by the said plaintiff and the said district court of the fourth judicial district, and the said su-
[578] preme court of Utah on appeal held *that these defendants had no right to erect such dam on the public unsurveyed lands of the United States.

"And the petitioners further say that the said fourth judicial district court in and for the county of Utah, state of Utah, and the said supreme court of the state of Utah in affirming the said decision on appeal, have decided against the right of these defendants existing under the statute of the United States to remove the said cause from the said state court above named to the United States court, which claim was exercised duly by the petition and bond filed in due time by these defendants in the fourth judicial district court before the time expired for these said defendants to appear and answer to the suit brought against them by the said plaintiff in this cause."

In the assignments of error those grounds are repeated, and errors are assigned upon the rulings on instructions by the district court and the action of the supreme court in sustaining those rulings.

Section 2339 [U. S. Comp. Stat. 1901, p. 1437], referred to in the assignments of error, is as follows:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purpose herein specified is acknowledged and confirmed; but whenever any person in the construction of any ditch or canal injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

*Mr.* **H. P. Henderson** argued the cause, and, with *Messrs. S. A. Bailey* and *Arthur Brown*, filed a brief for plaintiffs in error.

*Mr.* **Joel F. Vaile** argued the cause, and, with *Messrs. R. Harkness* and *E. O. Wolcott*, filed a brief for defendant in error.

*Mr. Justice **McKenna** delivered the [579] opinion of the court:

The defendant in error has moved to dismiss the case for want of jurisdiction in this court. The essential issues of fact were decided against the plaintiffs in error, and the case, therefore, seems to be brought within the ruling in *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.* 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245. The corporations in this case were parties in that case, and so were Nunn and Holbrook. The same public interests were in opposition, and the power company relied for rights in Provo cañon on § 2339 of the Revised Statutes of the United States [U. S. Comp. Stat. 1901, p. 1437], as the company does in this case, and the rulings on those interests and rights constituted the vital questions in that case as they do in this. It was pointed out there that, "in order to establish any rights under the statute, it was incumbent upon the defendants to prove their priority of possession, or at least to disprove priority on the part of the plaintiff." And it was observed: "The question who had acquired this priority of possession was not a Federal question, but a pure question of fact, upon which the decision of the state court was conclusive. No construction was put upon the statute; no question arose under it; but a preliminary question was to be decided before the statute became material, and that was whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defendants' right to the use of the water was recognized and acknowledged by the local customs, laws, and decisions, all of which were questions of state law."

After discussion it was also observed: "But the difficulty in this case is that, before it could be said that any right or title under a statute of the United States had been denied, it was necessary to establish as a question of fact priority of possession on the part of the Telluride Company, as well as conformity to local customs, laws, and decisions. These were local, and not Federal, questions. The jurisdiction of this court in this class of cases does not extend to questions of fact or of *local law, which [580]

are merely preliminary to, or the possible basis of, a Federal question."

Manifestly if the plaintiffs in error obtained no rights under § 2339 [U. S. Comp. Stat. 1901, p. 1437], none could be taken from them. But a violation of the 14th Amendment of the Constitution of the United States is claimed by both the power company and by Nunn, and the latter claims, besides, that he was denied the privileges to which he was entitled as a citizen of the United States.

The deprivation of the rights of the plaintiffs in error under the 14th Amendment was accomplished, it is said, by the court's assuming to try without the assistance of the jury the questions of fact upon which those rights depended. In other words, that the district court assumed to determine, and did determine, all conflicting or adverse claims to the property, and submitted only to the jury the questions of compensation and damages. This action, it is asserted, was contrary to the meaning of the statute of the state, or, if not so, the statute is void.

With the latter objection we only are concerned, and it is enough to say in answer to it that the invalidity of the statute was not raised in the district court, nor assigned as a ground of error on the appeal taken to the supreme court of the state. It appears for the first time in the petition for the writ of error from this court. Nor did the supreme court of the state pass upon the action of the district court in view of its unconstitutionality. Indeed, it found it unnecessary to pass upon that action except in the most general way. The court said:

"The appellants assign many errors upon the refusal of the court to instruct the jury as requested, upon the instructions given to the jury, and upon the facts found by the court. Under the view taken these questions become unimportant, as neither of the appellants were injured in their rights; nor were either entitled to any damages under the facts shown in this case. The instructions were, at least, as favorable to the appellants as they had a right to expect."

It is further urged that the decision of the supreme court deprived plaintiffs in error of their rights under the Constitution [581] of *the United States, and under § 2339 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 1437], in holding, as it is claimed, that neither the power company nor Nunn had any authority or right to locate and appropriate public land of the United States upon the Provo river for the purpose of maintaining a dam to store water with which to generate power to create electricity.

The supreme court in its opinion referred to its decision in the former case between the parties, 16 Utah, 125, 51 Pac. 146; 175 U. S. 639, 44 L. ed. 305, 20 Sup. Ct. Rep. 245, not, however, as conclusive, but "as authority and as determining the law in this case, in so far as it decided the same questions involved in the present case," and the court stated that it had been decided in that case, among other things, "that the defendants (plaintiffs in error here) had not appropriated the land in dispute, and that neither of the defendants was in actual possession of the land when the plaintiff located his right of way, took possession, and engaged in grading it."

Then passing upon the rights of the power company and Nunn, the court said:

"The record shows that the San Miguel Gold Mining Company was organized in Colorado, February 7, 1891, with a capital of $15,000,000, and was authorized to acquire by purchase, lease, or otherwise, mining property, together with water rights, power, ways, mills, and mill sites; to develop, mine, work, and utilize the same, and to carry on a general mining business. Its principal office is in Telluride, Colorado, and its principal business is to be done in Colorado, and its articles provide that part of its business may be done in Boston, Mass., and its principal office kept there. The stock is nonassessable, and no requirements for payments of subscription are incorporated in it. In February, 1896, an amendment of its articles was made and filed with the secretary of state in Colorado changing the name of the company to the Telluride Power Transmission Company. Appellant Nunn was its manager.

"Section 427, p. 614, 1 Colo. Stat. 1893, among other matters, provides that, 'when said corporation shall be created under the laws of this state for the purpose of carrying on part of its business beyond the limits thereof, such certificate shall state that fact.' Subdivision 2 of this section provides that *the object for which the company is [582] created shall be stated. Section 498 authorizes Colorado corporations authorized to do business out of the state to accept the laws of the other states, and there exercise its franchise.

"So it appears that the appellant company is a mining corporation organized in Colorado, without complying with the statute, and with no other powers to do business as such in this state. Without complying with the Constitution and laws of this state with respect to foreign corporations, it unlawfully assumes to appropriate both land and water within this state. This must be so, because under § 2, art. 12, of the Constitution of this state, no corporation in existence in this state when the Constitution is adopted shall have the benefit of its laws, without filing with the secretary of state an acceptance of the provisions of the Constitution; and under § 6, no corporation organized out of the state shall be allowed to transact business in this state on conditions more favorable than those prescribed by law for similar corporations organized under the laws of the state.

"Under § 9, no corporation is allowed to do business in this state without having one or more places of business therein, with an agent upon whom process may be served, nor without first filing a certified copy of its articles of incorporation with the secretary of state. Section 10 provides that no corporation shall engage in any business other than that expressly authorized in its charter or articles of incorporation.

"Section 2293, Utah Comp. Laws 1888, as amended in 1896, and §§ 351 and 352, Rev. Stat. 1898, expressly embody these provisions of the Constitution, and prohibit foreign corporations from doing business in this state, unless they have complied with these requirements of the law; and any corporation failing to so comply with the provisions of the law is not entitled to the benefits of the law of this state relating to corporations.

"The appellant corporation did not comply with the laws of this state, and has no power to engage in its business of mining, or to acquire any water rights under the laws of this state. A corporation of Colorado coming into this state cannot bring [583] with *it powers with which it is not endowed in Colorado. It can only have an existence under the express laws of the state where it is created, and can exercise no power which is not granted by its charter or some legislative act. The appellant corporation never filed with the secretary of state of the state of Utah a copy of its articles of incorporation, by either name under which it was incorporated, and never accepted the laws or Constitution of Utah, nor has it appointed any agent or fixed any place of business within the state as required by law. The defendant corporation, therefore, is not entitled to the benefit of the laws of this state, with reference to corporations. *State* v. *Southern P. Co.* 52 La. Ann. 1822, 28 So. 372; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 1, 32 L. ed. 837, 9 Sup. Ct. Rep. 409; *George R. Barse Live Stock Co.* v. *Range Valley Cattle Co.* 16 Utah, 59, 50 Pac. 630.

"Under § 2339, Rev. Stat. [U. S. Comp. Stat. 1901, p. 1437], even if priority of possession of the property in question was shown in the defendant corporation, still its right to locate and use the water or land is not recognized or acknowledged by the laws of this state, and it was not in a position to question the right of the plaintiff in the premises.

"5. Appellant Nunn was a resident of Colorado, the general manager and in charge of the business of the defendant corporation, both in Colorado and Utah. The chief engineer, hydraulic engineer, and officers of the defendant corporation, including the president and attorneys, consulted with and acted with him with respect to the acts performed with reference to the appropriation of water and in making the improvements discussed by them, at Hanging Rock, but no plan for a dam at Hanging Rock was ever actually made, and no dam was constructed there. Throughout the whole procedure the board of the defendant corporation was the controlling authority for and with whom Nunn acted. If Nunn had any right, it was with reference to the smaller power located below. The dam at Hanging Rock was to be a larger power, and was talked about in the project, but it was not constructed, and the ownership, if in anyone, was in the defendant company, which was incapable of acquiring such ownership.

"While the testimony is very uncertain, it sufficiently appears *that whatever was [584] done by Nunn in the appropriation of water was done for the use and benefit of the defendant company, and he cannot be treated as a personal claimant and owner of the easement and right of way in controversy as against the right of way acquired by respondent."

From this excerpt it appears that the supreme court construed the statutes and Constitution of Utah, deciding that the power company had no existence as a corporation in the state, and could acquire, therefore, no rights as such, and "was not in a position to question the right of the plaintiff [defendant in error] in the premises." And no independent right was found in Nunn. What was done by him the court said was done "for the use and benefit of the defendant company." And it was decided that he was not "a personal claimant and owner of the easement and right of way in controversy as against the right of way acquired by respondent [plaintiff in error]." These conclusions did not involve the decision of Federal questions. The first expressed the meaning and effect of local statutes. The second depended upon a finding of fact. Neither, therefore, is reviewable by us.

The whole controversy was and is as to the right to occupy Provo cañon, the defendant in error claiming that right for a railroad, the plaintiffs in error claiming that right for a reservoir site, and this latter right plaintiffs in error claimed and claims under § 2339 of the Revised Statutes of the United States [U. S. Comp. Stat. 1901, p. 1437]. That section was and is their reliance. They say in their brief that they "do not claim to hold the land in controversy" under the alleged contract with Ferguson.

"They claim to have obtained title to it under § 2339 of the Revised Statutes of the United States by entering upon it and appropriating it as a reservoir site, and this contract (the contract with Ferguson) only amounted to a waiver of Ferguson's rights as a squatter in favor of plaintiffs in error."

But their rights under that section depended upon questions of fact and questions of local law. The questions of fact were found against plaintiff in error, and the questions of local law we cannot review.

A Federal question is asserted because of the ruling of the *district court refusing to [585] remove the case to the United States circuit court upon the petition of plaintiffs in error. But upon the denial of the application to remove they filed the record in the circuit court of the United States, and that court remanded the cause, and a copy of its order was filed in the district court before the commencement of the trial. In substantially similar circumstances we held in *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389, that if error there had been in the ruling of the state court it became wholly immaterial.

*Writ of error dismissed.*

E. M. AYRES, *Plff. in Err.*,
*v.*
JOHN H. POLSDORFER and Wife, Louisa M. Polsdorfer.

(See S. C. Reporter's ed. 585-596.)

*Appeal—error to circuit court of appeals—motion for certiorari—when made in time.*

1. A judgment of the circuit court of appeals, in a case in which the jurisdiction of the circuit court was invoked solely on the ground of diverse citizenship, cannot be reviewed in the Supreme Court of the United States on writ of error because a Federal question arose in the course of the proceedings in the circuit court, even though such question may not be of such a character as would permit the case, under § 5 of the judiciary act of 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), to be brought directly from the circuit court to the Supreme Court.
2. Certiorari to the circuit court of appeals, sought because of the apprehension that a writ of error was improperly sued out, will not be granted where the judgment sought to be reviewed was rendered December 7, 1900, a rehearing denied February 23, 1901, the writ of error brought April 15, 1901, and the record filed and case docketed April 29, 1901, and the motion for such certiorari was not made until October 9, 1902.

[No. 89.]

*Argued November 13, 1902. Decided January 5, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which dismissed a writ of error from that court to review a judgment of the Circuit Court for the Western Division of the Western District of Tennessee.

On motion to dismiss. *Dismissed.*

Motion for certiorari denied.

See same case below, 45 C. C. A. 24, 105 Fed. 737.

Statement by Mr. Justice **McKenna:**

Ejectment and trespass brought in the circuit court of the United States, western division of the western district of Tennessee, for the recovery of lands and damages. Part of the land is an island in the Mississippi river. The declaration was in the usual form, and the ground of jurisdiction in the circuit court was diversity of citizenship, expressed as follows:

"The plaintiffs, who are citizens of the state of Indiana, residing at Evansville, therein, complain of the defendants, Joe C. [586] Marley, *Thomas Price, E. J. Roy, T. A. Roy, L. R. Coleman, and E. M. Ayers, who are citizens of the state of Tennessee, residing in the western division of the western district thereof, in an action of trespass and ejectment."

The declaration alleged ownership in fee of the plaintiffs (defendants in error here) and their possession, and alleged the entry of the defendants as follows:

"And the plaintiffs being so entitled to the said property, and so in possession thereof, the said defendants, to wit, on the said October 1st, 1898, at the said county of Lauderdale, unlawfully and without right entered into and upon the said premises, and falsely and unjustly set up title thereto, as in them respectively, and cut timber therefrom and removed the same and exercised acts of ownership thereof under such false and unjust claim of title, and denied and refused to recognize the claim of these plaintiffs to the title, or their possession thereunder, and wholly refused to admit and repudiated the same, as they still do."

Judgment for the recovery of the land was prayed, and $3,000 damages.

Price pleaded not guilty. The plaintiff in error also pleaded not guilty, and "that plaintiff's action accrued more than seven years before suit brought." Against the other defendants no judgment was sought.

Upon the issues thus joined, the jury found for the plaintiffs (defendants in error) as follows:

"That they find that the plaintiffs are the owners in fee and entitled to and in possession of the following lands, situated in Lauderdale county, Tennessee, to wit: . . ."

They also further found—

"That the plaintiffs are the owners in fee, and entitled to all the accretions and alluvion formed by the Mississippi river in front of the said three (3) tracts of land above described, the same being and constituting all the land added by accretion and alluvion to the river front, as such front of the said three tracts of land existed on the Mississippi river when the said tracts of land respectively were granted, and extending from and including all the accretions and alluvion in front thereof, *from the line on the [587] river of the tract first mentioned above, furthest up stream.

. . . . . .

As to the other land herein sued for not embraced in the above descriptions, the jury finds the plaintiffs are not entitled to the same."

Judgment was entered in accordance with the verdict. To this judgment plaintiff in error sued out a writ of error from the circuit court of appeals of the sixth circuit, which was dismissed upon the motion of defendant in error, on the ground that there had been no summons and severance of the defendant Thomas Price. 45 C. C. A. 24, 105 Fed. 737. A petition for rehearing was filed but denied. This writ of error was then sued out.

The assignments of error are as follows:

"1. The court erred in dismissing the writ of error of petitioner upon the ground that the judgment was against two jointly, and that they did not join in the appeal.

"2. The court erred in dismissing the petition for rehearing made by this petitioner.

"In support of this assignment he submits herewith counsel's brief No. 2.

"3. The court erred in refusing to entertain jurisdiction of this cause and not reversing it upon the merits. And in support of this he refers to the assignment of error, Record, pp. 266, 273, and submits herewith his counsel's brief thereon No. 3.

"The ground of this application is that the record in this cause shows that petitioner claimed under muniments of title from the state of Arkansas and Polsdorfer and wife, and also Price claimed under muniments of title from the state of Tennessee. In other words, petitioner claims that he has a right to the writ of error under the Constitution of the United States, art. 3, § 2."

*Messrs.* **J. B. Heiskell** and **T. B. Turley** argued the cause, and, with *Mr. C. W. Heiskell*, filed a brief for plaintiff in error.

*Mr.* **Wassell Randolph** argued the cause, and, with *Messrs. William M. Randolph* and *George Randolph*, filed a brief for defendants in error.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **McKenna** delivered the opinion of the court:

A motion is made to dismiss on the ground that the judgment of the circuit court of appeals was final, and therefore it is not reviewable by writ of error from this court.

Interpreting the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488], we said, in *McLish* v. *Roff*, 141 U. S. 661, 666, 35 L. ed. 893, 894, 12 Sup. Ct. Rep. 118, 120, that its purpose was to provide "for the distribution of the entire appellate jurisdiction of our national judicial system between the Supreme Court of the United States and the circuit courts of appeals therein established, by designating the classes of cases in respect of which each of those two courts shall respectively have final jurisdiction."

But special questions arose. It was provided in § 6 that the judgments and decrees of the circuit court of appeals should be final in all cases in which *jurisdiction* was dependent entirely upon diversity of citizenship. What jurisdiction was meant, and what would be the effect if Federal questions should appear in the proceedings after the commencement of the case? The questions were answered in *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

In that case the jurisdiction of the circuit court was invoked on the ground of diversity of citizenship, but the defendant claimed to have set up in defense a Federal question arising under § 2322 of the Revised Statutes of the United States [U. S. Comp. Stat. 1901, p. 1425], and on that ground insisted that the judgment of the circuit court of appeals in the case was not final. Rejecting the contention and dismissing the writ of error, this court held that before the defense under § 2322 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 1425], had been set up jurisdiction had "already attached, and could not be affected by the subsequent developments." Jurisdiction, it was said, "depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred." The same idea was expressed in subsequent *cases, though in somewhat [589] different language. But a distinction was not precisely made between the questions embraced in § 5 and other Federal questions. That distinction was presented in *Loeb* v. *Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

The case was an action upon bonds issued by the township for the purpose of raising money to meet the cost of widening and extending a certain avenue within its limits. There was a demurrer to the petition, and it appeared from the opinion of the court that one of the points raised on the demurrer was that the act of the general assembly, under and by virtue of which the bonds were issued, contravened the Constitution of the United States, and therefore the bonds were void. The case came directly from the circuit court to this court. A motion was made to dismiss for want of jurisdiction. The motion was denied, notwithstanding the petition in the circuit court showed that the parties were citizens of different states, and stated no other grounds of jurisdiction. If nothing more appeared, it was said, bearing upon jurisdiction, "it would be held that this court was without authority to review the judgment of the circuit court." But, as we have seen, the claim had been made in the circuit court by the defendant that the statute of Ohio, by the authority of which the bonds were issued, was in contravention of the Constitution of the United States. It was contended that such claim made by the defendant was not sufficient to give this court jurisdiction, upon a writ of error, to review the final judgment of the circuit court sustaining such claim. It was answered, "such an interpretation of the 5th section is not justified by its words. Our right to review, by the express words of the statute, extends to 'any case' of the kind specified in the 5th section." And this view was affirmed in *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452.

In *Robinson* v. *Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343, it had been decided that "it was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits, both in this court and in the circuit court of appeals." *This [590] was affirmed in *Loeb* v. *Columbia Twp.* It was there observed that the plaintiff in that action could have carried the case to the circuit court of appeals, but, had he done so, "he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the circuit court."

Therefore, when the jurisdiction of the

circuit court is invoked solely on the ground of diversity of citizenship, two classes of cases can arise, one in which the questions expressed in § 5 appear in the course of the proceedings, and one in which other Federal questions appear. Cases of the first class may be brought to this court directly, or may be taken to the circuit court of appeals. But if taken to the latter court they cannot then be brought here. Cases of the second class must be taken to the circuit court of appeals, and its judgment will be final. The case at bar falls under one or under the other of those classes.

The declaration was ejectment and trespass in the form used in the local practice. The only ground of jurisdiction was that the plaintiffs were citizens of the state of Indiana, and the defendants were citizens of the state of Tennessee. The answers were simply traverses in statutory form of the wrongs alleged in the declaration. The plaintiffs in the case recovered, and the plaintiffs in error here carried the case to the circuit court of appeals. The Federal question arose in the course of the proceedings in the circuit court, and is claimed to have been, and to be, based on grants of lands from different states, the conflict arising between grants from the state of Tennessee to defendants in error and to Price, under which they respectively claimed title, and a tax deed introduced in evidence by plaintiff in error, which was made by the officials of Mississippi county, Arkansas, and under which deed he claimed title. Granting, for argument sake, there was an opposition of grants within the meaning of the provision of the Constitution defining the judicial power of the United States, it would seem to bring the case within the doctrine of *Loeb* v. *Columbia Twp.*, both as to the question raised and the manner of its review, and the plaintiff in error, having sued out a writ of error [591] from *the circuit court of appeals, cannot now come to this court upon another. The plaintiff in error, however, denies that this consequence results from *Loeb* v. *Columbia Twp.*, and insists that the principle of the case justifies the present writ of error. The argument is that, when a Federal question not embraced in § 5 is disclosed by defendant's plea, or by subsequent proceedings, and there is judgment against the defendant, if he be denied the right to carry the case from the circuit court of appeals to this court, that the "result would be contrary to the principle laid down in *Loeb* v. *Columbia Twp.*" And it is insisted "there are cases of Federal jurisdiction which are not embraced under § 5 of the act of 1891, in which the judgment or decree of the circuit court of appeals is not final under § 6 of said act;" and *Northern P. R. Co.* v. *Amato*, 144 U. S. 471, 36 L. ed. 508, 12 Sup. Ct. Rep. 740, and *Union P. R. Co.* v. *Harris*, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843, are cited as examples. It is said that "in these [those] cases the declaration or complaints disclosed that the original jurisdiction of the circuit court was invoked on account of diverse citizenship, but they further disclosed that the defendants were corporations organized under the laws of the United States." It is then asked:

"Suppose a ground of Federal jurisdiction not embraced in § 5 of the act of 1891, and in which the judgment or decree of the circuit court of appeals is not conclusive, is first disclosed by defendant's plea, or by subsequent proceedings, in a case in which the original jurisdiction of the circuit court was invoked solely on the ground of diverse citizenship, or on one of the other grounds in which the decision of the circuit court of appeals is final. If, in such case, there was a judgment against the defendant, and he carried the case by writ of error or appeal to the circuit court of appeals, and judgment was there rendered against him, and he then sought to bring the case to this court by writ of error or appeal, how would it stand in this court?"

Answering the question, counsel say if the doctrine of *Colorado Cent. Consol. Min. Co.* v. *Turck* be enforced, and the writ of error dismissed, the result would be that "wherever a case involved two grounds *of [592] Federal jurisdiction, neither of which is embraced in § 5 of the act of 1891, and as to one of which the judgment or decree of the circuit court of appeals is final, and as to the other is not final, then the plaintiff suing in the circuit court can, by invoking its jurisdiction solely on the ground as to which the judgment or decree of the circuit court of appeals will be final, deprive the defendant of the right given him to carry the case from the circuit court of appeals to this court by writ of error or appeal. Such a result would be contrary to the principle laid down in *Loeb* v. *Columbia Twp.* 172 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174, which case, it will be seen, discountenances the idea that one party can, by the method or way in which he brings his suit, deprive the other of a right of review by this court."

We have quoted at length from counsel to exhibit their contention in full.

The contention has been answered by that which we have already said. Besides, counsel are wrong in their premises. *Northern P. R. Co.* v. *Amato* and *Union P. R. Co.* v. *Harris* were not cases in which the jurisdiction was invoked on the grounds of diversity of citizenship. The first was brought in a state court and removed to the circuit court of the United States, on the ground that, being a case against a corporation created by Congress, the suit arose under a law of the United States. The other case was brought in the circuit court of the United States and the Federal character of the corporation, following previous authority, was held to have constituted a ground of jurisdiction independent of the citizenship of the parties. We questioned the consistency of the reasoning upon which the conclusion was based, but recognized and yielded to authority, and we assigned the case to that

class of cases which was not dependent solely upon diversity of citizenship.

*Loeb* v. *Columbia Twp.* does not hold broadly that the plaintiff, "by the method or way in which he brings his suit," can "deprive the other of a right to review by this court." It only denies the right of review of the merits in this court and in the circuit court of appeals, and the limitation [593] is *reasonable considering the purpose of the statute. Its purpose was undoubtedly to hasten the results of litigation and to relieve this court of its burden of cases. This could only be accomplished through the medium of another appellate tribunal. And of what cases it should have jurisdiction and its relation to this court, was naturally expressed in general language. Interpretation, as we have said, was soon demanded and responded to, and the appellate power of this court and that of the circuit court of appeals definitely assigned. If the assignment leaves some cases unreviewable by this court, it, by that very effect, fulfils the purpose of the act of 1891. Against the assignment reasons, of course, may be urged, and counsel has seen and forcefully presented them.

Another argument is used by plaintiff in error to bring this case within *Northern P. R. Co.* v. *Amato, Union P. R. Co.* v. *Harris*, and *Loeb* v. *Columbia Twp.* It is, that the Federal question raised, to wit, the claim of grants under different states, does not involve the construction or application of the Constitution of the United States, and therefore is not within that clause of § 5 which provides for appeal or writ of error direct to this court. To so hold, it is claimed, would make all the other divisions of § 5 but nominal, and make all the cases arising under them involve the construction of the Constitution of the United States. That, it is claimed, was not the purpose of the section, "upon the familiar principle that the enumeration of six particular classes is a limitation upon the scope and effect of each particular class."

That clause, therefore, it is finally said, does not embrace the cases included in the other clauses. And, extending the argument, it is further said:

"It does not embrace cases of diverse citizenship, nor cases between citizens of the United States and aliens, nor patent cases, nor revenue cases, in which the United States is a party, nor criminal cases involving a crime less than capital or infamous, nor admiralty cases, for all these cases are provided for in § 6 of said act.

"The Constitution of the United States [594] gives the courts of *the United States jurisdiction in cases between citizens of different states, and between citizens of the same state, claiming lands under grants from different states.

"If 'the construction or application of the Constitution of the United States,' as used in § 5 of the act of 1891, does not embrace cases between citizens of different states, upon what ground can it be said to embrace cases between citizens of the same state claiming under grants of different states?

. . . . . .

"Parties claiming under grants from different states are allowed to come into the Federal court in order to obtain an impartial trial. The question as to the validity of the grants we may say never depended upon any construction of the Constitution of the United States. Hence it is, we insist, that, not being enumerated specifically in § 5 of the act of 1891, cases of parties claiming under grants of different states are not embraced therein, nor are they embraced in the classes of cases enumerated in § 6 of the act of 1891, in which the judgment and decree of the circuit court of appeals is final. If we are right in this, the result is that the writ of error should be maintained, it being sufficient under the case of *Loeb* v. *Columbia Twp.* that the question appears definitely elsewhere in the record."

The contention seems to be opposed to the assignments of error. The third assignment of error is "that the record in this cause shows that petitioner claimed under muniments of title from the state of Arkansas and Polsdorfer and wife, and also Price claimed under muniments of title from the state of Tennessee. In other words, petitioner claims that he has a right to the writ of error under the Constitution of the United States, art. 3, § 2."

But we may pass that, as we are not called upon to concede or deny that a case in which conflicting grants from different states to citizens of different states appear is one arising under the Constitution of the United States. If it be such a case it should be brought here directly from the circuit court, and *Loeb* v. *Columbia Twp.* applies. If it be not such a case, the other cases which we have cited apply. There is *noth- [595] ing to the contrary in *Northern P. R. Co.* v. *Amato* or *Union P. R. Co.* v. *Harris*. In such cases it always appears at the outset that one of the parties is a Federal corporation.

The final contention of plaintiff in error is that the principle of *Colorado Cent. Consol. Min. Co.* v. *Turck*, and kindred cases, is based "to a great extent on the doctrine that the act of 1891 was not intended to give a party, defeated in the circuit court, the right to have his case determined upon its merits both in this court and in the circuit court of appeals." And that "plaintiff in error has had no trial on the merits in the circuit court of appeals or in this court." This is claimed because the circuit court of appeals dismissed the case on the ground that Price, who was a defendant in the circuit court, was not made a party to the writ of error, nor as to him had there been summons and severance.

That the ruling was error we are not called upon to say. Granting it to have been error, we are powerless to review it. The expression as to the determination of a case "upon its merits" was used in distinction to the review of a question of jurisdic-

tion, strictly so called,—the right of the circuit court to entertain the case at all. As to such questions, other rules apply than those we have expressed in this opinion. It was not intended to decide that the circuit court of appeals must hear the case on the merits in the broad sense of that expression, disregarding every error committed in seeking a review by that court. Nor was it intended to deprive that court of the power to determine whether the conditions of its right to review the case had been properly observed.

It follows that the writ of error must be dismissed.

Apparently apprehending this result, plaintiff in error applied at the hearing on motion and petition filed October 9, 1902, for the writ of certiorari as under § 6 of the act of March 3, 1891.

Judgment was entered below December 7, 1900, and petition for rehearing denied February 23, 1901. This writ of error was brought April 15, 1901, and the record filed here and the cause docketed April 29, 1901.

[596] *In these circumstances we must decline to entertain the application.

*Motion for certiorari denied. Writ of error dismissed.*

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EDWARD D. PAGE (Bankrupt), *Appt.*,
*v.*
CHARLES W. EDMUNDS, Trustee.

(See S. C. Reporter's ed. 596-606.)

*Bankruptcy—property of bankrupt—membership in stock exchange—exemptions.*

1. The membership of a bankrupt in the Philadelphia Stock Exchange, which has a considerable vendible value, the purchaser taking it subject to his election by the exchange and certain other conditions, is property of the bankrupt within the meaning of the bankruptcy act of 1898, § 70 (30 Stat. at L. 566, chap. 541, U. S. Comp. Stat. 1901, p. 3451), vesting the trustee with the title of the bankrupt to "property which, prior to the filing of the petition, he could by any means have transferred."
2. A seat in a stock exchange having a considerable vendible value, which, if exempted from liability to satisfy the debts of its owner, is so exempted by decisions of the state courts which do not rest on any exemption by reason of a state statute, but upon definitions of property, will not be deemed exempt under the bankruptcy act of 1898 (30 Stat. at L. 566, chap. 541, U. S. Comp. Stat. 1901, p. 3451), by virtue of the provision of § 6 of that act, which allows to bankrupts the exemptions prescribed by the state laws in force at the time of filing the petition in bankruptcy.

[No. 100.]

*Argued and Submitted November 14, 1902. Decided January 5, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed an order of the District Court for the Eastern District of Pennsylvania, approving an order of sale of a seat in a stock exchange, made by a referee in bankruptcy, and directing it to be executed. *Affirmed.*

See same case below, 46 C. C. A. 160, 107 Fed. 89.

Statement by Mr. Justice **McKenna:**

The appellant is a resident of Philadelphia, Pennsylvania, and has been a member of the Philadelphia Stock Exchange in good standing since the year 1880. On the 16th of November, 1899, he was adjudged a voluntary bankrupt in the district court for the eastern district of Pennsylvania, and the cause was referred to Alfred Driver, Esq., referee in bankruptcy. In the schedules attached to his petition the appellant did not include as an asset of his estate his membership in the stock exchange. His trustee in bankruptcy caused the membership to be appraised, and petitioned the referee for an order to sell the same. The petition was heard before the referee, who, after hearing, filed his report containing a summary as follows:

"The said Page was adjudicated a bankrupt upon his own petition on November 16, 1899. Upon his examination he stated that he is a member of the Philadelphia Stock Exchange; that he bought his seat in 1880, paying for it at that time about $5,500: that when a member wishes to dispose of *his [597] seat he hunts up somebody who wants to buy and sells it to him; that seats are always salable; that the last price paid of which he heard was $8,500; that he could sell his seat at any time to anyone who wanted to buy it; that the buyer takes it with the understanding that he will be elected a member; otherwise it is no sale; that he could sell his seat without the approval and concurrence of the other members; that he did not include the seat as an asset in his schedules because from his understanding of the matter he did not consider it an asset; that in the event of his death there would be paid to his wife $5,000 out of the gratuity fund, and that she would get said sum and the seat; that if he should sell the seat the gratuity or insurance would go with the seat.

"The trustee upon this evidence of the bankrupt caused the seat in the stock exchange to be appraised, and the appraisers have reported its value to be $8,000.

"The secretary of the stock exchange testified that the bankrupt had no unsettled contracts with or claims against him by any member of the exchange. The Philadelphia Stock Exchange is an unincorporated association. The constitution and by-laws were offered in evidence. The articles of the constitution which relate to membership and the transfer of membership are as follows:

"Article 5.

"Sec. 4. A committee on admissions, consisting of five members, to which all applications for membership, transfer of mem-

bership, and readmissions of suspended members, shall be referred. It shall be its duty to inquire into the general standing of the applicant, and make a report thereon to the governing committee within one month of the presentation of the application. Until the committee makes a report favorable to the admission of the applicant, he shall not be voted for as a member, unless upon the written application of seven (7) members of the governing committee to the president, made within five (5) days after the committee's report has been presented; in which case the governing committee may, by a two-thirds vote, reverse the report of the committee, and such re-
[598] versal *shall have the same effect as if the committee's report had originally been favorable. If a report be favorable, the name of the candidate shall be posted in the stock exchange, and notice given that a ballot will be taken at the next stated meeting of the governing committee in order that every member of the exchange may have an opportunity of objecting to the candidate's election; such objection shall be in writing to the president of the governing committee.

"The election of candidates for membership shall be held by the governing committee, but no election shall be valid unless at least eighteen (18) ballots be cast; and, if five (5) ballots be cast against a candidate, he shall be declared not elected.

"Article 11.

"Sec. 1. The number of members shall be limited to two hundred and thirty (230).

"Sec. 4. Any member wishing to sell his membership shall have the right to do so, provided he has no unsettled contracts with or claim against him by any member of the stock exchange, for transactions arising in, or relating to, the business of banker or a stock or exchange broker; but, where the arbitration committee shall determine that any claims or contracts exist, the governing committee may, except in cases of insolvency, refuse to permit the membership to be sold, until such claims or contracts are, in its opinion, satisfactorily settled.

"The proceeds of the membership, if sold, shall, after deducting all charges due to the exchange,—to be determined, in cases of controversy, by the arbitration committee,—belong to its owner's creditors in the exchange, in proportion to the amount of their respective claims, determined by the arbitration committee, as hereinbefore provided in § 5, article 5, and be paid accordingly; and the remainder, if any, shall be paid to the owner.

"Sec. 5. When a member dies, his membership shall, within one year thereafter, be sold or transferred; if, however, he be indebted to any member of the stock exchange, then, on the written request of two thirds of the creditors in interest, said membership shall be sold, at the discretion of
[599] the committee *on admissions, and the proceeds thereof, after deducting all charges due to the exchange,—to be determined in case of controversy by the arbitration committee,—shall be paid to its owner's creditors who are members of the exchange, in proportion to the amount of their respective claims, determined as hereinbefore provided in § 5, article 5, as to disputes between living members; and the remainder, if any, shall be paid to the legal representatives of the deceased.

"The membership of a deceased member shall be liable for all dues and assessments which may be made by the exchange from the day of his death until such time as his membership is transferred.

"Sec. 8. Membership in the exchange shall, *ipso facto*, terminate in either of the following cases:

"1. Fraud in any transaction arising out of the member's business as a banker or broker.

"2. Conviction, by a jury, of any infamous offense or felony. And the commission of the offense shall be ascertained in each case, after notice and opportunity for hearing by a vote of two thirds present (being a majority of the whole number) of the governing committee.

"3. Suspension from the stock exchange for any cause, and inability for one year thereafter to comply with the constitution, by-laws, and rules as to eligibility for reinstatement.

"Sec. 9. Upon such termination of membership, the said membership shall be sold, at the discretion of the governing committee, and the proceeds, after deducting all charges due the exchange and all debts due to creditors in the exchange,—which amounts shall be determined by the arbitration committee,—shall be paid to the expelled member, his heirs or assigns.

"Article 12.

"Sec. 6. Any member who shall be declared a bankrupt shall, *ipso facto*, be suspended from the stock exchange; but a suspended member, presenting a certificate of discharge under the United States bankrupt law, becomes eligible under the rules for reinstating suspended members.

*"Sec. 7. If any suspended member fails [600] to settle with all his creditors within six months from the time of his suspension, his membership may be disposed of by the committee on admissions, and must be sold at the end of twelve months; and the proceeds, after deducting all charges due to the exchange, to be determined, in cases of controversy, by the arbitration committee, shall belong and be paid to his creditors in the exchange in accordance with § 3.

"Sec. 11. The proceeds arising from the sale of the membership of an insolvent shall be divided *pro rata* by the arbitration committee among the creditors recorded, as in § 3, and if any balance remain it shall be paid over to the insolvent.

"The by-laws do not contain any provision relating to membership or its transfer."

As a conclusion from these facts and from the bankrupt law, the referee on March 7, 1900, "ordered that the trustee sell at public auction the seat or membership of Edward

D. Page, the bankrupt, and all his right and interest therein, subject to the constitution and by-laws of the Philadelphia Stock Exchange regulating membership therein."

The appellant petitioned for a review of the referee's order by the district court, averring error in the order in that the petitioner was advised and believed that his membership in the Philadelphia Stock Exchange was not property within the meaning of the bankrupt act of July 1, 1898, nor was it an asset of his estate which could be sold by his trustee in bankruptcy.

On June 19, 1900, the district court approved the order of sale made by the referee, and directed it to be executed. The matter was then taken for review to the circuit court of appeals, which court confirmed the order of the district court. This appeal was thereupon taken.

*Mr.* **George W. Jacobs, Jr.**, argued the cause and filed a brief for appellant:

Membership in the Philadelphia Stock Exchange is not property in the eye of the law, and is not subject to execution in any form; it is a mere creation of its members, and is held and enjoyed as a personal privilege, with all the limitations and restrictions which the constitution of the exchange puts upon it.

*Thompson* v. *Adams*, 93 Pa. 55; *Pancoast* v. *Gowen*, 93 Pa. 66.

Membership in the Chicago Board of Trade is not property which can be subjected to the payment of debts by process of law, or order or decree of court.

*Barclay* v. *Smith*, 107 Ill. 349, 47 Am. Rep. 437; *Weaver* v. *Fisher*, 110 Ill. 146.

And does not pass to an assignee in bankruptcy.

*Re Sutherland*, 6 Biss. 526, Fed. Cas. No. 13,637.

The beneficial interest of a bankrupt *cestui que trust* in an estate held by trustees, who were given discretionary powers, under the donor's will, of withholding or paying over to him all or part of the beneficial interest, principal, or income, in the event of his bankruptcy; coupled with a positive direction as to the final disposition of the fund in the event of the death of the *cestui que trust* prior to the exercise of such discretionary payments,— was not a property right vested in him which he could transfer, or which would pass to his assignee in bankruptcy.

*Nichols* v. *Eaton*, 91 U. S. 716, 23 L. ed. 254.

The rules of law as announced in *Nichols* v. *Eaton*, 91 U. S. 716, 23 L. ed. 254, apply with equal force to the status of a membership in the San Francisco Stock Exchange.

*Hyde* v. *Woods*, 94 U. S. 523, 24 L. ed. 264.

Active membership in the Philadelphia Stock Exchange, if property, is exempt from the claims of creditors under the state law, and therefore also under the provisions of the bankrupt act of 1898.

*Mulford* v. *Shirk*, 26 Pa. 474; *Heckman* v. *Messinger*, 49 Pa. 468; *Nichols* v. *Eaton*, 91 U. S. 726, 23 L. ed. 257; *Re Beckerford*, 1 Dill. 46, Fed. Cas. No. 1,209; *Re Ruth*, 6 Phila. 438; *Appold's Estate*, 6 Phila. 469; *Re Jordan*, 8 Nat. Bankr. Reg. 189, Fed. Cas. No. 7,514; *Re Preston*, 6 Nat. Bankr. Reg. 545, Fed. Cas. No. 11,394.

The Pennsylvania supreme court, — its court of last resort, — in ruling upon the legislative enactments relative to debtor and creditor, has expressly upheld and declared this immunity or exemption from liability as property thereunder.

*Thompson* v. *Adams*, 93 Pa. 55; *Pancoast* v. *Gowen*, 93 Pa. 66; Pendleton, Debtor's Exemption in Pennsylvania, chap. 1, p. 22; Dos Passos, Stock Brokers & Stock Exchanges, p. 87.

The term "exemption" as defined by the authorities clearly brings within the scope of its general meaning the immunity of membership in the Philadelphia Stock Exchange from the recourse of creditors and from subjection to execution for the debts of the members under the laws of Pennsylvania.

Bouvier, Law Dict.; Century Dict. & Cyc.; Anderson, Law Dict.

The estate by courtesy initiate, which a bankrupt has in the property of his wife during her lifetime, is not property that passes to his trustee in bankruptcy.

*Hesseltine* v. *Prince*, 95 Fed. 802, 2 Am. Bankr. Rep. 600.

The bankrupt act of 1898 recognizes no distinction in the methods whereby exemptions may be created or established under state law, whether by act of legislature or under the common law, but in general terms incorporates all state exemption laws within its provisions.

*Steele* v. *Buel*, 49 C. C. A. 287, 104 Fed. 968, 5 Am. Bankr. Rep. 165; *Re Camp*, 91 Fed. 745, 1 Am. Bankr. Rep. 165; Loveland, Law & Proceedings in Bankruptcy, p. 333.

In the interpretation of local laws involving rules of property, it is the policy of the Federal courts to follow the construction placed upon such laws by the court of last resort of the state, even though in the absence of such decision the Federal courts might, on grounds of general jurisprudence, have decided differently on the facts.

*Shelby* v. *Guy*, 11 Wheat. 361, 6 L. ed. 495; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

The settled law of Pennsylvania constitutes the rule of property by which the rights of citizens must be determined, and a departure from this rule deprives the citizen of the benefit of the laws under which he lives.

*Green* v. *Neal*, 6 Pet. 291, 8 L. ed. 402; *Nichol* v. *Levy*, 5 Wall. 441, 18 L. ed. 598; *Eyster* v. *Gaff*, 91 U. S. 521, 23 L. ed. 403; *Re Wyllie*, 2 Hughes, 449, Fed. Cas. No. 18,112; *McKenna* v. *Simpson*, 129 U. S. 507, 32 L. ed. 772, 9 Sup. Ct. Rep. 365; *Re Stevens*, 2 Biss. 373, Fed. Cas. No. 13,392.

*Messrs.* **Henry La Barre Jayne** and **Henry R. Edmunds** submitted the cause for appellee:

A member's interest in an ordinary trading partnership is property in every sense, even if his legal representatives have no right to participate in the management of the business after his membership is terminated by any of the causes which terminate a partnership, such as death, insanity, bankruptcy, or a sale.

*Taylor* v. *Field*, 4 Ves. 396; Note to *Young* v. *Keighly*, 15 Ves. 559; *Deal* v. *Bogue*, 20 Pa. 228, 57 Am. Dec. 702.

Under the laws of Pennsylvania there are certain forms of property which cannot be reached by adversary process, either at law or in equity.

*North* v. *Turner*, 9 Serg. & R. 244; *Harrington* v. *Cambridge*, 14 W. N. C. 456; *Blakewell* v. *Keller*, 11 W. N. C. 300; *Hepworth* v. *Henshall*, 153 Pa. 592, 25 Atl. 1103; *Blackburne's Appeal*, 39 Pa. 160.

This court is not bound to accept the definition of property laid down by the supreme court of Pennsylvania.

*Schreiber* v. *Sharpless*, 17 Fed. 589; *Re Burrus*, 136 U. S. 586 note, 34 L. ed. 500, 10 Sup. Ct. Rep. 850; *Swift* v. *Tyson*, 16 Pet. 1, 10 L. ed. 865.

The exemption clause of the bankrupt act does not include within its scope property which is incapable of being levied upon and sold under judicial process in the various states, but only such property as is specifically exempted therefrom.

*Hyde* v. *Woods*, 94 U. S. 523, 24 L. ed. 264; *Sparhawk* v. *Yerkes*, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104.

[601] *Mr. Justice **McKenna** delivered the opinion of the court:

The case presented by the record is a simple one, and does not call for elaborate discussion. Indeed, it has been virtually ruled by this court. *Hyde* v. *Woods*, 94 U. S. 525, 24 L. ed. 265; *Sparhawk* v. *Yerkes*, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104.

Section 70 of the bankrupt act of 1898 provides that the trustee shall be vested with:

"The title of the bankrupt as of the date he was adjudged a bankrupt, except in so far as it is property which is exempt, to all. . . .

"(3) Powers which he might have exercised for his own benefit. . . .

"(5) Property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process." [30 Stat. at L. 566, chap. 541, U. S. Comp. Stat. 1901, p. 3451.]

This section, with that which provides for exemptions of property, constitute the elements to be considered.

Section 6 of the bankrupt act provides as follows:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicil for the six months, or the greater portion thereof, immediately preceding the filing of the petition."

1. Was the seat in the stock exchange property which could have been by any means transferred, *or* which might have been levied upon and sold under judicial process? If the seat was subject to either manner of disposition, it passed to the trustee of the appellant's estate.

We think it could have been transferred within the meaning of the statute. The appellant could have sold his membership, the purchaser taking it subject to election by the exchange, and some other conditions. It had decided value. The appellant paid for it in 1880, $5,500, and he testified that the last price he had heard paid for a seat was $8,500. One or the other of these sums, or, at any rate, some sum, was the value of the seat. It was property and substantial property to the extent of some *amount, not- [602] withstanding the contingencies to which it was subject. In other words, the buyer took the risk of the contingencies. And they seem to be capable of estimation. The appellant once estimated them and paid $5,500 for the seat in controversy; another buyer estimated them and paid $8,500 for a seat. A thing having such vendible value must be regarded as property, and as it could have been transferred by some means by appellant (one of the conditions expressed in § 70) it passed to and vested in his trustee. Whether it was subject to levy and sale by judicial process we need not consider except incidentally in discussing the next contention.

2. To sustain the claim of exemption under the state law, and therefore under the bankrupt act, appellant relies upon the decisions of the supreme court of the state of Pennsylvania. If those decisions are interpretations of the state statute, we must yield to their authority. If they are declarations of general law,—mere definitions of property,—we may dispute their conclusions if their reasoning does not persuade.

Two cases are cited by appellant: *Thompson* v. *Adams*, 93 Pa. 55, and *Pancoast* v. *Gowen*, 93 Pa. 66.

In *Thompson* v. *Adams* the following facts were presented (we quote from appellant's brief):

"Thompson furnished to Richards the money with which to purchase a membership seat in the Philadelphia Stock Exchange. Richards subsequently died indebted to sundry members of the exchange, and his seat was sold by it under its rules, to satisfy these claims, which were in excess of, and exhausted, the proceeds realized. Thompson sued Adams *et al.*, trading as the Philadelphia Stock Exchange, to recover the proceeds of the seat in the treasurer's hands, claiming to be the equitable owner of the seat, as against the creditors of Richards in the exchange."

The entire opinion of the court was as follows:

"The constitution and articles of a volun-

tary association such as the Philadelphia board of brokers are law as to the members. The plaintiff below was not a member, but had furnished the money by which Richards obtained a seat. His contention is that he [603] is the equitable owner of the seat and *had title to what was received for it, and that the defendant had no right to apply the proceeds to the debts due by Richards to other members, in pursuance of the terms of the constitution of the club. But why not? Richards was the member of the board, the legal owner of the seat, and the plaintiff an entire stranger, unknown to the association. The members give credit to each other in part, no doubt, upon the faith of the liability of a member's seat to them for his debts. There is nothing unlawful or unreasonable in this regulation. The seat is not property, in the eye of the law; it could not be seized in execution for debts of the members. It is the mere creation of the board, and of course was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it."

It is manifest that the court did not rest its decision upon the exemption of the property under a statute of the state. It asserted simply the rights of the members of the club, under its constitution, to be preferred in the payments of their claims. It is true, the court said, "the seat is not property, in the eye of the law; it could not be seized in execution for debts of the members." This language is not very clear. It is not certain whether the learned court intended to say that the seat was not property at all, or not property because it could not be seized in execution for debts. If the former, we cannot concur. The facts of this case demonstrate the contrary. If the latter, it does not affect the pending controversy. The power of the appellant to transfer it was sufficient to vest it in his trustee.

"The case of *Pancoast* v. *Gowen*" (we quote again from appellant's brief) involved "an attachment against the Philadelphia Stock Exchange, sought by a creditor of a member in good standing, to compel the sale of his seat in satisfaction of a judgment debt, which was refused on appeal to the supreme court, after an exhaustive examination by the court of the exchange rules." The opinion was as follows:

"A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license to buy and sell at the meetings of the board. It certainly [604] could not be levied on and sold under *a fi. fa. The sheriff's vendee would acquire no title which he could enforce; nor is it within either the words or the spirit of the act of June 16, 1836 (§ 35, Pamph. L. 767), providing for attachment on judgment. Whether the proceeds of the sale of the seat in the hands of the treasurer of the board and payable to the defendant, according to the regulations and by-laws of the board, could be thus reached is an entirely different question. This and no more is what we understand to have been decided by the Supreme Court of the United States in *Hyde* v. *Woods*, 94 U. S. 525, 24 L. ed. 265, where Mr. Justice Miller says: 'If there had been left in the hands of the defendants any balance after paying the debts due to the members of the board, that balance might have been recovered by the assignee' in bankruptcy."

There is an absence in the latter case, as there was in the other, of any purpose to construe a statute, and the test of property is the same as in the other case,—liability to be levied upon and sold under a fi. fa. An attempt to enforce such a levy and sale was made in both actions to the exclusion of the rights of other members of the association. The attempt was properly defeated. Undoubtedly the seat in the board "was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chooses to put upon it."

We expressed that limitation in *Hyde* v. *Woods*, 94 U. S. 525, 24 L. ed. 265, but we decided, nevertheless, that a seat was property, and that if upon its sale any balance was left after paying the debts due to the members of the board, that balance could be recovered by the assignee in bankruptcy. This was not denied by the supreme court of Pennsylvania, and it may be that the court only intended to declare the priority of board creditors over general creditors. If so, the decision expresses no rule with which we need take issue, or which is relevant to the pending controversy. Nor, indeed, if the case may be construed more broadly. The bankrupt act of 1898 has made its own rule. For the same reason it is not necessary to review the cases cited from other jurisdictions. Whatever is in them favorable to appellant's contention was based upon the inability that the respective courts found in the law to transfer a title which could be insisted upon and enjoyed against the consent of the *associa- [605] tion. But that consequence, in our judgment, affects the value of a seat in a stock board, not its existence as property. The contingencies which may defeat or affect its title, or its enjoyment, will be reflected in its price, and if, notwithstanding them, a seat has a vendible value of from $5,000 to $8,000, it would seem that the law should have some process to reach it for the benefit of creditors. And the bankrupt act supplies the process. The trustee of a bankrupt's estate is the bankrupt's assignee, and we only repeat the statute when we say that the trustee is vested with whatever the bankrupt can convey. And the statute is something more than another mode of transferring property *in invitum*. It is a gift of privileges, and expresses the conditions upon which they are conferred.

To establish the exemption of the seat under the state law counsel quotes the pro-

visions of the local insolvent law of June 16, 1836 (Pa. Laws, 72), as follows:

"That every insolvent shall be entitled to retain all such articles as may by law be exempted from levy and sale upon execution." (§ 37.)

"Every such debtor shall be entitled, notwithstanding his assignment, in conformity with this act, to retain for the use of himself and his family all such articles as are or may be by law exempted from levy or sale on any execution, or from distress for rent, and the property in such articles shall not pass to his trustees." (§ 38.)

It is argued that the supreme court of the state, having decided that a seat in the stock board is not subject to levy and sale under execution, it becomes under those provisions property exempt from debts under the state law, and exempt therefore under § 6 of the national bankrupt act.

But there is nothing in the opinion of the court which intimates an intention to construe the statute of 1836 or that the decision would give to the statute the effect asserted. If such had been the intention no question would have been reserved or mentioned of the right of general creditors to resort to the proceeds of the sale of a seat after board creditors should be paid. Not only the seat, but the proceeds of its sale, would be exempt.

[606] *Another answer is urged to the contention. By the act of April 9, 1849 (Pa. Laws, 533, § 1), it is enacted: "In lieu of the property now exempt by law from levy and sale on execution issued upon any judgment obtained upon contract and distress for rent property to the value of $300, exclusive of all wearing apparel of the defendant and his family and all bibles and school books in use in the family (which shall remain exempted as heretofore) *and no more* owned by or in possession of any debtor, shall be exempt from levy and sale on execution or by distress for rent."

*Judgment affirmed.*

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STEPHEN OTIS & JOSEPH F. GASSMAN, Copartners, etc., *Plffs. in Err.*,
*v.*
E. A. PARKER.

(See S. C. Reporter's ed. 606–611.)

*Constitutional law—right of contract—equal protection of laws—sale of stocks on margin.*

1. No unconstitutional interference with the right of contract is made by Cal. Const. art. 4, § 26, avoiding all contracts for sales of shares of corporate stock on margin, and providing for the recovery of any money paid on such contracts, although this provision may be construed to apply to bona fide as well as gambling contracts.
2. The equal protection of the laws is not denied by Cal. Const. art. 4, § 26, avoiding all contracts for the sale of shares of corporate stock on margin, because this provision strikes only at some, and not all, objects of possible speculation.

[No. 41.]

*Argued and Submitted April 24, 1902. Ordered for reargument May 5, 1902. Reargued December 11, 12, 1902. Decided January 5, 1903.*

IN ERROR to the Supreme Court of the State of California to review a judgment which modified and affirmed as modified a judgment of the Superior Court of that state in favor of plaintiff in an action to recover margins paid on contracts to buy and sell corporate stocks. *Affirmed.*

See same case below, 130 Cal. 322, 62 Pac. 571, 927.

The facts are stated in the opinion.

*Mr.* **John G. Johnson** argued the cause and filed a brief for plaintiffs in error:

A right to dispose of possessions by sale, and to make contracts concerning the same, is protected as fully as are the possessions themselves.

*Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Booth* v. *Illinois*, 184 U. S. 426, 46 L. ed. 625, 22 Sup. Ct. Rep. 425.

It is stretching legislative power beyond the enduring point, to endeavor to prevent gambling through shams, by forbidding genuine transactions.

*Lawton* v. *Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499.

If it be held that the California provision does bear a reasonable relation to the end sought to be accomplished, and proper of accomplishment, yet it is unconstitutional because it denies to persons within the jurisdiction of the commonwealth of California "the equal protection of the law."

*Yick Wo* v. *Hopkins*, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 165, 41 L. ed. 671, 17 Sup. Ct. Rep. 255; *Lake Shore & M. S. R. Co.* v. *Smith*, 173 U. S. 698, 43 L. ed. 864, 19 Sup. Ct. Rep. 565; *Barbier* v. *Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Frorer* v. *People use of School Fund*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395; *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Powell* v. *Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257.

*Mr. Edmund Tauszky* also filed a brief for plaintiffs in error:

The thing that the California Constitution forbids is the making of contracts for the sale of stock on margin or to be delivered at a future day. In doing this, it interferes

NOTE.—*On the constitutionality of statutes restricting contracts and business*—see note to State v. Loomis (Mo.) 21 L. R. A. 789.

*As to the validity of class legislation*—see State v. Goodwill (W. Va.) 6 L. R. A. 621, and note; and State v. Loomis (Mo.) 21 L. R. A. 789, and note.

*As to constitutional equality of privileges, immunities, and protection*—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R A. 579, and note.

with the liberty of contract in an unwarrantable manner.

*Powell* v. *Pennsylvania*, 127 U. S. 691, 32 L. ed. 258, 8 Sup. Ct. Rep. 992, 1257; *Williams* v. *Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 129; *Re Morgan*, 26 Colo. 420, 47 L. R. A. 52, 58 Pac. 1071; *State* v. *Goodwill*, 33 W. Va. 183, 6 L. R. A. 621, 10 S. E. 285; *State* v. *Fire Creek Coal & Coke Co.* 33 W. Va. 190, 6 L. R. A. 359, 10 S. E. 288; *Low* v. *Rees Printing Co.* 41 Neb. 135, 24 L. R. A. 702, 59 N. W. 362; *Leep* v. *St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 264, 25 S. W. 75; *State* v. *Julow*, 129 Mo. 172, 29 L. R. A. 257, 31 S. W. 781; *State* v. *Loomis*, 115 Mo. 316, 21 L. R. A. 789, 22 S. W. 350; *Ruhstrat* v. *People*, 185 Ill. 138, 49 L. R. A. 181, 57 N. E. 41; *Braceville Coal Co.* v. *People*, 147 Ill. 71, 22 L. R. A. 340, 35 N. E. 62; *Frorer* v. *People use of School Fund*, 141 Ill. 181, 16 L. R. A. 492, 31 N. E. 395; *Ritchie* v. *People*, 155 Ill. 104, 29 L. R. A. 79, 40 N. E. 454; *State* v. *Dalton*, 22 R. I. 77, 48 L. R. A. 775, 46 Atl. 237; *Godcharles* v. *Wigeman*, 113 Pa. 437, 6 Atl. 354; *Johnson* v. *Goodyear Min. Co.* 127 Cal. 11, 47 L. R. A. 338, 59 Pac. 304; *Ex parte Jentzsch*, 112 Cal. 473, 32 L. R. A. 664, 44 Pac. 803; *Re Jacobs*, 98 N. Y. 106, 50 Am. Rep. 636; *People* v. *Marx*, 99 N. Y. 386, 52 Am. Rep. 34, 2 N. E. 29; *People* v. *Gillson*, 109 N. Y. 398, 17 N. E. 343; *People ex rel. Tyroler* v. *Warden of City Prison*, 157 N. Y. 128, 43 L. R. A. 264, 51 N. E. 1006; *State* v. *Haun*, 61 Kan. 146, 47 L. R. A. 369, 59 Pac. 340; *Re Preston*, 63 Ohio St. 428, 52 L. R. A. 523, 59 N. E. 101.

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

*Lawton* v. *Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499. See also *State* v. *Dalton*, 22 R. I. 77, 48 L. R. A. 775, 46 Atl. 235; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *People* v. *Gillson*, 109 N. Y. 389, 17 N. E. 343; *Colon* v. *Lisk*, 153 N. Y. 196, 47 N. E. 302; *Mugler* v. *Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Austin* v. *Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Ruhstrat* v. *People*, 185 Ill. 141, 49 L. R. A. 181, 57 N. E. 41.

Sir John Barnard's act was never intended to affect the bona fide sale of stock, where the stock was actually transferred, although the seller was not possessed of it at the time of making the contract.

Dos Passos, Stock Brokers & Stock Exchanges, p. 383; note, pp. 384, 386.

All the acts which have been passed in this country on the subject were based upon the English law.

Dewey, Contracts for Future Delivery, pp. 14 *et seq.*; Dos Passos, Stock Brokers & Stock Exchanges, pp. 382 *et seq.*

Contracts for future delivery, where the intent is not merely to settle by the payment of differences, are universally recognized as legitimate.

Dos Passos, Stock Brokers & Stock Exchanges, p. 410. See also Benjamin, Sales, 7th ed. (1899) p. 537; Greenhood, Pub. Pol. Rules 215, 216; 1 Cook, Corp. 4th ed. §§ 341, 342; *Irwin* v. *Williar*, 110 U. S. 508, 28 L. ed. 229, 4 Sup. Ct. Rep. 160; *Embrey* v. *Jemison*, 131 U. S. 345, 33 L. ed. 176, 9 Sup. Ct. Rep. 776; *White* v. *Barber*, 123 U. S. 419, 31 L. ed. 252, 8 Sup. Ct. Rep. 221; *Bibb* v. *Allen*, 149 U. S. 492, 37 L. ed. 824, 13 Sup. Ct. Rep. 950; *Clews* v. *Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845.

"Margin" means, in the broker's lexicon, collateral security against loss to the broker while he is carrying stock for his customer.

*McNeil* v. *Tenth Nat. Bank*, 55 Barb. 64.

The mere fact that the parties are dealing on margins does not make the transaction illegitimate.

*Peters* v. *Grim*, 149 Pa. 164, 24 Atl. 192; *Hopkins* v. *O'Kane*, 169 Pa. 480, 32 Atl. 421.

Every individual citizen is to be allowed so much liberty as may exist without impairment of the equal rights of his fellows.

*Ex parte Jentzsch*, 112 Cal. 468, 32 L. R. A. 664, 44 Pac. 803; *People* v. *Gillson*, 109 N. Y. 405, 17 N. E. 343; *Printing & Numerical Registering Co.* v. *Sampson*, L. R. 19 Eq. 465.

There is nothing illegitimate in the transactions in the case at bar.

*Hatch* v. *Douglas*, 48 Conn. 127, 40 Am. Rep. 154; *Union Nat. Bank* v. *Carr*, 5 McCrary, 71, 15 Fed. 438; *Roundtree* v. *Smith*, 108 U. S. 269, 27 L. ed. 722, 2 Sup. Ct. Rep. 630. See also *Bigelow* v. *Benedict*, 70 N. Y. 202, 26 Am. Rep. 573; *Story* v. *Salomon*, 71 N. Y. 420; *Kent* v. *Miltenberger*, 13 Mo. App. 503; *Wall* v. *Schneider*, 59 Wis. 352, 18 N. W. 443; *Universal Stock Exch.* v. *Stevens*, 66 L. T. N. S. 612; *Thacker* v. *Hardy*, L. R. 4 Q. B. Div. 685; *Ashton* v. *Dakin*, 4 Hurlst. & N. 867; *Clarke* v. *Foss*, 7 Biss. 540, Fed. Cas. No. 5,852; *Dillaway* v. *Alden*, 88 Me. 234, 33 Atl. 981.

Parties are to be given the widest latitude in making contracts with reference to their private interests; and the invalidity of such contracts is never to be inferred, but must be clearly made to appear.

*Herriman* v. *Menzies*, 115 Cal. 16, 35 L. R. A. 318, 44 Pac. 660, 46 Pac. 730.

A transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood or meant it to be. The defendant in error must go further, and show that this understanding was mutual; that both parties so understood the transaction.

*Irwin* v. *Williar*, 110 U. S. 507, 28 L. ed. 229, 4 Sup. Ct. Rep. 160; *Bibb* v. *Allen*, 149 U. S. 492, 37 L. ed. 824, 13 Sup. Ct. Rep. 950. See also *Armstrong* v. *American Exch. Bank*, 133 U. S. 469, 33 L. ed. 760, 10 Sup. Ct. Rep. 450; *Clarke* v. *Foss*, 7 Biss. 540, Fed. Cas.

No. 2,852; *Bigelow* v. *Benedict*, 70 N. Y. 202, 26 Am. Rep. 573; *Williams* v. *Carr*, 80 N. C. 298; Cal. Civ. Code, § 3541; Dewey, Contracts for Future Delivery, pp. 45, 48.

The broker is not a principal, and there is no contract for sale or of sale between him and his customer.

2 Cook, Corp. 4th ed. §§ 457, 445; *Lehman Bros.* v. *Strassberger*, 2 Woods, 562, Fed. Cas. No. 8,216. See also *Whitesides* v. *Hunt*, 97 Ind. 191, 49 Am. Rep. 441; *Durant* v. *Burt*, 98 Mass. 161; *Sawyer* v. *Taggart*, 14 Bush, 727; *Gregory* v. *Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Bangs* v. *Hornick*, 30 Fed. 97; Dos Passos, Stock Brokers & Stock Exchanges, pp. 103, 111, 112, 410, 411; *Brown* v. *Speyers*, 20 Gratt. 308.

*Mr.* **John H. Miller** submitted the cause for defendant in error:

Upon a writ of error to the highest court of a state, the facts in the record as found by the court or jury are absolutely conclusive on this court.

*Stanley* v. *Albany County*, 121 U. S. 535, 30 L. ed. 1000, 7 Sup. Ct. Rep. 1234; *Allen* v. *St. Louis Nat. Bank*, 120 U. S. 20, 30 L. ed. 573, 7 Sup. Ct. Rep. 460; *Delaware, L. & W. R. Co.* v. *Converse*, 139 U. S. 469, 35 L. ed. 213, 11 Sup. Ct. Rep. 569; *Dower* v. *Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Quimby* v. *Boyd*, 128 U. S. 488, 32 L. ed. 502, 9 Sup. Ct. Rep. 147.

The construction, by the highest court of a state, of any provision of its own Constitution, is equally binding upon this court.

*M'Bride* v. *Hoey*, 11 Pet. 167, 9 L. ed. 673; *Lawler* v. *Walker*, 14 How. 149, 14 L. ed. 364; *Robertson* v. *Coulter*, 16 How. 106, 14 L. ed. 864; *Marshall* v. *Ladd*, 131 U. S. lxxxix, appx., and 19 L. ed. 153; *Grand Gulf R. & Bkg. Co.* v. *Marshall*, 12 How. 165, 13 L. ed. 938; *Commercial Bank* v. *Buckingham*, 5 How. 317, 12 L. ed. 169; *Harrison* v. *Myer*, 92 U. S. 111, 23 L. ed. 606; *McStay* v. *Friedman*, 92 U. S. 723, 23 L. ed. 767; *Re Duncan*, 139 U. S. 449, *sub nom. Duncan* v. *McCall*, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; *Baldwin* v. *Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Cornell University* v. *Fiske*, 136 U. S. 152, 34 L. ed. 427, 10 Sup. Ct. Rep. 775.

The 14th Amendment to the Constitution of the United States was not intended, and never has been construed, to affect or embrace or include the reserve police power of the several states, or their right to legislate concerning the health, morals, education, or prosperity of their people.

No case can be found in all the reports of the Federal courts, in which a state statute, either penal or remedial, creating a cause of action or establishing or enhancing a measure of damages, has been declared unconstitutional. On the contrary, many such statutes have been sustained.

*Missouri P. R. Co.* v. *Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Minneapolis & St. L. R. Co.* v. *Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207.

Stock jobbing acts have been in force in England for nearly 200 years.

Sir John Barnard's act; 7 Geo. II. chap. 8 (A. D. 1734); 10 Geo. II. chap. 8 (A. D. 1737).

Money paid upon such contracts or agreements may be recovered back.

2 N. Y. Rev. Laws, 187, § 18.

Money lost on wagers may be recovered back.

Mo. Rev. Stat. chap. 109, § 5728.

Statutes are valid which allow money paid by way of usury to be recovered back.

*Barnet* v. *Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212; *Driesbach* v. *Second Nat. Bank*, 104 U. S. 52, 26 L. ed. 658; *Stephens* v. *Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336; *Palmer* v. *Lord*, 6 Johns. Ch. 95; *Seymour* v. *Marvin*, 11 Barb. 80; *Porter* v. *Mount*, 41 Barb. 561; *Palen* v. *Johnson*, 46 Barb. 21; *Cummings* v. *Knight*, 65 N. H. 202, 23 Atl. 148; *Reading* v. *Weston*, 7 Conn. 409; *Brown* v. *McIntosh*, 39 N. J. L. 22; *Grow* v. *Albee*, 19 Vt. 540; *Nichols* v. *Bellows*, 22 Vt. 581, 54 Am. Dec. 85; *Webb* v. *Wilshire*, 19 Me. 406; *Pierce* v. *Conant*, 25 Me. 33; *Houghton* v. *Stowell*, 28 Me. 215; *Furlong* v. *Pearce*, 51 Me. 299; *Wood* v. *Lake*, 13 Wis. 84; *Nelson* v. *Betts*, 30 Mo. App. 10; *Kirkpatrick* v. *Wherritt*, 7 B. Mon. 388; *Wood* v. *Kennedy*, 19 Ind. 68; *Shockley* v. *Shockley*, 20 Ind. 108; *Bexar Bldg. & L. Asso.* v. *Robinson*, 78 Tex. 163, 9 L. R. A. 292, 14 S. W. 227; *Walker* v. *Villavaso*, 18 La. Ann. 712.

*Mr.* **Joseph Hutchinson** argued the cause and filed a brief for defendant in error on reargument:

Contracts legal in form, but whose plain intention is to evade the inhibition of the Constitution, are within the inhibition, and void.

*Cashman* v. *Root*, 89 Cal. 373, 12 L. R. A. 511, 26 Pac. 883; *Wetmore* v. *Barrett*, 103 Cal. 247, 37 Pac. 140; *Sheehy* v. *Shinn*, 103 Cal. 325, 37 Pac. 393; *Kullman* v. *Simmens*, 104 Cal. 595, 38 Pac. 362; *Baldwin* v. *Zadig*, 104 Cal. 594, 38 Pac. 363, 722.

If the provision in question on its face fails to distinguish between bona fide contracts and gambling contracts, as is urged, it is none the less a proper police regulation, for the question remains to be determined, in each case, whether the transaction is in contravention of the Constitution.

*Kullman* v. *Simmens*, 104 Cal. 595, 38 Pac. 362; *Sheehy* v. *Shinn*, 103 Cal. 325, 37 Pac. 393.

Laws aimed at the suppression of gambling are constitutional.

*Crandell* v. *White*, 164 Mass. 54, 41 N. E. 204.

Stock speculation is gambling.

Cook, Stock & Stockholders, § 342; History of Stock Jobbing Acts, chap. 8; Dos Passos, Stock Brokers & Stock Exchanges, p. 382, ed. 1882; *Crandell* v. *White*, 164 Mass. 54, 41 N. E. 204; *Booth* v. *People*, 186 Ill. 43, 50 L. R. A. 762, 57 N. E. 798, 184 U. S. 426, 46 L. ed. 625, 22 Sup. Ct. Rep. 425.

Laws may declare a particular kind of contract void.

*Opinion of the Justices*, 163 Mass. 589, *sub nom. Re House Bill, No. 1230*, 28 L. R. A. 344, 40 N. E. 713; *Frisbie* v. *United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586. See also *Wolcott* v. *Frissell*, 134 Mass. 1, 45 Am. Rep. 272.

Recovery of deposits may be prescribed as penalty.

*Crandell* v. *White*, 164 Mass. 54, 41 N. E. 204; *Barnet* v. *Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212; *Driesbach* v. *Second Nat. Bank*, 104 U. S. 52, 26 L. ed. 658; *Stephens* v. *Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336.

The government of a state, by virtue of its sovereignty and the exercise of what is called its police power, not only may, but must, take such steps as are necessary for the public good, to prevent offenses or manifest evils, or to preserve the public health, safety, morals, or general welfare.

*Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; *Powell* v. *Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Mugler* v. *Kansas*, 123 U. S. 663, 31 L. ed. 211, 8 Sup. Ct. Rep. 273; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

The 14th Amendment to the Constitution of the United States was not intended to destroy or abridge the police power of the state governments.

*Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Powell* v. *Pennsylvania*, 127 U. S. 684, 22 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

The suppression of gambling, in whatever form, has always been considered a proper field for the exercise of the police power.

*Crandell* v. *White*, 164 Mass. 54, 41 N. E. 204; *Com.* v. *Smith*, 166 Mass. 370, 44 N. E. 503; *Booth* v. *People*, 186 Ill. 43, 50 L. R. A. 762, 57 N. E. 798, 184 U. S. 426, 46 L. ed. 625, 22 Sup. Ct. Rep. 425.

All presumptions favor the validity of any enactment. It is presumed that the purpose of the enactment is proper, and also that its provisions are appropriate and necessary to accomplish the purpose.

*Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Sinking Fund Cases*, 99 U. S. 718, *sub nom. Union P. R. Co.* v. *United States*, 25 L. ed. 496; *Soon Hing* v. *Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Powell* v. *Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Booth* v. *Illinois*, 184 U. S. 426, 46 L. ed. 625, 22 Sup. Ct. Rep. 425; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 165, 41 L. ed. 671, 17 Sup. Ct. Rep. 255.

Questions as to the wisdom or expediency of the enactment, or the methods therein provided for, must be addressed to the legislative department, and not to the judiciary.

*Powell* v. *Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Booth* v. *Illinois*, 184 U. S. 426, 46 L. ed. 625, 22 Sup. Ct. Rep. 425.

The police power is the general power of the government to protect and promote the public welfare, even at the expense of private rights.

*Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; Am. & Eng. Enc. Law, Subject "Police Power."

Acts tending to encourage gambling may be prohibited.

*Booth* v. *Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425.

If it deems it necessary in order to eradicate evils, an entire business may be suppressed by the legislature, both the good and the bad, regardless of the question of intention.

*Ibid.*; *Mugler* v. *Kansas*, 123 U. S. 663, 31 L. ed. 211, 8 Sup. Ct. Rep. 273; *Powell* v. *Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257.

Where a law operates alike upon all persons and property similarly situated, it is not obnoxious to any constitutional provision guarantying equal protection to all persons and classes of persons.

*Barbier* v. *Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Soon Hing* v. *Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Missouri P. R. Co.* v. *Humes*, 115 U. S. 513, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Hayes* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Minneapolis & St. L. R. Co.* v. *Herrick*, 127 U. S. 210, 32 L. ed. 109, 8 Sup. Ct. Rep. 1176; *Walston* v. *Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; *Com.* v. *Danziger*, 176 Mass. 290, 57 N. E. 461; *Powell* v. *Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257.

It is not required that such a statute shall embrace all kinds of personal property, whether such kinds are the usual subjects of option dealings or not.

*State* v. *Gritzner*, 134 Mo. 512, 36 S. W. 39; *Booth* v. *Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action in three counts, for money had and received, *for money paid and [607] promised to be repaid, and for margins paid to the defendants as stock brokers on contracts to buy and sell mining stocks, respectively. The answers to the first two counts are general denials and other matters now immaterial. The answer to the third count, beside a general denial, sets up that the count is based upon a provision in article 4, § 26, of the Constitution of California, and that that provision is contrary to the 1st section of the 14th Amendment of the Constitution of the United States. It appears by the record that the only cause of action was that stated specifically in the third count, and that the defendants interposed the constitutional objection at the trial, and that it was overruled. The plain-

tiff had a general verdict on all three counts. The case was taken from the superior to the supreme court of California on appeal, and the judgment of the superior court was affirmed, with an immaterial modification. It now is brought here by a writ of error to the supreme court of the state.

We must take it as established that the plaintiff did enter into transactions prohibited by the Constitution of California, and that he had a right to his judgment under that Constitution if the clause relied upon is not contrary to the Constitution of the United States. There is no question that the parties were subject to the provisions of the latter Constitution, and no doubt that the question whether it invalidated the state Constitution necessarily was passed upon, and was answered in the negative by the state court. 130 Cal. 322, 62 Pac. 571, 927.

The provision of the state Constitution is as follows: "All contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." There was some suggestion that these words might be narrowed by construction to contracts not contemplating a bona fide acquisition of the stock, but intended to cover only a wager or contemplated settlement of differences. Of course, if they were construed in that sense there would be no doubt of their validity. *Booth* v. *Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425. But while the [608] supreme court of California says *in this case that it "will always see that legitimate business transactions are not brought under the ban," in the same sentence it leaves open the hypothesis that the provision "fails to distinguish between bona fide contracts and gambling contracts," and sustains it as a proper police regulation, even if it does fail as supposed. Therefore it may be held hereafter that ordinary contracts for the sale of stocks on margin are not legitimate transactions, and it would not be safe for us to take the words in any other than their literal meaning, or to assume in advance of a decision that they will be taken in a narrow sense. In this case the jury were instructed broadly to find for the plaintiff if he had paid any money to the defendants as a margin for the purchase of stock of a corporation, and this instruction was sustained.

The objection urged against the provision in its literal sense is that this prohibition of all sales on margin bears no reasonable relation to the evil sought to be cured, and therefore falls within the 1st section of the 14th Amendment. It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be disposed of to advantage, thus depriving persons of liberty and property without due process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched, thus depriving persons of the equal protection of the laws.

It is true, no doubt, that neither a state legislature nor a state Constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health, or morals, is not conclusive upon the courts. *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Lawton* v. *Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499. But general propositions do not carry us far. While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude *must be allowed for differences of view, as [609] well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus*.

Even if the provision before us should seem to us not to have been justified by the circumstances locally existing in California at the time when it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the state thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it "is a clear, unmistakable infringement of rights secured by the fundamental law." *Booth* v. *Illinois*, 184 U. S. 425, 429, 46 L. ed. 623, 626, 22 Sup. Ct. Rep. 425, 427. No court would declare a usury law unconstitutional, even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good. The Sunday laws, no doubt, would be sustained by a bench of judges, even if every one of them thought it superstitious to make any day holy. Or, to take cases where opinion has moved in the opposite direction, wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least. The case would not be decided differently if lotteries had been lawful when the 14th Amendment became law, as indeed they were in some civilized states. See *Ballock* v. *State*, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184.

We cannot say that there might not be conditions of public delirium in which at

least a temporary prohibition of sales on margins would be a salutary thing. Still less can we say that there might not be conditions in which it reasonably might be thought a salutary thing, even if we disagreed with the opinion. Of course, if a man can buy on margin he can launch into a [610]much *more extended venture than where he must pay the whole price at once. If he pays the whole price he gets the purchased article, whatever its worth may turn out to be. But if he buys stocks on margin he may put all his property into the venture, and being unable to keep his margins good if the stock market goes down, a slight fall leaves him penniless, with nothing to represent his outlay, except that he has had the chances of a bet. There is no doubt that purchases on margin may be and frequently are used as a means of gambling for a great gain or a loss of all one has. It is said that in California, when the Constitution was adopted, the whole people were buying mining stocks in this way with the result of infinite disaster. *Cashman* v. *Root*, 89 Cal. 373, 382, 383, 12 L. R. A. 511, 26 Pac. 883. If at that time the provision of the Constitution, instead of being put there, had been embodied in a temporary act, probably no one would have questioned it, and it would be hard to take a distinction solely on the ground of its more permanent form. Inserting the provision in the Constitution showed, as we have said, the conviction of the people at large that prohibition was a proper means of stopping the evil. And as was said with regard to a prohibition of option contracts in *Booth* v. *Illinois*, 184 U. S. 425, 431, 46 L. ed. 623, 627, 22 Sup. Ct. Rep. 425, we are unwilling to declare the judgment to have been wholly without foundation.

With regard to the objection that this provision strikes at only some, not all, of the objects of possible speculation, it is enough to say that probably in California the evil sought to be stopped was confined in the main to stocks in corporations. California is a mining state, and mines offer the most striking temptations to people in a hurry to get rich. Mines generally are represented by stocks. Stock is convenient for purposes of speculation, because of the ease with which it is transferred from hand to hand, as well as for other reasons. If stopping the purchase and sale of stocks on margin would stop the gambling which it was desired to prevent, it was proper for the people of California to go no farther in what they forbade. The circumstances disclose a reasonable ground for the classification, and thus distinguish the case from *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. We cannot [611]say that treating stocks *of corporations as a class subject to special restrictions was unjust discrimination or the denial of the equal protection of the laws.

*Judgment affirmed.*

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

DIAMOND GLUE COMPANY, *Plff. in Err.*,
*v.*
UNITED STATES GLUE COMPANY.

(See S. C. Reporter's ed. 611-617.)

*Foreign corporations—transaction of business within state—statutes—when retroactive—impairing obligation of contract—regulation of interstate commerce—validity of severable provisions.*

1. A contract under which a foreign corporation is to have the management of the manufacturing in a factory within the state, and is to assist in the operation of such factory and keep it supplied with a superintendent, calls for the transaction of business within the state, within the meaning of Wis. Stat. 1898, §§ 1770*b*, 4978, forbidding foreign corporations to transact business in the state until they have filed a copy of their charter with the secretary of state.
2. A statute which prohibits a foreign corporation which has not filed a copy of its charter with the secretary of state, from transacting business in the state after the date on which such statute goes into effect, is not retroactive with regard to that business, even though such business be done in pursuance of an earlier contract.
3. The obligation of a contract which calls for the transaction of business within the state by a foreign corporation which has not filed a copy of its charter with the secretary of state is not impaired by Wis. Stat. 1898, §§ 1770*b*, 4978, making such contracts wholly void on the corporation's behalf, but enforceable against it, although such statute was by its terms not to go into effect until after the contract was entered into,—at least where it was enacted before the contract was made.
4. A contract under which a foreign corporation was to superintend the operation of a factory within the state, and control, handle, and sell its output, is not relieved from the operations of Wis. Stat. 1898, §§ 1770*b*, 4978, prohibiting foreign corporations from transacting business within the state until they have filed a copy of their charter with the secretary of state, because the contem-

NOTE.—*On recognition or exclusion of foreign corporations*—see notes to Cone Export & Commission Co. v. Poole (S. C.) 24 L. R. A. 289; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 18.

*As to when a foreign corporation is doing business within the state*—see note to Wagner v. Meakin, 33 C. C. A. 585.

*As to the validity of contracts made by foreign corporations which have not complied with the statutory conditions of the right to do business in a state*—see note to Edison General Electric Co. v. Canadian Pacific Nav. Co. (Wash.) 24 L. R. A. 315.

*On the exclusion of foreign corporations as an interference with interstate commerce*—see note to Kindel v. Beck & P. Lithographing Co. (Colo.) 24 L. R. A. 311.

*As to what laws are void as impairing obligation of contracts*—see notes to Franklin County Grammar School v. Bailey (Vt.) 10 L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

plated traffic in the product might extend beyond the limits of the state.

5. The validity of Wis. Stat. 1898, §§ 1770b, 4978, so far as it prohibits foreign corporations from transacting business within the state until they have filed a copy of their charter with the secretary of state, is not affected by its possible invalidity as respects partnerships, where it is apparent on the face of the statute that the application of its provisions to corporations is severable from and independent of its application to partnerships.

[No. 119.]

*Argued December 16, 17, 1902. Decided January 5, 1903.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Wisconsin to review a judgment in favor of defendant in an action for a breach of a written contract. *Affirmed.*

See same case below, on demurrer to matter set up in the answer as barring the action, 103 Fed. 838.

The facts are stated in the opinion.

*Mr.* **Edgar A. Bancroft** argued the cause, and, with *Messrs. Franklin D. Locke, George H. Noyes,* and *Samuel Adams,* filed a brief for plaintiff in error:

The provisions of the Wisconsin statute concerning partnerships, joint-stock companies, and unincorporated associations are void, being in conflict with § 2, article 4, of the United States Constitution and with the 14th Amendment. Therefore, as the act had but a single purpose,—to impose special conditions on all foreign business concerns alike,—the whole act must fall.

*Bank of Augusta* v. *Earle,* 13 Pet. 519, 10 L. ed. 274; *Paul* v. *Virginia,* 8 Wall. 168, 19 L. ed. 357; *Barnes* v. *People,* 168 Ill. 425, 48 N. E. 91; *Allen* v. *Louisiana,* 103 U. S. 80, 26 L. ed. 318; *Slauson* v. *Racine,* 13 Wis. 398; *Virginia Coupon Cases,* 114 U. S. 270, *sub nom. Poindexter* v. *Greenhow,* 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Trade Mark Cases,* 100 U. S. 82, *sub nom. United States* v. *Steffens,* 25 L. ed. 550; *Pollock* v. *Farmers' Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; Cooley, Const. Lim. p. 178.

The Wisconsin statute, if it affords a defense to the action on this contract, is in so far unconstitutional as impairing the obligations of the contract.

*Walker* v. *Whitehead,* 16 Wall. 314, 21 L. ed. 357; *Peninsular Lead & Color Works* v. *Union Oil & Paint Co.* 100 Wis. 488, 42 L. R. A. 331, 76 N. W. 359; *Winter* v. *Jones,* 10 Ga. 190, 54 Am. Dec. 379; *Robinson* v. *McGee,* 9 Cal. 81. 70 Am. Dec. 638; *Austin* v. *Burgess,* 36 Wis. 186; *Green* v. *Biddle,* 8 Wheat. 1, 5 L. ed. 547; *Hope Mut. Ins. Co.* v. *Flynn,* 38 Mo. 483, 90 Am. Dec. 438; *Fletcher* v. *Peck,* 6 Cranch, 87, 3 L. ed. 162.

Statutes are never retroactive unless clearly so intended. A statute enacted at one time, to go into force at another, is to be deemed for all purposes as enacted at the later time, and need not be regarded by anyone until that time.

Sedgw. Statutory & Const. Law, p. 83; Endlich, Interpretation of Statutes, § 499; Bishop, Written Laws, § 31; Wade, Retroactive Laws, § 33; *Dewart* v. *Purdy,* 29 Pa. 113; 23 Am. & Eng. Enc. Law, 1st ed. p. 218; *Com.* v. *Fowler,* 10 Mass. 290; *Jackman* v. *Garland,* 64 Me. 133; *Sammis* v. *Bennett,* 32 Fla. 458, 22 L. R. A. 48, 14 So. 90; *Larrabee* v. *Talbott,* 5 Gill. 426, 46 Am. Dec. 637; *Ex parte Eames,* 2 Story, 322, Fed. Cas. No. 4,237; *Charless* v. *Lamberson,* 1 Iowa, 435, 63 Am. Dec. 457; *Rice* v. *Ruddiman,* 10 Mich. 125; *State ex rel. Atty. Gen.* v. *Messmore,* 14 Wis. 163; *State* v. *Bond,* 49 N. C. (4 Jones L.) 9.

Therefore a contract made between the enactment and going into effect of a statute cannot be affected by the statute. Such an effect would impair the obligations of the contract.

*Mix* v. *Vail,* 86 Ill. 40; *Security Sav. & L. Asso.* v. *Elbert,* 153 Ind. 198, 54 N. E. 753; *National Home Bldg. & L. Asso.* v. *Black,* 153 Ind. 701, 55 N. E. 743.

The contract between the parties related to and covered interstate commerce, and therefore was protected against the application of the Wisconsin statute.

*Cooper Mfg. Co.* v. *Ferguson,* 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *McCall* v. *California,* 136 U. S. 104, 34 L. ed. 391, 10 Sup. Ct. Rep. 881; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Corson* v. *Maryland,* 120 U. S. 502, 30 L. ed. 699, 1 Inters. Com. Rep. 50, 7 Sup. Ct. Rep. 655; *Milan Mill & Mfg. Co.* v. *Gorten,* 93 Tenn. 590, 26 L. R. A. 135, 4 Inters. Com. Rep. 851, 27 S. W. 971.

No legislative intent is shown in this statute, properly construed, to release the United States Glue Company from performance of its contract.

*Ætna L. Ins. Co.* v. *Harvey,* 11 Wis. 394; *Harris* v. *Runnels,* 12 How. 79, 13 L. ed. 901.

The contract as construed by the parties did not require the plaintiff in error to do business in Wisconsin; and where parties to a contract have by their acts put a practical working construction on it, the court will follow such construction.

*Chicago* v. *Sheldon,* 9 Wall. 50, 19 L. ed. 594; *Long-Bell Lumber Co.* v. *Stump,* 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574; *Winchester* v. *Glazier,* 152 Mass. 316, 9 L. R. A. 424, 25 N. E. 728; *Topliff* v. *Topliff,* 122 U. S. 121, 30 L. ed. 1110, 7 Sup. Ct. Rep. 1057.

The plaintiff's acts under the contract were not "doing business" in Wisconsin, as forbidden by the statute.

*United States* v. *American Bell Teleph. Co.* 29 Fed. 17; *American Loan & T. Co.* v. *East & West R. Co.* 37 Fed. 242; *Kilgore* v. *Smith,* 122 Pa. 48, 15 Atl. 698; 6 Thomp. Corp. ¶ 7936; *Scruggs* v. *Scottish Mortg. Co.* 54 Ark. 566, 16 S. W. 563; *D. S. Morgan & Co.* v.

*White*, 101 Ind. 413; *Beard* v. *Union & American Pub. Co.* 71 Ala. 60; *Sullivan* v. *Sullivan Timber Co.* 103 Ala. 371, 25 L. R. A. 543, 15 So. 941; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Utley* v. *Clark-Gardner Lode Min. Co.* 4 Colo. 369; *St. Louis Wire-Mill Co.* v. *Consolidated Barb-Wire Co.* 32 Fed. 802.

The alleged violation of the statute by the Diamond Glue Company had no connection with the breach of the contract by the United States Glue Company for which suit was brought. If, under the statute, the United States Glue Company had the right to repudiate the contract, it waived that right by its conduct.

*Weeks* v. *Robie*, 42 N. H. 316; *Lawrence* v. *Dale*, 3 Johns. Ch. 23; 2 Herman, Estoppel, §§ 1039, 1040, 1043, 1046; *Genoa* v. *Van Alstine*, 108 Ill. 555.

The Wisconsin statute, which by its terms did not go into effect until September 1, 1898, was not such a law of the state on June 25, 1898, that it entered into and formed a part of the contract made on that day.

*Com.* v. *Bennett*, 108 Mass. 30; *Price* v. *Hopkin*, 13 Mich. 318; *State ex rel. Atty. Gen.* v. *Messmore*, 14 Wis. 163; *Cargill* v. *Power*, 1 Mich. 369.

An executory contract may be impaired by a statute enacted after the contract was made.

*Bedford* v. *Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597.

*Messrs.* **Charles Quarles** and **J. V. Quarles** argued the cause, and, with *Mr. George Lines*, filed a brief for defendant in error:

This decision of the court of last resort of the state of Wisconsin, at least as to the construction to be given this statute, will be adopted and followed by this court.

*Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518.

A state may totally exclude foreign corporations, or, as a condition of recognition, impose such terms and conditions as the state may think proper, except "where a corporation created by one state rests its right to enter another and to engage in business therein, upon the Federal nature of its business."

*Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739.

It is perfectly apparent upon the face of the act, and from the subsequent action of the Wisconsin legislature, that the inclusion of partnerships was not the main purpose of the act, or in any way essential to it, but is separable and may be treated as null without affecting the main purpose of the statute.

Cooley, Const. Lim. 209, 211; *Allen* v. *Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Virginia Coupon Cases*, 114 U. S. 305, *sub nom. Poindexter* v. *Greenhow*, 29 L. ed. 198, 5 Sup. Ct. Rep. 903, 962; *Baldwin* v. *Franks*, 120 U. S. 678, 30 L. ed. 766, 7 Sup. Ct. Rep. 656, 763.

The power of Congress to regulate interstate commerce is confined to actual intercourse, and not to contemplated sales.

*Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Manufacturing corporations and all other corporations whose business is of a local and domestic nature are subject to the control of the state.

*Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

And this, irrespective of the proposition that a part of the business of such a manufacturing corporation may be the sale of its products in other states.

*United States* v. *E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; Prentice & Egan, Commerce Clause of Fed. Const. pp. 326 *et seq.*; *Hopkins* v. *United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.

A foreign corporation finding itself within the state of Wisconsin as a matter of grace could not by its own act acquire any vested right, as against the state, to continue its domicil therein.

*State ex rel. Crow* v. *Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595; *Doyle* v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

The contract having been made after the passage and publication of the statute, it was necessarily made with a view to the statute and subject to its terms.

*Ford* v. *Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L. R. A. 298, 39 N. E. 651; *Pinney* v. *Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52; *Stine* v. *Bennett*, 13 Minn. 153, Gil. 138; *Griffon* v. *The Mayor*, 5 Mart. N. S. 279; *Johnson* v. *Fay*, 16 Gray, 144.

The statute in question, even if retroactive, did not impair the obligation of the contract.

*Curtis* v. *Whitney*, 13 Wall. 68, 20 L. ed. 513; *Jackson ex dem. Hart* v. *Lamphire*, 3 Pet. 290, 7 L. ed. 683; *Coulter* v. *Stafford*, 6 C. C. A. 18, 15 U. S. App. 118, 56 Fed. 564; *McCracken* v. *Hayward*, 2 How. 608, 11 L. ed. 397; *Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. ed. 606; Cooley, Const. Lim. 344, 345.

*Mr. George Lines* also filed a separate brief for defendant in error:

Plaintiff was transacting business in the state of Wisconsin under the contract.

*Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; *Farrior* v. *New England Mortg. Secur. Co.* 98 Ala. 275, 7 So. 200; *Com.* v. *Standard Oil Co.* 101 Pa. 119; *Santa Clara Female Academy* v. *Sullivan*, 116 Ill. 375, 56 Am. Rep. 776, 6 N. E. 183; *Pennsylvania Co. for Ins. on Lives & G. A.* v. *Bauerle*, 143 Ill.

459, 33 N. E. 166; *Farmers' Loan & T. Co.* v. *Lake Street Elev. R. Co.* 173 Ill. 439, 51 N. E. 55.

Since the contract is plain, unambiguous, and in no way obscure, there is no room for construction, practical or otherwise.

*Chicago* v. *Sheldon*, 9 Wall. 50, 19 L. ed. 594.

Only laws passed after a contract has come into existence can impair its obligation.

*Edwards* v. *Kearzey*, 96 U. S. 595, 24 L. ed. 793; *Denny* v. *Bennett*, 128 U. S. 489, 32 L. ed. 491, 9 Sup. Ct. Rep. 134; 2 Rapalje & L. Law Dict. 935; Anderson, Law Dict. 754; *Johnson* v. *Fay*, 16 Gray, 144; *Com.* v. *Bennett*, 108 Mass. 30, 11 Am. Rep. 304; *Baker* v. *Johnson*, 2 Rob. 570; *Smith* v. *Morrison*, 22 Pick. 430; *Stine* v. *Bennett*, 13 Minn. 153, Gil. 138; *Logan* v. *State*, 3 Heisk. 442; *Hill* v. *State*, 5 Lea, 725; *Re Keneys*, 56 Hun, 117, 9 N. Y. Supp. 182; *Jones* v. *Hutchinson*, 43 Ala. 721; *Chumasero* v. *Potts*, 2 Mont. 242; *Wartman* v. *Philadelphia*, 33 Pa. 202.

The passage or enactment of a statute means the completion of the formalities required by the fundamental law, and has no relation to the time when the statute may become operative, except in those few cases where the statute itself provides a different rule of interpretation, or the context shows that the word "passage," or other similar word, was intended to mean the time of taking effect.

*Charless* v. *Lamberson*, 1 Iowa, 435, 63 Am. Dec. 457.

A statute may not be operative until it is published; but it does not follow that the printer aids in the enactment, or is part of the law-making power.

*Mead* v. *Bagnall*, 15 Wis. 156.

Plaintiff could not by contract acquire any vested right to do business in Wisconsin.

*Fletcher* v. *Peck*, 6 Cranch, 87, 3 L. ed. 162; *Bedford* v. *Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action upon a written contract [612] alleging a breach *and claiming damages. It was brought in the United States circuit court for the eastern district of Wisconsin by an Illinois corporation against a Wisconsin corporation. On June 25, 1898, the date when the contract was made, a law had been enacted in Wisconsin, to go into operation later, on September 1, 1898, requiring corporations incorporated elsewhere to file a copy of their charter with the secretary of state, and to pay a small fee as a condition of doing business there. Wis. Stat. 1898, §§ 1770*b*, 4978. This it was admitted that the plaintiff had not done, and the defendant set up that the contract was a contract to do business in Wisconsin after the statute took effect, and that the defendant was justified by the statute in declining to go on. The judge sustained this defense, and the plaintiff excepted, contending that the statute did not, and could not, constitutionally affect its rights under the contract in question. It brings the case here by a writ of error.

The contract was one by which it was agreed that the plaintiff should supervise the plans for a glue factory to be built by the defendant on a site to be selected within sixty days; that it should have the management of the manufacturing in the same, and should operate it for the defendant; that its officers should give the factory such personal supervision as might be necessary, and give the defendant in the management and operation of the factory the benefit of their experience and of the plaintiff's; that the plaintiff should furnish and keep the defendant supplied with a superintendent; that it should control, handle, and sell the entire output of the factory; that it should refrain from manufacturing hide or calf glues at any of its own factories; and that it should guarantee payment on all sales made by it, and should receive certain commissions for its services. The contract was to run for five years from the time that the plant was finished and began work. It was understood that the proposed factory was to be in Wisconsin. A site was selected near Milwaukee, and in a little over a year from the date of the contract, on July 25 or 26, 1899, the plant was built and put in operation.

The section of the Wisconsin statutes relied on by the defendant, *stated more at [613] length, forbade corporations organized otherwise than under the laws of that state to transact business in the state until they should have filed a copy of their charter with the secretary of state, which act, by the same statute, constituted the secretary of state the attorney of the corporation for the service of process. A failure to comply with any of the provisions of the section subjected the corporation to a fine. It was provided further that every contract made by such corporation affecting the personal liability thereof or relating to property within the state before compliance with the section should be wholly void on its behalf, but should be enforceable against it. A fee of $25 was to be paid for filing the charter. See *Ashland Lumber Co.* v. *Detroit Salt Co.* (Wis.) 89 N. W. 904.

According to the undisputed testimony of the plaintiff's vice president, who executed the contract, the instrument was signed in Wisconsin, and at all events, if it was executed with a view to the carrying on of business in that state by the plaintiff, the law of Wisconsin must be applied. *London Assur. Co.* v. *Companhia de Moagens do Barreiro*, 167 U. S. 149, 160, 161, 42 L. ed. 121, 17 Sup. Ct. Rep. 785; *Graves* v. *Johnson*, 156 Mass. 211, 15 L. R. A. 834, 30 N. E. 818. There is no controversy on this point. But it is said that the contract did not contemplate the carrying on of business by the plaintiff in Wisconsin, that at most it is ambiguous, and that practically it was construed in accordance with the plaintiff's

contention. The declaration is on the contract, and by that the plaintiff must stand or fall. We see no ambiguity in its terms. The plaintiff was to have the management of the manufacturing, was to operate the factory, or at least to assist in operating it, and to keep it supplied with a superintendent. It did assist in operating by its officers, and did supply a superintendent, and whether in his superintendence he in fact acted as agent for the plaintiff or the defendant, what the contract required is plain. It called for a carrying on of business in Wisconsin by the plaintiff at a time when to carry it on without filing a copy of the plaintiff's charter was forbidden by the laws of the state. See *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 611, 43 L. ed. 569, 572, 19 Sup. Ct. Rep. 308. The only complaint of the plaintiff is that the de-[614]fendant refused to perform *that contract when the plaintiff had filed no copy of its charter, and when the performance was forbidden by the law. It is said, to be sure, that the part refused by the defendant was a different and lawful portion. But the contract was an entire contract, as both parties agree, and therefore whatever the defendant had in mind, if it was justified by the law, in refusing to perform a material part, it was justified in refusing to perform any portion. See *McMullen* v. *Hoffman*, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839. It is alleged to have declared the contract at an end. We may add that it is not a question of election, but of the legality of performance, and therefore the justification could not be waived.

It hardly could be contended that the contract was illegal, on the ground just stated, when it was made. If, indeed, it had contemplated the plaintiff's going on without complying with the statute, it would have raised a question which we need not discuss. But it must be taken to have contemplated legal action, and if filing a copy of its charter was a condition precedent of the plaintiff's right to carry out its undertakings, then a promise might be implied on its part to take the necessary steps. But if, when the time came, the plaintiff did not take those steps, the defendant had the legal right to refuse to go on, whether its right be put on the ground of the plaintiff's breach of its implied undertaking or of the illegality of the proposed continuance of the work. The plaintiff contends, however, as we have said, that the statute did not and could not apply to the performance of the contract in suit. It will be remembered that while enacted before the contract was made, it did not go into effect until afterwards, although before the time when the factory was or could have been built in the ordinary course of business. It is said that if the statute is taken to govern the present contract it impairs the obligation of that contract, and encounters the United States Constitution, art. 1, § 10. It is assumed that to allow the statute any operation upon the contract is to give it a retroactive effect, and it is said that for that reason also plaintiff is not barred.

A prohibition of the doing of business after a statute goes into effect is not retroactive with regard to that business, even though the business be done in pursuance of an earlier contract. *The suggestion need-[615]ing discussion is whether the statute impairs the obligation of the contract. We are of opinion that it is not open to that objection. We leave on one side the question how the obligation of a contract can be impaired by a law enacted before the contract was made. *Pinney* v. *Nelson*, 183 U. S. 144, 147, 46 L. ed. 125, 127, 22 Sup. Ct. Rep. 52. Again, we need not consider in its full breadth whether or how far, notwithstanding *Security Sav. & L. Asso.* v. *Elbert*, 153 Ind. 198, 54 N. E. 753, a corporation, by making a contract reaching years into the future, can exonerate itself from all police or license laws, on the ground that by indirection they make performance of the contract more difficult to an infinitesimal degree. Compare *Curtis* v. *Whitney*, 13 Wall. 68, 71, 20 L. ed. 513, 514; *Bedford* v. *Eastern Bldg. & L. Asso.* 181 U. S. 227, 241, 45 L. ed. 834, 844, 21 Sup. Ct. Rep. 597. We shall advert to parallel considerations in connection with the alleged interference with commerce between the states. The prohibition in this case is not absolute, but is only conditional on the failure to deposit a copy of the plaintiff's charter and to pay a small fee. It is merely incident to a regulation which, but for the contract, unquestionably would be proper, and which is familiar in the laws of the state. It can be avoided by compliance with the regulation. We are not prepared to say that the regulation would be unreasonable or invalid as to such a contract as this, even if enacted after the contract was made. But we rest our decision upon the narrower ground of the foregoing considerations taken in connection with what we are about to say.

The suspension clause of § 4978 was of immediate operation, and therefore was notice to the plaintiff and defendant of itself and of what was suspended and for how long. If with that notice they contracted for the transaction of business within the jurisdiction of the statute and after the statute should have gone into effect, they did so with notice that, if nothing changed, the contemplated business would be unlawful by force merely of present conditions and the lapse of time, unless the plaintiff should comply with the regulation. In such circumstances, at least, it seems to us impossible to say that the obligation of the contract is impaired within the meaning of the Constitution by the Wisconsin law. Statements made with a *different intent in some[616]decisions, to the effect that suspended statutes are to be read as if passed on the day when they go into operation, do not apply to a case like this. Such statutes are to be read in that way for the purposes of the operation which is suspended, but not for all. *Stine* v. *Bennett*, 13 Minn. 153, 157, Gil. 138; *Smith* v. *Morrison*, 22 Pick. 430,

432; *Ford* v. *Chicago Milk Shippers' Asso.* 155 Ill. 166, 181, 27 L. R. A. 298, 39 N. E. 651.

It is said that the contract in suit, as carried out, was concerned in part with interstate commerce, and therefore was free from the operation of the Wisconsin statute. The portion of the contract that called for the carrying on of business in Wisconsin was not so concerned, and the inseparable provisions as to selling left it to chance or extrinsic business considerations whether the contemplated traffic should go outside the state or not. The foundation of the commerce outside the state was doing business within it. The superintendence and manufacture had to come before the sale. The small requirements of this act before allowing the plaintiff to do business in the state, if good as to that business taken by itself, are not made bad by the presence in the contract of an ulterior term which the plaintiff might or did intend to carry out by transporting the products of the business elsewhere. *United States* v. *E. C. Knight Co.* 156 U. S. 1, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; *Hopkins* v. *United States*, 171 U. S. 578, 592, 594, 43 L. ed. 290, 296, 297, 19 Sup. Ct. Rep. 40. The interference with the regulation of commerce between the states is more remote than when a bridge between two states, or the franchise of a domestic corporation created with the intent to carry on such commerce, is taxed. See *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 622, 623, 43 L. ed. 823, 834, 19 Sup. Ct. Rep. 553; *Central P. R. Co.* v. *California*, 162 U. S. 91, 119, 125, 126, 40 L. ed. 903, 913, 915, 16 Sup. Ct. Rep. 766. In modern societies every part is related so organically to every other that what affects any portion must be felt more or less by all the rest. Therefore, unless everything is to be forbidden and legislation is to come to a stop, it is not enough to show that, in the working of a statute, there is some tendency, logically discernible, to interfere with commerce or existing contracts. Practical lines have to be drawn, and distinctions of degree [617] must be made. See, further, **Kidd* v. *Pearson*, 128 U. S. 1, 21, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Coe* v. *Errol*, 116 U. S. 517, 525, 527, 29 L. ed. 715, 718, 6 Sup. Ct. Rep. 475; *Tredway* v. *Riley*, 32 Neb. 495, 49 N. W. 268.

Yet another objection to the statute remains to be mentioned. At the date of the contract the section applied to partnerships as well as to corporations. It is argued that the act, so far as it applied to the former, was contrary to art. 2, § 4, of the Constitution of the United States, and to the 14h Amendment, and therefore was invalid throughout. We shall not consider the validity of the law as applied to unincorporated associations, because, in our opinion, the application of the provision to corporations was severable from, and independent of, its application to partnerships, so that, even if in the latter aspect the section was bad, it remained unaffected and valid so far as this case is concerned. The independence seems to us obvious on reading the statute, and is emphasized by the fact that the next year after the enactment, before the completion of the factory, partnerships were struck out of the act. Stat. 1899, chap. 351, § 27. We are of opinion that the ruling of the circuit court was right, and that the judgment should be affirmed.

*Judgment affirmed.*

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FELIX M. HANLEY *et al.*, Members of the Railroad Commission of Arkansas, *Appts.*,

*v.*

KANSAS CITY SOUTHERN RAILWAY COMPANY.

(See S. C. Reporter's ed. 617-621.)

*Interstate commerce—state regulation of railroad rates—points within state—shipment over route partly outside state.*

The railroad commission of Arkansas cannot, without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of goods between two points within the state of Arkansas, where a large part of the route is outside of the state, through the Indian territory or Texas.

[No. 131.]

*Argued and Submitted December 18, 1902. Decided January 5, 1903.*

APPEAL from the Circuit Court of the United States for the Eastern District

NOTE.—*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. (Va.) 13 L. R. A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; and Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

*On legislative power to fix tolls, rates, or prices*—see note to Winchester & L. Turnp. Road Co. v. Croxton (Ky.) 33 L. R. A. 177.

This case settles what, since the decision in Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806, has been a disputed point, *viz.*, whether a state may regulate the transportation between two points within the state, over a route which passes outside the state during such transportation.

It had previously been held that vessels navigating the high seas, although engaged only in the transportation of goods and passengers between ports and places in the same state, were subject to the acts of Congress regulating the liability of the owners of vessels navigating the high seas, by virtue of the power of Congress over commerce. Lord v. Goodall, N. & P. S. S. Co. 102 U. S. 541, 26 L. ed. 224.

And that the California state railroad commissioners had no power to regulate or interfere with transportation by a steamship company between ports within the state if the vessels in the course of the voyage went out to sea more than a league from land, as they thus passed out of the jurisdiction of the state, and were brought under the exclusive control of Congress. Pacific Coast S. S. Co. v. Railroad Comrs. 9 Sawy. 253, 18 Fed. 10.

Following these decisions the supreme court

of Arkansas to review a decree for plaintiff in a suit to enjoin the railroad commissioners of Arkansas from fixing and enforcing railroad rates. *Affirmed.*

See same case below, 106 Fed. 353.

The facts are stated in the opinion.

*Mr.* **Charles E. Warner** submitted the cause for appellants. *Messrs. Winchester & Martin* were with him on the brief:

The completely internal commerce of a state may be considered as reserved for the state itself.

*Gibbons* v. *Ogden*, 9 Wheat. 69, 6 L. ed. 39; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067.

Navigation cases are exceptions to the rule that commerce between points in the same state, though incidentally passing through the territory of another state, is domestic as distinguished from interstate or foreign commerce.

*Lord* v. *Goodall, N. & P. S. S. Co.* 102 U. S. 541, 26 L. ed. 224; *Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; *Ex parte Boyer*, 109 U. S. 629, 27 L. ed. 1056, 3 Sup. Ct. Rep. 434.

The carriage of freight between two points in the same state, with incidental passage over another state, does not make the business interstate commerce; nor does it deprive the state of power and control over it.

*Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806; *Dillon* v. *Erie R. Co.* 19 Misc. 116, 7 Inters. Com. Rep. Appx., xxxvii, 43 N. Y. Supp. 320; *Campbell* v. *Chicago, M. & St. P. R. Co.* 86 Iowa, 587, 17 L. R. A. 443, 4 Inters. Com. Rep. 403, 53 N. W. 351; *State ex rel. Railroad Comrs.* v. *Western U. Teleg. Co.* 113 N. C. 213, 22 L. R. A. 570, 18 S. E. 389; *Leavell* v. *Western U. Teleg. Co.* 116 N. C. 211, 27 L. R. A. 843, 21 S. E. 391; *Scammon* v. *Kansas City, St. J. & C. B. R. Co.* 41 Mo. App. 194; *Seawell* v. *Kansas City, Ft. S. & M. R. Co.* 119 Mo. 224, 5 Inters. Com. Rep. 262, 24 S. W. 1002; *United States ex rel. Kellogg* v. *Lehigh Valley R. Co.* 115 Fed. 373.

Mere passage over the soil of another state than that of the origin and termini of the shipment gives the state over whose soil the transportation is had no jurisdiction or control over such commerce.

*Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

*Mr.* **Gardiner Lathrop** argued the cause, and, with *Messrs. Thomas R. Morrow, James B. Read*, and *Max Pam*, filed a brief for appellee:

In order that commerce may be domestic commerce of a state, the transportation must not only begin and end within the same state, but the entire transportation must be within that state.

*Louisville & N. R. Co.* v. *Railroad Commission*, 19 Fed. 702; *Pacific Coast S. S. Co.* v. *Railroad Comrs.* 9 Sawy. 253, 18 Fed. 13; *Lord* v. *Goodall, N. & P. S. S. Co.* 102 U. S. 543, 26 L. ed. 226; *State ex rel. Railroad & Warehouse Commission* v. *Chicago, St. P. M. & N. R. Co.* 40 Minn. 267, 3 L. R. A. 238, 2 Inters. Com. Rep. 519, 41 N. W. 1048; *Sternberger* v. *Cape Fear & Y. Valley R. Co.* 29 S. C. 510, 2 L. R. A. 105, 7 S. E. 837; *Milk Producers' Protective Asso.* v. *Delaware, L. & W. R. Co.* 7 Inters. Com. Rep. 160; *New Orleans Cotton Exch.* v. *Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289; *Hall* v. *DeCuir*, 95 U. S. 485, 24 L. ed. 547.

When transportation crosses a state line, the commerce becomes intermingled with and is among the different states or jurisdictions upon whose territory the carriage is performed.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Smith* v. *Turner*, 7 How. 283, 12 L. ed. 702; *State Freight Tax Case*, 15 Wall. 232, *sub nom. Philadelphia & R. R. Co.* v. *Pennsylvania*, 21 L. ed. 146; *Lord* v. *Goodall, N. & P. S. S. Co.* 102 U. S. 541, 26 L. ed. 224; *Pacific Coast S. S. Co.* v. *Railroad Comrs.* 9 Sawy. 253, 18 Fed. 10; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Sternberger* v. *Cape Fear & Y. Valley R. Co.* 29 S. C. 510, 2 L. R. A. 105, 7 S. E. 837; *Milk Producers' Protective Asso.* v.

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of Minnesota, in State *ex rel.* Warehouse Commission v. Chicago, St. P. M. & O. R. Co. 40 Minn. 267, 3 L. R. A. 238, 2 Inters. Com. Rep. 519, 41 N. W. 1047, held that the railroad and warehouse commission of that state had no authority to fix the rates for transportation between two points within the state, over a route extending across a neighboring state.

And a similar decision was reached by the South Carolina supreme court in Sternberger v. Cape Fear & Y. Valley R. Co. 29 S. C. 510, 2 L. R. A. 105, 7 S. E. 836.

In Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806, it was held that a state might impose a tax upon the receipts of a railroad company derived from the continuous transportation of goods between two points in the same state, over a route which incidentally traversed a portion of another state, the amount of such tax being "determined" in respect of receipts for the proportion of the transportation within the state.

Out of deference to the decision in this case—a mistaken deference the court says in HANLEY v. KANSAS CITY S. R. CO.—some of the courts have held that a state is not precluded from regulating railroad transportation between points in the same state, over a route partly in another state. Campbell v. Chicago, M. & St. P. R. Co. 86 Iowa, 587, 17 L. R. A. 443, 4 Inters. Com. Rep. 403, 53 N. W. 351; Seawell v. Kansas City, Ft. S. & M. R. Co. 119 Mo. 222, 5 Inters. Com. Rep. 262, 24 S. W. 1002. A similar ruling with reference to telegraph companies was made in State *ex rel.* Railroad Comrs. v. Western U. Teleg. Co. 113 N. C. 213, 22 L. R. A. 570, 18 S. E. 389.

So, in United States *ex rel.* Kellogg v. Lehigh Valley R. Co. 115 Fed. 373, traffic between points in the same state, over a route which, during such transportation passed through another state, was held not to be within the interstate commerce act.

To the contrary is Milk Producers' Protective Asso. v. Delaware, L. & W. R. Co. 7 Inters. Com. Rep. 92, where such transportation was held subject to regulation under that statute.

*Delaware, L. & W. R. Co.* 7 Inters. Com. Rep. 158.

*The Lehigh Valley Case* does not support state regulation of interstate rates.

Prentice & Egan, Commerce Clause of Fed. Const. pp. 85, 87, 88, 89; *Milk Producers' Protective Asso.* v. *Delaware, L. & W. R. Co.* 7 Inters. Com. Rep. 158.

While it is permissible for a state to tax property of a railroad situated entirely within the state, even though the road be engaged in interstate commerce, still the state cannot tax interstate commerce, or in any way regulate the rates for interstate commerce.

*Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 43 L. ed. 823, 19 Sup. Ct. Rep. 553; *Thomson* v. *Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792; *State Freight Tax Case*, 15 Wall. 232, *sub nom. Philadelphia & R. R. Co.* v. *Pennsylvania*, 21 L. ed. 146.

A state railroad commission cannot fix a rate of carriage between points within the same state, where the route extends across the boundary of a neighboring state.

*State ex rel. Railroad & Warehouse Commission* v. *Chicago, St. P. M. & O. R. Co.* 40 Minn. 267, 3 L. R. A. 238, 2 Inters. Com. Rep. 519, 41 N. W. 1047; *New Orleans Cotton Exch.* v. *Cincinnati, N. O. & T. P. R. Co.* 2 Inters. Com. Rep. 289.

If more than one state is affected by the transportation, it is interstate commerce. If only one state is affected, it is intra-state commerce.

*Gibbons* v. *Ogden*, 9 Wheat. 69, 6 L. ed. 39.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity brought in the circuit court by a railway company incorporated under the laws of Missouri, against the railroad commissioners of Arkansas, seeking an injunction against their fixing and enforcing certain rates, as we shall explain. The bill was demurred to for want of equity, the demurrer was overruled, and a decree was entered for the plaintiff. The defendants bring the case here by appeal.

The plaintiff owns a road running through several states and territories. The road after leaving Missouri runs for 28 miles and a fraction through Arkansas to the dividing line between that state and the Indian territory, then nearly 128 miles in the territory, and then over 117 miles in Arkansas, again to Texas. There is also a branch line running from Fort Smith, in Arkansas, to Spiro, in the Indian territory, about a mile of which is in the state and 15 in the territory, and there are other branches. Goods were shipped from Fort Smith by way of Spiro and the road in the Indian territory to Grannis, in Arkansas, on a through bill of lading, the total distance being a little more than 52 miles in Arkansas and nearly 64 in the Indian territory. For this the railroad company charged a sum in excess of the rate fixed by the railroad com-[619]missioners, *and was summoned before them under the state law. The commissioners decided that the company was liable to a penalty under the state statute, assert their right to fix rates for continuous transportation between two points in Arkansas, even when a large part of the route is outside the state through the Indian territory or Texas, and intend to enforce compliance with these rates. The only question argued, and the only one that we shall discuss, is whether the action of the commissioners is within the power of a state, or whether it is bad as interfering with the power of Congress to regulate commerce among the several states and with the Indian tribes. *Smyth* v. *Ames*, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418.

It may be assumed that this power of Congress over commerce between Arkansas and the Indian territory is not less than its power over commerce among the states (*Stoutenburgh* v. *Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256), and the distinction hardly is important, since the appellants are asserting similar authority where the loop beyond the state boundary runs through Texas. We may as well add, in this connection, that the present railroad gets the authority for its line in the Indian territory, through a predecessor in title, from an act of Congress of 1893, chap. 169, 27 Stat. at L. 487, and that, by that act, Congress "reserves the right to regulate the charges for freight and passengers on said railroad . . . until a state government shall be authorized to fix and regulate the cost," etc.; "but Congress expressly reserves the right to fix and regulate, at all times, the cost of such transportation by said railroad or said company whenever such transportation shall extend from one state into another, or shall extend into more than one state."

It may be assumed further, as implied by the language just quoted, that the transportation in the present case was commerce. See also the act of February 4, 1887, chap. 104, § 1, 24 Stat. at L. 379 [U. S. Comp. Stat. 1901, p. 3154]; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, and *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4. Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered.

*The transportation of these goods certain-[620]ly went outside of Arkansas, and we are of opinion that in its aspect of commerce it was not confined within the state. Suppose that the Indian territory were a state, and should try to regulate such traffic, what would stop it? Certainly not the fiction that the commerce was confined to Arkansas. If it could not interfere the only reason would be that this was commerce among the states. But if this commerce would have that character as against the state supposed to have been formed out of the Indian territory, it would have it equally as against the state of Ar-

kansas. If one could not regulate it the other could not.

No one contends that the regulation could be split up according to the jurisdiction of state or territory over the track, or that both state and territory may regulate the whole rate. There can be but one rate, fixed by one authority, whether that authority be Arkansas or Congress. *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Hall* v. *De Cuir*, 95 U. S. 485, 24 L. ed. 547. But it would be more logical to allow a division according to the jurisdiction over the track than to declare that the subject for regulation is indivisible, yet that the indivisibility does not depend upon the commerce being under the authority of Congress, but upon a fiction which attributes it wholly to Arkansas, although that fiction is quite beyond the power of Arkansas to enforce.

It is decided that navigation on the high seas between ports of the same state is subject to regulation by Congress (*Lord* v. *Goodall, N. & P. S. S. Co.* 102 U. S. 541, 26 L. ed. 224), and is not subject to regulation by the state (*Pacific Coast S. S. Co.* v. *Railroad Commissioners*, 9 Sawy. 253, 18 Fed. 10); and, although it is argued that these decisions are not conclusive, the reason given by Mr. Justice Field for his decision in the last-cited case disposes equally of the case at bar. "To bring the transportation within the control of the state, as part of its domestic commerce, the subject transported must be within the entire voyage under the exclusive jurisdiction of the state." 9 Sawy. 258, 18 Fed. 13. Decisions in point are *State ex rel. Railroad Warehouse Commission* v. *Chicago, St. P. M. & O. R. Co.* 40 Minn. 267, 3 L. R. A. 238, 2 Inters. Com. Rep. 519, 41 N. W. 1047; *Sternberger* v. [621] *Cape Fear & Y. Valley R. Co.* 29 S. C. 510, 2 L. R. A. 105, 7 S. E. 836. See also *Milk Producers' Protective Asso.* v. *Delaware, L. & W. R. Co.* 7 Inters. Com. Rep. 92, 160, 161.

There are some later state decisions contrary to those last cited. *Campbell* v. *Chicago, M. & St. P. R. Co.* 86 Iowa, 587, 17 L. R. A. 443, 4 Inters. Com. Rep. 403, 53 N. W. 351; *Seawell* v. *Kansas City, Ft. S. & M. R. Co.* 119 Mo. 222, 5 Inters. Com. Rep. 262, 24 S. W. 1002; *State ex rel. Railroad Comrs.* v. *Western U. Teleg. Co.* 113 N. C. 213, 22 L. R. A. 570, 18 S. E. 389. But these decisions were made simply out of deference to conclusions drawn from *Lehigh Valley R. Co.* v. *Pennsylvania*, 145 U. S. 192, 36 L. ed. 672, 4 Inters. Com. Rep. 87, 12 Sup. Ct. Rep. 806, and we are of opinion that they carry their conclusions too far. That was the case of a tax, and was distinguished expressly from an attempt by a state directly to regulate the transportation while outside its borders. 145 U. S. 204, 36 L. ed. 676, 4 Inters. Com. Rep. 91, 12 Sup. Ct. Rep. 809. And although it was intimated that, for the purposes before the court, to some extent commerce by transportation might have its character fixed by the relation between the two ends of the transit, the intimation was carefully confined to those purposes. Moreover, the tax "was determined in respect of receipts for the proportion of the transportation within the state." 145 U. S. 201, 36 L. ed. 675, 4 Inters. Com. Rep. 90, 12 Sup. Ct. Rep. 808. Such a proportioned tax had been sustained in the case of commerce admitted to be interstate. *Maine* v. *Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 103. Whereas it is decided, as we have said, that when a rate is established, it must be established as a whole.

We are of opinion that the language which we have quoted from Mr. Justice Field is correct, and that the decree of the circuit court should be affirmed.

*Decree affirmed.*

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E. M. CALDWELL, *Plff. in Err.*, [622]
*v.*
STATE OF NORTH CAROLINA and the City of Greensboro.

(See S. C. Reporter's ed. 622-633.)

*Constitutional law—state regulation of interstate commerce—tax on delivering agent for nonresident manufacturer.*

An ordinance under which a license fee may be required from an agent of a nonresident portrait company, who receives from such company pictures and frames manufactured by it to fill orders previously obtained, and, after breaking bulk and placing each picture in the frame designed for it, delivers them to the respective purchasers, is invalid as an attempt to interfere with and regulate interstate commerce.

[No. 54.]

*Argued October 22, 1902. Decided January 12, 1903.*

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a conviction in the Superior Court of Guilford County for a violation of an ordinance requiring a license fee from persons engaged in selling or delivering picture frames or pictures. *Reversed* and remanded for further proceedings.

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NOTE.—*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. (Va.) 13 L. R. A. 107; M'Canna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; and Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

*On license taxes as affecting interstate commerce*—see notes to Rothermel v. Meyerle (Pa.) 9 L. R. A. 366; and American Fertilizing Co. v. North Carolina Bd. of Agri. (C. C. E. D. N. C.) 11 L. R. A. 179.

*On peddlers and drummers as related to interstate commerce*—see notes to Stockard v. Morgan, 46 L. ed. U. S. 785; and *Re* Spain (C. C. E. D. N. C.) 14 L. R. A. 97.

See same case below, 127 N. C. 521, 37 S. E. 138.

Statement by Mr. Justice **Shiras**:

At June term, 1900, of the superior court of Guilford county, state of North Carolina, E. M. Caldwell was tried before a court and jury for an alleged offense in having engaged in the business of delivering pictures without having first obtained a license so to do. The jury found a special verdict as follows:

"The business mentioned in the ordinance following is not named in the charter of the city, other than in the above section.

"That the following is an ordinance duly passed by the board of aldermen of the city of Greensboro under and by virtue of the foregoing section of said charter, and prior to any of the orders being taken:

" 'Be it ordained by the board of aldermen of the city of Greensboro, North Carolina:

" 'That every person engaged in the business of selling or delivering picture frames, pictures, photographs, or likenesses of the human face, in the city of Greensboro, [623] whether an order *for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of $10 for each year.

" 'Any person engaging in said business without having paid the license tax required herein shall be fined $20, and each and every sale or delivery shall constitute a separate and distinct offense.'

"That neither the defendant, the Chicago Portrait Company, nor any of the employees of the Chicago Portrait Company, have paid the city any license tax.

"If, upon the foregoing facts, the court shall be of opinion that the defendant is guilty, the jury say that he is guilty; otherwise they say that he is not guilty.

"That on the — day of ——, 1900, the defendant, being employed by the Chicago Portrait Company, a foreign corporation, of Chicago, Illinois, came to Greensboro for the purpose of delivering certain pictures and frames for which contracts of sale had previously been made by other employees of the Chicago Portrait Company, who had preceded the defendant in Greensboro;

"That the defendant went to the Southern Railway freight station and took therefrom large packages of pictures and frames which had been shipped to Greensboro, North Carolina, addressed to the Chicago Portrait Company, carried these packages to the rooms of the defendant in the Woods House, a hotel in the city of Greensboro, and there broke the bulk, placing said pictures in their proper frames, and from this point delivered the pictures one at a time to the purchasers in the city of Greensboro;

"The defendant had been engaged in this work two days when arrested;

"That § 57 of the charter of the city of Greensboro, North Carolina, is as follows:

" 'That, in addition to the subjects listed for taxation, the aldermen may levy a tax on the following subjects, the amount of which taxed, when fixed, shall be collected by the collector of taxes, and if it be not paid on demand, the same may be recovered *by suit, or the articles upon which the tax [624] is imposed, or any other property of the owner may be forthwith distrained and sold to satisfy the same, namely:

" '21. Upon all subjects taxed under schedule B, chapter 136, Laws of North Carolina, session of 1883, not heretofore provided for, shall pay a license or privilege tax of $10. And the board of aldermen shall have power to impose a license tax on any business carried on in the city of Greensboro, not before enumerated herein, not to exceed $10 a year.' "

Upon this special verdict the court adjudged that defendant was guilty, and sentenced him to pay a fine of $20 and costs of the action. From this judgment the defendant appealed to the supreme court of North Carolina. [127 N. C. 521, 37 S. E. 138.] That court, Faircloth, Ch. J., and Clark, J., dissenting, on November 7, 1900, affirmed the judgment of the superior court; and thereupon the cause was brought to this court by a writ of error allowed by the chief justice of the supreme court of North Carolina.

*Mr.* **Charles M. Stedman** argued the cause, and, with *Mr. W. R. Plum*, filed a brief for plaintiff in error:

No state has the right to levy a tax on interstate commerce in any form.

*Lyng* v. *Michigan*, 135 U. S. 165, 34 L. ed. 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *State Freight Tax Case*, 15 Wall. 232, *sub nom. Philadelphia & R. R. Co.* v. *Pennsylvania*, 21 L. ed. 146; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 490, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *McGuigan* v. *Wilmington & W. R. Co.* 95 N. C. 428, 59 Am. Rep. 247; *State* v. *French*, 109 N. C. 722, 14 S. E. 383; *Adkins* v. *Richmond*, 98 Va. 91, 47 L. R. A. 583, 34 S. E. 967.

A tax on the occupation of doing a business is a tax on the business.

*Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678.

A regulation made in the exercise of the police power of the state cannot, under that guise, be made a direct burden and obstruction to interstate commerce.

*Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Henderson* v. *New York*, 92 U. S. 259, *sub nom. Henderson* v. *Wickham*, 23 L. ed. 543; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Walling* v. *Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

The power of Congress to regulate interstate commerce cannot be stopped at the external boundary of a state, but must enter its interior, and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

A corporation or citizen of another state, making contracts of sale for pictures and frames, of an interstate character, cannot be forced to the inconvenience and additional expense of shipping them singly and delivering them singly.

*Re Spain*, 14 L. R. A. 97, 3 Inters. Com. Rep. 738, 47 Fed. 208; *Re Tyerman*, 48 Fed. 167; *State* v. *Coop*, 52 S. C. 508, 41 L. R. A. 501, 30 S. E. 609; *Laurens* v. *Elmore*, 55 S. C. 477, 45 L. R. A. 249, 33 S. E. 560.

*Mr.* **Alfred M. Scales** argued the cause and filed a brief for defendants in error:

The sale was only completed when the pictures and frames were delivered and accepted.

Tiedeman, Sales, §§ 88, 89.

The carrier was the agent of the shipper, and not of those contracting to purchase.

*Wilson* v. *Stratton*, 47 Me. 120; *State* v. *O'Neil*, 58 Vt. 140, 56 Am. Rep. 557, 2 Atl. 586.

The goods became mixed with the general mass of property of the state by the action of the portrait company.

*Howe Mach. Co.* v. *Gage*, 100 U. S. 678, 25 L. ed. 755; *Emert* v. *Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *Wrought Iron Range Co.* v. *Carver*, 118 N. C. 328, 24 S. E. 352.

As soon as the goods are in the state and become part of its general mass of property, they become liable to be taxed in the same manner as other property of similar character.

*Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

When goods are sent from one state to another for sale or in consequence of a sale, they become part of its general property and amenable to its laws, provided that no discrimination be made against them as goods from another state, and that they be not taxed by reason of being brought from another state, but only taxed in the usual way as other goods are.

*Ibid.*; *Howe Mach. Co.* v. *Gage*, 100 U. S. 676, 25 L. ed. 754.

The point of time when the prohibition ceases and the power of the state to tax commerce begins is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands.

*Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

Mr. Justice **Shiras** delivered the opinion of the court:

It might fairly be contended that, upon the facts found by the special verdict, the defendant was not guilty of engaging in the business of delivering pictures without a license, within the purview of the ordinance in question. But as the supreme court of North Carolina has held otherwise, we must accept that conclusion as a question of construction belonging to that court. Our task is to determine whether the ordinance, as so construed, is invalid as an attempt to interfere with and to regulate interstate commerce, and can be speedily performed, for we *think the case falls within previous decisions of this court on this subject. [625]

Such decisions are numerous, but we do not deem it necessary to refer to but a few of them.

The subject was elaborately considered in *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592. The case was brought here on a writ of error to the supreme court of Tennessee, which had held valid a statute of that state, by which it was enacted that "all drummers and all persons not having a regular licensed house of business in the taxing district, offering for sale or selling goods, wares, or merchandise therein by sample, shall be required to pay to the county trustee the sum of $10 per week or $25 per month for such privilege, and no license shall be issued for a longer period of three months." Robbins, the plaintiff in error, was a citizen and resident of the city of Cincinnati, Ohio, and was convicted of having offered for sale articles of merchandise belonging to a firm in Cincinnati without having procured a license. In his discussion of the case Mr. Justice Bradley stated the following principles, as already established by this court: The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation; that where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left

free from any restrictions or impositions, and any regulation of the subject by the states, except in matters of local concern only, is repugnant to such freedom; that the only way in which commerce between the states can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a state provides for the security of the lives, health, and comfort of persons and the protection of property, and imposes taxes upon persons residing within the state or belonging to its population, and upon vocations and employments pursued therein, not directly connected with foreign or interstate commerce, [626] or with some other *employment or business exercised under authority of the Constitution and laws of the United States; and imposes taxes upon all property within the state, mingled with and forming part of the great mass of property therein; but that, in making such internal regulations, a state cannot impose taxes upon persons passing through the state, or coming into it merely for a temporary purpose, especially if connected with interstate or foreign commerce; nor can it impose such taxes upon property imported into the state from abroad, or from another state, and not become part of the common mass of property therein; and no discrimination can be made, by such regulations, adversely to the persons or property of other states; and no regulations can be made directly affecting interstate commerce.

Upon these established principles the conclusion was reached that the state statute in question was invalid, and the following observations are pertinent to the question before us:

"It would not be difficult, however, to show that the tax authorized by the state of Tennessee in the present case is discriminative against the merchants and manufacturers of other states. They can only sell their goods in Memphis by the employment of drummers and by means of samples, whilst the merchants and manufacturers of Memphis, having regular licensed houses of business there, have no occasion for such agents, and, if they had, they are not subject to any tax therefor. They are taxed for their licensed houses, it is true, but so, it is presumable, are the merchants and manufacturers of other states in the places where they reside; and the tax on drummers operates greatly to their disadvantage in comparison with the merchants and manufacturers of Memphis. And such was undoubtedly one of its objects. This kind of taxation is usually imposed at the instance and solicitation of domestic dealers, as a means of protecting them from foreign competition. And in many cases there may be some reason in their desire for such protection. But this shows in a still stronger light the unconstitutionality of the tax. It shows that it not only operates as a restriction upon interstate commerce, but that it is intended to have that effect as one of its principal objects. And if a state can, in this way, impose restrictions upon interstate commerce for the benefit and *protection of [627] its own citizens we are brought back to the condition of things which existed before the adoption of the Constitution, and which was one of the principal causes that led to it. If the selling of goods by sample and the employment of drummers for that purpose injuriously affect the local interest of the states, Congress, if applied to, will undoubtedly make such reasonable regulations as the case may demand. And Congress alone can do it, for it is obvious that such regulations should be based on a uniform system applicable to the whole country, and not left to the varied, discordant, or retaliatory enactments of forty different states. The confusion into which the commerce of the country would be thrown by being subject to state legislation on this subject would be but a repetition of the disorder which prevailed under the articles of confederation."

*Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1, was a case where a state statute required from "every commercial traveler, drummer, salesman, or solicitor of trade, by sample or otherwise, an annual occupation tax," and such legislation was declared inoperative, so far as it affected one soliciting orders for a business house in another state. The same doctrine was held in *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256, in the case of an agent of a Maryland business house soliciting orders in the District of Columbia without having taken out a license as required by an act of the legislative assembly of the District of Columbia.

In *Lyng* v. *Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725, the general proposition was repeated:

"We have repeatedly held that no state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

In *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851, an act of the state of Kentucky which forbade the agent of an express company, not incorporated by the laws of that state, from carrying on business *without first obtaining a [628] license from the state, was held to be a regulation of commerce and invalid. Mr. Justice Bradley, speaking for the court, said:

"The character of police regulation, claimed for the requirements of the statute in question, is certainly not such as to give them a controlling force over the regulations of interstate commerce which may have been expressly or impliedly adopted by Congress, or such as to exempt them from nullity when repugnant to the exclusive

power given to Congress in relation to that commerce. This is abundantly shown by the decisions to which we have already referred, which are clear to the effect that neither licenses nor indirect taxation of any kind, nor any system of state regulation, can be imposed upon interstate, any more than upon foreign, commerce; and that all acts of legislation producing any such result are, to that extent, unconstitutional and void."

In *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, was again presented the question of the validity of an ordinance providing "that all persons canvassing or soliciting, within said city [of Titusville], orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the mayor a license to transact said business, and shall pay the said treasurer therefor the following sums, according to the time for which said licenses shall be granted," and also prescribing a penalty for failing to procure such license. An agreed statement of facts showed that Shepard was a manufacturer of picture frames and maker of portraits, residing in Chicago in the state of Illinois, of which state he was a citizen, and in which state he had his manufactory and place of business; that in the prosecution of his business he employed agents, who, under his directions, solicited orders for pictures and picture frames in the state of Pennsylvania and in other states of the Union, by going personally to residents and citizens of said state of Pennsylvania and other states, and exhibiting samples of his pictures and frames, going, when necessary, from house to house; that Brennan was an agent of the said Shepard, employed by him to travel and solicit orders [629] for pictures and frames, *upon a salary; that upon receiving orders for pictures and picture frames, the agents of Shepard forwarded the same to him at Chicago, where the goods were made, and from there shipped to the purchasers in Titusville by railroad freight and express, and the price of said goods was collected and forwarded by the express companies and sometimes by the agents to said Shepard, at Chicago; that Brennan, the agent employed by Shepard, was engaged in conducting the business in the manner stated, at the time of his arrest, and acting solely for Shepard.

Upon such a state of facts, and upon a review of the cases, this court held it was not bound by the decision of the highest court of the state in which such a tax was authorized and imposed that such a tax was an exercise of the police power, and not of the taxing power; and that the ordinance in question imposed a tax upon interstate commerce, and was therefore void. To the argument that no discrimination was made in the ordinance between domestic and foreign drummers, the court said:

"It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers,—those of Tennessee and those of other states; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state. This was decided in the case of *State Freight Tax*, 15 Wall. 232, *sub nom. Philadelphia & R. R. Co.* v. *Pennsylvania*, 21 L. ed. 146. The negotiation of sales of goods which are in another state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce. A New Orleans merchant cannot be taxed there for ordering goods in London or New York, because, in the one case it is an act of foreign, and in the other of interstate commerce, both of which are subject to regulation by Congress alone." [*Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 497, 30 L. ed. 697, 1 Inters. Com. Rep. 48, 7 Sup. Ct. Rep. 596.]

The last case we shall cite is the recent one of *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576, where was considered the validity of a statute of the state of Tennessee providing for the collection of a privilege tax on the occupation of merchandise brokers. *By agreement of the [630] parties two questions only were argued in the state court: (1) Whether or not the complainants, who had filed a bill to restrain the collection of the tax, were merchandise brokers and subject by the statute to tax as such; (2) whether or not their business constituted interstate commerce, and therefore was beyond the reach of the state's taxing power. The state supreme court held that the complainants, as merchandise brokers, were within the meaning of the statute, and that the tax was a valid one under the Constitution of the United States.

This court, though recognizing that it was obliged to accept the construction put upon the statute by the state court, reversed the judgment of that court in respect to the nature of the commerce as interstate. In the opinion of the court, delivered by Mr. Justice Peckham, the principal cases, beginning with *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678, and ending with *Brennan* v. *Titusville*, were again reviewed, and the conclusions there reached were affirmed.

The state supreme court endeavored to distinguish the present case from that of *Brennan* v. *Titusville*, in the following observations:

"The defendant insists that *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829, is directly in point,—is, in every essential fact, this case,—and should control the opinion of the court on this appeal. And it is in many respects like this case, but there is one material difference between that case and this, which marks the distinction. In that case, the goods were shipped directly to the purchaser. In this case, they were shipped by the Chicago company to itself

in the city of Greensboro; and when they reached Greensboro, the defendant as the agent of the Chicago company received them from the railroad at its depot, carried them to its room in Greensboro, opened the boxes in which they were shipped, took out the pictures and picture frames, assorted them and put them together, and delivered them to the purchasers in the city of Greensboro, and had been engaged in this work two days when arrested. If they had been completed and shipped directly to the parties for whom they were intended, this case would have fallen within the decision of [631] *Brennan* v. *Titusville*, and we *should hold, as it was held there, that it was an interference with interstate commerce, and that the defendant was not guilty. But to our minds there is a decided difference between this case and that. The contract to make and deliver these pictures was an executory contract, and no title passed by this contract. . . . If they had been completed in Chicago, and under contract shipped to the purchaser, the title would have passed to the consignee upon delivery to the railroad in Chicago, the railroad being deemed to be the agent of the consignee, . . . and *Brennan* v. *Titusville* would have applied, as the tax would have been upon the commerce. But, instead of completing the pictures in Chicago and shipping them to the parties who had contracted for them, they were shipped to itself (the Chicago Portrait Company) in Greensboro. This being so, no title ever passed from the Chicago Portrait Company, until the pictures were put in the frames and delivered by the defendant. These pictures belonged to the Chicago company when they were shipped from Chicago, and belonged to it when they got to Greensboro. And the question is, Could the Chicago Portrait Company, because it was a foreign corporation, engage in the business of completing these pictures, and in selling and delivering them in Greensboro, without becoming liable to a city tax, for which its own citizens would be liable? It seems to us that it could not."

We are not persuaded by this reasoning. It seems to proceed upon two propositions: First, that the pictures in question were not completed before they were brought to Greensboro; and, second, that the articles were not shipped directly to the purchasers, but to an agent of the senders in Greensboro.

But it certainly cannot be pretended that, if the pictures and the disconnected frames had been directly shipped to the purchasers, the license tax could have been imposed, either on the vendor out of the state, or on the purchaser within the state. If the pictures and the frames intended for them had been shipped directly to the purchasers, whether in the same or separate packages, such a transaction would, beyond question, be interstate commerce beyond the reach of the taxing power of the state. It is too plain for argument that the supposed incomplete *condition of articles of com- [632] merce, if shipped directly to the purchasers, cannot subject them to the license tax.

But we are not disposed to concede that, under the facts of this case, the pictures were, in any proper sense, incomplete when received in Greensboro. That the frames and the pictures were in separate packages, if such was the case, was merely for convenience in packing and handling, and "placing the pictures in their proper places" (the language of the verdict) meant that each picture was placed in the frame designed for it. The selection of the frame was as much a part of the purchase and sale as the selection of the picture.

Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchaser. That the articles were sent as freight by rail, and were received at the railroad station by an agent who delivered them to the respective purchasers, in nowise changes the character of the commerce as interstate.

Transactions between manufacturing companies in one state, through agents, with citizens of another, constitute a large part of interstate commerce; and for us to hold, with the court below, that the same articles, if sent by rail directly to the purchaser, are free from state taxation, but, if sent to an agent to deliver, are taxable through a license tax upon the agent, would evidently take a considerable portion of such traffic out of the salutary protection of the interstate commerce clause of the Constitution.

It cannot escape observation that efforts to control commerce of this kind, in the interest of the states where the purchasers reside, have been frequently made in the form of statutes and *municipal ordinances, [633] but that such efforts have been heretofore rendered fruitless by the supervising action of this court. The cases hereinbefore cited disclose the truth of this observation.

Upon principle and authority, therefore, we conclude that *the judgment of the Supreme Court of North Carolina should be and is reversed*, and the cause is remanded to that court to take further proceedings not inconsistent with this opinion.

# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[635] *GEORGE TSUKAMOTO, *Appellant*, *v.* JOHN LACKMANN *et al.* [No. 55.]

Appeal from the Circuit Court of the United States for the Northern District of California.

*Mr. James G. Maguire* for appellant.

*Mr. Thos. D. Riordan* for appellees.

October 20, 1902. Final order *affirmed* with costs, on the authority of *Minnesota* v. *Brundage*, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; *Markuson* v. *Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; and cases cited.

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WILLIAM B. BROWN, *Appellant*, *v.* JOHN H. DRAIN, Street Superintendent, etc., *et al.* [No. 255.]

Appeal from the Circuit Court of the United States for the Southern District of California.

*Mr. Joseph H. Call* for appellant.

*Mr. Albert H. Crutcher* for appellees.

October 20, 1902. Decree *affirmed* with costs, on the authority of *Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Richardson* v. *Louisville & N. R. Co.* 169 U. S. 128, 42 L. ed. 687, 18 Sup. Ct. Rep. 268; *Walston* v. *Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *King* v. *Portland*, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290.

Mr. Justice Harlan took no part in the disposition of this case.

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BANK OF IRON GATE, *Plaintiff in Error*, *v.* MAGGIE A. BRADY, Executrix, etc. [No. 349.]

In error to the Circuit Court of the United States for the Eastern District of Virginia.

*Mr. Wm. L. Royall* for plaintiff in error.

*Messrs. Attorney General* and *Solicitor General Richards* for defendant in error.

October 20, 1902. Judgment *affirmed* with costs, on the authority of *Veazie Bank* v. *Fenno*, 8 Wall. 533, 19 L. ed. 482.

*INDIANA POWER COMPANY, *Plaintiff in Error*, *v.* ST. JOSEPH & ELKHART POWER COMPANY. [No. 394.] [636]

In Error to the Supreme Court of the State of Indiana.

*Messrs. Frank F. Reed* and *F. Winter* for plaintiff in error.

*Mr. Chas. Francis Carusi* for defendant in error.

October 20, 1902. *Dismissed* for the want of jurisdiction, on the authority of *Pim* v. *St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Dewey* v. *Des Moines*, 173 U. S. 200, 43 L. ed. 667, 19 Sup. Ct. Rep. 379; *Mountain View Min. & Mill. Co.* v. *McFadden*, 180 U. S. 535, 45 L. ed. 656, 21 Sup. Ct. Rep. 488.

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CHARLES T. CARNAHAN, *Plaintiff in Error*, *v.* P. K. CONNOLLY. [Nos. 328, 329, 330.]

In Error to the Court of Appeals of the State of Colorado.

*Mr. Charles J. Hughes, Jr.*, for plaintiff in error.

*Messrs. Chas. S. Thomas*, *W. H. Bryant*, and *H. H. Lee* for defendant in error.

October 27, 1902. Writs of error *dismissed* for want of jurisdiction on the authority of *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Harrison* v. *Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; and other cases; and see case below, *Carnahan* v. *Connolly* (Colo. App.) 68 Pac. 836.

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WILLIAM A. CALVERT, Administrator, etc., *Plaintiff in Error*, *v.* SOUTHERN RAILWAY COMPANY. [No. 60.]

In Error to the Circuit Court of the United States for the District of South Carolina.

*Messrs. Wm. N. Graydon* and *J. J. Darlington* for plaintiff in error.

*Messrs. Fairfax Harrison* and *Geo. E. Hamilton* for defendant in error.

November 3, 1902. *Judgment affirmed* with costs, on the authority of *St. Louis & S. F. R. Co.* v. *James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621, and see case below, *Calvert* v. *Southern R. Co.* 64 S. C. 143, 41 S. E. 963.

CLARENCE E. COLLINS, *Plaintiff in Error*, *v.* [637] STATE *OF NEW HAMPSHIRE. [No. 15.]

In Error to the Supreme Court of the State of New Hampshire.

*Messrs. Wm. D. Guthrie, Albert H. Veeder,* and *Harry E. Loveren* for plaintiff in error.

*Mr. Edwin G. Eastman* for defendant in error.

November 10, 1902. Judgment *affirmed* with costs by a divided court.

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ELIZA A. WALL, *Plaintiff in Error*, *v.* OLD COLONY TRUST COMPANY *et al.* [No. 361.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

*Mr. L. L. Scaife* for plaintiff in error.

*Messrs. Felix Rackemann, Moorfield Storey, Ezra R. Thayer,* and *J. L. Thorndike* for defendants in error.

November 10, 1902. *Dismissed* for the want of jurisdiction, on the authority of *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; and see case below, *Wall* v. *Old Colony Trust Co.* 174 Mass. 340, 54 N. E. 846, 177 Mass. 275, 58 N. E. 1015.

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MARTHA E. SMITH *et al.*, *Plaintiffs in Error*, *v.* EDWARD F. BROWN, Receiver, etc. [No. 91.]

In Error to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. Wm. M. Williams* for plaintiffs in error.

*Messrs. Wm. S. Shirk* and *Francis F. Oldham* for defendant in error.

November 17, 1902. Judgment *affirmed* with costs, on the authority of *Studebaker* v. *Perry*, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463; *McDonald* v. *Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297; *United States* v. *Knox*, 102 U. S. 422, 26 L. ed. 216 (see case below, *Dewecse* v. *Smith*, 45 C. C. A. 408, 106 Fed. 438), and case remanded to the circuit court of the United States for the western district of Missouri.

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DISTRICT OF COLUMBIA, *Appellant*, *v.* ELIAS E. BARNES. [No. 400.]

Appeal from the Court of Claims.

[638] *Messrs. Attorney General, Solicitor General Richards,* and *Robert A. Howard* for appellant.

*Mr. John C. Fay* for appellee.

December 8, 1902. Appeal *dismissed*. Act of June 6, 1900, 31 Stat. at L. 572, chap. 789; *Gordon* v. *United States*, 117 U. S. 697, 2 Wall. 561, 17 L. ed. 921; *District of Columbia* v. *Eslin*, 183 U. S. 62, 65, 46 L. ed. 86, 22 Sup. Ct. Rep. 17.

FERDINAND SIEGEL *et al.*, *Appellants*, *v.* S. L. SWARTS, Trustee. [No. 438.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Edward C. Eliot* and *Edward Cunningham, Jr.*, for appellants.

*Mr. David Goldsmith* for appellee.

December 8, 1902. Appeal *dismissed* for the want of jurisdiction, on the authority of *Bogy* v. *Daugherty*, 184 U. S. 696, 46 L. ed. 763, 22 Sup. Ct. Rep. 938; *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *Keystone Manganese & Iron Co.* v. *Martin*, 132 U. S. 91, 33 L. ed. 275, 10 Sup. Ct. Rep. 32.

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GEORGE F. HARDING, *Appellant*, *v.* JOHN S. HART *et al.* [No. 374.]

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. A. A. Hoehling, Jr.*, for appellant.

*Messrs. Frederic Ullman* and *D. J. Schuyler* for appellees.

December 15, 1902. *Dismissed* for the want of jurisdiction, on the authority of *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 294, 46 L. ed. 547, 22 Sup. Ct. Rep. 452, and cases cited; *Rouse* v. *Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266, and see case below, *Harding* v. *Hart*, 186 U. S. 483, 46 L. ed. 1261, 22 Sup. Ct. Rep. 943.

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CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *Plaintiff in Error*, *v.* KATE G. WOLFE, Administratrix, etc. [No. 128.]

In Error to the Supreme Court of the State of Nebraska.

*Messrs. C. F. Manderson* and *J. W. Deweese* for plaintiff in error.

*Mr. T. J. Mahoney* for defendant in error.

December 22, 1902. Judgment *affirmed* with costs, on the authority of *Chicago, R. I. & P. R. Co.* v. *Zernecke*, 183 U. S. 582, 46 L. ed. 339, 22 Sup. Ct. Rep. 229.

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*N. T. COOK, *Plaintiff in Error*, *v.* STATE OF [639] TENNESSEE. [No. 156.]

In Error to the Supreme Court of the State of Tennessee.

*Messrs. E. W. Ross* and *H. W. McCorry* for plaintiff in error.

*Mr. Charles T. Cates, Jr.*, for defendant in error.

January 12, 1903. *Dismissed* for the want of jurisdiction, on the authority of *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *Bogy* v. *Daugherty*, 184 U. S. 696, 46 L. ed. 763, 22 Sup. Ct. Rep. 938.

ANNIE WRIGHT SEMINARY, *Plaintiff in Error*, *v.* CITY OF TACOMA. [No. 162.]
In Error to the Supreme Court of the State of Washington.
*Mr. John F. Shafroth* for plaintiff in error.
*Mr. David A. Gourick* for defendant in error.
January 12, 1903. *Dismissed* for the want of jurisdiction, on the authority of *Gillis* v. *Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Pittsburgh & L. A. Iron Co.* v. *Cleveland Iron Min. Co.* 178 U. S. 279, 44 L. ed. 1068, 20 Sup. Ct. Rep. 931; *Speed* v. *McCarthy*, 181 U. S. 275, 45 L. ed. 858, 21 Sup. Ct. Rep. 613. See case below, *Annie Wright Seminary* v. *Tacoma*, 23 Wash. 109, 62 Pac. 499.

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ALLEGHENY OIL COMPANY *et al.*, *Petitioners*, *v.* HIRAM A. SNYDER *et al.* [No. 342.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
*Mr. S. Schoyer, Jr.*, for petitioners.
*Messrs. Edward McSweeney* and *D. A. Hollingsworth* for respondents.
October 20, 1902. *Denied.*

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[640] *BOSTON FRUIT COMPANY, *Petitioner*, *v.* A. G. HALL *et al.* [No. 399.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.
*Messrs. J. L. Thorndike* and *Chas. Theo. Russell* for petitioner.
*Mr. J. Parker Kirlin* for respondents.
October 20, 1902. *Denied.*

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PACIFIC COAST COMPANY, *Petitioner*, *v.* W. H. REYNOLDS *et al.* [No. 408.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
*Messrs. Geo. W. Towle, Jr.*, and *Thos. B. Reed* for petitioner.
No counsel for respondents.
October 20, 1902. *Denied.*

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GUARANTEE COMPANY OF NORTH AMERICA, *Petitioner*, *v.* PHENIX INSURANCE COMPANY OF BROOKLYN, N. Y. [No. 439.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
*Mr. Warren Switzler* for petitioner.
*Mr. H. C. Brome* for respondent.
October 20, 1902. *Denied.*

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SWAIN P. CHICK *et al.*, *Petitioners*, *v.* ALLEN C. FULLER *et al.* [No. 442.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Messrs. Wm. J. Manning* and *Jas. H. Barnard* for petitioners.
*Messrs. Charles H. Aldrich* and *Frank F. Reed* for respondents.
October 20, 1902. *Denied.*

CHICAGO & ERIE RAILROAD COMPANY, *Petitioner*, *v.* WILLIAM N. SHAW. [No. 453.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Messrs. W. H. H. Miller* and *W. O. Johnson* for petitioner.
*Mr. Jas. C. McShane* for respondent.
October 20, 1902. *Denied.*

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*LONDON, PARIS & AMERICAN BANK, Lim- [641] ited, *Petitioner*, *v.* ROSALIE AARONSTEIN, Executrix, etc. [No. 455.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
*Messrs. Louis Marshall* and *Henry Ach* for petitioner.
*Mr. Simon C. Scheeline* for respondent.
October 20, 1902. *Denied.*

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ADAH S. HORMAN, *Petitioner*, *v.* UNITED STATES. [No. 463.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
*Mr. H. M. Rulison* for petitioner.
*Messrs. Attorney General* and *Solicitor General Richards* for respondent.
October 20, 1902. *Denied.*

---

BURLINGTON TRUST COMPANY *et al.*, *Petitioners*, *v.* SILAS PORTER *et al.* [No. 464.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
*Messrs. B. P. Waggener, O. H. Dean, O. L. Miller*, and *Frank Hagerman* for petitioners.
No counsel for respondents.
October 20, 1902. *Denied.*

---

RUBBER TIRE WHEEL COMPANY *et al.*, *Petitioners*, *v.* GOODYEAR TIRE & RUBBER COMPANY *et al.* [No. 452.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
*Messrs. Hoke Smith, F. P. Fish*, and *J. R. Bennett* for petitioners.
*Messrs. Edmund Wetmore* and *H. A. Toulmin* for respondents.
October 27, 1902. *Denied.*

---

SOUTHERN RAILWAY COMPANY, *Petitioner*, *v.* JOHN R. CRAIG, Administrator, etc. [No. 454.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
*Mr. Fairfax Harrison* for petitioner.
*Mr. James E. McDonald* for respondent.
October 27, 1902. *Denied.*

[642] *CORNELIUS J. MCNAMARA *et al.*, *Petitioners*, *v.* HOME LAND & CATTLE COMPANY *et al.* [No. 465.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. Geo. R. Peck, John S. Miller, Merritt Starr*, and *H. G. McIntire* for petitioners.

*Messrs. W. E. Cullen, E. C. Day*, and *F. C. Sharp*, for respondents.

October 27, 1902. *Denied.*

---

PERKINS COUNTY, NEBRASKA, *Petitioner*, *v.* E. D. GRAFF. [No. 468.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Chas. F. Manderson* and *J. H. McGowan* for petitioner.

*Mr. J. M. Johnson* for respondent.

October 27, 1902. *Denied.*

---

UNITED STATES FIDELITY & GUARANTY COMPANY, *Petitioner*, *v.* OMAHA BUILDING & CONSTRUCTION COMPANY *et al.* [No. 469.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. E. G. McGilton* for petitioner.

*Mr. H. C. Brome* for respondents.

October 27, 1902. *Denied.*

---

BOARD OF COUNTY COMMISSIONERS OF KEARNEY COUNTY, KANSAS, *Petitioner*, *v.* L. VANDRISS. [No. 473.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. A. P. Jetmore* for petitioner.

No counsel for respondent.

October 27, 1902. *Denied.*

---

CHICAGO HOUSE WRECKING COMPANY, *Petitioner*, *v.* OTTO C. BIRNEY. [No. 474.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Jas. M. Woolworth* and *Wm. D. McHugh* for petitioner.

*Messrs. Charles J. Greene* and *Ralph W. Breckenridge* for respondent.

October 27, 1902. *Denied.*

---

[643] *NORTHERN PACIFIC RAILWAY COMPANY, *Petitioner*, *v.* LOUISE H. ADAMS *et al.* [No. 466.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. C. W. Bunn* for petitioner.

*Messrs. C. S. Voorhees* and *R. H. Voorhees* for respondents.

October 27, 1902. *Granted.*

JOHN M. PERKINS, *Petitioner*, *v.* ANDREW B. HENDRYX *et al.* [No. 437.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Mr. John M. Perkins* for petitioner.

*Messrs. Charles M. Reed* and *L. L. Scaife* for respondents.

November 3, 1902. *Denied.*

---

SILAS F. KING, *Petitioner*, *v.* J. O. BENDER. [No. 445.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. J. C. Campbell, Wm. A. Maury*, and *W. H. Metson* for petitioner.

*Mr. J. O. Bender propria persona.*

November 3, 1902. *Denied.*

---

PECK BROTHERS COMPANY OF ILLINOIS, *Petitioner*, *v.* PECK BROS. & CO. OF CONNECTICUT. [No. 467.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. Henry D. Coghlan* and *Joseph A. O'Donnell* for petitioner.

*Mr. E. A. Otis* for respondent.

November 3, 1902. *Denied.*

---

RURAL INDEPENDENT SCHOOL DISTRICT OF ALLISON *et al.*, *Petitioners*, *v.* ELEANOR G. FAIRFIELD. [No. 472.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. R. M. Wright* for petitioner.

*Mr. R. H. Brown* for respondent.

November 3, 1902. *Denied.*

---

*MINNESOTA MOLINE PLOW COMPANY *et al.*, [644] *Petitioners*, *v.* DOWAGIAC MANUFACTURING COMPANY. [No. 476.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Charles M. Peck* and *Lysander Hill* for petitioners.

*Messrs. Fred L. Chappell, Geo. A. Prevost*, and *J. H. Whitaker* for respondent.

November 3, 1902. *Denied.*

---

CHARLES P. CHISOLM *et al.*, *Petitioners*, *v.* ZACHARIAH JOHNSON. [No. 371.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. Gustav Bissing* and *Jno. W. Griggs* for petitioners.

*Mr. Robert S. Taylor* for respondent.

November 10, 1902. *Denied.*

---

J. HASELTINE CARSTAIRS *et al.*, *Petitioners*, *v.* AMERICAN BONDING & TRUST COMPANY OF BALTIMORE CITY. [No. 434.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Mr. Joseph De F. Junkin* for petitioners.

*Mr. Francis B. Bracken* for respondent.

November 10, 1902. *Denied.*

ADAM FOERSTER *et al. Petitioners, v.* UNITED STATES. [No. 481.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
*Mr. Joel W. West* for petitioners.
*Messrs. Attorney General* and *Solicitor General Richards* for respondent.
November 10, 1902. *Denied.*

---

W. A. MOORE, *Petitioner, v.* JAMES H. PARKER *et al.* [No. 483.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
*Mr. Henry J. Haynsworth* for petitioner.
*Mr. Fairfax Harrison* for respondent.
November 10, 1902. *Denied.*

---

[645] *ALBERT G. ROPES, ETC., *Petitioner, v.* CLYDE STEAMSHIP COMPANY *et al.* [No. 488.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Mr. Henry W. Goodrich* for petitioner.
*Mr. Henry Galbraith Ward* for respondents.
November 17, 1902. *Denied.*

---

PHENIX INSURANCE COMPANY OF BROOKLYN, N. Y., *Petitioner, v.* SIMEON F. LEONARD. [No. 496.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Mr. D. J. Schuyler* for petitioner.
*Messrs. Henry W. Magee* and *Myron H. Beach* for respondent.
November 17, 1902. *Denied.*

---

ORIENT INSURANCE COMPANY OF HARTFORD, CONN., *Petitioner, v.* SIMEON F. LEONARD. [No. 497.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Mr. D. J. Schuyler* for petitioner.
*Messrs. Henry W. Magee* and *Myron H. Beach* for respondent.
November 17, 1902. *Denied.*

---

BELLEVILLE & SOUTHERN ILLINOIS RAILROAD COMPANY, *Petitioner, v.* CITIZENS' SAVINGS & LOAN ASSOCIATION *et al.* [No. 500.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Mr. Charles W. Thomas,* for petitioner.
*Mr. Edward Cunningham, Jr.,* for respondent.
November 17, 1902. *Denied.*

---

CHRISTOPHER C. CRABB *et al., Petitioners, v.* JOHN JAY HARVEY WILLIAMS. [No. 508.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Messrs. T. A. Moran* and *Levy Mayer* for petitioners.
*Mr. Frank Crozier* for respondent.
December 1, 1902. *Denied.*

*ERNEST WILKINSON, *Petitioner, v.* WIL- [646]
LIAM DUNLAP OWENS, Administrator, etc. [No. 338.]
Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.
*Mr. Samuel Maddox* for petitioner.
*Mr. Clarence R. Wilson* for respondent.
December 8, 1902. *Denied.*

---

MARY H. ROYSTON, *Trustee, et al., Petitioners, v.* ROBERT WEIS. [No. 460.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Mr. Walter Gresham* for petitioners.
*Mr. James B. Stubbs* for respondent.
December 8, 1902. *Denied.*

---

LAWRENCE & CO. *et al., Petitioners, v.* ALBERT WEIS. [No. 461.]
Petition for a Writ of Certiorari to the United States Circuit Court of appeals for the Fifth Circuit.
*Mr. Walter Gresham* for petitioners.
*Mr. James B. Stubbs* for respondent.
December 8, 1902. *Denied.*

---

AMERICAN SURETY COMPANY OF NEW YORK, *Petitioner, v.* HENRY W. BALLMAN *et al.* [No. 495.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
*Messrs. Henry C. Willcox, Eben Richards,* and *J. W. Mason* for petitioner.
*Messrs. Clinton Rowell* and *Joseph S. Laurie* for respondents.
December 8, 1902. *Denied.*

---

LANYON ZINC COMPANY *et al., Petitioners, v.* HORACE F. BROWN *et al.* [No. 501.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
*Mr. Albert H. Walker* for petitioners.
*Mr. Philip C. Dyrenforth* for respondents.
December 8, 1902. Petition *denied.*

---

FRANK SEAMAN, *Petitioner, v.* BERLINER GRAMAPHONE COMPANY. [No. 130.]
Petition for a Writ of *Certiorari to the [647]
United States Circuit Court of Appeals for the Fourth Circuit.
*Mr. Philip Mauro,* for petitioner.
*Mr. Marshall McCormick* for respondent.
December 12, 1902. *Dismissed,* on authority of counsel for petitioner.

---

WALTER A. CUNNINGHAM *et al., Petitioners, v.* METROPOLITAN LUMBER COMPANY. [No. 176.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
*Mr. F. O. Clark* for petitioners.
*Messrs. B. J. Brown* and *D. H. Ball* for respondent.
December 15, 1902. *Denied.*

W. G. EADS BROKERAGE COMPANY, *Petitioner*, *v.* CITY OF FORT SCOTT, KANSAS. [No. 470.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Mr. T. F. Garver* for petitioner.

No counsel for respondent.

December 15, 1902. *Denied.*

---

LENA M. SLATER *et al.*, *Petitioners*, *v.* MEXICAN NATIONAL RAILROAD COMPANY. [No. 513.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Mr. Mason Williams* for petitioners.

No appearance for the respondent.

December 15, 1902. *Granted.*

---

WILLIAM GRAY BROOKS, *Petitioner*, *v.* CHARLES H. PRATT, Administrator, etc., *et al.* [No. 451.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

*Mr. Wm. Gray Brooks* for petitioner.

*Mr. J. L. Thorndike* for respondent.

December 22, 1902. *Denied.*

---

LOFTUS CUDDY *et al.*, *Petitioners*, *v.* PERCIVAL W. CLEMENT, Receiver, etc., *et al.* [No. 484.]

Petition for a Writ of Certiorari to the [648] United States Circuit Court of Appeals *for the First Circuit.

*Messrs. Harvey D. Goulder, S. H. Holding*, and *F. S. Masten* for petitioners.

*Messrs. Louis Hasbrouck, Michael H. Cardozo*, and *Benjamin N. Cardozo* for respondents.

December 22, 1902. *Denied.*

---

BANKER'S MUTUAL CASUALTY COMPANY, *Petitioner*, *v.* MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY. [No. 509.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. Horatio F. Dale* and *Wm. Connor* for petitioner.

No counsel for respondent.

December 22, 1902. *Denied.*

---

FRED. C. KILHAM, Administrator, etc., *Petitioner*, *v.* WILLIAM J. WILSON. [No. 520.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

*Messrs. R. T. McNeal* and *E. T. Wells* for petitioner.

No counsel for respondent.

December 22, 1902. *Denied.*

NATIONAL GLASS COMPANY *et al.*, *Petitioners*, *v.* BRYCE BROTHERS COMPANY *et al.* [No. 522.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. John G. Johnson, Wm. L. Pierce*, and *James K. Bakewell* for petitioners.

*Messrs. J. Snowden Bell* and *Francis T. Chambers* for respondents.

December 22, 1902. *Denied.*

---

UNITED STATES FIDELITY & GUARANTY COMPANY, *Petitioner*, *v.* D. D. MUIR, as Receiver, etc. [No. 523.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. Isidor Rayner* and *J. Kemp Bartlett* for petitioner.

*Mr. Joel C. Baker* for respondent.

December 22, 1902. *Denied.*

---

*RHODE ISLAND LOCOMOTIVE WORKS, *Petitioner*, *v.* CONTINENTAL TRUST COMPANY. [649] [No. 185.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Thomas Emery* and *John Ford* for petitioner.

No counsel for respondent.

January 5, 1903. *Denied.*

---

GREAT SOUTHERN FIRE PROOF HOTEL COMPANY, *Petitioner*, *v.* BENJAMIN F. JONES *et al.* [No. 517.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. John E. Sater* for petitioner.

*Mr. Talfourd P. Linn* for respondents.

January 5, 1903. *Granted.*

---

CITY TRUST, SAFE DEPOSIT & SURETY COMPANY OF PHILADELPHIA, *Petitioner*, *v.* GLENCOVE GRANITE COMPANY. [No. 529.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Mr. Henry M. Hoyt* for petitioner.

*Messrs. Horace L. Cheyney* and *La Roy S. Gove* for respondent.

January 5, 1903. *Denied.*

---

CHARLES L. RAWSON *et al.*, *Petitioners*, *v.* WESTERN SAND BLAST COMPANY *et al.* [No. 521.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. James H. Raymond* and *Otto R. Barnett* for petitioners.

No appearance for the respondents.

January 12, 1903. *Granted.*

WILLIAM WHITE, JR., *Petitioner*, *v.* PEERLESS RUBBER MANUFACTURING COMPANY. [No. 536.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Mr. George H. Christy* for petitioner.

*Mr. Livingston Gifford* for respondent.

January 12, 1903. *Denied.*

---

[650] *BALTIMORE & OHIO RAILROAD COMPANY *et al.*, *Petitioners*, *v.* WABASH RAILROAD COMPANY. [No. 544.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. W. H. H. Miller, Hugh L. Bond, Jr.*, and *J. H. Collins* for petitioners.

*Messrs. Addison C. Harris* and *Wells H. Blodgett* for respondent.

January 12, 1903. *Denied.*

---

SUN LIFE INSURANCE COMPANY OF AMERICA, *Plaintiff in Error*, *v.* ALBERT MCCABE. [Nos. 253, 254.]

In Error to the County Court of Dallas County, Texas.

*Mr. Maurice E. Locke* for plaintiff in error.

No counsel for defendant in error.

October 14, 1902. *Dismissed* with costs, on motion of *Mr. Maurice E. Locke* for the plaintiff in error.

---

CITY OF AUSTIN, *Plaintiff in Error*, *v.* E. C. BARTHOLOMEW *et al.*, Receivers. [No. 71.]

In Error to the Circuit Court of the United States for the Western District of Texas.

*Mr. S. R. Fisher* for plaintiff in error.

No counsel for defendants in error.

October 14, 1902. *Dismissed* with costs, on motion of counsel for plaintiff in error.

---

PEOPLE OF THE STATE OF NEW YORK *ex rel.* CAYADUTTA PLANK ROAD COMPANY, *Plaintiff in Error*, *v.* CURTIS S. CUMMINGS, Mayor, *et al.* [No. 112.]

In Error to the Supreme Court of the State of New York.

*Mr. Harwood Dudley* for plaintiff in error.

No counsel for defendants in error.

October 14, 1902. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

---

[651] *O. E. COPE, *Appellant*, *v.* LANDA H. BRADEN. [No. 245.]

Appeal from the Supreme Court of the Territory of Oklahoma.

*Mr. Horace Speed* for appellant.

No counsel for appellee.

October 14, 1902. *Dismissed* with costs, on motion of counsel for appellant.

GLUCOSE SUGAR REFINING COMPANY, *Plaintiff in Error*, *v.* GEORGE F. HARDING *et al.* [No. 6.]

In Error to the Supreme Court of the State of Illinois.

*Messrs. Jno. P. Wilson, Thos. A. Moran*, and *John J. Herrick* for plaintiff in error.

No counsel for defendants in error.

October 14, 1902. *Dismissed* with costs, pursuant to the 10th Rule.

---

MANCHESTER FIRE ASSURANCE COMPANY OF MANCHESTER, ENGLAND, *et al.*, *Appellants*, *v.* JOHN HERRIOTT, Treasurer of the State of Iowa, *et al.* [No. 3.]

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

*Messrs. A. H. McVey* and *Wm. Allen Butler* for appellants.

*Messrs. Chas. W. Mullan* and *Milton Remley* for appellees.

October 14, 1902. *Dismissed*, per stipulation, on motion of *Mr. C. W. Mullan* for the appellees.

---

SCOTTISH UNION & NATIONAL INSURANCE COMPANY OF EDINBURGH, SCOTLAND, AND LONDON, ENGLAND, *Plaintiff in Error*, *v.* JOHN HERRIOT, ETC. [No. 25.]

In Error to the Supreme Court of the State of Iowa.

*Mr. A. H. McVey* for plaintiff in error.

*Mr. Chas. W. Mullan* for defendants in error.

October 14, 1902. *Dismissed* per stipulation, on motion of *Mr. C. W. Mullan* for the defendant in error.

---

HAROLD CROWLEY, *Appellant*, *v.* UNITED STATES. [No. 475.]

Appeal from the District Court of the United States for the District of Porto Rico.

*Messrs. Attorney General* and *Assistant Attorney General Hoyt* for appellee.

No counsel for appellant.

October 20, 1902. Docketed and *dismissed*, on motion of *Mr. Assistant Attorney General Hoyt* for the appellee.

---

[652] *NEW ORLEANS & WASHINGTON PACKET COMPANY, *Appellant*, *v.* RAILROAD COMMISSION OF LOUISIANA. [No. 129.]

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

*Mr. J. D. Rouse* for appellant.

*Mr. Walter Guion* for appellee.

October 20, 1902. *Dismissed*, each party to pay its own costs, per stipulation.

---

GEORGE A. BLINN, JR., *et al.* *Appellants*, *v.* DAN JENKINS *et al.* [No. 164.]

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

*Mr. James L. Tanner* for appellants.

*Mr. J. A. W. Smith* for appellees.

October 20, 1902. *Dismissed* with costs, per stipulation.

HENRY THOMAS, *Petitioner*, *v.* INTERSTATE BUILDING & LOAN ASSOCIATION. [No. 334.]

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. James B. Stubbs* and *Thomas H. Clark* for petitioner.

No counsel for respondent.

October 21, 1902. *Dismissed*, on motion of *Mr. Thomas H. Clark* for the petitioner.

---

DU SHEN TAU *et al.*, *Appellants*, *v.* UNITED STATES. [No. 485.]; LEE CHIN CHING, *Appellant*, *v.* UNITED STATES. [No. 486.]; MOY YEE TAI *et al.*, *Appellants*, *v.* UNITED STATES. [No. 487.]

Appeals from the District Court of the United States for the Northern District of New York.

*Messrs. Attorney General* and *Solicitor General Richards* for appellee.

No counsel for appellants.

October 27, 1902. Docketed and *dismissed*, on motion of *Mr. Solicitor General Richards* for the appellee.

---

SOUTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error*, *v.* FRANK A. WOOD *et al.* [No. 133.]

[653] *In Error to the Supreme Court of the State of California.

*Messrs. Maxwell Evarts* for plaintiff in error.

No counsel for defendants in error.

November 3, 1902. *Dismissed* with costs, on motion of counsel for plaintiff in error.

---

SOUTHERN PACIFIC RAILROAD COMPANY, *Plaintiff in Error*, *v.* FREDERICK B. JACK *et al.* [No. 134.]

In Error to the Supreme Court of the State of California.

*Mr. Maxwell Evarts* for plaintiff in error.

No counsel for defendants in error.

November 3, 1902. *Dismissed* with costs, on motion of counsel for the plaintiff in error.

---

RAILROAD EQUIPMENT COMPANY, *Appellant*, *v.* SOUTHERN RAILWAY COMPANY *et al.* [No. 5.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Tully R. Cornick, Wager Swayne*, and *Alex. C. King* for appellant.

*Messrs. Francis Lynde Stetson, Leon Jourolmon*, and *W. A. Henderson* for appellees.

November 6, 1902. *Dismissed* with costs, per stipulation.

RICHARD C. KETCHUM, *Plaintiff in Error*, *v.* UNITED STATES. [No. 503.]

In Error to the Circuit Court of the United States for the Eastern District of Texas.

*Messrs. Attorney General* and *Solicitor General Richards* for defendant in error.

No counsel for plaintiff in error.

November 10, 1902. Docketed and *dismissed*, on motion of *Mr. Solicitor General Richards* for the defendant in error.

---

OWEN MCCANN, ETC., *Plaintiff in Error*, *v.* COMMONWEALTH OF PENNSYLVANIA FOR USE OF LEVI WELLS, Dairy and Food Commissioner. [No. 99.]

In Error to the Supreme Court of the State of Pennsylvania.

*Mr. Simon R. Huss* for plaintiff in error.

*Mr. Jno. P. Elkin* for defendant in error.

November 13, 1902. *Dismissed* with costs, pursuant to the 10th Rule.

---

*WILLIAM K. VANDERBILT *et al.*, Trustees [654] *et al.*, *Plaintiffs in Error*, *v.* BIRD S. COLER, Comptroller, etc. [No. 110.]

In Error to the Surrogate's Court of New York County, State of New York.

*Mr. Chandler P. Anderson* for plaintiffs in error.

*Mr. Jabish Holmes, Jr.*, for defendant in error.

December 1, 1902. *Dismissed*, per stipulation.

---

TEXAS & PACIFIC RAILWAY COMPANY, *Plaintiff in Error*, *v.* GEORGE R. L. WHITE. [No. 114.]

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. John F. Dillon, W. S. Pierce*, and *D. D. Duncan* for plaintiff in error.

*Mr. John L. Sheppard* for defendant in error.

December 3, 1902. *Dismissed* with costs, on authority of counsel for plaintiff in error.

---

AUGUSTUS BURGDORF *et al.*, *Plaintiffs in Error*, *v.* UNITED STATES TO THE USE OF THE VERMONT MARBLE COMPANY. [No. 7.]

In Error to the Court of Appeals of the District of Columbia.

*Messrs. J. J. Darlington, Calderon Carlisle*, and *Wm. G. Johnson* for plaintiffs in error.

*Mr. John B. Cotton* for defendant in error.

December 11. 1902. *Dismissed* with costs, on motion of *Mr. William G. Johnson* for the plaintiffs in error.

---

ELIAS F. BARNES, *Appellant*, *v.* DISTRICT OF COLUMBIA. [No. 401.]

Appeal from the Court of Claims.

*Messrs. John C. Fay* and *J. W. Douglass* for appellant.

*Mr. Attorney General* for appellee.

December 15, 1902. *Dismissed*, on motion of *Mr. John C. Fay* for the appellant.

GEORGE B. ROMMEL *et al.*, *Appellants*, *v.* COUNTY COURT OF BARBOUR COUNTY *et al.* [No. 287.]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia.

[655] *Messrs. *John. H. Holt* and *Melville D. Post* for appellants.

*Mr. Alston G. Dayton* for appellees.

December 15, 1902. *Dismissed*, clerk's costs to be paid by appellants, per stipulation of counsel.

---

LEE LING *et al.*, *Appellants*, *v.* UNITED STATES [No. 365.]; SAY ON *et al.*, *Appellants*, *v.* UNITED STATES [No. 366.]; KING DUNG, *Appellants*, *v.* UNITED STATES [No. 367.]; YEE TOY *et al.*, *Appellants*, *v.* UNITED STATES [No. 368.]

Appeals from the District Court of the United States for the Northern District of New York.

*Mr. Attorney General* for appellee.

No counsel for appellants.

June 25, 1902. *Docketed and dismissed.*

---

LEE AH YIN, *Appellant*, *v.* UNITED STATES. [No. 411.]

Appeal from United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. Franklin H. Mackey* for appellant.

*Attorney General* for appellee.

October 9, 1902. *Dismissed* pursuant to Rule 23.

# CASES

ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

AT

OCTOBER TERM, 1902.

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Vol. 188.

U. S., Book 47—23.

# REFERENCE TABLE

OF SUCH CASES

## DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1902,

AND REPORTED HEREIN.

---

VOLUME 188,

---

AS ALSO APPEAR IN

## OFFICIAL REPORTER'S EDITION.

| Off. Rep. 188 U. S. | Title. | Here in. |
|---|---|---|
| 1-2 | Kelley v. Rhoads | 359 |
| 3-4 | " " | 360 |
| 4-5 | " " | 361 |
| 5-9 | " " | 362 |
| 9-10 | " " | 363 |
| 10-11 | Weber v. Rogan | 363 |
| 11-12 | " " | 364 |
| 12-14 | " " | 365 |
| 14-17 | Andrews v. Andrews | 366 |
| 17-18 | " " | 367 |
| 28-30 | " " | 368 |
| 30-32 | " " | 369 |
| 32-33 | " " | 370 |
| 33-37 | " " | 371 |
| 37-40 | " " | 372 |
| 40-42 | " " | 373 |
| 42 | Ezzie v. Carson | 373 |
| 42-44 | " " | 374 |
| 44-45 | " " | 375 |
| 45-47 | " " | 376 |
| 47-50 | " " | 377 |
| 50-53 | " " | 378 |
| 53-55 | " " | 379 |
| 55 | " " | 380 |
| 56 | Hale v. Allison | 380 |
| 56-58 | " " | 381 |
| 58-59 | " " | 382 |
| 59-62 | " " | 385 |
| 62-65 | " " | 387 |
| 65-69 | " " | 388 |
| 69-70 | " " | 389 |
| 70-72 | " " | 390 |
| 72-75 | " " | 391 |
| 75-78 | " " | 392 |
| 78-81 | " " | 393 |
| 81 | " " | 394 |
| 82-83 | Diamond Match Co. v. Ontonagon | 394 |
| 83-85 | " " | 395 |
| 85-86 | " " | 396 |
| 86-87 | " " | 397 |
| 87-88 | " " | 398 |
| 88-97 | " " | 399 |
| 97 | | 400 |
| 188 U. S. | Billings v. Illinois | 400 |

| Off. Rep. 188 U. S. | Title. | Here in. |
|---|---|---|
| 98-99 | Billings v. Illinois | 401 |
| 99-101 | " " | 402 |
| 101-104 | " " | 403 |
| 104 | American Colortype Co. v. Continental Colortype Co. | 404 |
| 105-108 | " " | 405 |
| 108 | " " | 406 |
| 108 | Nelson v. Northern Pacific R. Co. | 406 |
| 110 | " " | 407 |
| 110-113 | " " | 408 |
| 113-115 | " " | 409 |
| 115-118 | " " | 410 |
| 118-120 | " " | 411 |
| 120-123 | " " | 412 |
| 123-125 | " " | 413 |
| 125-128 | " " | 414 |
| 128-131 | " " | 415 |
| 131-133 | " " | 416 |
| 133-136 | " " | 417 |
| 136-138 | " " | 418 |
| 139-141 | " " | 419 |
| 141-144 | " " | 420 |
| 144-146 | " " | 421 |
| 146-149 | " " | 422 |
| 149-152 | " " | 423 |
| 152-154 | " " | 424 |
| 154-156 | " " | 425 |
| 156 | Smythe v. United States | 425 |
| 156-158 | " " | 427 |
| 163 | " " | 427 |
| 163-166 | " " | 428 |
| 166-168 | " " | 429 |
| 168-171 | " " | 430 |
| 171-173 | " " | 431 |
| 173-176 | " " | 432 |
| 176-179 | " " | 433 |
| 179-181 | " " | 434 |
| 181-183 | " " | 435 |
| 184 | Beals v. Cone | 435 |
| 184-185 | " " | 436 |
| 186-188 | " " | 438 |
| 188 | " " | 439 |
| 189 | Blackstone v. Miller | 439 |
| 202 | " " | 443 |

| Off. Rep. 188 U. S. | Title. | Here in. |
|---|---|---|
| 202–205 | Blackstone v. Miller | 444 |
| 205–207 | " " | 445 |
| 207 | " " | 446 |
| 208–209 | Connecticut Mut. L. Ins. Co. v. Hillmon | 446 |
| 209–210 | " " | 447 |
| 210–211 | " " | 448 |
| 211–213 | " " | 449 |
| 213–216 | " " | 450 |
| 216–219 | " " | 451 |
| 219–220 | " " | 452 |
| 220–221 | Easton v. Iowa | 452 |
| 227–228 | " " | 455 |
| 228–230 | " " | 456 |
| 230–233 | " " | 457 |
| 233–236 | " " | 458 |
| 236–238 | " " | 459 |
| 238–239 | " " | 460 |
| 239 | Bleistein v. Donaldson Lithographing Co. | 460 |
| 248–249 | " " | 461 |
| 249–252 | " " | 462 |
| 252–253 | " " | 463 |
| 254 | Manilla Prize Cases ("United States v. Dewey Dewey v. Don Juan de Austria Stovell v. Dewey") | 463 |
| 255–256 | " " | 464 |
| 256–258 | " " | 465 |
| 258–259 | " " | 467 |
| 260–262 | " " | 468 |
| 262–265 | " " | 469 |
| 265–267 | " " | 470 |
| 267–270 | " " | 471 |
| 270–272 | " " | 472 |
| 272–275 | " " | 473 |
| 275–277 | " " | 474 |
| 277–280 | " " | 475 |
| 280–283 | " " | 476 |
| 283 | " " | 477 |
| 283–285 | The Infanta Maria Teresa ("United States v. Taylor") | 477 |
| 285–287 | " " | 478 |
| 287–290 | " " | 479 |
| 290–291 | " " | 480 |
| 291–292 | Mutual L. Ins. Co. v. McGrew | 480 |
| 292–295 | " " | 481 |
| 295–297 | " " | 482 |
| 307–308 | " " | 484 |
| 308–311 | " " | 485 |
| 311–313 | " " | 486 |
| 313 | " " | 487 |
| 314–315 | Hooker v. Los Angeles | 487 |
| 315–317 | " " | 490 |
| 317–320 | " " | 491 |
| 320–321 | " " | 492 |
| 321 | Lottery Case ("Champion v. Ames") | 492 |
| 321–322 | " " | 495 |
| 322–325 | " " | 496 |
| 344–345 | " " | 496 |
| 345–347 | " " | 497 |
| 347–350 | " " | 498 |
| 350–352 | " " | 499 |
| 352–355 | " " | 500 |
| 355–357 | " " | 501 |
| 357–360 | " " | 502 |
| 360–362 | " " | 503 |

| Off. Rep. 188 U. S. | Title. | Here in. |
|---|---|---|
| 362–365 | Lottery Case ("Champion v. Ames") | 504 |
| 365–367 | " " | 505 |
| 367–370 | " " | 506 |
| 370–373 | " " | 507 |
| 373–375 | " " | 508 |
| 375 | Francis v. United States | 508 |
| 375–376 | " " | 509 |
| 376–378 | " " | 510 |
| 378–380 | " " | 511 |
| 381–383 | " " | 512 |
| 383–385 | " " | 513 |
| 385 | Louisville & J. Ferry Co. v. Kentucky | 513 |
| 386 | " " | 514 |
| 387–389 | " " | 515 |
| 389–392 | " " | 516 |
| 392–395 | " " | 517 |
| 395–397 | " " | 518 |
| 397–399 | " " | 519 |
| 399 | Louisville & J. Ferry Co. v. Kentucky | 519 |
| 400 | Bigby v. United States | 519 |
| 400–401 | " " | 521 |
| 401–404 | " " | 522 |
| 404–407 | " " | 523 |
| 407–409 | " " | 524 |
| 409–410 | " " | 525 |
| 410 | Cummings v. Chicago | 525 |
| 411–413 | " " | 527 |
| 413–415 | " " | 528 |
| 415–418 | " " | 529 |
| 425–426 | " " | 529 |
| 426–428 | " " | 530 |
| 428–431 | " " | 531 |
| 431 | " " | 532 |
| 431 | Calumet Grain & Elevator Co. v. Chicago | 532 |
| 432 | United States v. Rickert | 532 |
| 432 | " " | 533 |
| 432–433 | " " | 534 |
| 433–436 | " " | 535 |
| 436–439 | " " | 536 |
| 439–441 | " " | 537 |
| 441–444 | " " | 538 |
| 444–445 | " " | 539 |
| 445–446 | United States v. Lynah | 539 |
| 446–449 | " " | 540 |
| 449–452 | " " | 541 |
| 452 | " " | 542 |
| 458–460 | " " | 544 |
| 460–463 | " " | 545 |
| 463–465 | " " | 546 |
| 465–468 | " " | 547 |
| 468–470 | " " | 548 |
| 470–473 | " " | 549 |
| 473–476 | " " | 550 |
| 476–478 | " " | 551 |
| 478–481 | " " | 552 |
| 481–484 | " " | 553 |
| 484–485 | " " | 554 |
| 485 | United States v. Williams | 554 |
| 485 | " " | 555 |
| 486–487 | Clarke v. Larremore | 555 |
| 487 | " " | 556 |
| 487–488 | " " | 557 |
| 488–490 | " " | 558 |
| 491–493 | Williams v. Parker | 559 |
| 493 | " " | 560 |
| 502–503 | " " | 562 |

| Title. | Here in. | Off. Rep. 188 U. S. | Title. | Here in. |
|---|---|---|---|---|
| Williams v. Parker | 563 | 622–623 | Jaquith v. Rowley | 621 |
| Reetz v. Michigan | 563 | 623–624 | " " | 622 |
| " " | 564 | 624–626 | " " | 623 |
| " " | 565 | 626 | American Ice Co. v. Eastern Trust & Bkg. Co. | 623 |
| " " | 566 | | | |
| " " | 567 | 626–628 | " " | 624 |
| Leach v. Burr | 567 | 629–630 | " " | 625 |
| " " | 568 | 630–632 | " " | 626 |
| " " | 569 | 632 | Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. | |
| " " | 570 | | | 626 |
| Schaefer v. Werling | 570 | | | |
| " " | 571 | 632–634 | " " | 627 |
| " " | 572 | 634–637 | " " | 628 |
| Tarrance v. Florida | 572 | 637 | " " | 629 |
| " " | 573 | 638–639 | " " | 631 |
| " " | 574 | 639–641 | " " | 632 |
| " " | 575 | 641–644 | " " | 633 |
| Northern Pacific R. Co. v. Soderberg | | 644–645 | " " | 634 |
| | 575 | 645 | Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. | 634 |
| " " | 576 | | | |
| " " | 580 | | | |
| " " | 581 | 645 | Boston & M. Consol. Copper & S. Min. Co. v. Chile Gold Min. Co. | 634 |
| " " | 582 | | | |
| " " | 583 | | | |
| " " | 584 | 646 | " " | 635 |
| Frost v. Starr | 584 | 646–648 | Winslow v. Baltimore & O. R. Co. | 635 |
| " " | 585 | | | |
| " " | 586 | 648–650 | " " | 636 |
| " " | 587 | 650–653 | " " | 637 |
| " " | 588 | 653–654 | " " | 638 |
| Gutierres v. Albuquerque Land & Irrig. Co. | | 654–656 | " " | 639 |
| | 588 | 656–659 | " " | 640 |
| " " | 589 | 659–661 | " " | 641 |
| " " | 590 | 662 | Chicago Theological Seminary v. Illinois ("Board of Directors of Chicago Theological Seminary v. Illinois ex rel. Raymond") | |
| " " | 591 | | | |
| " " | 592 | | | |
| " " | 593 | | | |
| " " | 594 | | | 641 |
| Easkin v. Chase Nat. Bank | 594 | 662–663 | " " | 642 |
| " " | 595 | 663 | " " | 643 |
| " " | 596 | 663–664 | " " | 644 |
| " " | 597 | 672–673 | " " | 648 |
| Commercial Pub. Co. v. Beckwith | | 673–676 | " " | 649 |
| | 598 | 676–678 | " " | 650 |
| " " | 599 | 678–681 | " " | 651 |
| " " | 600 | 681 | Indiana Mfg. Co. v. Koehne | 651 |
| " " | 601 | 682–683 | " " | 653 |
| " " | 602 | 683–686 | " " | 654 |
| United States v. Barringer | 602 | 686–688 | " " | 655 |
| " " | 603 | 688–691 | " " | 656 |
| " " | 604 | 691–692 | Hyatt v. New York ex rel. Corkran | |
| " " | 605 | | | 657 |
| " " | 606 | 692–694 | " " | 658 |
| " " | 607 | 694–695 | " " | 659 |
| " " | 608 | 708–709 | " " | 660 |
| " " | 609 | 709–712 | " " | 661 |
| Wagoner v. Flack | 609 | 712–715 | " " | 662 |
| " " | 610 | 715–717 | " " | 663 |
| " " | 611 | 717–719 | " " | 664 |
| " " | 612 | 720 | The Mangrove Prize Cases ("United States v. Officers & Crew of the U. S. S. Mangrove; Officers & Enlisted Men of U. S. Ships New York; Indiana & Wilmington v. Officers & Crew of the U. S. S. Mangrove.") | |
| " " | 613 | | | |
| " " | 614 | | | |
| Halwig v. United States | 614 | | | |
| " " | 615 | | | |
| " " | 616 | | | |
| " " | 617 | | | |
| " " | 618 | | | 664 |
| " " | 619 | 720–721 | " " | 665 |
| " " | 620 | 721–724 | " " | 666 |
| Jaquith v. Rowley | 620 | 724–726 | " " | 667 |

| Off. Rep. 188 U. S. | Title. | Here in. |
|---|---|---|
| 726 | Home L. Ins. Co. v. Fisher | 667 |
| 727–728 | " " | 668 |
| 728–730 | " " | 669 |
| 730 | Kidd v. Alabama | 669 |
| 730–733 | " " | 672 |
| 733 | " " | 673 |

| Off. Rep. 188 U. S. | Title. | Here in. |
|---|---|---|
| 734 | Fourth Nat. Bank v. Albaugh | 673 |
| 734–736 | " " | 674 |
| 736–738 | " " | 675 |
| 739–743 | Memorandum Cases | 677–678 |

# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1902.

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[1] *JOHN KELLEY, *Plff. in Err.*,
*v.*
OLIVER F. RHOADS.

(See S. C. Reporter's ed. 1-10.)

*Error to state court—conclusiveness of agreed statement of facts—interstate commerce—state regulation—taxation of property in transit.*

1. The Supreme Court of the United States, though bound by an agreed statement of facts when reviewing the judgment of a state court, may inquire whether the facts agreed upon support the judgment.
2. A flock of 10,000 sheep, which is being driven from the territory of Utah by a direct route across the state of Wyoming to the state of Nebraska at a rate of about 9 miles per day, is the subject of interstate commerce, and is therefore exempt from taxation under Wyo. Laws 1895, chap. 61, authorizing the taxing of live stock brought into the state for grazing purposes, although the sheep may while actually in transit have been permitted incidentally to support themselves by grazing over land ¼ of a mile in width, and might have been transported by rail.

[No. 93.]

*Submitted November 12, 1902. Decided January 19, 1903.*

ON WRIT of Error to the Supreme Court of the State of Wyoming to review a judgment which affirmed a judgment of the District Court of Laramie County in favor of defendant in a suit to recover back certain taxes. *Reversed.*

See same case below, 9 Wyo. 352, 63 Pac. 935.

Statement by Mr. Justice **Brown**:

This was a petition originally filed in the district court of Laramie county, Wyoming, by Kelley against Rhoads, county assessor of the county of Laramie, to recover back certain taxes to the amount of $250 upon a flock of sheep owned by the plaintiff and in charge of a shepherd who was driving them through the state of Wyoming, from the then territory of Utah to the state of Nebraska.

The case was finally presented to the district court upon the following agreed statement of facts, upon which the court entered judgment *in favor of the defendant, which [2] was affirmed by the supreme court of the state (9 Wyo. 352, 63 Pac. 935):

Agreed Statement of Facts.

1. John Kelley is now, and was at all times mentioned in the petition filed herein, a citizen and resident of the state of Kansas.

2. Oliver F. Rhoads was the duly elected, qualified, and acting county assessor of the county of Laramie, state of Wyoming, from the 7th day of January, A. D. 1895, until the 4th day of January, A. D. 1897.

3. Plaintiff at all times mentioned in the petition herein was the owner of the sheep mentioned in said petition, and that said sheep on or about the 29th day of October, A. D. 1895, were in the county of Laramie, in charge of James M. Yeates, the agent of the plaintiff, who was driving and trans-

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NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 57; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. (Va.) 13 L. R. A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

porting said sheep through the state of Wyoming, from the then territory of Utah to the state of Nebraska.

4. In driving said sheep in such manner it was the practice of the person in charge to permit them to spread out at times in the neighborhood of a quarter of a mile, and while so being driven the sheep were permitted to graze over land of that width. They were driven in some instances through large pastures, in other instances through the public domain, and in other instances through pastures inclosed by fences. While being driven from the western boundary of the state to Pine Bluffs station, they were maintained by grazing along the route of travel.

5. Said sheep were duly returned by plaintiff for taxation and assessed by the assessor and collector of taxes for the year *1895 in the county of Juab, territory of Utah.

6. On the 29th day of October, A. D. 1895, while the said herd of sheep were in charge of the agent of the plaintiff in the county of Laramie, state of Wyoming, the defendant, in company with S. J. Robb, deputy sheriff, of Laramie county, Wyoming, collected from said plaintiff's agent the sum of two hundred and fifty dollars ($250), alleged to be taxes due for the current year 1895, and that before the collection of said [3]tax, *upon demand for the payment of the same by the said defendant, the plaintiff's agent refused to pay the same, whereupon the said defendant said to the agent of plaintiff that the said defendant could or would take enough sheep and sell them, and from the proceeds retain the said amount of two hundred and fifty dollars ($250) with costs; whereupon the plaintiff's agent to prevent the seizure and sale of plaintiff's property and the damage that would thereby accrue to plaintiff, paid the said defendant the sum of two hundred and fifty dollars ($250).

7. It was a fact, and defendant had knowledge of the fact and was notified by plaintiff's agent, that said herd of sheep was being driven across the state of Wyoming to Pine Bluffs station for the purpose of shipment, and that the same were not brought into the state for the purpose of being maintained permanently therein.

8. At the time of the regular assessment of property for the purpose of taxation in the county of Laramie, in the year 1895, plaintiff had no property of any kind whatever in the county of Laramie, or in the state of Wyoming.

9. At the time the assessment of property in the county of Laramie for the year 1895 was equalized by the board of equalization of the county of Laramie, plaintiff had no notice of the time or place of meeting of said board of equalization, or that any assessment had been made against him for any purpose whatever within the state of Wyoming or the county of Laramie.

10. At the time the taxes for the current year 1895 were regularly and legally levied in the said county of Laramie, plaintiff had no property whatever in the county of Laramie or state of Wyoming.

11. Plaintiff has demanded of defendant a return to him of the amount of tax so collected from plaintiff's agent, but defendant refused and still refuses to return to plaintiff the amount so collected.

12. The time consumed in driving said sheep from the western boundary of the state of Wyoming to Pine Bluffs station, in Laramie county, was from six to eight weeks, and by the route followed the distance traveled was about 500 miles.

*13. The said taxes were assessed, levied, [4] and collected by the defendant without the action, authority, or assistance of the board of county commissioners, or of any other officer or officers of Laramie county.

14. The said property so owned by the plaintiff had not been regularly assessed in any other county of the state for that year, and no taxes had been paid thereon in any other county in the state.

15. That for the purpose of shipping said sheep it was not necessary that they should be driven into the state of Wyoming, and that the railroad over which they were shipped could be reached from the point where the sheep were first driven by traveling a less distance than was necessary to travel from the place where they were first driven to any point in the state of Wyoming.

16. That at the time the $250 was paid to the defendant, it was paid without any protest other than appears in the other paragraphs of this agreed statement of facts.

*Mr.* **Josiah A. Van Orsdel** submitted the cause for plaintiff in error:

A state cannot in any manner interfere with or obstruct interstate commerce.

Rorer, Inter-State Law, p. 311; Cooley, Taxn. p. 62; Black, Const. Law, 167–186.

The neglect of Congress to legislate on the subject of interstate commerce does not give to the several states authority to regulate such commerce.

*Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Leisy* v. *Hardin*, 135 U. S. 150, 34 L. ed. 146, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

Interstate commerce embraces all the means of transportation commonly used in transferring property from one state or country to another.

*Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708.

Before the property of plaintiff in error in this case could have been taxed by the authorities of Wyoming, the property in question must have become identified and incorporated with the property of the state.

*Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Robbins* v. *Shelby County Taxing*

*Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Brown* v. *Houston*, 114 U. S. 622, 630, 29 L. ed. 257, 260, 5 Sup. Ct. Rep. 1091; *Kelley* v. *Rhoads*, 7 Wyo. 237, 39 L. R. A. 594, 51 Pac. 593; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. ed. 382; *Crandall* v. *Nevada*, 6 Wall. 35, 18 L. ed. 745; *Almy* v. *California*, 24 How. 169, 16 L. ed. 644; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Hays* v. *Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254.

There is an implied license permitting all citizens alike to use for grazing the public domain of the United States.

*Buford* v. *Houtz*, 133 U. S. 320, 33 L. ed. 618, 10 Sup. Ct. Rep. 305.

*Mr.* **Willis Van Devanter** submitted the cause for defendant in error. *Mr. W. R. Stoll* was with him on the brief.

The statute of the state of Wyoming requiring live stock brought into the state for the purpose of being grazed, to be taxed, is not in violation of the commerce clause of the Constitution of the United States.

*Kelley* v. *Rhoads*, 7 Wyo. 237, 39 L. R. A. 594, 51 Pac. 593, and cases there cited.

It is incumbent upon the party who complains of error in the determination of a matter of fact in the trial court to disclose by the record that the determination of the fact as found by the trial court was at least palpably contrary to the evidence in the case.

*Marshall* v. *Rugg*, 6 Wyo. 270, 33 L. R. A. 679, 44 Pac. 700, 45 Pac. 486.

A state statute authorizing the levying of a tax upon live stock which are brought into the state for a purpose similar to the purpose for which live stock are maintained therein—as, for instance, for grazing, or for the purpose of being fed—is not an unconstitutional statute; and the tax is a valid tax, notwithstanding the fact that the live stock may have been brought into the state for a short period of time, or may have been driven into or through the state "on foot," or were "through cattle," or were ultimately designed for shipment into another state.

*Myers* v. *Baltimore County*, 83 Md. 385, 34 L. R. A. 309, 35 Atl. 144; *Waggoner* v. *Whaley*, 21 Tex. Civ. App. 1, 50 S. W. 153; *Prairie Cattle Co.* v. *Williamson*, 5 Okla. 488, 49 Pac. 937; *Collins* v. *Green*, 10 Okla. 244, 62 Pac. 813; *Lasater* v. *Green*, 10 Okla. 335, 62 Pac. 816; *Halff* v. *Green*, 10 Okla. 338, 62 Pac. 816; *Russell* v. *Green*, 10 Okla. 340, 62 Pac. 817.

Mr. Justice **Brown** delivered the opinion of the court:

This case resolves itself into the single question whether the property of the plaintiff was engaged in interstate commerce to such an extent as to be exempt from taxation by the state of Wyoming, through which it was being transported.

The statute of the state upon this subject (Laws 1895, chap. 61) is as follows:

"Sec. 1. All live stock brought into this state *for the purpose of being grazed* shall be taxed for the fiscal year during which it shall have been brought into the state.

"Sec. 2. Assessors are, for the purpose of enforcing this act, *hereby vested with the [5] powers and charged with the duties vested in and conferred upon other officers for the collection of taxes.

"Sec. 3. It shall be the duty of the assessors in the several counties to levy and immediately collect the taxes as provided for in this act, as soon as live stock is brought into their counties to graze, and to pay without delay such sums to the treasurers of their respective counties.

"Sec. 4. Whenever the owner of any live stock upon which a tax has been levied, as provided in this act, shall refuse to immediately pay the amount of such tax to the assessor who levied it, such assessor shall proceed forthwith to collect such tax, as provided by law for the collection of delinquent taxes on other kinds of personal property."

The question to be determined, then, is whether the stock of the plaintiff was brought into the state *for the purpose of being grazed* at the time it was assessed for taxation. This question must be answered by the agreed statement of facts. While this statement is binding upon this court, as well as the state courts, different inferences may be drawn from these facts as to the applicability of the state statute. Had the state court found directly the ultimate fact that these sheep were brought into the state for the purpose of being grazed, such finding might have bound us, but, under the facts actually found or agreed upon, we are at liberty to inquire whether they support the judgment. *Harrison* v. *Perea*, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129.

The law upon this subject, so far as it concerns interference with interstate commerce, is settled by several cases in this court, which hold that property actually in transit is exempt from local taxation, although if it be stored for an indefinite time during such transit, at least for other than natural causes or lack of facilities for immediate transportation, it may be lawfully assessed by the local authorities. *State, Detmold, Prosecutor*, v. *Engle*, 34 N. J. L. 425; *Standard Oil Co.* v. *Bachelor*, 89 Ind. 1; *Burlington Lumber Co.* v. *Willetts*, 118 Ill. 559, 9 N. E. 254.

The first case in which the question arose is that of *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, in which it was held that coal mined in Pennsylvania and sent by water to New Orleans to be *sold in the open market there on account [6] of the owners in Pennsylvania, and lying at New Orleans in flatboats for sale, became intermingled, on its arrival there, with the general property of the state, and was subject to taxation under the general laws of Louisiana, although it might have been, after arrival, sold from the vessel on which the transportation was made, without being landed, and for the purpose of being taken out of the country by a vessel bound to a foreign port. The case was affirmed in

*Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415, which differed from the former only in the fact that the coal did not reach New Orleans, the port of destination, but was still on the Mississippi river, 9 miles above Baton Rouge, where it was held for sale. It appeared that the boats were held subject to the orders of plaintiff to be navigated to such place or places as he might deem convenient or advantageous to the trade in which he was engaged.

In *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, it was held that logs cut in New Hampshire, which were hauled down to the town of Errol, on the Androscoggin river in that state, to be thence floated down the river to Lewiston, Maine, and were awaiting a convenient opportunity for such transportation, were still a part of the general mass of property of the state, liable to taxation, if taxed in the usual way in which such property was taxed in that state. It was a stipulated fact that the timber thus cut had lain over one season, being about a year, in the Androscoggin river in that state, either in Errol, Dummer, or Milan; and that other timber referred to in the petition as having been cut in Maine had lain over in Errol since the spring or summer before the taxation. The question is thus stated by Mr. Justice Bradley: "Are the products of a state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place or port of shipment within the state, liable to be taxed like other property within the state?" Said he: "There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for [7] this purpose, in which *they commence their final movement for transportation from the state of their origin to that [the state] of their destination. . . . Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there."

The substance of these cases is that, while the property is at rest for an indefinite time awaiting transportation, or awaiting a sale at its place of destination, or at an intermediate point, it is subject to taxation. But if it be actually in transit to another state, it becomes the subject of interstate commerce, and is exempt from local assessment.

We place no reliance upon the fact in this case that plaintiff's sheep had been duly returned for taxation, and assessed for the taxes of 1895 in the territory of Utah, since, although this may have some bearing upon the equities of the case, it was declared in *Coe* v. *Errol* to have no significance as a matter of law.

The question turns upon the purpose for which the sheep were driven into the state. If for the purpose of being grazed, they are expressly within the 1st section of the act. But if for the purpose of being driven through the state to a market, they would be exempt as a subject of interstate commerce, though they might incidentally have supported themselves in grazing while actually in transit. We think the question is sufficiently answered by the statement of facts, from which it appears (3) that the sheep were in charge of plaintiff's agent, "who was driving and transporting said sheep through said state of Wyoming, from the then territory of Utah to the state of Nebraska." (4) "While being driven from the western boundary of the state to Pine Bluffs station, on the eastern boundary, they were maintained by grazing along the route of travel." (7) "It was a fact, and defendant had knowledge of the fact and was notified by plaintiff's agent, that said herd of sheep were being driven across the state of Wyoming to Pine Bluffs station *for the purpose of shipment*, and that the same were not brought into the state for the purpose of being maintained permanently there." (12) "The time consumed in driving *said sheep from the western boundary [8] of the state of Wyoming to Pine Bluffs station, in Laramie county, was from six to eight weeks and by the route followed the distance traveled was about 500 miles."

It thus appears that the only purpose found for which this herd of sheep was being driven across the state was for *shipment*, and the agreed statement wholly fails to show that they were detained at any place within the state for the purpose of grazing, or otherwise. As they consumed from six to eight weeks in traveling about 500 miles, or, as the supreme court found, at the rate of about 9 miles per day, it does not even appear that they loitered unnecessarily on the way. As they required sustenance on the journey, and could obtain it only by grazing, it would appear, though there is no testimony upon that point, that they could hardly have been driven more rapidly without a loss of flesh during the transit. The only evidence as to the manner in which such grazing was conducted is contained in the fourth stipulation: "In driving said sheep in such manner it was the practice of the person in charge to permit them to spread out at times in the neighborhood of a quarter of a mile, and while being so driven the sheep were permitted to graze over land of that width. They were driven, in some instances, through large pastures, in other instances through the public domain, and in other instances through pastures inclosed by fences." Considering that the herd numbered about 10,000 sheep, and were moved eastward at the rate of 9 miles a day, it does not seem as though the fact that they were permitted to graze over a width of a quarter of a mile was evidence of any unnecessary delay; and while the owner would undoubtedly be liable for any damage done to pasturage *en route*, there is no evidence at all that the transit of the sheep was delayed for the purpose of grazing while go-

ing through the state. Bearing in mind that the weight of all the previous cases in this court has been laid upon the fact of an indefinite delay, awaiting transportation at the commencement of the journey, or awaiting sale or delivery at its termination the facts of this case fail completely to bring it within those authorities. The fact [9] that the sheep may not *have lost flesh, or may even have gained flesh, during their transit through the state, is impertinent, unless the primary purpose of their being driven there was for grazing.

It is true that the sheep might have been transported by rail from Utah to Pine Bluffs, but the statement fails to show whether that course would have been more or less expensive than the one adopted. It is clear that the owner had the right to avail himself of such means of transportation as he preferred, and in estimating the probable cost he was at liberty to consider the fact that he was licensed to make use of the public lands of the United States, without charge, for the sustenance of his sheep. *Buford* v. *Houts*, 133 U. S. 320, 33 L. ed. 618, 10 Sup. Ct. Rep. 305. Why he shipped them by rail from Pine Bluffs is not explained, but it seems quite probable that it was due to the fact that the public lands in Nebraska had been so far taken up that the sheep would not be able to obtain sufficient nourishment if they were driven through that state. We do not deny that it may have been plaintiff's intention not only to graze, but to fatten, his sheep while *en route* through Wyoming. Indeed, we may suspect it, but there is nothing in the agreed statement of facts to justify that inference. While the 15th finding states that for the purpose of shipping said sheep it was not necessary that they should be driven into the state of Wyoming, and that they might have been shipped on the railroad much farther west than Pine Bluffs station, that finding really resolves itself back to the proposition already stated, that the owner or his shepherd was at liberty to choose his own method of transportation, and as he took a direct route through the state, deviating neither to the right nor to the left, and traveled as rapidly as a due regard for the condition of his flock permitted, we think there could be no fair inference from these facts that the sheep were introduced into the state for the purpose of grazing.

There is another consideration worthy of attention, and that is that the right which the state of Wyoming had to tax this property might have been exercised in every state through which the sheep were driven. In this particular case it would appear that they were shipped at Pine Bluffs, but they might with equal propriety have been [10] driven through Nebraska and *Iowa before reaching their final destination. Indeed, § 3 of the act, which provides "it shall be the duty of the assessors in the several counties to levy and immediately collect taxes as provided for in this act, as soon as live stock is brought into their counties to graze," leaves it an open question whether these taxes may not have been assessed in every county through which these sheep were driven.

*The judgment of the Supreme Court of Wyoming is therefore reversed*, and the case remanded to that court for further proceedings not inconsistent with this opinion.

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PAUL O. WEBER, *Plff. in Err.*,
*v.*
CHARLES ROGAN.

(See S. C. Reporter's ed. 10-14.)

*Error to state court—Federal question—when raised in time.*

A Federal question is raised too late to confer jurisdiction on the Supreme Court of the United States to review the judgment of a state court, where it is first suggested upon application for a rehearing after the final decision of the highest state court.

[No. 107.]

*Submitted December 1, 1902. Decided January 19, 1903.*

IN ERROR to the Supreme Court of the State of Texas to review a decree which refused a writ of mandamus to compel the commissioner of the general land office of that state to award to the petitioner certain sections of the public school lands. *Dismissed.*

See same case below, 94 Tex. 62, 54 S. W. 1016, 55 S. W. 559, 57 S. W. 940.

Statement by Mr. Justice **Brown**:

This was an original petition filed in the supreme court of Texas by the plaintiff in error, Weber, against Charles Rogan, commissioner of the general land office of the state, praying for a writ of mandamus directing such commissioner to award to the petitioner two isolated and detached sections of the public school lands, situated respectively in Polk and Jefferson counties, in the state of Texas.

*The petitioner alleged in substance that [11] on August 11, 1899, being desirous of purchasing such lands, he applied to the commissioner for the same at the price fixed by law, $1 per acre, and otherwise fully complied with the terms of sale offered by law authorizing him to become the purchaser: that the commissioner refused and rejected his applications, for the reason that the two sections applied for had theretofore been classified,—the first as timber land, and the second as grazing land, to neither of which the law was applicable,—and could not be purchased under the law in force at the date of the application for $1 per acre,

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998, and *Re* Buchanan, 39 L. ed. U. S. 384.

though such grazing and timber lands were isolated and detached from other public lands, and were situated in counties organized prior to January 1, 1875, and that there was no law under which the petitioner could have lawfully awarded to him the two said sections at $1 per acre. Petitioner admitted that said two sections were classified by the commissioner,—one as timber land and the other as grazing land,—but averred that such classification was of no force or effect because the provisions of the law requiring lands belonging to the public school fund to be classified did not relate or apply to isolated and detached sections, or fractions of sections of such lands, situated in counties organized prior to January 1, 1875, but that the price of said lands was at that time fixed by law at $1 per acre, irrespective of any classification made of said lands either before or after the time they became isolated and detached. That by application to the commissioner and depositing with the treasurer of the state the amount due therefor, he became the purchaser of said two sections, and the commissioner was without authority to withhold from him said lands.

Upon this petition the case was submitted upon briefs and oral arguments to the supreme court, which awarded a mandamus (94 Tex. 62, 54 S. W. 1016), subsequently granted a rehearing (94 Tex. 67, 55 S. W. 559), and upon such rehearing filed an opinion refusing the writ (94 Tex. 67, 57 S. W. 940).

Whereupon petitioner applied for, and was granted a writ of error from this court, and assigned as error that the state had offered to sell all isolated and detached sections [12] and fractions of sections of public school lands situated in counties organized prior to January 1, 1875, at $1 per acre; that this offer by the state was accepted by the petitioner, and that such acceptance constituted a contract between the state and the purchaser, and that, by holding that the commissioner of the land office might decline to award the petitioner the lands applied for, the court gave a construction to the statute which impaired the obligation of such contract.

*Mr.* **F. Charles Hume** submitted the cause for plaintiff in error. *Mr. M. E. Kleberg* was with him on the brief:

In reviewing the judgment of a state court this court is not limited to a mere consideration of the language used in the opinion of the state court, but may examine and determine what is the real substance and effect of the decision; and should this court find that the effect of such decision is to give such force to subsequent legislation as to impair contracts made under former legislation, then a Federal question is presented, of which this court will take jurisdiction.

*McCullough* v. *Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 74, 44 L. ed. 679, 20 Sup. Ct. Rep. 545.

The Federal question in this case was properly and seasonably raised and presented in the trial court, and decided adversely to plaintiff in error.

*Mallett* v. *North Carolina*, 181 U. S. 591, 45 L. ed. 1017, 21 Sup. Ct. Rep. 730.

*Mr.* **C. K. Bell** submitted the cause for defendant in error:

No Federal question is involved, nor has there been, by the construction placed upon the statute by the supreme court of the state, any impairment of the obligation of a contract between Weber and the state.

*Caperton* v. *Bowyer*, 14 Wall. 216, 20 L. ed. 882; *Steines* v. *Franklin County*, 14 Wall. 15, 20 L. ed. 846; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 29, 31 L. ed. 612, 8 Sup. Ct. Rep. 741; *Dugger* v. *Boocock*, 104 U. S. 596, 26 L. ed. 846.

The only question raised or decided in the state court was as to the construction of a statute of the state.

*Phœnix Ins. Co.* v. *Treasurer*, 11 Wall. 204, *sub nom. Phœnix Ins. Co.* v. *Gardiner*, 20 L. ed. 112; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

The true interpretation of any statute passed by a state for a purpose specified, and the acts which will be justified under the statute, are matters which lie exclusively within the determination of the highest court of the state.

*Aicardi* v. *Alabama*, 19 Wall. 636, 22 L. ed. 215; *Congdon* v. *Goodman*, 2 Black, 574, 17 L. ed. 257; *Grand Gulf R. & Bkg. Co.* v. *Marshall*, 12 How. 166, 13 L. ed. 938; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

Where a party claims below wholly in virtue of the laws of the state, and the highest court of the state decides that under these laws the claimant has no case, no writ of error lies here.

*Worthy* v. *Moore County*, 9 Wall. 611, *sub nom. Worthy* v. *Barrett*, 19 L. ed. 565; *Mississippi & M. R. Co.* v. *McClure*, 10 Wall. 511, 19 L. ed. 997.

This court cannot entertain jurisdiction of a case from a state court because the judgment of that court impairs, or fails to give effect to, a contract.

*Knox* v. *Exchange Bank*, 12 Wall. 379, 20 L. ed. 414.

In order to come within the provisions of the Constitution of the United States, which declares that no state shall pass any law impairing the obligations of contracts, not only must the obligations of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only.

*Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

If there was a Federal question it was not

raised and presented by the complaining party, and no reference thereto was made until the motion for rehearing.

*Smith* v. *Hunter*, 7 How. 740, 12 L. ed. 895; *Grand Gulf R. & Bkg. Co.* v. *Marshall*, 12 How. 166, 13 L. ed. 938; *Hamilton Mfg. Co.* v. *Massachusetts*, 6 Wall. 632, 18 L. ed. 904; *Schuyler Nat. Bank* v. *Bollong*, 150 U. S. 85, 37 L. ed. 1008, 14 Sup. Ct. Rep. 24; *Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Eastern Bldg. & L. Asso.* v. *Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *Turner* v. *Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Meyer* v. *Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106.

The allowance of the writ of error upon the ground stated in the application therefor is not conclusive to show that a Federal question was raised in the case.

*Caperton* v. *Bowyer*, 14 Wall. 216, 20 L. ed. 882; *Powell* v. *Brunswick County*, 150 U. S. 439, 37 L. ed. 1136, 14 Sup. Ct. Rep. 166.

MR. Justice **Brown** delivered the opinion of the court:

At the time the petitioner made his applications to the commissioner of the land office for the purchase of these lands, the following law was in force (2 Batt's Rev. Stat. art. 4218*y*):

"The commissioner of the general land office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased if, in the judgment of the commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to the actual settlers only, under the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the 1st day of January, 1875, except El Paso, Presidio, and Pecos counties, which sections are isolated and detached from other public lands, *may be sold* to any purchaser, except to a corporation, without actual settlement, at $1 per acre, upon the same terms as other public lands are sold under the provisions of this chapter." Acts 1897, chap. 129.

The supreme court held that the determination of the case depended upon the question whether it was made by this law the imperative duty of the commissioner of the land office to sell all isolated and detached [13] sections and parts of sections *of the public free school lands to the first applicant without regard to their classification; and that that construction depended upon the question whether the words "may be sold to any purchaser" implied a discretion in the commissioner to refuse, or was to be understood as equivalent to "shall," which would imply a duty upon the part of the commissioner to sell to any purchaser at the price fixed, of $1 per acre. At first the court was of opinion that the word "may" was used in the sense of "shall;" that no discretion was vested in the commissioner; that the general provisions regulating the sale of public school lands did not apply to isolated and detached sections and fractions of sections; that they required no classification or appraisement; that the law of 1897 fixed their purchase price absolutely at $1 per acre; and that all that was necessary to acquire an inchoate title was to make application to the commissioner and tender the proportion of the purchase money, required by law to be paid in cash, together with the statutory obligations for the balance. Upon rehearing, the opinion of the court was changed, and the majority came to the conclusion that the word "may," as used in the statute, ought to be construed in its literal sense, and as merely conferring the power upon the commissioner to sell land at $1 per acre, but not making it obligatory upon him to do so. The mandamus was denied. Another rehearing was also denied.

There is hardly a semblance of a Federal question in this case. None such was noticed in the original petition or in either opinion of the court; and it was not until after an application was made for a rehearing that petitioner discovered that the act of the legislature of 1895, as amended by the act of 1897 (Rev. Stat. 4218*y*), above cited, constituted a contract on the part of the state to sell all isolated and detached sections and fractions of sections of public school lands to any purchaser who would offer $1 per acre therefor, which had been impaired by the supreme court of the state in holding that the commissioner of the land office might refuse to execute such contract by declining to award the lands applied for, and therefore violated its obligation.

*We agree with the supreme court of the [14] state that no contract was created by this statute. Hence, there was none to be impaired. We had occasion to hold in *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80, that we have no jurisdiction of a writ of error to a state court upon the ground that the obligation of a contract has been impaired, when the validity of the statute under which the contract is made is admitted, and the only question is as to the construction of the statute by that court; and in the same case, as well as in *Hanford* v. *Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051, we held that the constitutional inhibition applies only to the legislative enactments of the state, and not to judicial decisions or the acts of state tribunals or officers under statutes in force at the time of the making of the contract, the obligation of which is alleged to have been impaired.

In addition to this, however, the question was not made until after the final decision of the state court, and upon application for a rehearing. This was clearly too late. *Miller* v. *Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874.

*The writ of error is dismissed.*

ANNIE ANDREWS, *Plff. in Err.*,
*v.*
KATE H. ANDREWS.

(See S. C. Reporter's ed. 14-42.)

*Error to state court—Federal question—constitutional law—full faith and credit—foreign decree of divorce—bona fide domicil—appearance by nonresident defendant.*

1. The Supreme Court of the United States is not without jurisdiction of a writ of error to a state court because that court committed no error in deciding the Federal question involved.
2. The full faith and credit clause of the Federal Constitution is not violated by the refusal of the Massachusetts courts, acting in accordance with Mass. Pub. Stat. chap. 146, § 41, to give effect to a decree of divorce rendered by a court of another state in a suit instituted by one who temporarily left the state of Massachusetts, where he was domiciled, for the purpose of obtaining a divorce for a cause which occurred in that state while the parties resided there, but which was not a ground for divorce in that state.
3. The appearance of the nonresident defendant cannot invest a court with jurisdiction of a suit for divorce instituted by a person who has no bona fide domicil within the state.

[No. 23.]

*Argued February 28, 1902. Decided January 19, 1903.*

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review a decree overruling exceptions to a decree of a probate court which denied effect to a decree of divorce rendered in the state of South Dakota. *Affirmed.*

See same case below, 176 Mass. 92, 57 N. E. 333.

Statement by Mr. Justice **White:**

The plaintiff and the defendant in error, each claiming to be the lawful widow of Charles S. Andrews, petitioned to be appointed administratrix of his estate. The facts were found as follows.

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*As to full faith and credit to be given to state records and judicial proceedings*—see Lindley v. O'Reilly (N. J. Eq.) 1 L. R. A. 79, and note; Cummington v. Belchertown (Mass.) 4 L. R. A. 131, and note; Rand v. Hanson (Mass.) 12 L. R. A. 574, and note. And see notes to Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; and Mills v. Duryee, 3 L. ed. U. S. 411.

*On the conclusiveness of judgment of divorce under conflict of laws*—see notes to Thompson v. Thompson (Ala.) 11 L. R. A. 444; and Benton's Succession (La.) 59 L. R. A. 135.

*On the validity of a decree of divorce obtained on publication or service out of the state, where the defendant did not appear*—see Butler v. Washington (La.) 19 L. R. A. 814, and note.

*Charles S. and Kate H. Andrews married [16] in Boston in April, 1887, and they lived together at their matrimonial domicil in the state of Massachusetts. In April, 1890, the wife began a suit for separate maintenance, which was dismissed in December, 1890, because of a settlement between the parties, adjusting their property relations.

In the summer of 1891, Charles S. Andrews, to quote from the findings, "being then a citizen of Massachusetts and domiciled in Boston, went to South Dakota to obtain a divorce for a cause which occurred here while the parties resided here, and which would not authorize a divorce by the laws of this commonwealth; he remained personally in that state a period of time longer than is necessary by the laws of said state to gain a domicil there, and on November 19, 1891, filed a petition for divorce in the proper court of that state."

Concerning the conduct of Charles S. Andrews and his purpose to obtain a divorce in South Dakota, while retaining his domicil in Massachusetts, the facts were found as follows:

"The husband went to South Dakota, and took up his residence there to get this divorce, and that he intended to return to this state when the business was finished. He boarded at a hotel in Sioux Falls all the time, and had no other business there than the prosecution of this divorce suit. I find, however, that he voted there at a state election in the fall of 1891, claiming the right to do so as a bona fide resident under the laws of that state. His intention was to become a resident of that state for the purpose of getting his divorce, and to that end to do all that was needful to make him such a resident, and I find he became a resident if, as a matter of law, such finding is warranted in the facts above stated."

And further, that—

"The parties had never lived together as husband and wife in South Dakota, nor was it claimed that either one of them was ever in that state, except as above stated."

With reference to the divorce proceedings in South Dakota it was found as follows:

"The wife received notice, and appeared by counsel and filed an answer, denying that the libellant was then or ever had been a *bona fide resident of South Dakota, or [17] that she had deserted him, and setting up cruelty on his part toward her. This case was settled, so far as the parties were concerned, in accordance with the terms of the agreement of April 22, 1892, signed by the wife and consented to by the husband, and, for the purpose of carrying out her agreement 'to consent to the granting of divorce for desertion in South Dakota,' she requested her counsel there to withdraw her appearance in that suit, which they did, and thereafterwards, namely, on May 6, 1892, a decree granting the divorce was passed, and within a day or two afterwards the said Charles, having attained the object of his sojourn in that state, returned to this commonwealth, where he resided and was domiciled until his death, which occurred in October, 1897."

By the agreement of April 22, 1892, to which reference is made in the finding just quoted, it was stipulated that a payment of a sum of money should be made by Charles S. Andrews to his wife, and she authorized her attorney, on the receipt of the money to execute certain papers, and it was then provided as follows:

"Fourth. Upon the execution of such papers, M. F. Dickinson, Jr., is authorized in my name to consent to the granting of divorce for desertion, in the South Dakota court."

Respecting the claim of Annie Andrews to be the wife of Charles S. Andrews, it was found as follows:

"Upon his return to this state he soon met the petitioner, and on January 11, 1893, they were married in Boston, and ever after that lived as husband and wife in Boston, and were recognized as such by all until his death. The issue of this marriage are two children, still living."

It was additionally found that Annie Andrews married Charles S. Andrews in good faith, and in ignorance of any illegality in the South Dakota divorce, and that Kate H. Andrews, as far as she had the power to do so, had connived at and acquiesced in the South Dakota divorce, had preferred no claim thereafter to be the wife of Charles S. Andrews until his death, when in this case she asserted her right to administer his estate as his lawful widow.

[18] *From the evidence above stated the ultimate facts were found to be that Andrews had always retained his domicil in Massachusetts, had gone to Dakota for the purpose of obtaining a divorce, in fraud of the laws of Massachusetts, and with the intention of returning to that state when the divorce was procured, and hence that he had never acquired a bona fide domicil in South Dakota. Applying a statute of the state of Massachusetts forbidding the enforcement in that state of a divorce obtained under the circumstances stated, it was decided that the decree rendered in South Dakota was void in the state of Massachusetts, and hence that Kate H. Andrews was the widow of Charles S. Andrews and entitled to administer his estate. 176 Mass. 92, 57 N. E. 333.

*Mr.* **Elbridge R. Anderson** argued the cause, and, with *Mr. Charles W. Bartlett*, filed a brief for plaintiff in error:

An *ex parte* judgment of divorce is not conclusive beyond the state in which it is rendered, and every other state is at liberty to give it such effect as may seem proper as a matter of comity or public policy.

*Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565.

On the other hand, it is settled that where the applicant has resided in the state for the period required by the local laws, and the defendant is before the court, a judgment of divorce is conclusive everywhere.

*Cheever* v. *Wilson*, 9 Wall. 108, 19 L. ed. 664.

A man may move from one town to another for the avowed purpose of escaping taxation, but his change of residence depends, not upon his motive, but upon his intent. "The wish to change for that purpose does not tend to show any want of a real intention to change, but rather the contrary."

*Thayer* v. *Boston*, 124 Mass. 132, 26 Am. Rep. 650.

Methodist clergymen are required by the rules of their denomination to change from place to place every two or three years; but these rules do not prevent a clergyman from obtaining a residence and a right to vote in every place in which he resides.

*Holmes* v. *Greene*, 7 Gray, 299; *Carnoe* v. *Freetown*, 9 Gray, 357; *Sleeper* v. *Paige*, 15 Gray, 349.

The finding of the South Dakota court that the libellant was a resident of that state is conclusive in the absence of fraud.

*Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Re Ellis*, 55 Minn. 401, 23 L. R. A. 287, 56 N. W. 1056; *Kinnier* v. *Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Jones* v. *Jones*, 108 N. Y. 415, 15 N. E. 707; *Kirrigan* v. *Kirrigan*, 15 N. J. Eq. 147; *Fairchild* v. *Fairchild*, 53 N. J. Eq. 678, 34 Atl. 10; *Waldo* v. *Waldo*, 52 Mich. 94, 17 N. W. 710; Van Fleet, Collateral Attack, 1892, § 648.

The judgment of a court which has the power to enter judgment upon the facts alleged is binding upon the parties before it; and this proposition is true of divorce judgments as of other judgments.

*Prudam* v. *Phillips*, Hargrave's Law Tracts, 456, note; *Greene* v. *Greene*, 2 Gray, 361, 61 Am. Dec. 454; *Adams* v. *Adams*, 154 Mass. 290, 13 L. R. A. 275, 28 N. E. 260; *Edson* v. *Edson*, 108 Mass. 590, 11 Am. Rep. 393; *Waldo* v. *Waldo*, 52 Mich. 94, 17 N. W. 710; *Re Ellis*, 55 Minn. 401, 23 L. R. A. 287, 56 N. W. 1056.

A party who assents to a divorce judgment is bound by it.

*Nichols* v. *Nichols*, 25 N. J. Eq. 60; *Zoellner* v. *Zoellner*, 46 Mich. 511, 9 N. W. 831; *Richardson's Estate*, 132 Pa. 292, 19 Atl. 82; *Arthur* v. *Israel*, 15 Colo. 147, 10 L. R. A. 693, 25 Pac. 81; *Mohler* v. *Shank*, 93 Iowa, 273, 34 L. R. A. 161, 61 N. W. 981; *Marvin* v. *Foster*, 61 Minn. 154, 63 N. W. 484; *Stephens* v. *Stephens*, 51 Ind. 542; *Nicholson* v. *Nicholson*, 113 Ind. 131, 15 N. E. 223; *Davis* v. *Davis*, 61 Me. 395; *Miltimore* v. *Miltimore*, 40 Pa. 151; *Re Morrison*, 52 Hun, 102, 5 N. Y. Supp. 90, Affirmed in 117 N. Y. 638, 22 N. E. 1130; *Ellis* v. *White*, 61 Iowa, 644, 17 N. W. 28; *Elliott* v. *Wohlfrom*, 55 Cal. 384.

*Messrs.* **Frank Dewey Allen** and **Wayne MacVeagh** argued the cause, and, with *Mr. Frederic D. McKenney*, filed a brief for defendant in error:

It is plain that a court may have jurisdiction to try a divorce case without having power to grant a valid decree of divorce to the applicant, even though he may allege and prove a cause for divorce under the laws of the state where relief is sought; for ex-

ample, if the applicant be not in fact domiciled within the territorial jurisdiction of the court.

Bishop, Mar. Div. & Sep. § 51.

The tribunals of a country have no jurisdiction over any cause of divorce, wherever or whenever it arose, if neither of the parties has within its territory an actual bona fide domicil. Nor does it make any difference that both parties are temporarily there, submitting to the jurisdiction.

Bishop, Mar. & Div. 6th ed. § 144.

Though the words "domicil" and "residence" are not synonymous, a statute requiring a specified number of years' residence in a state to give the courts jurisdiction of an application for divorce is to be interpreted as requiring domicil.

Bishop, Mar. & Div. § 124.

Our divorce statutes giving jurisdiction commonly provide that the applicant shall have "resided" a given number of years in the state. The principles of international law and the general principles of our own requiring the residence for divorce to be *animo menendi*, such residence must at least partake of the character of permanency.

*Whitcomb* v. *Whitcomb*, 46 Iowa, 437; *Hanson* v. *Hanson*, 111 Mass. 158; Cooley, Const. Lim. p. 401; *Hanover* v. *Turner*, 14 Mass. 227, 7 Am. Dec. 203; *Greenlaw* v. *Greenlaw*, 12 N. H. 200; *Kimball* v. *Kimball*, 13 N. H. 225; *Batchelder* v. *Batchelder*, 14 N. H. 380; *Payson* v. *Payson*, 34 N. H. 518; *Hopkins* v. *Hopkins*, 35 N. H. 474; *Neff* v. *Beauchamp*, 74 Iowa, 92, 36 N. W. 905.

Residence in good faith includes the attributes of domicil.

*Carpenter* v. *Carpenter*, 30 Kan. 712, 46 Am. Rep. 108, 2 Pac. 122.

It presupposes the intention of remaining in the place permanently.

*Smith* v. *Smith*, 7 N. D. 412, 75 N. W. 783.

In divorce proceedings, consent cannot vitalize an otherwise void decree.

*Harrison* v. *Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Maguire* v. *Maguire*, 7 Dana, 181; *People* v. *Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Van Fossen* v. *State*, 37 Ohio St. 317, 41 Am. Rep. 507; *Whitcomb* v. *Whitcomb*, 46 Iowa, 437; *Litowich* v. *Litowich*, 19 Kan. 451; *Chase* v. *Chase*, 6 Gray, 157; *Sewall* v. *Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Leith* v. *Leith*, 39 N. H. 20; *Platt's Appeal*, 80 Pa. 501; *Hare* v. *Hare*, 10 Tex. 355; *Jackson* v. *Jackson*, 1 Johns. 424; Bishop, Marr. & Div. 6th ed. §§ 229b, 230; *Maynard* v. *Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723. See also *Chase* v. *Chase*, 6 Gray, 157.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

It was suggested at bar that this court was without jurisdiction. But it is unquestionable that rights under the Constitution of the United States were expressly and in due time asserted, and that the effect of the judgment was to deny these rights. Indeed, when the argument is analyzed, we think it is apparent that it but asserts that, as the court below committed *no error in deciding [29] the Federal controversy, therefore there is no Federal question for review. But the power to decide whether the Federal issue was rightly disposed of involves the exercise of jurisdiction. *Penn Mut. L. Ins. Co.* v. *Austin* (1897) 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223. As the Federal question was not unsubstantial and frivolous, we pass to a consideration of the merits of the case.

The statute of the state of Massachusetts in virtue of which the court refused to give effect to the judgment of divorce, is as follows:

"Sec. 35. A divorce decreed in another state or country according to the laws thereof, by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this commonwealth; but if an inhabitant of this commonwealth goes into another state or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth." 2 Mass. Comp. Laws 1902, chap. 152, p. 1357; Pub. Stat. chap. 146, § 41.

It is clear that this statute, as a general rule, directs the courts of Massachusetts to give effect to decrees of divorce rendered in another state or country by a court having jurisdiction. It is equally clear that the statute prohibits an inhabitant of Massachusetts from going into another state to obtain a divorce, for a cause which occurred in Massachusetts while the parties were domiciled there, or for a cause which would not have authorized a divorce by the law of Massachusetts; and that the statute forbids the courts of Massachusetts from giving effect to a judgment of divorce obtained in violation of these prohibitions. That the statute establishes a rule of public policy is undeniable. Did the court fail to give effect to Federal rights when it applied the provisions of the statute to this case, and, therefore, refused to enforce the South Dakota decree? In other words, the question for decision is, Does the statute conflict with the Constitution of the United States? In coming to the solution of this question it is essential, we repeat, to bear always in mind that the prohibitions of the *statute [30] are directed solely to citizens of Massachusetts domiciled therein, and that it only forbids the enforcement in Massachusetts of a divorce obtained in another state by a citizen of Massachusetts who, in fraud of the laws of the state of Massachusetts, while retaining his domicil, goes into another state for the purpose of there procuring a decree of divorce.

We shall test the constitutionality of the statute, first, by a consideration of the nature of the contract of marriage, and the authority which government possesses over the subject; and, secondly, by the application of the principles thus to be developed to the case in hand.

1. That marriage, viewed solely as a civil relation, possesses elements of contract is obvious. But it is also elementary that marriage, even considering it as only a civil contract, is so interwoven with the very fabric of society that it cannot be entered into except as authorized by law, and that it may not, when once entered into, be dissolved by the mere consent of the parties. It would be superfluous to cite the many authorities establishing these truisms, and we, therefore, are content to excerpt a statement of the doctrine on the subject contained in the opinion of this court delivered by Mr. Justice Field, in *Maynard* v. *Hill* (1888) 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723:

"Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of the people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effect upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution." p. 205, L. ed. p. 657, Sup. Ct. Rep. p. 726.

. . . . . .

"It is also to be observed that, while marriage is often termed by text writers and in decisions of courts as a civil contract,—generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization,—it is something more than a mere contract. The consent of the [31] parties is, of course, essential *to its existence; but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." 125 U. S. 210, 31 L. ed. 658, 8 Sup. Ct. Rep. 728.

It follows that the statute in question was but the exercise of an essential attribute of government, to dispute the possession of which would be to deny the authority of the state of Massachusetts to legislate over a subject inherently domestic in its nature and upon which the existence of civilized society depends. True, it is asserted that the result just above indicated will not necessarily flow from the conclusion that the statute is repugnant to the Constitution of the United States. The decision that the Constitution compels the state of Massachusetts to give effect to the decree of divorce rendered in South Dakota cannot, it is insisted in the nature of things, be an abridgment of the authority of the state of Massachusetts over a subject within its legislative power, since such ruling would only direct the enforcement of a decree rendered in another state, and therefore without the territory of Massachusetts. In reason it cannot, it is argued, be held to the contrary without disregarding the distinction between acts which are done within, and those which are performed without, the territory of a particular state. But this disregards the fact that the prohibitions of the statute, so far as necessary to be considered for the purposes of this case, are directed, not against the enforcement of divorces obtained in other states as to persons domiciled in such states, but against the execution in Massachusetts of decrees of divorce obtained in other states by persons who are domiciled in Massachusetts, and who go into such other states with the purpose of practising a fraud upon the laws of the state of their domicil; that is, to procure a divorce without obtaining a bona fide domicil in such other state. This being the scope of the statute, it is *evident, as we shall hereafter [32] have occasion to show, that the argument, while apparently conceding the power of the state to regulate the dissolution of marriage among its own citizens, yet, in substance, necessarily denies the possession of such power by the state. But, it is further argued, as the Constitution of the United Sates is the paramount law, and as, by that instrument the state of Massachusetts is compelled to give effect to the decree, it follows that the Constitution of the United States must prevail, whatever may be the result of enforcing it.

Before coming to consider the clause of the Constitution of the United States upon which the proposition is rested, let us more precisely weigh the consequences which must come from upholding the contention, not only as it may abridge the authority of the state of Massachusetts, but as it may concern the powers of government existing under the Constitution, whether state or Federal.

It cannot be doubted that if a state may not forbid the enforcement within its borders of a decree of divorce procured by its own citizens, who, while retaining their domicil in the prohibiting state, have gone into another state to procure a divorce in fraud of the laws of the domicil, that the existence of all efficacious power on the subject of divorce will be at an end. This must follow if it be conceded that one who is domiciled in a state may, whenever he chooses, go into another state, and, without acquiring a bona fide domicil therein, obtain a divorce, and then compel the state of the domicil to give full effect to the divorce thus fraudulently procured. Of course, the destruction of all substantial legislative power over the subject of the dissolution of the marriage tie which would result would be equally applicable to every state in the Union. Now, as it is certain that the Constitution of the United States confers no power whatever upon the government of the

United States to regulate marriage in the states, or its dissolution, the result would be that the Constitution of the United States has not only deprived the states of power on the subject, but while doing so has delegated no authority in the premises to the government of the United States. It would thus come to pass that the governments, state and Federal, are bereft by the [33] *operation of the Constitution of the United States of a power which must belong to, and somewhere reside in, every civilized government. This would be but to declare that, in a necessary aspect, government had been destroyed by the adoption of the Constitution. And such result would be reached by holding that a power of local government vested in the states when the Constitution was adopted had been lost to the states, though not delegated to the Federal government, because each state was endowed, as a consequence of the adoption of the Constitution, with the means of destroying the authority, with respect to the dissolution of the marriage tie, as to every other state, while having no right to save its own power in the premises from annihilation.

But let us consider the particular clause of the Constitution of the United States which is relied upon, in order to ascertain whether such an abnormal and disastrous result can possibly arise from its correct application.

The provision of the Constitution of the United States in question is § 1 of art. 4, providing that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." The argument is that, even although the Massachusetts statute but announces a rule of public policy, in a matter purely local, nevertheless it violates this clause of the Constitution. The decree of the court of another state, it is insisted, and not the relation of the parties to the state of Massachusetts and their subjection to its lawful authority, is what the Constitution of the United States considers in requiring the state of Massachusetts to give due faith and credit to the judicial proceedings of the courts of other states. This proposition, however, must rest on the assumption that the Constitution has destroyed those rights of local self-government which it was its purpose to preserve. It, moreover, presupposes that the determination of what powers are reserved and what delegated by the Constitution is to be ascertained by a blind adherence to mere form, in disregard of the substance of things. But the settled rule is directly to the contrary. Reasoning from analogy, the unsoundness of the proposition is demon- [34] strated. Thus, in enforcing *the clause of the Constitution forbidding a state from impairing the obligations of a contract, it is settled by the decisions of this court: Although a state, for adequate consideration, may have executed a contract sanctioning the carrying on of a lottery for a stated term, no contract protected from impairment under the Constitution results, because, disregarding the mere form and looking at substance, a state may not, by the application of the contract clause of the Constitution, be shorn of an ever inherent authority to preserve the public morals by suppressing lotteries. *Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199. In other words, the doctrine is that, although a particular provision of the Constitution may seemingly be applicable, its controlling effect is limited by the essential nature of the powers of government reserved to the states when the Constitution was adopted. In view of the rule thus applied to the contract clause of the Constitution, we could not maintain the claim now made as to the effect of the due faith and credit clause, without saying that the states must, in the nature of things, always possess the power to legislate for the preservation of the morals of society, but that they need not have the continued authority to save society from destruction.

Resort to reasoning by analogy, however, is not required, since the principle which has been applied to the contract clause has been likewise enforced as to the due faith and credit clause.

In *Thompson* v. *Whitman* (1874) 18 Wall. 457, 21 L. ed. 897, the action in the court below was trespass for the conversion of a sloop, her tackle, furniture, etc., upon a seizure for an alleged violation of a statute of the state of New Jersey. By special plea in bar, the defendant set up that the seizure was made within the limits of a named county, in the state of New Jersey, and by answer to this plea the plaintiff took issue as to the place of seizure, thus challenging the jurisdiction of the justices who had tried the information and decreed the forfeiture and sale of the property. The precise point involved in the case, as presented in this court, was whether or not error had been committed by the trial court in receiving evidence to contradict the record of the New Jersey judgment as to jurisdictional facts asserted *therein, and espe- [35] cially as to facts stated to have been passed upon by the court which had rendered the judgment. It was contended that to permit the jurisdictional facts, which were foreclosed by the judgment, to be re-examined, would be a violation of the due faith and credit clause of the Constitution. This court, however, decided to the contrary, saying:

"We think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the 4th article of the Constitution, and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

The ground upon which this conclusion was predicated is thus embodied in an excerpt made from the opinion delivered by Mr. Chief Justice Marshall, speaking for

the court, in *Rose v. Himely*, 4 Cranch, 269, 2 L. ed. 617, where it was said:

"Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."

And the same principle, in a different aspect, was applied in *Wisconsin* v. *Pelican Ins. Co.* (1888) 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370. In that case the state of Wisconsin had obtained a money judgment in its own courts against the Pelican Insurance Company, a Louisiana corporation. Availing itself of the original jurisdiction of this court, the state of Wisconsin brought in this court an action of debt upon the judgment in question. The answer of the defendant was to the effect [36] that the judgment *was not entitled to extraterritorial enforcement, because the claim upon which it was based was a penalty imposed upon the corporation for an alleged violation of the insurance laws of the state of Wisconsin. The answer having been demurred to, it was, of course, conceded that the claim which was merged in the judgment was such a penalty. This court, having concluded that ordinarily a penalty imposed by the laws of one state could have no extraterritorial operation, came then to consider whether, under the due faith and credit clause of the Constitution of the United States, a judgment rendered upon a penal statute was entitled to recognition outside of the state in which it had been rendered, because the character of the cause of action had been merged in the judgment as such. In declining to enforce the Wisconsin judgment, and in deciding that, notwithstanding the judgment and the due faith and credit clause of the Constitution, the power existed to look back of the judgment and ascertain whether the claim which had entered into it was one susceptible of being enforced in another state, the court, speaking through Mr. Justice Gray, said (p. 291, L. ed. p. 243, Sup. Ct. Rep. p. 1375):

"The application of the rule to the courts of the several states and of the United States is not affected by the provisions of the Constitution and of the act of Congress, by which the judgments of the courts of any state are to have such faith and credit given to them in every court within the United States as they have by law or usage in the state in which they were rendered. Const. art. 4, § 1; act May 26, 1790, 1 Stat. at L. 122, chap. 11; Rev. Stat. § 905, U. S. Comp. Stat. 1901, p. 677.

"Those provisions establish a rule of evidence, rather than of jurisdiction. While they make the record of a judgment, rendered after due notice in one state, conclusive evidence in the courts of another state or of the United States, of the matter adjudged, they do not affect the jurisdiction either of the court in which the judgment is rendered or of the court in which it is offered in evidence. Judgments recovered in one state of the Union, when proved in the courts of another government, whether state or national, within the United States, differ from judgments recovered in a foreign country in no *other respect than in not being [37] re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties. *Hanley* v. *Donoghue*, 116 U. S. 1, 4, 29 L. ed. 535, 536, 6 Sup. Ct. Rep. 242.

"In the words of Mr. Justice Story, cited and approved by Mr. Justice Bradley speaking for this court, 'the Constitution did not mean to confer any new power upon the states, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other states domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other states. And they enjoy not the right of priority or lien which they have in the state where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments.' Story, Confl. L. § 609; *Thompson* v. *Whitman*, 18 Wall. 457, 462, 463, 21 L. ed. 897, 899.

"A judgment recovered in one state, as was said by Mr. Justice Wayne, delivering an earlier judgment of this court, 'does not carry with it into another state the efficacy of a judgment upon property or persons, to be enforced by execution. To give it the force of a judgment in another state it must be made a judgment there, and can only be executed in the latter as its laws may permit.' *M'Elmoyle* v. *Cohen*, 13 Pet. 312, 325, 10 L. ed. 177, 183.

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it, and the technical rules which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

2. When the principles which we have

above demonstrated by reason and authority are applied to the question in hand, its solution is free from difficulty. As the [38] state of Massachusetts *had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicil by temporarily sojourning in another state, and there, without acquiring a bona fide domicil, procuring a decree of divorce, it follows that the South Dakota decree relied upon was rendered by a court without jurisdiction, and hence the due faith and credit clause of the Constitution of the United States did not require the enforcement of such decree in the state of Massachusetts, against the public policy of that state as expressed in its statutes. Indeed, this application of the general principle is not open to dispute, since it has been directly sustained by decisions of this court. *Bell* v. *Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; *Streitwolf* v. *Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553. In each of these cases it was sought in one state to enforce a decree of divorce rendered in another state, and the authority of the due faith and credit clause of the Constitution was invoked for that purpose. It having been established in each case that at the time the divorce proceedings were commenced, the plaintiff in the proceedings had no bona fide domicil within the state where the decree of divorce was rendered, it was held, applying the principle announced in *Thompson* v. *Whitman*, 18 Wall. 457, 21 L. ed. 897, that the question of jurisdiction was open for consideration, and that, as, in any event, domicil was essential to confer jurisdiction, the due faith and credit clause did not require recognition of such decree outside of the state in which it had been rendered. A like rule, by inverse reasoning, was also applied in the case of *Atherton* v. *Atherton*, 181 U. S. 155, 45 L. ed. 794, 21 Sup. Ct. Rep. 544. There, a decree of divorce was rendered in Kentucky in favor of a husband who had commenced proceedings in Kentucky against his wife, then a resident of the state of New York. The courts of the latter state having, in substance, refused to give effect to the Kentucky divorce, the question whether such refusal constituted a violation of the due faith and credit clause of the Constitution was brought to this court for decision. It having been established that Kentucky was the domicil of the husband and had ever been the matrimonial domicil, and, therefore, that the courts of Kentucky had jurisdiction over the subject-matter, it [39] was *held that the due faith and credit clause of the Constitution of the United States imposed upon the courts of New York the duty of giving effect to the decree of divorce which had been rendered in Kentucky.

But it is said that the decrees of divorce which were under consideration in *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf* were rendered in *ex parte* proceedings, the defendants having been summoned by substituted service, and making no appearance; hence, the case now under consideration is taken out of the rule announced in those cases, since here the defendant appeared, and consequently became subject to the jurisdiction of the court by which the decree of divorce was rendered. But this disregards the fact that the rulings in the cases referred to were predicated upon the proposition that jurisdiction over the subject-matter depended upon domicil, and without such domicil there was no authority to decree a divorce. This becomes apparent when it is considered that the cases referred to were directly rested upon the authority of *Thompson* v. *Whitman*, 18 Wall. 457, 21 L. ed. 897, where the jurisdiction was assailed, not because there was no power in the court to operate, by *ex parte* proceedings, on the *res*, if jurisdiction existed, but solely because the *res* was not, at the time of its seizure, within the territorial sway of the court, and hence was not a subject-matter over which the court could exercise jurisdiction by *ex parte* or other proceedings. And this view is emphasized by a consideration of the ruling in *Wisconsin* v. *Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370, where the judgment was one *inter partes*, and yet it was held that, in so far as the extraterritorial effect of the judgment was concerned, the jurisdiction over the subject-matter of the state and its courts was open to inquiry, and if jurisdiction did not exist, the enforcement of the judgment was not compelled by reason of the due faith and credit clause of the Constitution.

Indeed, the argument by which it is sought to take this case out of the rule laid down in the cases just referred to, and which was applied to decrees of divorce in the *Bell* and *Streitwolf Cases*, practically invokes the overruling of those cases, and, in effect, also, the overthrow of the decision in the *Atherton Case*, since, in reason, it but insists that the rule announced in *those cases [40] should not be applied merely because of a distinction without a difference.

This is demonstrated as to *Thompson* v. *Whitman* and *Wisconsin* v. *Pelican Ins. Co.* by the considerations already adverted to. It becomes clear, also, that such is the result of the argument as to *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf*, when it is considered that in both those cases it was conceded, *arguendo*, that the power to decree the divorce in *ex parte* proceedings by substituted service would have obtained if there had been bona fide domicil. The rulings made in the case referred to, hence, rested not at all upon the fact that the proceedings were *ex parte*, but on the premise that, there being no domicil, there could be no jurisdiction. True it is that in *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf* the question was reserved whether jurisdiction to render a divorce having extraterritorial effect could be acquired by a mere domicil in the state of the party plaintiff, where there had been no matrimonial domicil in such

state,—a question also reserved here. But the fact that this question was reserved does not affect the issue now involved, since those cases proceeded, as does this, upon the hypothesis conceded, *arguendo*, that if there had been domicil there would have been jurisdiction, whether the proceedings were *ex parte* or not, and therefore the ruling on both cases was that, at least, domicil was in any event the inherent element upon which the jurisdiction must rest, whether the proceedings were *ex parte* or *inter partes*. And these conclusions are rendered certain when the decision in *Atherton* v. *Atherton* is taken into view, for there, although the proceeding was *ex parte*, as it was found that bona fide domicil, both personal and matrimonial, existed in Kentucky, jurisdiction over the subject-matter was held to obtain, and the duty to enforce the decree of divorce was consequently declared. Nor is there force in the suggestion that because, in the case before us, the wife appeared, hence the South Dakota court had jurisdiction to decree the divorce. The contention stated must rest on the premise that the authority of the court depended on the appearance of the parties, and not on its jurisdiction over the subject-matter —that is, bona [41] fide domicil, irrespective of the *appearance of the parties. Here again the argument, if sustained, would involve the overruling of *Bell* v. *Bell* and *Streitwolf* v. *Streitwolf*. As, in each of the cases, jurisdiction was conferred, as far as it could be given, by the appearance of the plaintiff who brought the suit, it follows that the decision that there was no jurisdiction because of the want of bona fide domicil was a ruling that, in its absence, there could be no jurisdiction over the subject-matter, irrespective of the appearance of the party by whom the suit was brought. But it is obvious that the inadequacy of the appearance or consent of one person to confer jurisdiction over a subject-matter not resting on consent includes, necessarily, the want of power of both parties to endow the court with jurisdiction over a subject-matter, which appearance or consent could not give. Indeed, the argument but ignores the nature of the marriage contract and the legislative control over its dissolution which was pointed out at the outset. The principle dominating the subject is that the marriage relation is so interwoven with public policy that the consent of the parties is impotent to dissolve it contrary to the law of the domicil. The proposition relied upon, if maintained, would involve this contradiction in terms: That marriage may not be dissolved by the consent of the parties, but that they can, by their consent, accomplish the dissolution of the marriage tie by appearing in a court foreign to their domicil and wholly wanting in jurisdiction, and may subsequently compel the courts of the domicil to give effect to such judgment despite the prohibitions of the law of the domicil and the rule of public policy by which it is enforced.

Although it is not essential to the question before us, which calls upon us only to determine whether the decree of divorce rendered in South Dakota was entitled to extraterritorial effect, we observe, in passing, that the statute of South Dakota made domicil, and not mere residence, the basis of divorce proceedings in that state. As, without reference to the statute of South Dakota and in any event, domicil in that state was essential to give jurisdiction to the courts of such state to render a decree of divorce which would have extraterritorial effect, and as the appearance of one or both of the parties to a divorce proceeding *could not suffice to confer jurisdiction over [42] the subject-matter, where it was wanting because of the absence of domicil within the state, we conclude that no violation of the due faith and credit clause of the Constitution of the United States arose from the action of the supreme judicial court of Massachusetts in obeying the command of the state statute, and refusing to give effect to the decree of divorce in question.

*Affirmed.*

Mr. Justice **Brewer**, Mr. Justice **Shiras**, and Mr. Justice **Peckham** dissent.

Mr Justice **Holmes**, not being a member of the court when the case was argued, takes no part.

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GEORGE H. EARLE, Jr., Receiver of the Chestnut Street National Bank, *Plff. in Err.*,

*v.*

SUSAN CARSON.

(See S. C. Reporter's ed. 42-55.)

*National banks—liability of shareholders—transfer of stock—bona fides—reduction of reserve—knowledge of insolvency—financial condition of purchaser.*

1. The presumption of liability for an assessment on shares of stock in an insolvent national bank, arising from the presence of a person's name on the stock register, is rebutted by evidence that a bona fide sale of the stock had been made, and that the vendor had performed every duty which the law imposed in order to secure the transfer on the registry of the bank.
2. A transfer of stock of a national bank, made with knowledge of the fact that the reserve of the bank is below the limit fixed by U. S. Rev. Stat. § 5191 (U. S. Comp. Stat. 1901, p. 3486), does not create a presumption of bad faith which will avoid the transaction as a fraud on the bank's creditors in the event of the future suspension of the bank, since

NOTE.—*On enforcement of statutory liability of stockholders in national banks*—see note to Williamson v. American Bank, 52 C. C. A. 6.

*As to who are liable as shareholders in national banks*—see notes to Earle v. Carson, 16 C. C. A. 503; and Beal v. Essex Sav. Bank, 15 C. C. A. 130.

*On the effect of transfer of stock upon stockholder's liability*—see notes to Rochester & K. F. Land Co. v. Raymond (N. Y.) 47 L. R. A. 256; and United States v. Stanford, 40 L. ed. U. S. 751.

the statute creates no presumption of inability to continue business as a consequence of a reduction of the reserve below the legal requirement.

3. A bona fide sale of stock of a national bank, made in the exercise of the power given to stockholders by U. S. Rev. Stat. § 5139 (U. S. Comp. Stat. 1901, p. 3461), to transfer their stock "like other personal property," was not void as a fraud on the bank's creditors because the bank was insolvent at the time of the transfer in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale.

4. The insolvency of the purchaser of shares of stock of a national bank which subsequently suspends business does not render the sale void as in fraud of the bank's creditors, where the insolvency of the purchaser is unknown to the seller.

[No. 83.]

*Argued November 11, 1902. Decided January 19, 1903.*

IN ERROR to the Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the trial court in favor of defendant in a suit to enforce the liability of a shareholder in a national bank. *Affirmed.*

See same case below, 46 C. C. A. 498, 107 Fed. 639.

Statement by Mr. Justice **White:**

When the Chestnut Street National Bank [43] of Philadelphia *suspended payment and its doors were closed, there stood on the stock register ten shares in the name of the defendant in error. A call having been made by the Comptroller for the sum of the double liability, this suit was commenced to recover the amount. The defense was: First, that prior to the suspension of the bank the defendant had, in good faith, sold the stock standing in her name for a full market price, which had been paid her; second, that, in consummation of such sale, she had, by her agent, delivered to the proper officer of the bank in its banking house, at the place where transfers were made, the stock certificate, with an adequate power of attorney to make the transfer, and requested that the stock be transferred; third, that the officer of the bank said that the transfer would be made as requested, and the defendant was ignorant of the fact that the officer had failed to discharge his duty; fourth, that, as the defendant had done everything which the law required her to do to secure the transfer, she had ceased to be a stockholder, and was not responsible.

In submitting the case to the jury the court instructed: First, that the presence of the name of the defendant on the stock register created a presumption of liability. This, however, the jury was informed, was not conclusive, but might be rebutted. Such rebuttal, the court charged, would result if it was proved that the defendant had made a bona fide sale of her stock, and had, at the proper time and place, handed to the proper officer of the bank a power to transfer the same, although the officer of the bank had neglected to fulfil his duty in the premises. Second, after charging fully and accurately as to the proof essential to show a bona fide sale of stock in a national bank, the court having, during the trial, applied a like rule in passing on the admissibility of evidence, instructed the jury if the evidence established that a sale of such character had been made while the bank was a going concern, the defendant would not be liable, because, unknown to her, the bank was, at the time of the sale, in fact insolvent. And the same principle was applied to the unknown insolvency of the person to whom the stock was sold. There was verdict and judgment for the defendant, which was affirmed by the circuit court of *appeals; [44] thereupon this writ of error was prosecuted.

*Messrs.* **Charles Biddle** and **Asa W. Waters** argued the cause and filed a brief for plaintiff in error:

The liability imposed by the national banking act constitutes a contract between the creditors of the bank and the persons who are its stockholders when the debt is contracted.

*Irons* v. *Manufacturers' Nat. Bank*, 21 Fed. 197; 2 Morawetz, Priv. Corp. § 870; *Hobart* v. *Johnson*, 19 Blatchf. 359, 8 Fed. 495; *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

The liability of the stockholder attaches when the bank becomes insolvent.

*Stuart* v. *Hayden*, 169 U. S. 8, 42 L. ed. 642, 18 Sup. Ct. Rep. 274.

Persons are presumed to extend credit to national banks in reliance upon the amount of their issued capital stock, although they do not know accurately by whom such stock is at the time held.

*Langtry* v. *Wallace*, 38 C. C. A. 510, 97 Fed. 867.

If a person has accepted a certificate of stock, and becomes, to all external appearance, a stockholder, persons may have become creditors of the company on the faith of his membership, and in law are presumed to do so.

*Upton* v. *Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800.

Where an assignment has been made to an insolvent person after the bank has become insolvent, the stockholder by such assignment does not escape his liability.

*Stuart* v. *Hayden*, 169 U. S. 9, 42 L. ed. 642, 18 Sup. Ct. Rep. 274; *McClaren* v. *Francisous*, 43 Mo. 452.

Insolvency instantly changes the relationship between stockholders and creditors.

*McDonald* v. *Williams*, 174 U. S. 397, 43 L. ed. 1022, 19 Sup. Ct. Rep. 743.

Stockholders should be held as partners to the amount of their stock when insolvency is established.

*Schalucky* v. *Field*, 124 Ill. 617, 16 N. E. 904.

After a corporation has become insolvent, it is the duty of the company to wind up its business, call in the outstanding capital, and

satisfy creditors. The shares have ceased to be the subject-matter of legitimate traffic. They are a burden to the owner, and a transfer would be merely a subterfuge to avoid liability.

1 Morawetz, Priv. Corp. § 166.

Ignorance should never free a stockholder from his contract.

*Sawyer* v. *Hoag*, 17 Wall. 610, 21 L. ed. 731.

After the liability has once attached in favor of a creditor, a stockholder cannot discharge it by a subsequent transfer of his stock.

*Brown* v. *Hitchcock*, 36 Ohio St. 667; *Wheeler* v. *Faurot*, 37 Ohio St. 26; *Mason* v. *Alexander*, 44 Ohio St. 318, 7 N. E. 435; *Harpold* v. *Stobart*, 46 Ohio St. 397, 21 N. E. 637; *Boice* v. *Hodge*, 51 Ohio St. 236, 37 N. E. 265; *Herrick* v. *Wardwell*, 58 Ohio St. 294, 50 N. E. 903; *Wick Nat. Bank* v. *Union Nat. Bank*, 62 Ohio St. 446, 57 N. E. 320; *Rider* v. *Fritchey*, 49 Ohio St. 295, 15 L. R. A. 513, 30 N. E. 692; *Peter* v. *Union Mfg. Co.* 56 Ohio St. 181, 46 N. E. 894; *Hager* v. *Cleveland*, 36 Md. 476; *Moss* v. *Oakley*, 2 Hill, 265; *Judson* v. *Rossie Galena Co.* 9 Paige, 598, 38 Am. Dec. 569; *McCullough* v. *Moss*, 5 Denio, 567; *Jackson* v. *Meek*, 87 Tenn. 69, 9 S. W. 225; *Voight* v. *Dregge*, 97 Mich. 322, 56 N. W. 557; *Cutting Packing Co.* v. *Packers' Exchange*, 86 Cal. 574, 10 L. R. A. 369, 25 Pac. 52; *Billings* v. *Robinson*, 28 Hun. 140.

*Mr.* **Richard C. Dale** argued the cause and filed a brief for defendant in error:

Where a transfer of stock is made and delivered to officers of a bank, and such officials fail to make entry of it, the Federal statutes will operate a transfer on the books, and extinguish the liability of the transferrers as stockholders.

*Whitney* v. *Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61; *Earle* v. *Coyle*, 95 Fed. 99; *Matteson* v. *Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; *Snyder* v. *Foster*, 19 C. C. A. 406, 41 U. S. App. 95, 73 Fed. 136; *Hayes* v. *Shoemaker*, 39 Fed. 319; *Young* v. *McKay*, 50 Fed. 394.

The general knowledge which every intelligent shareholder has that the law imposes upon national bank stockholders a double liability does not render a sale of the shares fraudulent as to creditors, when that knowledge operates upon the mind of the stockholder in good faith to sell his shares, having no knowledge or suspicion that the bank of which he is a shareholder is embarrassed or likely to become insolvent.

*Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448; *Bowden* v. *Johnson*, 107 U. S. 251, *sub nom. Adams* v. *Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; *Johnston* v. *Laflin*, 103 U. S. 800, 26 L. ed. 532.

Liability under the national banking act is a liability, not to the creditors, but for the indebtedness.

*Kennedy* v. *Gibson*, 8 Wall. 498, 19 L. ed. 476; *McDonald* v. *Thompson*, 184 U. S. 71, 46 L. ed. 437, 22 Sup. Ct. Rep. 297; *Studebaker* v. *Perry*, 184 U. S. 258, 46 L. ed. 528, 22 Sup. Ct. Rep. 463.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

In the argument at bar all but three of the grounds of error specified in the circuit court of appeals and assigned on the allowance of this writ were expressly waived. In stating the case we have, therefore, called attention only to the facts and proceedings essential to an elucidation of the three questions now pressed, and hence, disregarding the grounds of error which are obsolete, we come to consider the real issues.

1. Treating the facts as foreclosed by the verdict, the circuit court of appeals held that the trial court rightly instructed that the presumption of liability begotten by the presence of the name on the stock register would be rebutted if the jury found the fact to be that a bona fide sale of the stock had been made, and that the defendant had performed every duty which the law imposed on her in order to secure a transfer on the registry of the bank. The correctness of this ruling is not open to controversy. *Matteson* v. *Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; *Whitney* v. *Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 47. But, it is urged, the court erroneously assumed the bona fides of the sale to have been concluded by the verdict, since the trial court mistakenly refused to instruct the jury that the sale of the stock, though in every other respect lawful, could not be so treated by the jury if, as a matter of fact, it was found that at the time of the sale, to the knowledge of the defendant, the reserve of the bank was below the limit fixed by law. Rev. Stat. 5191, U. S. Comp. Stat. 1901, p. 3486. To sustain this contention it is argued that, by operation of law, when the reserve of a national bank falls below the maximum provided in the statute, every transfer of stock made by a person *having knowledge of the fact creates [45] a legal presumption of bad faith, and, therefore, in the event of the future suspension of the bank, avoids the transaction. But the statute creates no presumption of inability to continue business as a consequence of the reduction of the reserve below the legal requirement. On the contrary, the statute expressly contemplates the continuance of business by a bank, although its reserve may have fallen below the standard, since it merely forbids the making by a bank of certain enumerated transactions during the period when the reserve is impaired. Whether the provisions just referred to are mandatory or directory, we are not called upon to determine, but certainly, in either event, they clearly refute the construction of the statute which would be necessary in order to sustain the proposition. True, the law confers authority on the Comptroller, in his discretion, to require a bank, whose reserve has fallen below the legal limit, to restore the reserve within thirty days, and moreover gives power to

the Comptroller, with the approval of the Secretary of the Treasury, to appoint a receiver when a bank fails to comply, after the thirty days, with the demand made. These provisions, however, but add cogency to the view that it cannot be implied that the mere reduction of the reserve below the legal limit, as a matter of law, suspends the business of the bank, or, what would be tantamount thereto, affects with a legal presumption of bad faith all transactions made with or concerning the bank during the period while the reserve is impaired.

2. The proposition which arises under this head is that it was erroneously ruled that the insolvency of the bank when the sale of stock was made was irrelevant unless the fact of insolvency was known to the seller, and the sale was made to avoid impending liability,—that is, in contemplation of insolvency. It is undisputed that at the date when the stock was sold the doors of the bank were open, and it had not failed in business. Hence, the proposition is this: Although a national bank has not suspended payment, all sales of its stock, whatever may be the good faith with which they are made, are void if it develops that at the date of the sale the assets of the [46]bank, if they had *been then realized on, would have been insufficient to pay its debts. The proposition is supported by what is assumed to be the essential nature of the double liability of a stockholder in a national bank and the time when such liability, by operation of law, becomes irrevocably fixed. Passing for a moment an analysis of the premises upon which the argument proceeds, let us determine the result to which it necessarily leads. Proceeding to do so, it becomes clear that the effect of maintaining the argument would be to virtually prevent the exercise of the power to transfer stock "like other personal property," which the statute gives in express terms. Rev. Stat. 5139, U. S. Comp. Stat. 1901, p. 3461. That such would be the result if the validity of every sale of stock depended, not upon the good faith of the seller, but upon the condition of the bank as subsequently developed is, we think, obvious. Certainly, it cannot in reason be said that the power would exist to sell stock like any other personal property if, before the power could be exercised, the seller must examine the affairs of the bank, marshal its assets and liabilities in order to form an accurate judgment as to the precise condition of the bank. But it has long since been pointed out (*First Nat. Bank* v. *Lanier*, 11 Wall. 377, 20 L. ed. 174), that—

"The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of stock a safe mode of investment, and easily convertible, tends to enhance their value. It is not less the interest of the shareholder than the public, that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

"It is in obedience to this requirement that stock certificates of all kinds have been construed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form nor character negotiable paper, they approximate to it as nearly as practicable."

*And in the same case (p. 376, L. ed. p. [47] 374), attention was called to the fact that the purpose of Congress in making the certificates transferable had been clearly manifested by the repeal, in adopting the national banking act of 1864 [13 Stat. at L. 99, chap. 106], of § 36 of the act of 1863 [12 Stat. at L. 665, 675, chap. 58], which subjected any transfer of stock in a national bank to debts due to the bank by the seller of the stock. To maintain the proposition, then, would compel us to give an interpretation to the statute which would destroy one of its essential features, under the guise of giving effect to another provision of the same statute; in other words, to destroy the law under the pretext of enforcing it. But the controlling principle is that, when reasonably possible, a statute should be so interpreted as to harmonize all its requirements by giving effect to the whole.

Moreover, when other parts of the statute are brought into view the *reductio ad absurdum* to which the proposition leads is additionally shown. Thus, it is provided (Rev. Stat. § 5242, U. S. Comp. Stat. 1901, p. 3517), that—

"All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association, or all deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another except in payment of its circulating notes, shall be utterly null and void, . . ."

This, by a negative affirmative, establishes the validity of all contracts, otherwise lawful, made by the bank concerning its assets before its failure, albeit at the time such contracts were made the bank was insolvent, unless the contracts come within the restrictions which the section imposes, —that is, those entered into after the commission of an act of insolvency or in contemplation thereof, or made with a view to prevent the application of the assets of the bank in the manner prescribed by law, or with the purpose of giving a preference to

[48]one creditor over another. If the *proposition were sustained it would thus come to pass that the power of stockholders to freely transfer their stock like any other personal property would be burdened with a restriction arising from the unknown insolvency of the bank, while such limitation would not apply to any other contract concerning the property or affairs of the bank. This would be to hold that the statute had conferred the lesser freedom of contract where it was its avowed purpose to give the greater. It would, besides, require us to say that a limitation resulting from unknown insolvency was made effective upon a stockholder in transferring his stock, when such restriction was not made operative on the bank and its officers when they entered into contracts. But this would cause the unknown insolvency to restrict the power of the person less likely to be aware of its existence, and to cause it not to be controlling where knowledge was most apt to obtain. Taking into view the whole act,—the provision conferring the power to transfer stock; the one already referred to, which avoids contracts made in contemplation of insolvency; the authority conferred upon the Comptroller to constantly test the condition of a national bank; the right given him to suspend the business of such bank when the exigencies of its situation require it; and the double liability imposed on the registered stockholders,—we think it results that the power to transfer stock, like other personal property, is not limited by the mere fact that at the time of the transfer the bank, which was a going concern, was insolvent in the sense that its assets, if liquidated, would not discharge its liabilities, unless it be shown that the seller was aware of the fact, and had sold his stock to avoid the double liability which was impending.

Let us come, however, to consider the matter in the light of authority. It is clear that the assertion that the power to transfer the stock was limited by the unknown insolvency of the bank rests, not upon any express provision of the statute, but is deduced from mere implications which it is deemed must be drawn from the statute as a whole. But the settled rule hitherto enunciated by this court, in accord with the rule obtaining in the English courts is, that, where an express power is given to transfer stock, such power may not [49]be rendered *nugatory by implication. This general principle, however, is, by the decisions of this court, subjected to a limitation which does not prevail in England; that is, that the exercise of the power to transfer stock in a national bank is controlled by the rules of good faith applicable to other contracts. The qualification just stated gives no support to the proposition that where a sale of stock in a national bank is made in good faith, nevertheless the consequences of the sale are avoided if subsequently it develops that the bank was insolvent at the time of the transfer, in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale. Without undertaking to refer to the numerous cases in which the subject has been variously considered since the adoption of the national banking act in 1863, we advert to some of the leading authorities.

In *Germania Nat. Bank* v. *Case*, 99 U. S. 629, 25 L. ed. 449, the proof concerning the insolvency of the bank was thus stated in the opinion of the court:

"The Crescent City National Bank of New Orleans was organized under the national banking law in 1871. On the 13th of February, 1873, its London correspondents failed, and the bank lost heavily by the failure,—nearly the entire amount of its capital. This loss was almost immediately known in the community where the institution was located, and necessarily affected its credit. On the 4th of March, 1873, payment of checks drawn upon it by its depositors was suspended, and on the 17th of the same month its circulating notes went to protest."

As a result of the failure of the bank, its doors were closed and suit was brought by the receiver to recover from the Germania the sum of its double liability on 103 shares of stock which had previously stood in the name of the Germania on the stock register of the Crescent bank. The stock in question had been acquired and registered in the name of the Germania on the 10th day of March, 1873, and the Germania had, on the same day, caused it to be transferred on the register from its own name to that of Waldo, one of its clerks. The court, in enforcing the liability, said:

*"While it is true that shareholders of [50] the stock of a corporation generally have a right to transfer their shares, and thus disconnect themselves from the corporation and from any responsibility on account of it, it is equally true that there are some limits to this right. A transfer for the mere purpose of avoiding his liability to the company or its creditors is fraudulent and void, and he remains still liable. The English cases, it is admitted, give effect to such transfers, if they are made (as it is called) 'out and out;' that is, completely, so as to divest the transferrer of all interest in the stock. But even in them, it is held that if the transfer is merely colorable, or, as sometimes coarsely denominated, a sham,—if, in fact, the transferee is a mere tool or nominee of the transferrer, so that, as between themselves there has been no real transfer, 'but, in the event of the company becoming prosperous, the transferrer would become interested in the profits,—the transfer will be held for naught, and the transferrer will be put upon the list of contributories.' *Williams's Case*, L. R. 9 Eq. 225, note, where the transfer was, as in the present case, made to a clerk of the transferrer without consideration; *Payne's Case*, L. R. 9 Eq. 223; *Ex parte Kintrea*, L. R. 5 Ch. 95. See also Lindley, Partn. 2d ed. p. 1352; *Chinnock's Case*, Johns. V. C. (Eng.) 714; *Hyam's*

*Case*, 1 De G. F. & J. 75; *Budd's Case*, 3 De G. F. & J. 297. The American doctrine is even more stringent. Mr. Thompson states it thus, and he is supported by the adjudicated cases: 'A transfer of shares in a failing corporation, made by the transferrer with the purpose of escaping his liability as a shareholder, to a person who, from any cause, is incapable of responding in respect to such liability, is void as to the creditors of the company and as to other shareholders, although, as between the transferrer and the transferee, it was out and out.' "

It was decided, however, that it was not necessary to apply the more stringent American rule, since it was found that the transfer under consideration was not real, but was fraudulent and collusive. As, from the undisputed facts stated by the court in its opinion, the bank became insolvent, in the sense that its assets were unequal to [51]pay its debts, in February, 1873, *nearly a month before the alleged sale was made, it follows that everything said in the opinion of the court, as to the fraudulent and collusive nature of the transfer, was wholly unnecessary if mere insolvency avoided the sale and affixed the liability. But it clearly appears from the reasoning of the court that the investigation of the question of fraud and collusion was essential because it was deemed that insolvency alone did not avoid the transfer. The ruling, therefore, was directly adverse to the construction of the law now relied upon.

*Bowden* v. *Johnson*, 107 U. S. 251, *sub nom. Adams* v. *Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246, also involved whether a stockholder in a national bank was liable despite a transfer made by him of his stock. It was asserted that he was,—first, because he had made the sale with knowledge of the approaching failure of the bank, and to avoid the double liability which was impending; and, second, because the sale had been collusively made to a person who was known by the seller to be insolvent and unable to respond to the double liability. The undoubted fact was, although the bank had not suspended, that at the time of the transfer it was insolvent in the sense that its assets were not equal to the discharge of its liabilities. In considering whether the stockholder was liable, the court said:

"As such shareholder, he became subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a bona fide transfer of the stock."

Having thus held that there could be no liability if the sale of stock had been made in good faith, and hence excluding the power to avoid the transfer merely because of the insolvency of the bank at the time when the sale was made, the court proceeded to examine the question of good faith, and to renunciate the principle which had been previously stated in *Germania Nat. Bank* v. *Case*, 99 U. S. 629, 25 L. ed. 449. The court said (p. 261, L. ed. p. 389, Sup. Ct. Rep. p. 254):

"But where the transferrer, possessed of information showing that there is good ground to apprehend the failure of the bank, colludes and combines, as in this case, with an irresponsible *transferee, with the [52]design of substituting the latter in his place and of thus leaving no one with any ability to respond for the individual liability imposed by the statute, in respect of the shares of stock transferred, the transaction will be decreed to be a fraud on the creditors, and he will be held to the same liability to the creditors as before the transfer."

Answering the contention that, even admitting the sale to have been made with knowledge of impending failure, to avoid the liability to arise therefrom, it could not be avoided because the sale was intended between the parties to be real, or, to use the expression referred to in *Germania Nat. Bank* v. *Case*, was an out and out sale, the court, in declining to follow the English cases, and in adhering to the broader doctrine adverted to in *Germania Nat. Bank* v. *Case*, said: "But it was held by this court in *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448, that a transfer on the books of the bank is not, in all cases, enough to extinguish liability. The court in that case defined, as one limit of the right to transfer, that the transfer must be out and out, or one really transferring the ownership as between the parties to it. But there is nothing in the statute excluding, as another limit, that the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability and defeating the rights given by the statute to creditors."

In *Whitney* v. *Butler*, 118 U. S. 655, 30 L. ed. 266, 7 Sup. Ct. Rep. 61, the facts were these: A stockholder in the Pacific National Bank of Boston sold his stock on the 8th of November, 1881. Ten days thereafter, on November the 18th, the bank suspended payment and closed its doors. Beyond doubt the bank was insolvent on the 8th of November when the stock was sold, since the Comptroller certified, on the 16th of December, 1881, that the result of his investigation disclosed that "the entire capital stock," amounting to $961,300, had been lost. See statement of facts, *Delano* v. *Butler*, 118 U. S. 638, 30 L. ed. 261, 7 Sup. Ct. Rep. 39, which statement was also a part of the record in *Whitney* v. *Butler*. The defense of the stockholder, against whom the double liability was sought to be enforced, was that, having sold his stock and performed every duty required of him to secure a transfer, he was no longer liable, although his name remained upon the register. The court, *after expressly stat-[53]ing (p. 658, L. ed. p. 267, Sup. Ct. Rep. p. 62) the good faith of the defendant, because he had no reason whatever "to believe that the bank was insolvent, or was about to become so," and treating the sale as valid for that reason, proceeded to hold that the

stockholder was not liable, because he had done everything in his power to secure the transfer, and hence his name remained on the register by the neglect of the officers of the bank. It requires no comment to demonstrate that that case was wrongly decided if the contention now made is sustainable.

In *Stuart* v. *Hayden*, 169 U. S. 2, 42 L. ed. 639, 18 Sup. Ct. Rep. 274, the facts were these: Stuart was an owner of shares in the Capital National Bank of Lincoln, Nebraska. He was a director of the bank and a member of its finance committee. On the 22d day of December, 1892, in consequence of contracts made by Stuart with Gruetter & Joers, Stuart delivered to them his certificates of stock, with the power to transfer, and a few days afterwards the stock was transferred. On the 6th of February, 1893, the bank failed. That the bank was insolvent at the date of the sale appears on the face of the opinion, for the court said:

"The bank closed its doors within less than three weeks after the stock was transferred on its books to Gruetter & Joers, its total assets being about $900,000, and total liabilities $1,463,013.17. Its bills receivable on hand were $519,600, of which $58,576.82 were good, $141,393.27 were doubtful, and $319,611.90 were worthless. Its bills receivable not on hand amounted to $141,000, of which only $10,000 were worth anything."

The question presented for decision was whether Stuart continued liable, despite the transfer made to Gruetter & Joers. The court elaborately stated the facts, directed attention to the finding by the court below that at the time of the sale the bank was absolutely insolvent, and proceeded to enforce the liability against Stuart solely because, being a director of the bank and a member of its finance committee, he had knowledge of the insolvency, and therefore the sale was in bad faith. Manifestly, this case also reiterates the doctrine announced in the previous cases, and excludes the conception that the mere fact of unknown insolvency avoids the transfer, since every word of the careful statement in the opin-
[54] ion on the facts showing knowledge *would have been wholly unnecessary if the doctrine now asserted were well founded.

From what has previously been said, and the cases just referred to, it is demonstrated that the contention now made is not supported by the statute, and is foreclosed by the decisions of this court. But it is suggested the rule announced in the previous cases is shown to have been a mistaken one by an observation in the opinion in *Stuart* v. *Hayden*, 169 U. S. 2, 42 L. ed. 639, 18 Sup. Ct. Rep. 274. The passage referred to (p. 9, L. ed. p. 642, Sup. Ct. Rep. p. 276) is as follows:

"Whether—the bank being in fact insolvent—the transferrer is liable to be treated as a shareholder, in respect of its existing contracts, debts, and engagements, if he believed in good faith, at the time of transfer, that the bank was solvent, is a question which, in the view we take of the present case, need not be discussed, although he may be so treated, even when acting in good faith, if the transfer is to one who is financially irresponsible."

But this remark does not purport to pass upon the question which it suggests, but simply reserves it. The argument, however, is that the opinion would not have reserved a question which had been conclusively foreclosed. The suggestion is based on a misconception of the sentences relied on. Obviously, the observations in *Stuart* v. *Hayden* cannot, in reason, be construed as throwing doubt upon the doctrine announced in the opinion in which the expressions relied on are contained. This would, however, be the case if the significance now attributed to the language were sound. The error of the argument arises from the fact that it affixes to the word "insolvency," as found in the sentences quoted, the erroneous import hitherto pointed out; that is, an inadequacy of the assets of a bank to pay its liabilities, instead of giving to it its true meaning, that of failure and consequent suspension of business.

3. The proposition under this head is that, as the person to whom the stock was sold in the case before us was in fact insolvent, and hence unable to respond to the double liability, the sale was void, although the fact of such insolvency of the buyer was unknown to the seller. But this, in its last analysis, merely again reiterates the proposition which we have previously disposed of, *since it but insists that the va- [55]
lidity of the sale of the stock is to be tested, not by the good faith of the seller, but upon the unknown financial condition of the buyer. The rule on this subject was clearly stated in the passage which has already been excerpted from *Bowden* v. *Johnson*, 107 U. S. 251, *sub nom. Adams* v. *Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246, where, in declining to follow the English rule upholding a real, or out and out, sale, even if the purpose was to avoid impending liability, the court said that "the transfer must not be to a person known to be irresponsible, and collusively made, with the intent of escaping liability and defeating the rights given by the statute to creditors,"—a principle which has been since expressly reiterated in *Matteson* v. *Dent*, 176 U. S. 521, 531, 44 L. ed. 571, 576, 20 Sup. Ct. Rep. 419. Here, again, support for the proposition is sought to be derived from the concluding sentence in the passage from the opinion in *Stuart* v. *Hayden*. But in any event the observation relied upon was not essential for the decision of the case of *Stuart* v. *Hayden*, and moreover its meaning is clearly shown by the context of the opinion, in which the difference between the American and English rule is pointed out. When this is borne in mind it will be seen that the expression in *Stuart* v. *Hayden* referred to but stated that difference, and, being taken in connection with other clauses of the opinion in that case, must be understood as implying that a real, or out

and out, transfer would not be adequate to relieve the seller from his liability as a stockholder if the sale was made by him to escape his impending liability, and to a person whom he knew, or had reason to know, was financially irresponsible. As the views hitherto expressed are conclusive of the meaning of the act of Congress, we deem it unnecessary to refer to the many cases from state courts of last resort construing state statutes referred to in the argument.

*Affirmed.*

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[56]*WILLIAM E. HALE, as Receiver, etc., *Petitioner.*

*v.*

EDWARD P. ALLINSON *et al.*

(See S. C. Reporter's ed. 56-81.)

*Courts—jurisdiction—suit by receiver in foreign jurisdiction—equity—multiplicity of suits—ancillary remedy—suit to enforce stockholder's liability.*

1. A receiver appointed by a court of equity in the exercise of its general jurisdiction cannot, by virtue of his appointment and the direction to sue contained therein, maintain a suit in equity in a foreign jurisdiction to enforce the statutory liability of stockholders in an insolvent corporation,—especially where the courts of the state where the receiver was appointed have held that such an action cannot be maintained by him in the courts of that state.
2. Equity is without jurisdiction, on the ground of the prevention of a multiplicity of suits, of a suit to enforce the statutory liability of the stockholders of a foreign corporation, in which the amount demanded is the full amount of the par value of the shares held by each defendant.
3. A suit to enforce the statutory liability of stockholders in a foreign corporation cannot be maintained in a court of equity on the theory that it is an ancillary or auxiliary proceeding brought in aid of and to enforce an equitable decree of a court of the state where the corporation resides in a suit to enforce the liability of its stockholders, where the nonresident stockholders were merely nominal parties in that suit, and no judgment was rendered against them because of a want of jurisdiction over them.

[No. 77.]

*Argued November 6, 7, 1902. Decided January 19, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Pennsylvania sustaining a demurrer to a bill to enforce

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NOTE.—*On the rights of receiver as to property outside of the jurisdiction in which he is appointed*—see note to Gilman v. Hudson River Boot & Shoe Mfg. Co. (Wis.) 23 L. R. A. 52.

*On the right to enforce stockholder's liability outside of the state of incorporation*—see note to Cushing v. Perot (Pa.) 34 L. R. A. 737.

*On the jurisdiction of equity where the remedy at law exists*—see notes to Meldrum v. Meldrum (Colo.) 11 L. R. A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. (N. J. Eq.) 6 L. R. A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

*Right of receiver to enforce liability of corporate stockholder outside of the state of his appointment.*

While the foreign appointment of a receiver of a corporation does not create an absolute right to sue in another state, the privilege of maintaining such suit is quite generally extended to him on principles of comity, where this will not defeat the remedies of resident creditors. See note to Gilman v. Hudson River Boot & Shoe Mfg. Co. (Wis.) 23 L. R. A. 52, on the rights of receiver as to property outside of the jurisdiction in which he is appointed.

This principle has been applied to cases where the foreign receiver of a corporation attempts to enforce the liability of a stockholder outside of the state of his appointment. And it has been held that an action to collect the amount found due and payable may be maintained by him in a Federal court sitting in another state, where it will not violate the policy of the state or interfere with the interests of domestic creditors. Burr v. Smith, 113 Fed. 858.

And that the enforcement by a foreign receiver of the payment of subscriptions to the capital stock of the corporation, where there are no resident creditors or other persons interested in the distribution of its assets, does not injuriously affect the interests of the citizens of the state in which the suit is brought, or violate its policy or laws, and that the suit may therefore be maintained on principles of comity. Castleman v. Templeman, 87 Md. 546, 41 L. R. A. 367, 40 Atl. 275.

"When an action by a foreign receiver to collect assets, under the authority of the court which appointed him, works no detriment to any citizen of this state, and is not repugnant to its policy, it would be a provincial and narrow view," says Vann, J., in Howarth v. Angle, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489, "for our courts to refuse to extend the usual state comity. There is a close business connection between the citizens of the different states of the Union. Investments are freely made in other states by the citizens of this state, who need the aid of the courts of the jurisdiction where the investments are made. The comity which we expect to have extended to citizens of our state we cannot, in justice, refuse to citizens of other states. State lines should not prevent justice from being done. Our courts should not close their doors to a receiver from another state, who comes here armed with the title to a just claim against a citizen of this state, and offers to establish by common-law evidence the liability of that citizen. While we should keep control of the subject, so as to see that no discrimination is practised against our citizens, or injustice done them either as to the substance of the liability or the method of procedure, when the same result is attained in practically the same way as, under similar circumstances, would be attained in the case of a domestic corporation, there is no reason for withholding that aid which is now afforded by the courts of almost all enlightened countries." Here the amount of the stockholder's liability had been definitely ascertained, and was only his proportion of the ascertained deficiency of assets, and it did not appear that there was any other stockholder or any creditor of the corporation in New York, or that injury would be done to

the liability of stockholders of a foreign corporation. *Affirmed.*

See same case below, 45 C. C. A. 270, 106 Fed. 258.

Statement by Mr. Justice **Peckham:**

This case comes here by virtue of a writ of certiorari directed to the circuit court of appeals for the third circuit. It is a suit in equity brought by a foreign receiver, in [57] the United States *circuit court for the eastern district of Pennsylvania, to enforce the liability of stockholders, residing in Pennsylvania, of the Northwestern Guaranty Loan Company, a corporation of Minnesota.

Demurrers were filed, setting up, among other grounds, that the receiver appointed under proceedings in Minnesota had no right to sue in any court of a foreign jurisdiction; also that, even if the receiver had the right to sue, there was an adequate remedy at law for whatever rights might exist in the receiver or any other person, and that no ground of equitable jurisdiction was stated. The circuit court sustained the demurrer on the ground that the remedy, if any the complainant had, was at law. 102 Fed. 790. The judgment was affirmed by the circuit court of appeals for the third circuit. 45 C. C. A. 270, 106 Fed. 258.

The facts are these: In May, 1893, the loan company was adjudged insolvent in proceedings instituted, under the Minnesota statute, in the district court of Hennepin county, which court had jurisdiction, and the Minneapolis Trust Company was appointed a receiver of the corporate assets, and took possession thereof, and proceeded to the discharge of its duties. In November, 1893, one Arthur R. Rogers, who was the assignee of a judgment creditor of the corporation, whose execution against it had been returned wholly unsatisfied, filed a bill in equity in the Minnesota state court, in behalf of himself and all other creditors of the loan company, against that company and all its stockholders, for the purpose of enforcing the stockholders' liability to the creditors, provided for by the statutes of Minnesota. Out of about five hundred stockholders, some twenty-three only resided in the state of Minnesota and were served with process.

The creditors of the loan company, as required by the court, came in and proved their debts against the company, but none of the nonresident stockholders had been served with process in the action, and not one of them appeared therein. It was adjudged that the defendants who were named as resident stockholders of the loan company, and over whom the court had acquired jurisdiction by the service of process upon them, *were liable, to the extent of the [58]

any citizen of the state, or any established policy of the state interfered with.

So, in Pugh v. Hurtt, 52 How. Pr. 22, it was held that a receiver appointed in another state may be allowed by comity to bring suit against a resident to enforce his liability as stockholder in an insolvent corporation.

And a receiver of a foreign corporation was allowed to recover on a bill in chancery against an executrix of a deceased stockholder, in the case of Mann v. Cooke, 20 Conn. 178. In this case the shares had been surrendered by the subscriber to the company after its insolvency, and, besides this, he had paid 50 per cent of his subscription, which by his agreement was all that the company required of him.

But a receiver of a corporation appointed in another state will not be allowed by the exercise of comity to sue to enforce the liability of stockholders, when it would be in contravention of the rights of the citizens of the state and operate to their injury. Wyman v. Eaton, 107 Iowa, 214, 43 L. R. A. 695, 75 N. W. 865. Here the obligation sought to be enforced was a subscription to the capital stock of an insurance company which was to be formed in two separate states and thereafter consolidated. The consolidation was never effected, but each company, having changed its name, continued to do business in the state of its incorporation. The court said: "There is not, in view of the entire record in this case, an equitable consideration favorable to a recovery against these defendants. The present liabilities of the Nebraska corporation cannot truthfully be said to have accrued in consequence of, or with reliance upon, the former connection of these defendants with the enterprise from which sprang the present company. These facts are important as aiding in the solution of a legal proposition, urged by appellees, to the effect that this action cannot be maintained in Iowa, because it is brought by a receiver of a Nebraska corporation to enforce a provision of the law of that state; the claim being that such a proceeding can only be had as a result of comity between the states, and that the basis of such an exercise is that the citizens of the state granting it shall not be thereby prejudiced or injured. Admitting, for the sake of argument, the rule that comity controls as to the authority of plaintiff to sue in this state, and, as we have in effect said, the record leaves us without doubt that its exercise should be denied, because it would be in contravention of the rights of our citizens, and operate to their injury."

It would seem that the principles of comity should not require a state to extend greater consideration to a foreign receiver than he is accorded at home, and that, therefore, unless a similar action might be maintained by him in the state of his appointment, he has no standing in a foreign jurisdiction. And in a number of cases where his right to maintain such a suit has been sustained (Cuykendall v. Miles, 10 Fed. 342; Sheafe v. Larimer, 79 Fed. 921; Howarth v. Ellwanger, 86 Fed. 54; Howarth v. Lombard, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; Howarth v. Angle, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489, Affirming 39 App. Div. 151, 57 N. Y. Supp. 187; Wigton v. Kenney, 51 App. Div. 215, 64 N. Y. Supp. 924), the court has been careful to refer to his power in the state of his appointment.

Thus, in Howarth v. Ellwanger, 86 Fed. 54, *supra*, the court says that a receiver of a corporation is the only person who, under the laws of the state of his appointment, can enforce, under the direction of the court, the individual liability of the stockholders.

And in Howarth v. Lombard, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888, *supra*, the receiver was said to have, under the laws of the state of his appointment, the legal title to the fund as trustee for creditors, and to be the only person who could legally demand and collect the money.

And in Howarth v. Angle, 162 N. Y. 179,

par value of their stock, for the debts of the company. The decree also found a list of the creditors who had intervened, and the amounts due to each of them from the loan company.

In addition to giving judgments against the resident stockholders of the loan company in favor of its ascertained creditors, the court also decreed as follows:

"Tenth. That for the purpose of enforcing and collecting said judgments and all thereof and any and all liability thereon or in anywise incident thereto, and any and all liability upon the part of nonresident stockholders of said Northwestern Guaranty Loan Company, against whom no personal judgment for the ascertained liability is herein rendered, and disbursing the amounts so collected as hereinafter provided, W. E. Hale, Esq., has been by the order of this court appointed receiver, and has given bond in the sum of $25,000 and qualified as such receiver. That by the terms of said order of appointment said receiver was and hereby is authorized, empowered, and directed to take any and all appropriate or necessary steps or proceedings for the purpose of collecting the judgments herein rendered, and was and hereby is authorized, empowered, and directed to take any and all necessary or appropriate steps or proceedings against the nonresident stockholders of said defendant Northwestern Guaranty Loan Company against whom no personal judgment herein has been ordered, for the enforcement and realization upon their aforesaid stockholders' liability, and to that end said receiver be and hereby is authorized, empowered, and directed to institute and prosecute all such actions or proceedings in foreign jurisdictions as may be necessary or appropriate to this end."

The decree also provided that jurisdiction of the cause should be retained until the adjustment of the several rights and liabilities of the respective parties.

Thereupon the receiver thus appointed commenced this suit in equity to recover from the resident stockholders in Pennsylvania the full amount of the par value of the shares of stock held by them. Rogers, the assignee of the judgment creditor in the Minnesota action, was joined as complainant in this *suit with the receiver, and a de- [59] murrer having been interposed on the ground, among others, of this joinder, the circuit court, upon the trial and upon the application of complainant, granted leave to dismiss the assignee as a party, and the case proceeded thereafter in the name of the receiver alone.

*Mr.* **M. H. Boutelle** argued the cause, and, with *Messrs. William E. Hale, Charles C. Lister,* and *A. L. Pincoffs,* filed a brief for petitioner:

The statutory stock-liability imposed by the laws of corporate domicil is contractual in character, and enforceable in any court where jurisdiction of the parties may be obtained.

*Hawthorne* v. *Calef,* 2 Wall. 10, 17 L. ed. 776; *Carrol* v. *Green,* 92 U. S. 509, 23 L. ed. 738; *Flash* v. *Conn,* 109 U. S. 371, 27 L.

47 L. R. A. 725, 56 N. E. 489, *supra,* the court was careful to point out that the receiver, by the law of the state where he was appointed, had title to the right of action against stockholders to enforce their liability.

So, in Sheafe v. Larimer, 79 Fed. 921, *supra,* a decision of the state of the receiver's appointment was referred to as showing that the statutory liability imposed by the statutes of that state on corporate stockholders could be enforced by the receiver.

Likewise, in Cuykendall v. Miles, 10 Fed. 342, *supra,* it appeared that the receiver could maintain such an action in the state of his appointment.

In Burr v. Smith, 118 Fed. 858, *supra,* it appeared that the statutes of the state of the receiver's appointment provided that stockholders' liabilities should be enforced by a receiver in his own name, both within and without the state.

And in Wigton v. Kenney, 51 App. Div. 215. 64 N. Y. Supp. 924, *supra,* which sustained an order overruling a demurrer to the receiver's complaint, such complaint contained an allegation that the receiver was authorized to maintain and bring the action.

And because a Kansas receiver of the assets of a corporation was without power to maintain a suit to enforce the statutory liability of a stockholder in that state, by reason of his failure to take the steps which the statutes of that state make a prerequisite to such enforcement, the court in Evans v. Nellis, 187 U. S. 271, *ante,* 173, 23 Sup. Ct. Rep. 74, held that he could maintain no such action in a Federal court sitting in another state. "It is manifest," says Mr. Justice White, in delivering the opinion of the court, "that the receiver had no authority to bring this suit, even in the courts of the state of Kansas, and he clearly, therefore, had no power to prosecute such action in the courts of another jurisdiction."

The decision in HALE v. ALLINSON likewise rests upon the facts that the appointment of the receiver was not authorized by any statute, but was merely in the exercise of the general powers of a court of equity, and that he had no title to the fund, and could not maintain such an action in the courts of the state where he was appointed. And the diverse conclusions reached by the lower Federal courts as to the right of such a receiver to maintain an action to enforce a stockholder's liability outside the state of his appointment seem to have proceeded from different views with respect to the nature of such appointment.

Thus, in Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747, it was held, Reversing 89 Fed. 283, that the appointment of a receiver by a Minnesota court in a proceeding by creditors to wind up the affairs of a domestic corporation and enforce the liability of stockholders for its debts, being contemplated by the Minnesota statutes and in the general course of equity or legal procedure in that state, such a receiver might, on principles of comity, be permitted to maintain an action at law to enforce such liability in the courts of another jurisdiction. This ruling was followed in Hale v. Tyler, 104 Fed. 757.

But in Hilliker v. Hale, 54 C. C. A. 252, 117 Fed. 220, it was held, Reversing 109 Fed. 273, that such a receiver, not being appointed, under the authority of any statute, but simply under the general equity powers of the court, with instructions to proceed against nonresi-

ed. 966, 3 Sup. Ct. Rep. 263; *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Pinney* v. *Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52.

Where such liability contemplates the creation of a fund, the purposes in this regard may be best accomplished through the medium of a receiver.

2 Morawetz, Priv. Corp. § 902.

In some jurisdictions the administration of this quasi-asset is conferred upon the general receiver of the corporation, but, by the clear weight of authority, unless power in this respect be conferred by special enactment, the general receiver has no interest in the right in question.

*Ochiltree* v. *Iowa Railroad Contracting Co.* 21 Wall. 249, 22 L. ed. 546; 2 Cook, Stock & Stockholders, § 218; 2 Morawetz, Priv. Corp. § 849; Gluck & B. Receivers, 2d ed. 266; *Hancock Nat. Bank* v. *Ellis*, 172 Mass. 47, 42 L. R. A. 396, 51 N. E. 207.

The laws of Minnesota provide in such cases for the appointment of a special receiver as representative of creditors in respect to this special liability.

*Hale* v. *Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Childs* v. *Cleaves*, 95 Me. 498, 50 Atl. 714; *Hanson* v. *Davison*, 73 Minn. 454, 76 N. W. 254.

The basis of decision in *Booth* v. *Clark*, 17 How. 322, 15 L. ed. 164, predicated, as was that case, of a denial of all comity between the states, has been so far removed by the now thoroughly established doctrines of comity sustained by nearly every state in the Union, as to deprive the conclusions there announced of the force otherwise attributable thereto.

The modern rule sustained by the great weight of authority, and applicable, in this regard, indiscriminately to statutory as well as receivers of courts of equity, is that a receiver will be permitted to sue and defend, as foreign receiver, in all courts of other states than that in which he is appointed, on the principles of comity, except where the rights of citizens of the state of the forum are prejudiced thereby, or where it would be in contravention of the policy of such state.

Smith, Receiverships, 167 (f). See also 2 Beach Modern Eq. Pr. § 747; Beach, Receivers, § 682; High, Receivers, 2d ed. § 241; Gluck & B. Receivers 2d ed. 34 *et seq.*, 222; 20 Am. & Eng. Enc. Law, p. 244.

The general rule of comity prevails in Pennsylvania.

*Bagby* v. *Atlantic, M. & O. R. Co.* 86 Pa. 291.

The demand asserted is not opposed to any policy of the local law of that commonwealth.

*Aultman's Appeal*, 98 Pa. 505; *Cushing* v. *Perot*, 175 Pa. 66, 34 L. R. A. 737, 34 Atl. 447.

Neither local creditors nor any other creditors may avail themselves of this liability, or assert any rights whatsoever therein, otherwise than on full compliance with the several conditions of the law of the domicil.

*Terry* v. *Little*, 101 U. S. 216, 25 L. ed. 864.

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dent stockholders and hold the moneys collected, subject to the further orders of the court, could not maintain an action at law on such liability in a foreign jurisdiction, as he was vested with no title, but was merely acting as the agent of the court.

In Hale v. Coffin, 114 Fed. 567, the court held that since it was necessary to the conclusions of the circuit court of appeals in Hale v. Hardon, 37 C. C. A. 240, 95 Fed. 747, *supra*, that under the laws of Minnesota there was something which vested in the receiver, sufficient to enable him to maintain a suit at common law, such a receiver might maintain a suit in equity to enforce the stockholder's liability, in a Federal court sitting in a state where the common-law rule prevails, which requires plaintiff to have title, although no action at law could be sustained.

And it has been held that a receiver appointed in a suit to enforce the statutory liability of stockholders in a corporation for the benefit of all creditors may, although appointed without specific legislative authority, but in accordance with the usages of equity, maintain a suit in his own name in another jurisdiction. Kirtley v. Holmes, 52 L. R. A. 738, 46 C. C. A. 102, 107 Fed. 1.

And the right of the receiver of a foreign corporation to collect an unpaid subscription to its stock was sustained in Dayton v. Borst, 31 N. Y. 435, without showing that any statute of the state in which he was appointed authorized such proceeding.

A suit by a receiver of an Iowa corporation to enforce the individual liability of stockholders to the creditors of the corporation under Iowa Acts 18th Gen. Assem., chap. 208, was dismissed in Steinke v. Loofbourow, 17 Utah, 252, 54 Pac. 120, on the ground that the receiver was not the proper person to bring the suit. No question of comity appears to have been considered in this case, and the court's attention does not seem to have been called to State *ex rel.* Stone v. Union Stock Yards State Bank, 103 Iowa, 549, 70 N. W. 752, 72 N. W. 1076, in which the receiver was held to be the proper party to bring suit under this statute.

In Wigton v. Bosler, 102 Fed. 70, it was also held that a receiver appointed by an Iowa court could not maintain an action in the courts of another jurisdiction to enforce the statutory liability of stockholders. The court refers to the fact that the liability under the Iowa statute, as stated in the declaration, is to the creditors of the corporation, but does not seem to regard this as essential to justify its refusal to entertain the suit, and it assumes that the effect of the Iowa statutes is in fact to make the liability which they create an asset of the corporation.

Assessments on members of a foreign benefit society which had become insolvent were collected in Baldwin v. Hosmer, 101 Mich. 119, 25 L. R. A. 739, 59 N. W. 432, by an ancillary receiver.

The statute of limitations of the state in which a corporation was domiciled governs an action in another state by a receiver of the company to enforce the liability of a stockholder under the statute of the former state. Andrews v. Bacon, 38 Fed. 777.

On the general question of the right to enforce a stockholder's liability outside of the state of incorporation, see the exhaustive note appended to the case of Cushing v. Perot (Pa.) 34 L. R. A. 737.

Local creditors have no other or different rights than any others, and all are referable in this regard to the laws of the domicil prescribing equality for creditors in common.

*Childs* v. *Cleaves*, 95 Me. 498, 50 Atl. 714.

The power of appointment may be referred both to the express provisions of the Minnesota statutes and the general equity powers exercised by courts of chancery in analogous cases.

*Hale* v. *Hardon*, 37 C. C. A. 240, 95 Fed. 747; *Childs* v. *Cleaves*, 95 Me. 498, 50 Atl. 714; *Zieverink* v. *Kemper*, 50 Ohio St. 208, 34 N. E. 250.

Such an appointment is obviously calculated to effectuate the general objects and purposes, in that, without it, no practical means have ever yet been suggested for insuring harmony in the administration and efficiency in the proceedings contemplated.

*Childs* v. *Cleaves*, 95 Me. 498, 50 Atl. 714.

The creditors to the original proceeding, being parties to that proceeding, are bound by the decree vesting their rights in the premises in a receiver.

High, Receivers, § 37.

A payment to that receiver unquestionably relieves the stockholder from any further liability.

*Castleman* v. *Templeman*, 87 Md. 546, 41 L. R. A. 367, 40 Atl. 275.

The receiver may not inaptly be termed one of the statutory agencies provided by the laws of the domicil in case of the insolvency of the corporation. It is immaterial in this regard whether this agency be committed to a specially designated official, or generally to a person to be designated by an appropriate court for the purposes contemplated.

*Relfe* v. *Rundle*, 103 U. S. 222, *sub nom. Life Asso. of America* v. *Rundle*, 26 L. ed. 337; *Parsons* v. *Charter Oak L. Ins. Co.* 31 Fed. 305.

The result, both as respects the character of the agency itself and the implied assent thereto by the stockholders, must, of necessity, be the same.

*Hale* v. *Hardon*, 37 C. C. A. 240, 95 Fed. 747. See also *Howarth* v. *Angle*, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489; *Tompkins* v. *Blakey*, 70 N. H. 584, 49 Atl. 111; *Howarth* v. *Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; *Childs* v. *Cleaves*, 95 Me. 498, 50 Atl. 714.

The receiver, upon the happening of the specified contingency,—the corporation's insolvency,—became a substituted promisee, and asserted the obligation as a matter of right and as running to himself directly.

*Fish* v. *Smith*, 73 Conn. 377, 47 Atl. 711.

No question has been or can be made of the chancery jurisdiction in cases where the object of the suit is the enforcement or carrying into effect of the decree of the court itself, or other courts of equity.

Story, Eq. Pl. §§ 429–431; Mitford, Eq. Pl. 95; Cooper, Eq. Pl. 98, 99; 2 Beach Modern, Eq. Pr. § 903; *Shainwald* v. *Lewis*, 69 Fed. 487.

Jurisdiction exists on this ground although the original decree was for the payment of money.

*Shields* v. *Thomas*, 18 How. 253, 15 L. ed. 368.

The decree of the Minnesota court, in so far as it adjudicated by its decree the amount of the corporate debts, the assets available for the liquidation thereof, and the deficiency to be contributed by the stockholders, was a decree against appellees, binding and conclusive upon them by representation to the extent indicated, until impeached for fraud.

*Hawkins* v. *Glenn*, 131 U. S. 329, 33 L. ed. 191, 9 Sup. Ct. Rep. 739.

Jurisdiction existed on the ground of avoiding a multiplicity of suits.

*Garrison* v. *Memphis Ins. Co.* 19 How. 312, 15 L. ed. 656; *Oelrichs* v. *Spain*, 15 Wall. 211, *sub nom. Oelrichs* v. *Williams*, 21 L. ed. 43; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 32 L. ed. 1005, 9 Sup. Ct. Rep. 594; *Wylie* v. *Coxe*, 15 How. 415, 14 L. ed. 753; *May* v. *Le Claire*, 11 Wall. 217, 20 L. ed. 50; 1 Pom. Eq. Jur. §§ 255–259–260; See also generally 1 Dan. Ch. Pr. ed. 1845, 445, 446; *York* v. *Pilkington*, 1 Atk. 282; *London* v. *Perkins*, 3 Bro. P. C. 602; *Tenham* v. *Herbert*, 2 Atk. 483; *Bailey* v. *Tillinghast*, 40 C. C. A. 93, 99 Fed. 801; *Hayden* v. *Thompson*, 17 C. C. A. 592, 36 U. S. App. 361, 71 Fed. 60; *Cockrill* v. *Cooper*, 29 C. C. A. 529, 57 U. S. App. 576, 86 Fed. 7.

The circumstances of each case must determine the application of the rule.

*Rich* v. *Braxton*, 158 U. S. 405, 39 L. ed. 1032, 15 Sup. Ct. Rep. 1006; *Payne* v. *Hook*, 7 Wall. 430, 1 L. ed. 262; *Watson* v. *Sutherland*, 5 Wall. 74, 18 L. ed. 580.

The assumption that the only defense open is that of payment or nonstockholding is anticipation. On the demurrers there are no defenses in either regard. The facts stand admitted. The case is thus bereft of a single substantial element save that common to all and involved in the common grounds asserted by the demurrers.

*Powell* v. *Powis*, 1 Young & J. 159; *Commissioners of Sewers* v. *Glasse*, 41 L. J. Ch. N. S. 409.

The ground of avoiding multiplicity of suits, in and of itself, and without regard either to the character of the right asserted or the relief demanded, constitutes a distinct element of jurisdiction.

1 Pom. Eq. Jur. § 243.

The prevention of multiplicity of suits as an independent jurisdictional ground has been frequently recognized in the Federal precedents.

*Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Louisville, N. A. & C. R. Co.* v. *Ohio Valley Improv. & Contract Co.* 57 Fed. 42; 1 Pom. Eq. Jur. § 243; *McConnaughy* v. *Pennoyer*, 43 Fed. 339; *Hyman* v. *Wheeler*, 33 Fed. 629; *De Forest* v. *Thompson*, 40 Fed. 375.

If the receiver cannot enforce the liability, it follows that there is no one who can maintain the requisite action for its enforcement.

*Childs* v. *Cleaves*, 95 Me. 498, 50 Atl. 714.

Receivers occupy a dual capacity. In the one they succeed to the rights and interests of the defendant in the property confided to their charge; in the other they occupy an entirely different status as quasi-trustees representing the common interests of creditors.

The power and authority of a receiver in the representative capacity to sue in behalf of creditors, without regard to title or succession, is clear.

Smith, Receiverships, § 70, p. 156; High, Receivers, 3d ed. § 320; *Howarth* v. *Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; *Howarth* v. *Angle*, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489; *Cushing* v. *Perot*, 175 Pa. 66, 34 L. R. A. 737, 34 Atl. 447; Gluck & B. Receivers, §§ 43, 44.

No doubt can exist as to the receiver's capacity to sue in foreign forums.

*Kirtley* v. *Holmes*, 52 L. R. A. 738, 46 C. C. A. 102, 107 Fed. 1; *Burr* v. *Smith*, 113 Fed. 858; Gluck & B. Receivers, 2d ed. 223; High, Receivers, 3d ed. 211; 3 Cook, Corp. 4th ed. § 869; 6 Thomp. Corp. §§ 7337–7339. See also *Buswell* v. *Supreme Sitting, O. of I. H.* 161 Mass. 224, 23 L. R. A. 846, 36 N. E. 1065; *Boulware* v. *Davis*, 90 Ala. 207, 9 L. R. A. 601, 8 So. 84; *Lycoming F. Ins. Co.* v. *Wright*, 55 Vt. 526; *Cooke* v. *Orange*, 48 Conn. 401; *Hunt* v. *Gilbert*, 54 Ill. App. 491; *Weil* v. *Bank of Burr Oak*, 76 Mo. App. 35; *Merchants' Nat. Bank* v. *McLeod*, 38 Ohio St. 174; *Hurd* v. *Elizabeth*, 41 N. J. L. 1; *Stoddard* v. *Lum*, 159 N. Y. 265, 45 L. R. A. 551, 53 N. E. 1108.

*Mr.* **John G. Johnson** argued the cause and filed a brief for respondent:

Where the whole amount of the statutory liability is sought to be recovered, the proceeding must be at law.

*Kennedy* v. *Gibson*, 8 Wall. 505, 19 L. ed. 478; *Bailey* v. *Tillinghast*, 40 C. C. A. 93, 99 Fed. 801.

An action cannot be maintained in the courts of one jurisdiction by a receiver appointed in another jurisdiction merely to bring suit, not clothed with title to the *rem* in controversy.

*Hilliker* v. *Hale*, 54 C. C. A. 252, 117 Fed. 220; *Wigton* v. *Bosler*, 102 Fed. 70; High, Receivers, §§ 239, 241; *Booth* v. *Clark*, 17 How. 322, 15 L. ed. 164.

*Mr. Herman W. Chaplin* submitted a brief by leave of court as *amicus curiæ*.

A proceeding purely ancillary to another proceeding must be brought in the same court in which the main proceeding is pending.

1 Foster, Fed. Pr. 2d ed. § 41, p. 43; *First Nat. Bank* v. *Turnbull*, 16 Wall. 190, 21 L. ed. 296; *Barrow* v. *Hunton*, 99 U. S. 80, 25 L. ed. 407; *Pratt* v. *Albright*, 10 Biss. 511, 9 Fed. 634; *Buford* v. *Strother*, 3 McCrary, 253, 10 Fed. 406; *Poole* v. *Thatcherdeft*, 19 Fed. 49; *Flash* v. *Dillon*, 22 Fed. 1.

Receivers who acquire no title to property or assets are without any standing in courts of other jurisdictions.

*Booth* v. *Clark*, 17 How. 322, 15 L. ed. 164; High, Receivers, § 239.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

Of the several grounds of demurrer to the bill herein, only two need be specially noticed. They are (1) that this complainant (receiver) has no right to sue in the courts of a state foreign to that in which he was appointed; and (2) that, even if he had the right to sue, there was no ground of equitable jurisdiction set forth in the bill, and the complainant's remedy, if any he had, was at law.

The circuit court sustained the demurrer on the ground that no case for equitable relief was stated, and dismissed the bill without prejudice. The circuit court of appeals sustained that view of the case, and affirmed the judgment, but also intimated that it was strongly inclined to the opinion that the complainant's appointment as receiver by the Minnesota court did not entitle him to sue as such in a foreign jurisdiction.

In our judgment both grounds of demurrer were well taken.

First. As to the right of the receiver appointed in the Minnesota action to sue in a foreign state. The portions of the Constitution and laws of Minnesota which are applicable are set forth in the margin.†

†Constitution of Minnesota, article 10, § 3, provides:

Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him.

The General Statutes of Minnesota of 1894, chapter 76, p. 1595, provide, among other matters, for the method of enforcing the liability of stockholders, as follows:

Sec. 5897. Whenever a judgment is obtained against any corporation incorporated under the laws of this state, and an execution issued thereon is returned unsatisfied in whole or in part, upon the complaint of the person obtaining such judgment, or his representative, the district court within the proper county may sequestrate the stock, property, things in action, and effects of such corporation, and appoint a receiver of the same.

Sec. 5905. Whenever a creditor of a corporation seeks to charge the directors, trustees, or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.

Sec. 5906. The court shall proceed thereon, as in other cases, and, when necessary, shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.

Sec. 5907. If, on the coming in of the answer or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment, as in other cases.

Sec. 5908. Upon a final judgment in any such

[60] *The Constitution of Minnesota, it will be seen, simply imposes a double liability upon [61]the stockholders. The statutes of the *state provide the only means of there enforcing that liability.

The supreme court of Minnesota has decided that the liability of the stockholder is to the creditor, and that the receiver of the company cannot enforce it. It was held, as far back as 1879, in *Allen* v. *Walsh*, 25 Minn. 543, that the only remedy to enforce the liability of stockholders was laid down in the General Statutes of Minnesota, chapter 76 (the one in question), and that the statute contemplated a single action, in which all persons having or claiming any interest in the subject of the action should be joined or particularly represented, and their respective rights, equities, and liabilities finally settled and determined. The receiver of an insolvent corporation was not a proper party to bring such action.

In *Palmer* v. *Bank of Zumbrota*, 65 Minn. 90, 67 N. W. 893 (decided in 1896), the court referred to *Allen* v. *Walsh* as holding that a receiver could not maintain an action to enforce the liability of the stockholders, and held that the direction in the decree then under review, ordering the receiver to sue the stockholders on such liability, was a harmless error which had been corrected before it was assailed.

Again, in *Minneapolis Baseball Co.* v. *City Bank*, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331 (decided in 1896), it was once more distinctly held that a receiver could not, under chapter 76, maintain in the courts of that state an action to enforce such liability of stockholders. The supreme court of Minnesota has, however, in a very late case,—*Hanson* v. *Davison*, 73 Minn. 454, 76 N. W. 254 (decided in July, 1898),—somewhat limited or explained *Allen* v. *Walsh*, 25 Minn. 543, and, in the course of his opinion, the Chief Justice expressed views as to the right of a receiver [62]to sue in another *state under the facts which he rehearsed. The case does not, however, overrule the prior cases above referred to. The point as to the right of a receiver to sue in a foreign jurisdiction was not in issue or involved in the case. The material facts were, as stated in the opinion, that a creditor of the Citizens' Bank, which was an insolvent concern, brought an action (*Harper* v. *Carroll*, reported in 66 Minn. 487, 69 N. W. 610, 1069), in behalf of himself and all other creditors against all of the resident stockholders thereof, pursuant to the provisions of chapter 76, *supra*. The creditors of the bank intervened and proved their claims against it, and judgment was duly rendered in the action against the bank and all of its stockholders within the jurisdiction of the court, in favor of each of the creditors, of whom the complainant herein was one, for the amount of their claims respectively, as adjudged in that action. Executions were issued on each of these judgments, which were returned, and there still remained unpaid upon them the sum of forty odd thousand dollars, exclusive of interest. The defendant in the *Hanson* v. *Davison* action was named as a defendant in the other, or *Harper* v. *Carroll*, action, but being a nonresident, the court in the latter case did not acquire jurisdiction to render a judgment against her. In the opinion in *Hanson* v. *Davison* the court, after referring to the fact of nonresidence, continues:

"She was, however, a stockholder of the bank at the time it became insolvent and made its assignment, and ever since has been, and now is, the owner of the capital stock thereof of the par value of $1,500, and now has property within this state to satisfy her liability to the creditors of the bank as a stockholder therein. The existence of such property within the jurisdiction of the court was discovered after the entry of the judgment in the *Harper-Carroll* case. Upon the discovery of such property, the plaintiff herein obtained leave of court to bring this action against the defendant, to the end that her statutory liability might be collected and paid to the receiver in the original action, and by him distributed to the judgment creditors of the bank. The defendant's property was attached. Thereupon she appeared in this action."

The trial court dismissed the complaint, and the supreme *court affirmed the dis- [63] missal on the ground that the property of the stockholder having been found within the jurisdiction of the court either before or after judgment in the original action (*Harper* v. *Carroll*), a separate suit against her to reach the property was neither necessary

action to restrain a corporation, or against directors or stockholders, the court shall cause a just and fair distribution of the property of such corporation and of the proceeds thereof to be made among its creditors.

Sec. 5909. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

Sec. 5910. If the debts of the company remain unsatisfied, the court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases.

Sec. 5911. Whenever any action is brought against any corporation, its directors, or other superintending officers or stockholders, according to the provisions of this chapter, the court, whenever it appears necessary or proper, may order notice to be published, in such a manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment.

nor proper, for it could be attached or sequestered in the original action.

It was contended by the defendant in the *Hanson* v. *Davison* case that, as there had been a former action (*Harper* v. *Carroll*) brought for the purpose of enforcing the liability of the stockholders, which action was, as prescribed by the statute, the exclusive remedy, that no further suit could be maintained. The court, in commenting upon the contention, said that if it were correct, then, as the court could only acquire jurisdiction of the resident stockholders in a corporation, all nonresident stockholders would have absolute immunity from such liability, while their associates who happened to be within the jurisdiction of the court would have to respond to the last cent of their liability. Continuing, the court said:

"Inequitable as such a conclusion would be, still it must be admitted that there are expressions in the opinion in the case of *Allen* v. *Walsh*, 25 Minn. 543, relied upon by the defendant, which, if taken literally, and without reference to the actual point decided by the court, justify the contention. A decision upon this claim of the defendant involves a consideration of the nature of the liability of stockholders for the debts of the corporation, the method of enforcing it, and just what was decided by the case of *Allen* v. *Walsh*. In that case, which was an action at law by a creditor, for his sole and exclusive benefit, against a single stockholder, to enforce his individual liability, it was correctly held that the action could not be maintained, and that the plaintiff's remedy was an equitable action, in behalf of himself and all other creditors, against the corporation and its stockholders, wherein the debts of the corporation must be determined, and, after exhausting the corporate assets, the liability of stockholders for the deficiency might be adjudicated and enforced pursuant to the provisions of Gen. Stat. 1878, chap. 76; Gen. Stat. 1894, chap. 76. It was not, however, decided in that case that, if a stockholder was omitted from [64] such original action because the court could not acquire jurisdiction of him, or for any other cause, the liability could not be subsequently enforced against him by bringing him or his property into the original action, if found within the jurisdiction of the court, or by proceeding against him alone, in an action ancillary to the original action, in any other jurisdiction where he might be found, if the comity of the sister state would permit it."

The particular attention of the court was directed to the objection that but one action could ever be maintained against the stockholders over whom the court had jurisdiction, who must all be joined therein, and that the rest could not thereafter be made liable. The action, it will be noticed, was not brought by a receiver, the plaintiff in the action being a creditor of the corporation, and no question arose in regard to the right of a receiver appointed under chapter 76 to maintain an action, either inside or outside of the state, to enforce the liability of stockholders to the creditors of an insolvent corporation. Whatever was said in the opinion regarding the possible right of a receiver to maintain such an action as the one now before us was not necessary to the decision of the case, and cannot be regarded as overruling the prior cases.

The opinions in *Minneapolis Baseball Co.* v. *City Bank*, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331, and in *Hanson* v. *Davison*, 73 Minn. 454, 76 N. W. 254, were written by the same judge, and in the latter case he does not refer to the earlier one decided but two years before, and which held that a receiver, under the state statute, could not maintain such an action as this. There was a strong dissent by Mr. Justice Canty from the remarks of the Chief Justice, as to the right of the receiver to maintain an action in a foreign state. Referring to the earlier cases, he said:

"This court has several times held that a receiver appointed under chapter 76 has no authority to enforce the stockholders' superadded liability. See *Minneapolis Baseball Co.* v. *City Bank*, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331; *Palmer* v. *Bank of Zumbrota*, 65 Minn. 90, 67 N. W. 893. I am unable to see how this court can lay down a rule or edict to govern proceedings in courts of other states, contrary to the rule it lays down to govern proceedings in the courts of this state."

[65] We can ourselves see the difficulty in holding that such an action may be maintained by the receiver in a foreign jurisdiction, while at the same time holding that such receiver could not maintain a like action in the Minnesota courts. If a receiver cannot maintain this kind of an action in the courts of his own state, because its statute provides another in the name of a creditor, or permits it only after the performance of conditions precedent which he has not performed, he cannot, although appointed in the state, maintain such action in a foreign jurisdiction. This we have decided at this term in *Evans* v. *Nellis*, 187 U. S. 271, *ante*, 173, 23 Sup. Ct. Rep. 74. In that case it was said the receiver was appointed under the statute of that state of 1868 or 1899. It was shown that the act of 1868 made the stockholder liable to the creditor, and that the receiver could not maintain the action thereunder. It also appeared that under the statute of 1899, which made the stockholder's liability an asset of the corporation, to be collected by the receiver, no such action could be maintained except by complying with the statute, and as the receiver had not done so, it was held he could not maintain the action outside the state.

This would seemingly be enough to compel the affirmance of the judgment herein, when we see that the Minnesota supreme court has held that a receiver cannot maintain such an action as this in the courts of that state.

An examination of the opinion of the Chief Justice, however, in the *Hanson* v.

*Davison case*, shows that it is not based upon the proposition that such an action is provided for by the Minnesota statute, but that the statute failed to say anything forbidding it, and this failure the judge thought left the matter open to the general rules governing in such cases, for he says, at page 461, N. W. p. 256:

"The remedy for enforcing the liability must, in the first instance, from the nature of the liability, be an equitable action. Gen. Stat. 1878, chap. 76; Gen. Stat. 1894, chap. 76, indicates and regulates to some extent the remedy, leaving to the court the duty of making the remedy effectual by an application of the principles of equitable procedure. This statute prescribes the exclusive remedy only to the extent that an [66] equitable action of the *character therein indicated must be first instituted for the enforcement of the liability of stockholders. Such an action, though provided by statute, is essentially an equitable proceeding; and the rules of equity are to be followed, unless inconsistent with the statute. If chapter 76 were repealed, equity would find an adequate remedy for the enforcement of the liability. . . . There is nothing in the statute which justifies the conclusion that, if a stockholder's liability is not enforced in the original action because he is a nonresident, an ancillary action may not be brought against him alone after the amount for which stockholders are individually liable has been determined in the original action."

This language would seem to indicate that there is nothing in the statute which prevents a receiver from maintaining an action in a foreign state. There is no holding that the statute itself provides in terms for such an action, or empowers a receiver to maintain it, or that it transfers any title in the fund to him. We should not, therefore, be justified in following the remarks made in this case, in opposition to those cases which had already been decided by the same court years before and up to and including the *Minneapolis Baseball Co.* v. *City Bank*, 66 Minn. 441, 38 L. R. A. 415, 69 N. W. 331, especially when it appears, as in this case, that all the facts had occurred prior to the declaration of the Chief Justice of the court. The suit now before us was commenced in November, 1898. The corporation failed in May, 1893, and in November of that year proceedings were commenced in Minnesota, which ended in the final decree in 1897, months prior to the last decision, July 26, 1898.

It seems also entirely clear that the receiver provided for in § 5906 of above quoted statute, while not the receiver mentioned in § 5897, is yet simply one to be appointed in aid of the court to work out the provisions of the section, if the court choose to appoint him, and by § 5907 the court, if it appear that the corporation is insolvent, may proceed, without appointing any receiver, to ascertain and enforce the liabilities of stockholders in the creditors' action. The receiver, if he be appointed, is not given power to represent the creditors or to maintain, as representative owner or trustee, an action, *inside or outside the state, to en- [67] force the liability spoken of. That is the right of the creditors themselves, and the statute provides for their action against the stockholders.

Assuming the contractual character of the subscription to the stock of the corporation, the right of the receiver to maintain this suit is not thereby made plainer. The contract may have been to pay, in the event of its insolvency, to the creditors of the corporation the amount for which the shareholder might be liable up to the par value of his stock. That was a contract in behalf of the creditor, with which the corporation had nothing to do, and the statute did not make this liability assets of the corporation, or confer upon any receiver appointed in the case the right to proceed to enforce it. The cases of *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477, and *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506, do not bear upon the question, as the plaintiff in each case was a creditor of the corporation.

We are of opinion, following the decisions of the highest court of Minnesota, that the statutes of that state do not provide for the appointment of a receiver to recover as such the amount of the added liability of the nonresident shareholders to creditors of an insolvent corporation. They do not provide that such liability shall be assets of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered. There is no transfer of any right or title to a receiver to enforce the liability (certainly not as to nonresident stockholders), nor is it a case where any assignment of such right by the creditors has been made, so that the receiver is, in fact, an assignee of the persons interested in the recovery from the stockholders.

We are thus brought to the fact that this is a plain and simple case of the appointment, authorized by statute, of a receiver by a court of equity in the exercise of its general jurisdiction as such court, with no title to the fund in him, and where such receiver acts simply as the arm of the court without any other right or title; and the question is whether, in these circumstances, a receiver can maintain this suit in equity in a foreign state by virtue of his appointment, and the direction *to sue contained in the decree [68] in the case in which he was appointed a receiver? We pursue the subject after the decision of *Evans* v. *Nellis*, 187 U. S. 271, *ante*, 173, 23 Sup. Ct. Rep. 74, only because of the argument made by counsel for appellant, that such a receiver as in this case is not prevented by the statute or decisions of Minnesota from maintaining such an action as this, and that, if the statute do not prevent it, he may maintain an action of this nature notwithstanding the former decision of this court in *Booth* v. *Clark*, 17 How. 322, 15 L. ed. 164, which, it is claimed,

has been, if not overruled, at least shaken in principle by the decisions as to the comity which is said to prevail among the different states to permit such an action by a receiver outside the jurisdiction of the state of his appointment. We do not think anything has been said or decided in this court which destroys or limits the controlling authority of that case.

It was there held that an ordinary receiver could not sue in a foreign jurisdiction, and an elaborate examination was made by Mr. Justice Wayne of the principles upon which the decision was founded. In speaking of the right of a receiver appointed under a creditors' bill in New York, to bring an action in a foreign state, it was said, in the course of the opinion, as to such a receiver, "whether appointed as this receiver was, under the statute of New York, or under the rules and practice of chancery, as they may be, his official relations to the court are the same. A statute appointment neither enlarges nor diminishes the limitation upon his action. His responsibilities are unaltered. Under either kind of appointment, he has at most only a passive capacity in the most important part of what it may be necessary for him to do, until it has been called by the direction of the court into ability to act. He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court of another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." This statement has not [69] been overruled or *explained away by any subsequent decision of this court to which our attention has been called.

In *Relfe* v. *Rundle*, 103 U. S. 222, *sub nom. Life Asso. of America* v. *Rundle*, 26 L. ed. 337, it was held that a final decree dissovling an insolvent life insurance company of Missouri, and vesting, as provided by the statutes in force, for the use and benefit of creditors and policy holders, the entire property of the company in the superintendent of the insurance department of the state, made him the statutory successor of the corporation for the purpose of winding up its affairs; as such he represented the corporation at all times and places in all matters connected with its trust; he was the officer of the state, and represented the state in its sovereignty, and as his authority did not come from the decree of the court, but from the statutes, he was, in fact, the corporation itself for the purpose mentioned. The superintendent of insurance, being the successor of the corporation, had the right to represent it, and he became a party to the suit commenced against it in Louisiana, and, being a citizen of Missouri, and appearing in time, had the right to remove the case into the United States court. The suit had been commenced against the company in Louisiana, and it having been dissolved by the decree of a court of competent jurisdiction, it was dead, and if the representative appointed pursuant to the laws of the state and holding the title to the property could not be substituted in place of the original defendant it would follow that no defense could be made by anyone. The case is no authority for the maintenance of this action.

In *Hawkins* v. *Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739, Glenn was the trustee of the corporation, which by its deed assigned and transferred to three trustees, for whom he was afterwards substituted, all the property and effects of the corporation, in trust, for the payment of its debts. Glenn subsequently brought a suit in another jurisdiction against a stockholder, Hawkins. The right of Glenn was through an assignment, and he derived title to the property and to the rights of the corporation through a deed. No question was decided in that case which is material to be here considered.

There has been some contrariety of opinion in the lower *Federal courts in regard [70] to the right of a receiver situated as the complainant is in this suit, to maintain an action outside of the state of his appointment. In *Haxard* v. *Durant*, 19 Fed. 471, in the circuit court, district of Massachusetts, before Judges Lowell and Nelson, it was held that a receiver appointed in one jurisdiction to take charge of a fund cannot sue in another in his own name, though expressly authorized by the decree to maintain actions in his own name.

In *Hale* v. *Hardon*, 89 Fed. 283, Putnam, Circuit Judge, held that the plaintiff, as receiver appointed in Minnesota, who had commenced an action at law in the Federal circuit court in Massachusetts to enforce the liability of a stockholder in this same corporation of Minnesota, could not maintain such action in another jurisdiction from that in which he was appointed. That judgment was reversed by the circuit court of appeals in 37 C. C. A. 240, 95 Fed. 747, in which District Judge Aldrich delivered the opinion, which was concurred in by District Judge Webb, while Circuit Judge Colt delivered a dissenting opinion. The judges were thus divided, two district judges in favor of the right of the plaintiff to maintain the action, and the two circuit judges denying it.

In *Hilliker* v. *Hale*, 117 Fed. 224, the right of such receiver to maintain his action in a foreign jurisdiction was denied by the circuit court of appeals of the second circuit.

In *Wigton* v. *Bosler*, 102 Fed. 70, 73, Dallas, one of the circuit judges of the third circuit, took the same view as Colt and Putnam, Circuit Judges, in 89 and 95 Fed., and made a decree in accordance with such views.

In *Hale* v. *Tyler*, 104 Fed. 757, Judge Putnam, regarding himself bound by the decision of the circuit court of appeals in his own circuit, in *Hale* v. *Hardon*, 89 Fed.

283, follows the authority of that case, but he added some further views to show that the receiver in *Hale* v. *Hardon* was constituted such under the general equity powers of the court, and merely as its hand to assist it in realizing rights of action which vested, not in the receiver, but in the creditors. He referred also to the case of *Hayward* v. *Leeson*, decided by the supreme judicial court of Massachusetts, June 15, 1900, and reported in 176 Mass. 310, 49 L. [71] R. A. 725, 57 N. E. 656, *in which that court held that, as none of the proceedings in Tennessee operated as an assignment to the receiver of the choses in action in litigation in Massachusetts, and as the utmost effect of the appointment of a receiver is to put property into his custody as an officer of the court, but not to change the title, nor even the right of possession, the receiver could not sue in his own name in Massachusetts.

The question of comity cannot avail in a case where the courts of the state in which the receiver was appointed hold that an action similar to the one brought in the foreign jurisdiction cannot be maintained by him in the courts of the state of his appointment.

Second. The other ground of demurrer is that, whatever remedy may exist in favor of the complainant is at law, and that no case is made which gives a court of equity jurisdiction.

It appears from the bill and the record annexed to and forming a part thereof that there were in all somewhere about five hundred stockholders of the loan company, twenty-three of whom, living in Minnesota, had been made parties to the Rogers creditors' suit, and judgments had been obtained against them in that suit. Forty-seven of the remainder resided in Pennsylvania and were made parties to this suit, and the balance lived in different states. The indebtedness of the corporation was so great that the liability of the stockholders was up to the full amount imposed by the statutes of Minnesota. The theory of the bill was that the Minnesota decree was conclusive (even upon nonresident stockholders not served with process and not appearing in that suit) as to the amount of the indebtedness of the corporation and the amount of its assets, thereby concluding the parties as to the necessity of a resort to the stockholders' liability in favor of creditors, leaving open the question of the special liability of each particular shareholder, and whether, if once liable, his liability had ceased, wholly or partly, by reason of facts pertaining to such stockholder. No accounting was asked for, but simply a judgment against each stockholder for the amount of the par value of his stock.

The jurisdiction of a court of equity over the subject-matter is placed by the com- [72] plainant upon the two grounds, among *others, that to sustain such jurisdiction prevents a multiplicity of suits, and also that this suit is an ancillary or auxiliary proceeding brought in aid of and to enforce an equitable decree of another court.

1. Upon the first ground, the cases are various in which the court has either taken or refused jurisdiction, but one cannot adduce from them a plain and uniform rule by which to determine the question. The application of the principles upon which jurisdiction has been suggested or denied has been various, both in England and in this country, and it is difficult, if not impossible, to reconcile the cases. The subject is discussed at length in 1 Pomeroy's Equity Jurisprudence, 2d ed. p. 318, §§ 243 *et seq.* It is therein shown that the foundation of the jurisdiction, or perhaps the earliest exercise of it upon this ground, was in so-called "bills of peace," where in one class of such bills the suit was brought to establish a general right between a single party and numerous other persons claiming distinct and individual interests; the second class being where the complainant sought to quiet his title and possession of land, and to prevent the bringing of repeated actions of ejectment against him. The ground was that the title could never be finally established by indefinite repetitions of such legal actions. And again the question has arisen whether the defendants in a suit by one complainant to establish his right against them all must be connected by some kind of privity among themselves, or can they hold their rights wholly separate and distinct from each other. The question has been answered differently by different courts, and while assuming that there was not always a necessity to show a common interest or privity between the members of the same class of defendants, the courts have also differed in regard to the jurisdiction of a court of equity in particular cases, even upon such assumption. Numerous cases are cited by Mr. Pomeroy, showing both sides of this question. In any case where the facts bring it within the possible jurisdiction of the court, according to the view taken by it in regard to such facts, the decision must depend largely upon the question of the reasonable convenience of the remedy, its effectiveness, and the inadequacy of the remedy at law. To sustain the right to bring the *suit where the separate defendants have [73] no privity among themselves, two early and leading cases in the English courts are cited, *viz.:* *London* v. *Perkins*, 3 Bro. P. C. Tomlins's ed. 602, decided in 1734, and *York* v. *Pilkington*, 1 Atk. 282, decided in 1737.

In the first case the city claimed to be entitled to, and that it had received time out of mind, from all masters of ships bringing cheese eastward of London bridge to the port of London to be sold, a certain duty per ton on such cheese. The defendants, being great importers of cheese, refused to pay the duty, and it was shown by the complainant that the right of the city had been proved at law in other cases, and a verdict given for the city in favor of its right, and the city therefore claimed there was no reason why the question should be sent to law

to be tried over again. The real point decided in the case was that depositions of witnesses taken in former causes relating to the same matter for which a new suit is instituted against another party ought to be permitted to be read as evidence upon the hearing of such new cause, although the witnesses themselves are not proved to be dead. The depositions being regarded as proper evidence, and the right at law having been maintained, the judgment was for the recovery of the toll.

The second case was a bill filed by the mayor of York, who claimed in behalf of the city to have been in possession of a fishery in the river Ouse, the city claiming the sole right of fishery; and the court held that the mayor might bring a bill to be quieted in the possession, although he had not established his right at law, and that it was no objection, upon a demurrer to such bill, that the defendants had distinct rights, for upon an issue to try the general right they may at law take advantage of their several objections and distinct rights. The bill is described as a "bill of peace," and it is assumed that there would be an issue sent to a court of law for trial as to the sole right of the complainant and where the defendants might show their distinct rights. The Lord Chancellor said:

"Here are two causes of demurrer, one assigned originally, and one now at the bar, that this is not a proper bill, as it claims a sole right of fishery against five lords of [74] manors, because *they ought to be considered as distinct trespassers, and that there is no general right that can be established against *them, nor any privity between the plaintiffs and them. . . . But there are cases where bills of peace have been brought, though there has been a general right claimed by the plaintiff, and yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants, and where many more might be concerned than those brought before the court. . . . I think, therefore, this bill is proper, and the more so, because it appears there are no other persons but the defendants who set up any claim against the plaintiffs, and it is no objection that they have separate defenses; but the question is whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants; for, notwithstanding the general right is tried and established, the defendants may take advantage of their several exemptions, or distinct rights."

The demurrer was therefore overruled.

On the other hand, in *Bouverie* v. *Prentice*, 1 Bro. Ch. 200, decided in 1783, it was held that a bill would not lie against several tenants of a manor for quit rents, the plaintiff's remedy being at law, and the suit also multifarious as to the different tenants. The Lord Chancellor said:

"Upon what principle two different tenants, of distinct estates, should be brought hither to hear each others rights discussed, I cannot conceive. The court has gone great lengths in bills of this sort, and taking the authority for granted, I cannot conceive on what ground such a suit can stand."

The Chancellor also remarked that, where a number of persons claimed one right in one subject, such a bill may be entertained to put an end to litigation. Here no one issue could have tried the cause between any two of the parties. See also *Ward* v. *Northumberland*, 2 Anstr. 469, decided in the Exchequer in 1794. The court in that case held that the suit could not be maintained in equity on the ground of preventing a multiplicity of suits, where the demands against each of the defendants, although of the same nature, were entirely distinct from and unconnected with any other defendant. In *such case each defend- [75] ant had a right to object to the joining of any distinct and unconnected causes of action.

To the same effect is *Birkley* v. *Presgrave*, 1 East, 220, 227, decided in the King's bench in 1801. In that case the court said:

"But generally speaking, a court of equity will not take cognizance of distinct and separate claims of different persons in one suit, though standing in the same relative situation."

In *Weale* v. *West-Middlesex Waterworks*, 1 Jac. & W. 358, decided in 1820, the Lord Chancellor, in holding that the suit would not lie, referred to the case of *York* v. *Pilkington*, and said:

"For where the plaintiffs stated themselves to have the exclusive right, it signified nothing what particular rights might be set up against them; because if they prevailed, the rights of no other persons could stand; and it has been long settled that if any person has a common right against a great many of the King's subjects, inasmuch as he cannot contend with all the King's subjects, a court of equity will permit him to file a bill against some of them; taking care to bring so many persons before the court that their interests shall be such as to lead to a fair and honest support of the public interest; and when a decree has been obtained, then, with respect to the individuals whose interest is so fully and honestly established, the court, on the footing of the former decree, will carry the benefit of it into execution against other individuals who were not parties."

In *Marselis* v. *Morris Canal & Bkg. Co.* 1 N. J. Eq. 31, decided in 1830, it was held that the plaintiff could not maintain an action against several defendants to recover matters of different natures against them. It was a suit in equity by several landowners of different lands not coming under a common title, against the defendant for taking their lands for the purposes of its incorporation, and not paying or compensating the owners therefor. It was alleged that the company was insolvent, and it was prayed that an account might be taken and damages awarded to the complainants for the injuries already sustained, and for compensation, and an injunction restraining the company from occupying the land

[76] was *asked for. The court held the bill could not be maintained, as the same was multifarious, and said the fact that the plaintiffs had a common interest in the question, and that to sustain the jurisdiction would relieve the necessity of a number of suits at law brought by the separate plaintiffs, would not confer jurisdiction on the court upon any principle of equity.

In *Demarest* v. *Hardham*, 34 N. J. Eq. 469, decided in 1881, several persons owning distinct parcels of land, or occupying different dwellings, and having no common interest, sought to restrain a nuisance in consequence of the special injury done to each particular property, and it was held that each must bring a separate suit and obtain relief, if at all, upon his own special wrong. It was said that several persons might join to restrain a nuisance which is common to all and effects each in the same way,—instancing slaughter houses in a populous part of the town, and the offensive and deleterious odors there generated being allowed to diffuse themselves throughout the neighborhood. In such cases all injuriously affected by them may join in the same suit, for in such a case the injury is a common one, and the object of the suit is to give protection to each suitor in the enjoyment of a common right. To the same effect is *Rowbotham* v. *Jones*, 47 N. J. Eq. 337, 19 L. R. A. 663, 20 Atl. 731, decided in 1890.

Then there were cases arising by reason of the so-called Schuyler frauds, such as *New York & N. H. R. Co.* v. *Schuyler*, 17 N. Y. 592, 602, on demurrer, decided in 1858; again reported on appeal from the judgment on the merits, in 34 N. Y. 30, decided in 1865. These were very complicated questions arising by reason of the frauds referred to, and jurisdiction was maintained upon what might be termed general principles of necessity for the purpose of quieting what would otherwise have been endless litigation, and as stated by Davis, J., in 34 N. Y., the case was not decided upon any one head of equity jurisdiction.

In *Third Ave. R. Co.* v. *New York*, 54 N. Y. 159, defendants had commenced seventy-seven actions to recover penalties for violation of a city ordinance. The company commenced this action to restrain their prosecution until the right could be determined in one of the actions, and the suit [77] was maintained *on the ground of thereby preventing vexatious litigation in a multiplicity of suits.

In *Saratoga County* v. *Deyoe*, 77 N. Y. 219, questions of the indebtedness of the county upon certain certificates wrongfully issued by its treasurer were complicated with questions of the liability of the county to various holders of the certificates, and the court held a suit in equity could be sustained, making all the holders of the different certificates parties, because a multiplicity of suits would thereby be avoided and the whole question more conveniently and properly disposed of, all the defendants having in fact a common interest.

In *Meyer* v. *Phillips*, 97 N. Y. 485, 49 Am. Rep. 538, the suit was sustained as one to quiet the title of plaintiff, the acts threatened by various defendants being under a claim of right, and being of exactly the same nature, the issue being the same in all.

Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes within the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than *would be com- [78] pensated for by the convenience of a single plaintiff; and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction.

We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of rights or interest in the subject-matter among such defendants, but where there is a community of interest among them in the questions of law and fact involved in the general controversy.

Is there, upon the complainant's theory of this case, any such common interest among these defendants as to the questions of fact that may be put in issue between them and the plaintiff? Each defendant's defense may, and in all probability will, depend upon totally different facts, upon distinct and particular contracts, made at different times, and in establishing a defense, even of like character, different witnesses would probably be required for each defendant, and no defendant has any interest with another.

In this case from the complainant's own bill, the amount demanded is the full amount of the par value of the shares held

by each defendant. In *Kennedy* v. *Gibson*, 8 Wall. 498, 505, 19 L. ed. 476, 478, a receiver brought suit to recover from the stockholders of an insolvent national bank the statutory liability imposed upon them, and in the course of the opinion it was stated by the court:

"Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required, the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court, if such action should subsequently prove to be necessary,—until the full amount of the liability is exhausted."

In *Bailey* v. *Tillinghast*, 40 C. C. A. 93, 99 Fed. 801, this statement of the law was recognized, and the cases of *Casey* v. *Galli*, 94 U. S. 673, 24 L. ed. 168, and *United States* v. *Knox*, 102 U. S. 422, 26 L. ed. 216, were referred to as recognizing the same rule. In *United States* v. *Knox*, the court [79] approved and reaffirmed the rule laid *down in *Kennedy* v. *Gibson*, and one of those rules was that, when the whole amount was sought to be recovered, the proceeding must be at law.

The facts surrounding the present case and the reasons for holding that they do not bring it within the principle of preventing a multiplicity of suits are so well stated in the opinion of McPherson, District Judge, in this case (102 Fed. 790), that we quote the same. After speaking of the alleged conclusiveness of the Minnesota decree upon the question therein decided, the judge continued:

"Thereafter a different question arose for determination, namely, Can the assessment be lawfully enforced against the individuals charged therewith? And in this question the interest of each stockholder is separate and distinct. The bill asserts the conclusiveness of the Minnesota decree upon the defendants, so far as the necessity for the assessment and the amount charged against each stockholder are concerned. *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506. Assuming that position to be sound (and, if I do not so assume it; if these questions are still open for determination, so far as the Pennsylvania stockholders are to be affected,—the bill must fail for want of necessary parties), it is clear that only two classes of questions remain to be decided: The first is whether a given stockholder was ever liable as such; and the second is whether, if he were originally liable, his liability has ceased, either in whole or in part. Manifestly, as it seems to me, the defendants have no common interest in these questions, or in the relief sought by the receiver against each defendant. The receiver's cause of action against each defendant is, no doubt, similar to his cause of action against every other, but this is only part of the matter. The real issue, the actual dispute, can only be known after each defendant has set up his defense, and defenses may vary so widely that no two controversies may be exactly or even nearly alike. If, as is sure to happen, differing defenses are put in by different defendants, the bill evidently becomes a single proceeding only in name. In reality it is a congeries of suits with little relation to each other, except there is a common plaintiff who has similar claims against many persons. But as each of these persons *became [80] liable, if at all, by reason of a contract entered into by himself alone, with the making of which his codefendants had nothing whatever to do, so he continues to be liable, if at all, because he himself, and not they, has done nothing to discharge the liability. Suppose A to aver that his signature to the subscription list was a forgery; what connection has that averment with B's contention that his subscription was made by an agent who had exceeded his powers? or with C's defense that his subscription was obtained by fraudulent representations? or with D's defense that he has discharged his full liability by a voluntary payment to the receiver himself? or with E's defense that he has paid to a creditor of the corporation a larger sum than is now demanded? These are separate and individual defenses, having nothing in common; and upon each the defendant setting it up is entitled to a trial by jury, although it may be somewhat troublesome and expensive to award him his constitutional right. But, even if the ground of diminished trouble and expense may sometimes be sufficient, I should still be much inclined to hesitate before I conceded the superiority of the equitable remedy in the present case. Such a bill as is now before the court is certain to be the beginning of a long and expensive litigation. The hearings are sure to be protracted. Several, perhaps many, counsel will no doubt be concerned, whose convenience must be consulted. The testimony will soon grow to be voluminous. The expense of printing will be large. The costs of witnesses will not in any degree be diminished, and, if some docket costs may be escaped, this is probably the only pecuniary advantage to be enjoyed by this one cumbersome bill over separate actions at law."

We are in accord with the views thus expressed, and we therefore must deny the jurisdiction of equity, so far as it is based upon the asserted prevention of a multiplicity of suits.

2. There remains the further question of maintaining the suit on the ground that it is ancillary or auxiliary to the decree of the Minnesota court, and aids in its enforcement. We think this contention cannot be sustained.

In the first place, all the nonresident stockholders were but nominal parties in the Minnesota suit. Their names were merely placed in its title. No service of process was ever made *on one of them, and [81] as the suit was not one in which service by publication of process could be ordered, there was nothing in the nature of the suit to give them notice or to enable the court to give judgment against them without their appearing. The court did not assume to

give any such judgment. Indeed, the complainant averred there were no means of obtaining jurisdiction over the nonresident stockholders, and the court assumed that it had no jurisdiction over them, and on account of such lack of jurisdiction it only gave judgment against those resident stockholders who were parties to the suit. The complainant claims that the nonresident stockholders are bound because the corporation was a party, not because they were parties to the suit. There is no decree or judgment, therefore, against the stockholders who were nonresidents. The claim that they are bound by certain findings of fact by the court, because of the corporation being a party and in law representing them to that extent, assuming it for this purpose to be well founded, is far from transforming a decree against resident stockholders into one against nonresidents who were not parties to the action. Even assuming that the decree concludes them upon certain facts found in that action, where there was no decree against them, still, another action in another jurisdiction to enforce their liability as originally created by statute cannot, within any reason, be said to be one to enforce the former judgment. Indeed, it is because of the very fact that no judgment was or could be obtained against the nonresident stockholders in the Minnesota suit that the Pennsylvania Federal court is asked to exercise its jurisdiction and give judgment against the defendants on their statutory liability. This does not make the Pennsylvania suit ancillary to the Minnesota decree for the purpose of enforcing it, for there is no decree against them to be enforced. There is only a claim that they are bound by certain facts found in another action to which they were not parties in any but a merely formal and nominal sense.

We think that, upon grounds discussed herein, *the judgments of the courts below were right, and they are therefore affirmed.*

Mr. Justice **Brewer** dissented.

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[82] *DIAMOND MATCH COMPANY, *Appt.*,
*v.*
VILLAGE OF ONTONAGON and George Ducleau, Treasurer of Said Village.

(See S. C. Reporter's ed. 82-97.)

*Taxes—situs of property in transit—state regulation of interstate commerce.*

1. Forest products in transit to a point outside the state may be given by the legislature a situs, for the purpose of taxation, at the place nearest to the last boom or sorting gap of the stream in or bordering on the state in which such products naturally will be last floated during such transit.
2. Transportation of logs partly by water and partly by rail is included in the provision of Mich. act April 8, 1899, making forest products in transit to a point outside the state assessable at the place in the state nearest to the last boom or sorting gap of the stream in or bordering on such state in which they will naturally be last floated during such transit, although the statute also provides that, if the transit "is to be other than through any watercourse in or bordering on" the state, such property shall be assessed at the point where it will naturally leave the state in the ordinary course of its transit.
3. Logs which have been cut and floated down a stream and its tributaries to a boom or sorting gap from which they are to be shipped by rail as needed to a point outside the state are not, while awaiting delivery to the railroad company, the subject of interstate commerce so as to be exempt from state taxation.

[No. 96.]

*Argued and Submitted December 1, 1902. Decided January 19, 1903.*

APPEAL from the Circuit Court of the United States for the Western District of Michigan to review a decree which dismissed a bill to restrain the collection of a tax on forest products in transit to a point outside the state. *Affirmed.*

Statement by Mr. Justice **McKenna:**

This is a bill in equity to restrain the collection of certain taxes levied under the following law of the state of Michigan:

"Personal property of nonresidents of the state, and all forest products owned by residents or nonresidents or estates of deceased persons shall be assessed in the township or ward where the same may be, to the person having control of the premises, store, mill, dock, yard, piling ground, place of storage, or warehouse where such property is situated in such township, on the 2d Monday of April of the year when the assessment is made, except that where such property is in transit to some place within *the state it shall be assessed in such [83] place, except that where such property is in transit to some place without the state it shall be assessed at the place in this state nearest to the last boom or sorting gap of the stream in or bordering on this state in which said property will naturally be last floated during the transit thereof; and in case the transit of any such property is to be other than through any watercourse in or bordering on this state, then such assessment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit; and such

NOTE.—*On the limitation of taxing power of a state*—see notes to Cass County v. Chicago, B. & Q. R. Co. (Neb.) 2 L. R. A. 188; and Palmer v. State (Tenn.) 8 L. R. A. 280.

*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. (Va.) 13 L. R. A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; and Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

property so in transit to any place without the state shall be assessed to the owner or person, persons or corporation, in possession or control thereof; and in case such transit will pass said logs through the booms or sorting gaps, or into the places of storage of any person, persons, or corporation operating upon any such stream, then such property may be assessed to such person, persons, or corporation, and the person, persons, or corporation so assessed for any such property belonging to a nonresident of this state shall be entitled to recover from the owner of such property, by a suit in attachment, garnishment, or for money had and received, any amount which the person, persons, or corporation so assessed is compelled to pay because of such assessment, and shall have a lien upon said property as security against loss or damage because of being so assessed for the property of another, and may retain possession of such property until such lien is satisfied: *Provided, further*, That any owner or person interested in said property may secure the release of the same from such lien by giving to the person, persons, or corporation so assessed a bond in an amount double the probable tax to be assessed thereon, but not less than the sum of two hundred dollars ($200), with two sufficient securities, conditioned for the payment of such tax by such owner or person interested, and the saving of the person, persons, or corporation assessed from payment thereof, and from costs, damages, and expense on account of his nonpayment, which bond, as to amount and sufficiency of surety, shall be approved by the county clerk of the county in which the assessment is made."

It was contended that the taxes assessed [84] were illegal and *void, "because said taxes were assessed in violation of and repugnant to the general provisions of the Constitution of the United States; and especially because said taxes were assessed in violation of, and said statutes of the state of Michigan are in violation of and repugnant to, those parts of § 8 of article 1 of the Constitution of the United States, which provide that: 'The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states,' and § 10 of said article, which provides that 'no state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws.'"

By stipulation the bill was dismissed as to the township of Ontonagon and the township of McMillan. As to the other defendants the bill was submitted on an agreed statement of facts and the pleadings. The court sustained the assessment and dismissed the bill. This appeal was then taken under § 5 of the judiciary act of 1891 [26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549.]

The following is the stipulation of facts:

"It is hereby further stipulated by and between the complainant and the defendants village of Ontonagon, and George Ducleau, its treasurer, that the following statements of fact are true, and may be used in evidence on the hearing of said cause by either of the parties to this stipulation, subject to objections for immateriality, to wit:

"1. The complainant is a corporation organized and existing under and by virtue of the laws of the state of Illinois, with its principal office and place of business in the city of Chicago, in said state; that it is engaged, and has been from the date of its organization, in the manufacture and sale of matches, and that in the prosecution of its business it purchased and became the owner of a large amount of pine wood, timber, etc., situate on the Ontonagon river and its tributaries in Ontonagon county and other counties in the state of Michigan, and that for many years prior to 1896 it owned and operated extensive sawmills and plant near the mouth of the Ontonagon river, and within the corporate limits of the defendant village of Ontonagon; that, in its usual course of business, it cut or *purchased a [85] sufficient quantity of timber to supply its mills during the following season, not exceeding 40,000,000 of feet, board measure, and placed the same during the winter upon and in said Ontonagon river and its tributaries, there to remain until the breaking up of the ice in said river in spring time, when they were and are driven down the river to the pier jams, booms, and sorting grounds of the complainant, located above said mills, and outside of the limits of defendant, the village of Ontonagon.

"2. That in the summer of the year 1894 extensive forest fires swept over said pine lands of the complainant, and other pine lands, situate on said Ontonagon river, doing great damage to the timber thereon; that in order to preserve the timber so injured by said fire it became and was necessary to cut all of said timber and put the same into the waters of the above-named stream for preservation; that during the winter of 1894 and 1895 said complainant, in order to preserve said timber, was compelled to cut and did cut about 180,000,000 feet of logs, and for the sole purpose of preservation placed the same in said river and its tributaries, there to remain until the complainant could float said logs down said river and streams to its mills to be manufactured into lumber; that it was not the intention or purpose of the complainant after the opening of navigation and during the season of 1896 to remove all said logs but only such amount as could be manufactured at its said mills during the season, and that the capacity of said mills did not exceed about the amount of 40,000,000 feet per annum, as hereinbefore stipulated.

"3. That the navigation of said river and stream is closed by reason of the formation of ice about the 1st of December of each year, and is not open until after the 1st of May, following in each year.

"4. That in the month of August, A. D.

1896, the complainant's said mills were destroyed by fire, and that thereafter it became necessary, and the complainant did transport said logs by the Chicago, Milwaukee & St. Paul Railway, from Ontonagon to its sawmills located at Green Bay, in the state of Wisconsin. That in the reg-[86]ular prosecution of its business of *manufacturing said logs into lumber, said complainant has not, during any season since 1896, transported a larger quantity of said logs than it could manufacture into lumber at its mills at Green Bay, said quantity being on an average of less than 40,000,000 feet of logs, board measure.

"5. That for the purpose of preserving said logs and preventing the same from floating down said river and into Lake Superior, said complainant was compelled to and has utilized certain jam piers, booms, and appurtenances constructed by the plaintiff across said river, more than 1 mile above the mouth thereof, and beyond the limits of said village of Ontonagon; that by reason of said appliances said logs have been held in said river and upon the banks thereof above said jam piers, booms, etc., said complainant only passing through said piers such quantities as it could transport and manufacture into lumber at its said mills from time to time during each successive season since the year 1896; that during each successive season it has been the usual and necessary practice of the complainant to pass through said piers, booms, etc., such quantities of logs as said railway company could furnish facilities for transportation, thence down the river to the place of delivery, as described in ¶ 2 of another stipulation of facts made herein, to said railway company, to be loaded upon cars for transportation, and that said place of delivery was near the mouth of said river and within the corporate limits of said defendant the village of Ontonagon; that all of said logs so delivered to said railway company are transported over its lines to Green Bay, Wisconsin, leaving the state of Michigan at a point near the village of Iron Mountain, in said state.

"6. That at the close of the season of 1898 the logs in controversy were held by said complainant and detained and preserved by said jam piers, booms, etc., in said Ontonagon river, above and beyond the limits of said defendant the village of Ontonagon, waiting the delivery for transportation, as aforesaid, during the following season of the year 1899, and that all of said logs were a part of the entire quantity cut and put in said river during the winter of 1895 and 1896, and had since that date been so held [87]and detained by the complainant in its *regular course of business; that all of said logs were so held and detained, and by reason of the ice in said river could not be floated down the same until about the middle of May, 1899, and that said logs so assessed, as charged in said bill of complaint, were not at the time said assessment was made, and on the 2d Monday of April, A. D. 1899, were not, except as stated in ¶ 4 of another stipulation, made herein, and never had been, within the corporate limits of the said defendant the village of Ontonagon.

"7. That the logs in controversy at the time said assessment was made by said defendant the village of Ontonagon were and had been for more than one year prior thereto, in the manner above described, held and detained by the complainant within the municipal limits of the township of McMillan, in said county of Ontonagon, and were assessed for the purpose of levying a tax thereon, for the year 1899, by the proper officers of said township of McMillan, claiming the right so to do under the general statutes and laws of the state of Michigan.

"It is further stipulated and admitted by the parties to this stipulation that the assessment of the complainant's logs in controversy was not valid unless it shall be held as a question of law that the defendant the village of Ontonagon had the legal right to assess said logs in said river outside and beyond the geographical limits of said village, as being in transit, under the statutes of the state of Michigan in such case made and provided."

The other stipulation of facts referred to is as follows:

"1. Complainant shipped by rail from the village of Ontonagon to its mills at Green Bay, Wisconsin, for sawing there, the following quantities of logs, at the following times, out of its logs in the Ontonagon river, described in the bill of complaint:

"Forty-two million feet in the season of 1897; 37,000,000 feet in the season of 1898, and 14,000,000 feet in the season of 1899 up to the date of the seizure of logs by the village of Ontonagon for the satisfaction of the tax levied and assessed in and by said village in the year last named.

"2. Within the village of Ontonagon, is, and has been, situated *in and throughout [88] the year 1899 the last boom or sorting gap in said river, from which complainant's logs in said river are taken and placed upon the railroad cars for shipment to its said mills at Green Bay, and said boom or sorting gap is the last place in said river where said logs are floated before shipment by rail as aforesaid.

"3. During the season of 1899, beginning about June 1, and up to the time of the seizure above mentioned, about — million feet of the ten (10) million feet of logs mentioned in the bill of complaint, were driven down the said river from the boom, pier jam, or sorting grounds outside of said village, to the boom or sorting gap within said village, above described, and shipped thence by rail to complainant's said mills at Green Bay.

"4. About 500,000 feet of complainant's said logs in said river have been (in said river of slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid.

"5. The village of Ontonagon is a duly incorporated village under the general law of Michigan, to wit: act No. 3 of the Laws of

Michigan of the year 1895, entitled 'An Act to Provide for the Incorporation of Villages within the State of Michigan, and Defining Their Powers and Duties,' and is situate on said river and in the township of Ontonagon, one of the defendants herein.

"6. The water transit of said logs of complainant has heretofore always ceased since the burning of complainant's mills, described in the bill of complaint, in said village, whence the same are shipped by rail as aforesaid.

"7. Said river and its tributaries are streams of water or rivers, all within the state of Michigan and within the county of Ontonagon (and as to some small part within the counties of Gogebic and Houghton) in which county of Ontonagon said village is situated.

"8. Pursuant to and in accordance with the acts of the legislature of Michigan mentioned in the answer of said village in this suit, namely, act No. 319 of the Laws of 1893, and act No. 263 of the year 1895, and pursuant to and in accordance with a vote of the electors of the said village, duly held [89] therein, *and pursuant to, and in accordance with the action of its council, said village, in the year 1894, borrowed the sum of thirty thousand dollars ($30,000), and issued and sold its bonds therefor, and in the year 1895 borrowed the further sum of twelve thousand dollars ($12,000), and issued its bonds therefor; and all of said bonds, being in principal and interest about forty thousand dollars ($40,000), were, at the date of filing the bill of complaint in this cause, outstanding, and said bonds outstanding constitute a valid charge against said village and against the taxable property thereof."

*Mr.* **Edwin Walker** argued the cause and filed a brief for appellant:

The village of Ontonagon had no power to assess property for taxation and levy taxes thereon, except as specifically conferred by the general or special statutes of the state of Michigan.

Cooley, Taxn. pp. 96, 209, 474; Dill. Mun. Corp. 4th ed. § 763; *Re Second Ave. M. E. Church*, 66 N. Y. 395; *Re Washington Avenue*, 69 Pa. 352, 8 Am. Rep. 255; *English* v. *People*, 96 Ill. 566.

The state of Michigan could not by legislative grant authorize the village of Ontonagon to impose a tax upon the property of nonresidents, when the situs of such property was beyond its municipal limits and jurisdiction.

*Wells* v. *Weston*, 22 Mo. 384, 66 Am. Dec. 627; *Re Assessment of Lands*, 60 N. Y. 398; *Trigg* v. *Glasgow*, 2 Bush, 594; *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 430, 20 L. ed. 194.

The statute of the state of Michigan, under and by authority of which the complainant's property was assessed for taxation, is in contravention of, and repugnant to, the Constitution of the United States.

*Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *The Daniel Ball*, 10 Wall. 557, 19 L. ed. 999; *State Freight Tax Case*, 15 Wall. 272, *sub nom. Philadelphia & R. R. Co.* v. *Pennsylvania*, 21 L. ed. 161.

*Mr.* **T. L. Chadbourne** submitted the cause for appellees:

Michigan is not the only state having legislation of this sort. There is similar legislation in at least Wisconsin and Maine.

Wis. Rev. Stat. 1878, § 1040; *Farmingdale* v. *Berlin Mills Co.* 93 Me. 333, 45 Atl. 39.

The statute has frequently been passed upon by the supreme court of Michigan, and no question of its validity under the state Constitution has, so far as the cases show, ever been raised.

*Corning* v. *Masonville Twp.* 74 Mich. 177, 41 N. W. 831; *Pardee* v. *Freesoil Twp.* 74 Mich. 81, 41 N. W. 867; *Elk Rapids Iron Co.* v. *Helena Twp.* 117 Mich. 211, 75 N. W. 455.

Logs are in transit when they are situate upon a body of water intended to act as a means of transport, and destined to some point upon the stream or water beyond where they lie.

*Elk Rapids Iron Co.* v. *Helena Twp.* 117 Mich. 211, 75 N. W. 455; *Mitchell* v. *Lake Twp.* 126 Mich. 367, 85 N. W. 865.

The logs were not exempt from state taxation in consequence of the Constitution of the United States.

*Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

Mr. Justice **McKenna** delivered the opinion of the court:

The contention of appellant is presented in three propositions: (1) That the village of Ontonagon had no power to assess the property under its charter; (2) that the legislature could not confer such power; (3) that the property was in the course of transportation within the meaning of the commerce clause of the Constitution of the United States.

1. This proposition is unimportant. If the charter did not, the statute of 1899 did, authorize the assessment.

2. To sustain this proposition would embarrass the power of the state,—indeed, make it impotent to deal with the conditions there existing. The statute, no doubt, was enacted as a means to subject property to taxation which had no definite or enduring locality, and because of the clash or confusion of jurisdictions. In such circumstances experience, probably, demonstrated that property escaped taxation or was difficult to tax, or that controversies arose. It was competent for the legislature to defeat either result by giving moving property a definite situs as of some day. Nor is that power impugned by the principle that protection is the consideration of taxation. There is protection during the transit through the municipalities of the state and at its termination in the state,—protection accommodated to the kind of property and as efficient as links are to the continuity of a chain.

There is nothing in the cases cited by appellant which sustains the opposite view. *Trigg* v. *Glasgow*, 2 Bush, 594, seems to

have turned upon the interpretation of a state statute. Under a statute of the state the town of Glasgow was authorized to subscribe to the stock of a railroad, and by the [91] charter of *the town it was the duty of the trustees to "levy an ad valorem tax on the property, both real and personal, within said town that is listed for state purposes, including the amount given in under the equalization law, sufficient," etc.

By an amendatory act it was provided that "all the taxable property in said town on the 10th of April shall be subject to taxation for the payment of said subscription;" and it also provided that the taxable property *in* said town which may have been removed without its limits between the 1st of January and the 10th of April, for the purpose of evading the tax, should be listed for taxation.

The court held, as we understand its opinion, that property to be subject to taxation under the statute must be *in* the town. If it had been taken out to avoid taxation, it was subject to taxation when brought back.

*St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192, was also an interpretation of the state statute. The city of St. Louis had power to tax all property *within the city*. It was held under the circumstances of the case that the ferryboats of the ferry company had their situs in the state of Illinois. It was said:

"Their relation to the city was merely that of contact there, as one of the termini of their transit across the river in the prosecution of their business. The time of such contact was limited by the city ordinance. Ten minutes was the maximum of the stay they were permitted to make at any one time. The owner was, in the eye of the law, a citizen of that state, and from the inherent law of its nature could not emigrate or become a citizen elsewhere. As the boats were laid up on the Illinois shore when not in use, and the pilots and engineers who ran them lived there, that locality, under the circumstances, must be taken to be their home port. They did not so abide within the city as to become incorporated with and form a part of its personal property."

In *Wells* v. *Weston*, 22 Mo. 384, 66 Am. Dec. 627, and *Re Assessments of Lands*, 60 N. Y. 398, the property taxed was real estate.

The purpose of the statute of Michigan is to assess the forest products of the state, —things which are a part of the general [92] *property of the state. Those "in transit" are assessable according to their destination. If that be "some place within the state," the property is to be "assessed in such place;" if that be "some place without the state," the property is to be assessed at the place in the state "nearest to the last boom or sorting gap of the same in or bordering on the state in which said property will naturally be the last floated during the transit thereof."

But it is also provided that "*in case the transit of any such property is to be other than through any watercourse in or bordering on this state, then such assessment shall be made at the point where such property will naturally leave the state in the ordinary course of its transit.*"

We may assume for the present that the property was in transit and to some place without the state. Was the "transit to be other than through any watercourse in or bordering on" the state? The appellant contends that it was, because it was to be by water and by rail; in other words, the transit was not to be exclusively "through any watercourse." But to give that meaning to the statute, words must be added to it. It must be made to read other than *exclusively* or *wholly* or *entirely* "through any watercourse." One of these words must be added to make the sense contended for. The word "other" is used to express a difference,—the difference being between a transit which is and one which is not through *any* (the word is significant) watercourse.

The transit in controversy was to be through (by means of) the Ontonagon river, certainly a watercourse, and by the Chicago, Milwaukee, & St. Paul Railway, and therefore the property was properly assessed by the village of Ontonagon, that being the place in the state nearest to the last boom or sorting gap of the stream in or bordering on the state in which said property naturally would be and was intended to be last floated during the transit thereof.

3. Was the transit interstate commerce? We agree with counsel that it is unimportant in determining an answer whether the transit "was by water or by railroad, or both water and railroad." But no purpose to burden interstate commerce is *evident [93] in the statute, and the power of the state to tax everything which is part of what has been called "the general property," or "the general mass of property," of the state, is undoubted. But things which have been brought to a state may not have reached that condition. Things intended to be sent out of a state, but which have not left it, may not have ceased to be in that condition. The exact moment in either case may not be easy to point out,—may be confused by circumstances,—and the confident assignment of the property as subject or not subject to taxation is not easily made. Fortunately we are not without illustrations in prior cases, and in *Kelley* v. *Rhoads*, 188 U. S. 1, *ante*, 359, 23 Sup. Ct. Rep. 259, decided concurrently with this, we express the principles of decision.

In *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091, the property (coal in barges) had reached the state, but was yet in the boats in which it had been brought into the state. While on the barges it was offered for sale. It was held it had become part of the property of the state and was subject to taxation. *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 577, 39 L. ed. 538, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415, had facts assimilating it to the case at bar, and it was affirmed on

the authority of *Brown* v. *Houston*. As in the latter case, the tax was on coal in barges shipped from the mines in Pennsylvania, and consigned to New Orleans, Louisiana. The coal, however, had not reached, as the coal in *Brown* v. *Houston*, its exact destination. To accommodate the exigencies of the owner's business, the barges, "about one hundred in number, were stopped and moored in the Mississippi river, at a convenient mooring place about 9 miles above the port of Baton Rouge." The coal was held subject to taxation.

In *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475, logs which had been cut in the state of Maine, and others which had been cut in the state of New Hampshire, were floated in course of transit down a stream in New Hampshire to the town of Errol, in the latter state; thence to be floated down the Androscoggin river to the state of Maine. The town of Errol assessed upon the property a county, town, school, and highway tax. The tax was sustained by the supreme court of the state of New Hampshire as to the logs cut [94] in that state, and abated as to *those cut in Maine. The judgment was affirmed by this court.

Mr. Justice Bradley, delivering the opinion of the court, expressed the contentions of the parties in two questions:

"Are the products of a state, though intended for exportation to another state, and partially prepared for that purpose by being deposited at a place or port of shipment within the state, liable to be taxed like other property within the state?

"Do the owner's state of mind in relation to the goods,—that is, his intent to export them,—and his partial preparation to do so, exempt them from taxation? This is the precise question for solution."

It is obvious that like questions could be framed upon the facts of the case at bar to express the propositions presented. Mr. Justice Bradley's observations, therefore, become pertinent and decisive. He discussed every consideration. He clearly exhibited the extent of the power of the state over the property within it, whether in motion or at rest, though destined for points out of it. He said:

"There must be a point of time when they [goods destined to other states] cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or on a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there if not taxed by reason of their being intended for exportation, but taxed without *any discrimination, in the usual [95] way and manner in which such property is taxed in the state."

And further:

"But no definite rule has been adopted with regard to the point of time at which the taxing power of the state ceases as to goods exported to a foreign country or to another state. What we have already said, however, in relation to the products of a state intended for exportation to another state will indicate the view which seems to us the sound one on that subject, namely that such goods do not cease to be part of the general mass of property in the state, subject as such to its jurisdiction and to taxation in the usual way, until they have been shipped or entered with a common carrier for transportation to another state, or have been started upon such transportation in a continuous route or journey. We think that this must be the true rule on the subject. It seems to us untenable to hold that a crop or a herd is exempt from taxation merely because it is, by its owner, intended for exportation. If such were the rule in many states there would be nothing but the lands and real estate to bear the taxes. Some of the western states produce very little except wheat and corn, most of which is intended for export; and so of cotton in the southern states. Certainly, as long as these products are on the lands which produce them, they are part of the general property of the state. And so we think they continue to be until they have entered upon their final journey for leaving the state and going into another state. It is true, it was said in the case, *The Daniel Ball*, 10 Wall. 557, 565, *sub nom. The Daniel Ball* v. *United States*, 19 L. ed. 1002: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence, is no part of that journey."

These cases are referred to in *Kelley* v. *Rhoads*, 188 U. S. 1, *ante*, 359, 23 Sup. Ct. Rep. 259, as defining the taxing power of a state. And their substance is declared to be "that while the property is at rest for an indefinite *time awaiting transportation, [96] or awaiting a sale at its place of destination, or at an intermediate point, it is sub-

ject to taxation. But if it be actually in transit to another state, it becomes the subject of interstate commerce, and is exempt from local assessment."

In further specialization of these propositions we may say that the cases establish that there may be an interior movement of property which does not constitute interstate commerce, though property come from or be destined to another state. In the one case, though it have not reached its place of disembarkation or delivery it may be taxed. 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091. In the other case, until it be shipped or started on its final journey it may be taxed. 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

The case at bar falls within this principle. It is alleged in the bill that during the winters of 1895 and 1896 the plaintiff cut, hauled, and put into the Ontonagon river and its tributaries 180,000,000 feet of logs for the purpose of saving, protecting, and preserving the same; that said lumber was more than plaintiff could utilize in any one season at its mills, and it was not, therefore, the intention at the opening of the streams to make a clean drive of the same, but only to take down the streams the following spring and summer, and each succeeding driving season, the number complainant could utilize; that complainant was, at the time the logs were cut and put in the streams, an owner of lumber mills situated at or near the corporate limits of the village of Ontonagon; that said mills were destroyed by fire in the fall of 1896, and were not rebuilt, and that after the destruction thereof plaintiff destined the logs for its mills at Green Bay, Wisconsin, but that it was not its intention to take to said mills during any one summer any more than sufficient for its purposes, and not to exceed generally 20,000,000 feet,—according to the stipulation 40,000,000 feet. The route of the logs from the forests to the mills is described as follows:

"They are driven down the tributaries of said Ontonagon river into the stream of said river, and thence down said Ontonagon river to a point at or near the mouth there-
[97] of, in the *township of Ontonagon, to the sorting grounds and pier jams of the complainant; they are then loaded aboard cars and shipped by rail to Green Bay, Wisconsin, *via* the Chicago, Milwaukee, & St. Paul Railway, and pass out of the state of Michigan at a point near the village of Iron Mountain, in said state."

The number of the logs shipped by rail from Ontonagon to Green Bay before the levy of the tax complained of is given in the stipulation of facts, and it is stipulated that "about 500,000 feet of complainant's said logs in said river have been (in said river of slough) constantly within said village since 1898, for the purpose of shipment by rail to the destination as aforesaid."

The appellant's contention is that the movement of the logs commenced at the opening of navigation of the river (presumably in the spring or summer of 1896 and 1897), and from that date were in continuous transit as subjects of interstate commerce, and exempt from taxation. The contention is more extreme than that made and rejected in *Coe* v. *Errol*.

*Decree affirmed.*

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CORNELIUS K. G. BILLINGS and Albert M. Billings Ruddock, *Plffs. in Err.*,
*v.*
PEOPLE OF THE STATE OF ILLINOIS.

(See S. C. Reporter's ed. 97-104.)

*Constitutional law—inheritance tax—equal protection—classification.*

The equal protection of the laws is not denied by the Illinois inheritance tax law because, under that statute as interpreted and enforced by the state courts, certain life estates may be taxed when the remainder is to lineal descendants of the decedent, but not when the remainder is to collateral heirs or strangers in blood.

[No. 106.]

*Argued and Submitted December 4, 1902. Decided January 19, 1903.*

IN ERROR to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment order of the County Court of Cook County assessing an inheritance tax on certain life estates. *Affirmed.*

See same case below, 189 Ill. 472, 59 N. E. 798.

The facts are stated in the opinion.

*Mr.* **James F. Meagher** argued the cause, and, with *Mr. William D. Guthrie*, filed a brief for plaintiffs in error:

A statute is not constitutional which selects particular individuals from a class or locality, and subjects them to peculiar rules, or imposes upon them special obligations or burdens from which others in the same locality or class are exempt.

Cooley, Const. Lim. 6th ed. 481, 483.

The legislature may regulate the devolution of property, but when it so regulates it must treat the constituents of a class alike; and when it discriminates against constit-

NOTE.—*On inheritance and succession taxes*—see notes to *Re* Howe (N. Y.) 2 L. R. A. 825; Wallace v. Myers (C. C. S. D. N. Y.) 4 L. R. A. 171; Com. v. Ferguson (Pa.) 10 L. R. A. 240; *Re* Romaine (N. Y.) 12 L. R. A. 401; Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

*As to the validity of class legislation*—see State v. Goodwill (W. Va.) 6 L. R. A. 621, and note; State v. Loomis (Mo.) 21 L. R. A. 789, and note.

*As to constitutional equality of privileges, immunities, and protection*—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, and note.

uents of a class, it invades the constitutional right of the constituents thus discriminated against.

*Frorer* v. *People*, 141 Ill. 180, 16 L. R. A. 492, 31 N. E. 395.

An individual is denied the equal protection of the laws if his property is subjected by the state to higher taxation than is imposed upon like property of other individuals in the same community.

*Fire Asso. of Philadelphia* v. *New York*, 119 U. S. 110, 30 L. ed. 342, 7 Sup. Ct. Rep. 108.

No person in a class shall be treated otherwise than or differently from every other person in the same class, under the like circumstances.

*Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594; *State* v. *Julow*, 129 Mo. 163, 29 L. R. A. 257, 31 S. W. 781.

The power of the state to classify is not denied; but "the power of the state stops at injustice."

*Southern P. Co.* v. *Railroad Comrs.* 78 Fed. 236.

The classification must be based upon some reasonable ground.

*Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Re Grice*, 79 Fed. 627; Cooley, Taxn. 215; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350.

Such classification "must be so general as to bring within its limit all those who are in substantially the same situation or circumstances."

*Lippman* v. *People*, 175 Ill. 101, 51 N. E. 872; *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. W. 454; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492, 31 N. E. 395.

The devolution of property upon death involves a transaction which is a fit and proper subject of taxation, wholly irrespective of the power to regulate such devolution.

*Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

Even if the power to levy an inheritance tax depended upon the right to regulate inheritance to the fullest extent that may be argued on behalf of the defendant in error, nevertheless the constitutional guaranty of equal laws would be applicable.

*Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The taxing power must be exercised impartially and by equal laws, and taxes must be imposed without discrimination upon all persons fairly within the same class and exercising like rights or privileges.

*Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Hayes* v. *Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Cotting* v. *Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cotting* v. *Godard*, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

*Mr.* **Howland J. Hamlin** submitted the cause for defendant in error:

Plaintiffs in error have no right to the legacy before the inheritance tax is paid, which entitles them to complain of the tax as against the state. They have no title until the tax is paid. The tax is not imposed upon their property nor upon them, but upon the right of their testator to devise the estate.

*United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *State* v. *Dalrymple*, 70 Md. 924, 3 L. R. A. 372, 17 Atl. 82; *Plummer* v. *Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774; *New York* v. *Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58.

The classification here complained of is based upon a reasonable ground.

*Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The constitutionality of the Illinois inheritance tax law is not now open to review.

*Kochersperger* v. *Drake*, 167 Ill. 122, 41 L. R. A. 446, 47 N. E. 321; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

Mr. Justice **McKenna** delivered the opinion of the court:

The case presents the question of the constitutionality, under the 14th Amendment of the Constitution of the United States, of § 2 of the inheritance tax law of the state of Illinois. The constitutionality of the law was passed upon in *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, and is there set out. As much of § 2 as is necessary to quote is as follows:

*"Sec. 2. When any person shall bequeath [99] or devise any property or interest therein or income therefrom to mother, father, husband, wife, brother and sister, the widow of the son, or a lineal descendant during the life or for a term of years, or [and] remainder to the collateral heir of the decedent, or to the stranger in blood, or to the body politic or corporate, at their decease, or on the expiration of such term, the said life estate or estates for a term of years shall not be subject to any tax, and the property so passing shall be appraised immediately after the death at what was the fair market value thereof at the time of the death of the decedent in the manner hereinafter provided, and after deducting therefrom the value of said life estate, or term of years, the tax transcribed by this act on the remainder shall be immediately due and payable to the treasurer of the proper county, and, together with the interests thereon,

shall be and remain a lien on said property until the same is paid; . . ." [Starr & C. Anno. Stat. 1896, p. 3529, ¶ 317.]

It is claimed, however, that the question presented in this case was not passed upon in *Magoun* v. *Illinois Trust & Sav. Bank.* If this be not so, if this case cannot be distinguished from that, it follows necessarily that the judgment sought to be reviewed must be affirmed.

The proceedings originated in the county court of Cook county, Illinois, which entered a judgment order assessing taxes, under the law in controversy, upon the property and estates passing to the plaintiffs in error. The order was affirmed by the supreme court of the state. 189 Ill. 472, 59 N. E. 798.

Albert M. Billings, a resident of Chicago, died in that city February 7, 1897. He left surviving him a widow, Augusta S. Billings; a son, Cornelius K. G. Billings, one of the plaintiffs in error, and grandson Albert M. Billings Ruddock, who is the other plaintiff in error. He also left a son by a former marriage, with whom this record is not concerned. His estate was very large, and he devised and bequeathed it all to his wife, excepting certain reservations, during her natural life. How it should be divided then, the will proceeded to provide as follows:

"I do also herein give and bequeath to [100] my son Cornelius *Kingsley Garrison Billings, and to my grandson Albert M. Billings Ruddock, to be held and owned by them at the death of my wife Augusta S. Billings as is hereinafter explained and set forth, all the property and estate herein bequeathed to her my wife not otherwise disposed of by my said executors hereinafter named, in the manner following, to wit: Two thirds thereof to my son C. K. G. Billings and one third thereof to my grandson Albert M. Billings Ruddock, to be held and owned by them as above stated during their lifetime, and should my son C. K. G. Billings die, not leaving a living child or children of his own issue, the property herein bequeathed to him shall revert and be held and owned by my grandchild Albert M. Billings Ruddock during his lifetime, and should my grandson Albert M. Billings Ruddock die not leaving a child or children of his own issue, then all the property and estate herein bequeathed to him shall revert and become the property and estate of my brother John D. Billings (should he be alive at that time) and my living nephews and nieces who shall be living at the time of the death of my said grandson, as aforesaid, said brother, nieces, and nephews to share and share alike in said estate."

The will therefore created a life estate in the widow in the entire estate, and at her death life estates of two thirds and one third of the property bequeathed respectively to the testator's son and grandson, the plaintiffs in error.

The widow renounced the provision made for her, and elected to take in lieu thereof her dower and legal share, and the estates to the plaintiffs in error accrued at once. The county court appointed an appraiser to fix the fair market value of the estates for the purpose of assessing the inheritance tax as provided by the statute. "The widow's dower award," to quote from the opinion of the supreme court, "and one third of the personalty were appraised at the total sum of $2,363,151.75, the tax upon which, after deducting the $20,000 exemption, was fixed at $23,443.53. The life interest (as it was decreed to be) of said Cornelius in the two thirds bequeathed to him was appraised at $2,472,118.75, and, after deducting his exemption of $20,000, the tax to be paid by him was assessed at $24,821.18. *This in- [101] cluded the specific devise of real estate valued at $30,000. The life interest of Albert M. Billings Ruddock in the one-third interest bequeathed to him was appraised at $1,408,374.77, and, after deducting his exemption of $20,000, his tax was assessed at $14,043.74. This included also the tax on a specific devise to him of real estate valued at $16,000. The court, in approving the appraiser's report, found that Cornelius K. G. Billings took a life estate in the two thirds of the residuary estate bequeathed to him, and that there was a remainder therein of the value, at the testator's death, of $864,584.70, which had not vested, and that there was a remainder in the one third bequeathed to Albert M. Billings Ruddock for life of the value of $250,976.95, which had not vested, and ordered that the tax on these remainders be postponed until they shall have become vested."

The widow was an appellant in the supreme court of the state, but she is not a party here.

The assignment of error is "that the statute is in contravention of the 14th Amendment to the Constitution of the United States of America, in that the classification of life tenants is arbitrary and unreasonable, and denies to the plaintiffs in error, as life tenants, the equal protection of the laws; because the statute, as interpreted and enforced by the state courts, taxes life estates where the remainder is to lineals, but does not tax, and expressly exempts, similar life estates where the remainder is to collaterals or to strangers in blood."

Turning to the *Magoun Case*, we find that the objection made to the statute was that it denied to the appellant the equal protection of the laws, and the somewhat elementary and lengthy discussion in the opinion was induced by the grounds upon which, and the ability with which, the statute was attacked. It is very certain that no consideration was omitted from the arguments at bar which could have aided the court to form a judgment. If there had been a proper classification there could not have been the denial of the equal protection of the laws, and we therefore expressed and illustrated the principle upon which it should be based. We said it was established by

cases that classification must be based on [102] some reasonable ground. *It could not be a "mere arbitrary selection." But what is the test of an arbitrary selection? It is difficult to exhibit it precisely in a general rule. Classification is essentially the same in law as it is in other departments of knowledge or practice. It is the grouping of things in speculation or practice because they "agree with one another in certain particulars and differ from other things in those same particulars." Things may have very diverse qualities, and yet be united in a class. They may have very similar qualities, and yet be cast in different classes. Cattle and horses may be considered in a class for some purposes. Their difference are certainly pronounced. Salt and sugar may be associated in a grocer's stock for a grocer's purposes. To confound them in use would be very disappointing. Human beings are essentially alike, yet some individuals may have attributes or relations not possessed by others, which may constitute them a class. But their classification—indeed, all classification—must primarily depend upon purpose—the problem presented. Science will have one purpose, business another, and legislation still another. The latter, of course, on account of the restraints upon the legislature, may not be legal,—may not be within the power of the legislature. To dispute that power, however, is not the same thing as to dispute a classification, and yet that there may be dependence,—more freedom of classification in some instances,—has been indicated by the cases. A state cannot regulate interstate commerce, however accurate its classification of objects may be. On the other hand, the taxing power of a state is one of its most extensive powers. It cannot be exercised upon persons grouped according to their complexions. It can be exercised if they are grouped according to their occupations. A state may regulate or suppress combinations to restrict the sale of products. The power cannot be exerted to forbid combinations among those who buy products, and permit combinations among those who raise or grow products. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. And yet, exercising its taxing power, it has been decided, that a state may make that discrimination. 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43. Other illustrations may be taken from the cases which tend to the same end. If the pur- [103] pose *is within the legal powers of the legislature, and the classification made has relation to that purpose (excludes no persons or objects that are affected by the purpose, includes all that are), logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. And, excluding our right to consider policies or assume legislation, we have many times said that a state in its purposes and in the execution of them must be allowed a wide range of discretion, and that this court will not make itself a harbor in which can be found "a refuge from ill-advised, unequeal, and oppressive" legislation. 102 U. S. 691, 26 L. ed. 238.

These principles were announced in the *Magoun Case*, and found to sustain the Illinois statute. We said "There are three main classes in the Illinois statute, the first and second being based, respectively, on lineal and collateral relationship to the testator or intestate, and the third being composed of strangers to his blood and distant relatives. The latter is again divided into four subclasses dependent upon the amount of the estate received. The first two classes, therefore, depend upon substantial differences, differences which may distinguish them from each other, and them or either of them from the other class,—differences, therefore, which 'bear a just and proper relation to the attempted classification'—the rule expressed in *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255. And if the constituents of each class are affected alike, the rule of equality prescribed by the cases is satisfied. In other words, the law operates 'equally and uniformly upon all persons in similar circumstances.'"

But it is insisted that the classification sustained in the *Magoun Case* "related solely to the graduated feature of the tax." In the case at bar, it is said, the question is "whether or not the Illinois legislature can discriminate against *constituents of a certain class*, and apply different rules for the taxation of its members. Life tenants constitute but a single class, and the incidents of such an estate, the source thereof, the extent, the dominion over and quality of interest in the tenant, is the same irrespective of the ultimate vesting of the remainder. The tax *is not upon the property, but [104] is upon the person succeeding to the property."

Undoubtedly, life tenants, regarded simply as persons, may be in legal contemplation the same; estates for life, regarded simply as estates with their attributes also in legal contemplation, may be said to be the same, but that is not all that is to be considered, nor is it determinative. We must regard the power of the state over testate and intestate dispositions of property, its power to create and limit estates, and, as resulting, its power to impose conditions upon their transfer or devolution. It is upon this power that inheritance-tax laws are based, and we said, in the *Magoun Case*, that the power could be exercised by distinguishing between the lineal and collateral relatives of a testator. There the amount of tax depended upon him who immediately received; here the existence of the tax depends upon him who ultimately receives. That can make no difference with the power of the state. No discrimination being exercised in the creation of the class, equality is observed. Crossing the lines of the classes created by the statute, discriminations may be exhibited, but within the classes there is equality.

*Judgment affirmed.*

AMERICAN COLORTYPE COMPANY, *Appt.*,
*v.*
CONTINENTAL COLORTYPE COMPANY, William J. Maas, Baxter J. Fierlein, Henry Freese, Henry E. Schultz, O. H. Quetsch, and J. O. M. Seibert.

(See S. C. Reporter's ed. 104-108.)

*Courts—jurisdiction—diverse citizenship—assigned claim.*

The jurisdiction of a circuit court of the United States, on the ground of diverse citizenship, of a suit by a foreign corporation against residents of the state, is not defeated on the theory that plaintiff is suing as the assignee of a domestic corporation, where the bill, although emphasizing the existence of certain contracts between defendants and its assignor, and alleging that it became substituted for such assignor as a party thereto, contains allegations which show that the parties, having the old contracts before them, entered into new agreements determined by reference to the terms of the old contracts, but none the less personal and immediate.

[No. 440.]

*Submitted December 22, 1902. Decided January 19, 1903.*

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a judgment which dismissed for want of jurisdiction a bill in a suit sought to be maintained therein on the ground of diverse citizenship. *Reversed.*

The facts are stated in the opinion.

*Messrs.* **A. M. Pence, Otto C. Butz,** and **Amos C. Miller** submitted the cause for appellant. *Messrs. Lackner, Butz, & Miller* were on the brief:

The complainant's case rests, not merely upon the assignment of the contracts with the defendants, but upon new agreements made directly with these defendants.

21 Am. & Eng. Enc. Law, 2d ed. p. 660; *Chapin* v. *Longworth*, 31 Ohio St. 423; *McKinney* v. *Alvis*, 14 Ill. 33.

As to the secrets communicated by the complainant directly to the defendants, the complainant's right to relief is entirely clear, even in the absence of the allegations respecting a novation.

*Harrison* v. *Glucose Sugar Ref. Co.* 58 L. R. A. 915, 53 C. C. A. 484, 116 Fed. 304; *O. & W. Thum Co.* v. *Tloczynski*, 114 Mich. 149, 38 L. R. A. 200, 72 N. W. 140; *Eastman Kodak Co.* v. *Reichenbach*, 79 Hun, 183, 29 N. Y. Supp. 1143; *Westervelt* v. *National Paper & Supply Co.* 154 Ind. 673, 57 N. E. 552; *Little* v. *Gallus*, 4 App. Div. 569, 38 N. Y. Supp. 487; *Morison* v. *Moat*, 21 L. J. Ch. N. S. 248; 1 High, Inj. § 19; 1 Story, Eq. Jur. § 323; 2 Story, Eq. Jur. § 953; *Chadwick* v. *Covell*, 151 Mass. 190, 6 L. R. A. 839, 23 N. E. 1068; *Peabody* v. *Norfolk*, 98 Mass. 452, 96 Am. Dec. 664; *Salomon* v. *Hertz*, 40 N. J. Eq. 400, 2 Atl. 379; *Yovatt* v. *Wingard*, 1 Jac. & W. 394; Hopkins, Unfair Trade, § 67.

The Federal court, clearly having jurisdiction to grant the relief asked as to the trade and business secrets communicated to the defendants, even in the absence of any novation, may adjudicate upon the other matters inseparably connected therewith.

*Evans* v. *Durango Land & Coal Co.* 25 C. C. A. 531, 49 U. S. App. 320, 80 Fed. 433.

*Mr.* **John C. Mathis** submitted the cause for appellees. *Messrs. Shope, Mathis, Zane & Weber* were on his brief:

Novation requires that there must always be a discharge of a precedent contract as a consideration for the creation of a new contract.

Anson, Contracts, 8th ed. Huffcut, 289, *p. 235; *Cuxon* v. *Chadley*, 3 Barn. & C. 591; *Barnes* v. *Hekla F. Ins. Co.* 56 Minn. 38, 57 N. W. 314; *Liversidge* v. *Broadbent*, 4 Hulst. & N. 603; *American Paper-Bag Co.* v. *Van Nortwick*, 3 C. C. A. 274, 9 U. S. App. 25, 52 Fed. 752; 6 Harvard Law Rev. 184; *McKinney* v. *Alvis*, 14 Ill. 33; *Hayward* v. *Burke*, 151 Ill. 121, 37 N. E. 846.

The substitution of one creditor for another is ordinarily treated as an assignment.

21 Am. & Eng. Enc. Law, 2d ed. p. 662.

Where a new party comes into a contract by transfer, there is no release of the party transferring, who is bound by the contract.

*Chapin* v. *Longworth*, 31 Ohio St. 421.

No new contract is pleaded, but it is expressly stated that the transferee came into the existing contract in place of the transferrer. Such a transfer falls within the terms of the assignment statute.

*Plant Investment Co.* v. *Jacksonville, T. & K. W. R. Co.* 152 U. S. 71, 38 L. ed. 358, 14 Sup. Ct. Rep. 483.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity brought in the circuit court for the northern district of Illinois by a New Jersey corporation against an Illinois corporation and private persons, citizens of Illinois. Upon demurrer the bill was dismissed for want of jurisdiction, on the ground, as is certified, that it was a bill to recover the contents of a chose in action in favor of an assignee, the assignors being citizens of Illinois. The case comes here by appeal. The prayers of the bill are for injunctions to prevent the defendants Maas, Fierlein, Freese, and Schultz assisting the defendant company or the defendants Quetsch and Seibert in the three-color printing business, revealing secret processes, etc., until different specified dates. The main ground of the

NOTE.—*As to diverse citizenship as ground of Federal jurisdiction*—see Shipp v. Williams, 10 C. C. A. 247, and note; Mason v. Dullagham, 27 C. C. A. 296, and note; Seddon v. Virginia, T. & C. Steel & I. Co. (C. C. W. D. Va.) 1 L. R. A. 108, and note; Myers v. Murray, N. & Co. (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

prayers is the contracts to be mentioned, and the question is whether the claim stated by the plaintiff is a claim as assignee.

The plaintiff is the assignee of the assets and good will of the National Colortype Company, the American Three-Color Company, Illinois corporations, and the Osborne Company, a New Jersey corporation, and was formed on March 1, 1902, for the purpose of consolidating the three. Among the more important contracts which purported to be transferred were two between the National Colortype Company and Maas and Fierlein respectively. By the former, Maas [106] was employed as superintendent *of the plat-making department, and agreed to remain in the company's employment and not to accept employment from others in the business of three-color printing for five years from December 1, 1901, and not to become interested in any way in that business in the United States, east of the Rocky Mountains, or divulge any secrets or processes relating to that business, for ten years from the day mentioned. By the other contract Fierlein was employed as salesman, and agreed to devote his whole time and attention to the interest and business of the company for two years from the same date. There was a similar contract with the defendant Freese, expiring May 1, 1903, but containing a promise by him never to divulge any of the secrets, methods, or practices of the company, and agreeing that his going to work for any others engaged in similar business should be considered a breach of the promise just set forth.

The bill alleges that Maas, knowing of the transfer, consented to it, announced his intention of holding the plaintiff to the contract with him, remained in its employ in the same capacity, accepted the stipulated salary, and was instructed in valuable secrets, and that the complainant, by the consent of all parties, became substituted as a party to the contract in place of the National Colortype Company. There are shorter but similar allegations concerning Fierlein and Freese. An independent contract with the defendant Schultz is alleged, which has expired, but it is alleged that by virtue of his employment he also has become possessed of trade secrets and processes belonging to plaintiff.

The bill goes on to allege that Maas and Fierlein, while in the plaintiff's employment and pay, conspiring with the defendants Quetsch and Seibert, got up the defendant corporation as a rival to the plaintiff, induced the defendants Freese and Schultz to enter its service, have taken over their own special skill and knowledge of the plaintiff's secrets to the hostile camp, and, in short, will ruin the plaintiff if they are permitted to go on.

We are of opinion that a case is stated within the jurisdiction of the court. It is true that the starting point for the relations between the plaintiff and its employees was [107] what purported to *be an assignment. It is true that the bill emphasizes this aspect of the case, and states the evidence more accurately than the result. But those circumstances do not change the legal conclusion from the facts set forth. The allegations show that, having the old contract before them, the parties came together under a new agreement, which was determined by reference to the terms of that contract, but which none the less was personal and immediate. Maas, Fierlein, and Freese, who were under contract with the National Colortype Company, agreed to work for the plaintiff instead. The plaintiff accepted their promises, and gave a consideration for them by undertaking personally to pay. It does not matter that the bill calls this becoming substituted as the employer and as a party to the old contracts. The plaintiff could not become substituted to a strictly personal relation. All that it could do was to enter into a new one which was exactly like that which had existed before. Service is like marriage, which, in the old law, was a species of it. It may be repeated, but substitution is unknown. *Arkansas Valley Smelting Co.* v. *Belden Min. Co.* 127 U. S. 379, 387, 32 L. ed. 246, 248, 8 Sup. Ct. Rep. 1308.

It may be that the form of the allegation was suggested by the hope to get some help from the written documents when the plaintiff comes to the proof, as against difficulties raised by the statute of frauds. We have nothing to do with that. It is quite manifest that the plaintiff, if it prevails, will not do so on the ground that, by virtue of the transfer to it, it can claim the beneficial interest in the original agreements, and thus is an assignee within the definition given in *Plant Investment Co.* v. *Jacksonville, T. & K. W. R. Co.* 152 U. S. 71, 77, 38 L. ed. 358, 360, 14 Sup. Ct. Rep. 483; if it recovers it will recover on a promise made directly to it upon a consideration which it has furnished. This test is recognized in *Thompson* v. *Perrine*, 106 U. S. 589, 593, 27 L. ed. 298, 300, 1 Sup. Ct. Rep. 564, 568, although the doctrine there quoted from Mr. Justice Story, that the holder of a note payable to bearer recovers on a new promise made directly to himself, has been controverted elsewhere, and, indeed, long has smouldered as a dimly burning question of the law. Holtzendorff, Rechtslexicon, sub v. Inhaberpapiere, ad fin. (3d ed. 365, 371). Compare *Abbott* v. *Hills*, 158 Mass. 396, 397, 33 N. E. 592, Story, Confl. L. 8th ed. § 344.

*What we have said suggests the answer [108] to the objection that a novation is not set forth. The allegations seem to mean that the old company was discharged, but this is not a question of novation. We are dealing with a new bilateral contract made up of mutual undertakings to serve and to pay. The implication that the old contract is discharged is material only so far as it shows that the plaintiff's rights can be enforced without unjustly disregarding the rights of a third person.

It is unnecessary to consider whether an independent ground of jurisdiction is shown in the threatened revelation of trade

secrets, or to discuss the different position of the defendant Schultz. Whether the obligation not to disclose secrets be independent of the express contract, or not, a case is made out. The question of independence will not arise unless a difficulty is encountered in the evidence because of the statute of frauds, but that is not a matter of pleading. We have not to consider how far the injunction should go in case the plaintiff succeeds, or anything except the objection that the plaintiff is suing as an assignee.

*Decree reversed.*

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PETER NELSON and Henry Nelson, *Plffs. in Err.*,
*v.*
NORTHERN PACIFIC RAILWAY COMPANY.

(See S. C. Reporter's ed. 108-156.)

*Railroad land grants—effect of order of withdrawal based on map of general route—land within exterior limits—occupancy in good faith.*

1. The alternate odd-numbered sections within the exterior limits of the general route of the Northern Pacific Railway Company were not so vested in that company by the mere filing of the map of general route and a withdrawal order based thereon as not to be subject to occupancy in good faith by homestead settlers prior to the definite location of the road, although the act of July 2, 1864, chap. 217 (13 Stat. at L. 365), § 6, declares that the "odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company," since this section must be read in connection with § 3, which restricts the grant to such odd-numbered sections as are free from pre-emption or other claims or rights at the date of definite location, and authorizes the company to select other lands in lieu of any found at that date to be "occupied by homestead settlers."
2. Continuous occupation of public land, with a bona fide intention to acquire it under the homestead laws as soon as it should be surveyed, constitutes, when begun prior to the definite location by the Northern Pacific Railroad Company of its route, a "claim" upon the land within the meaning of the act of Congress of July 2, 1864, chap. 217 (13 Stat. at L. 365), § 3, restricting the grant in aid of such railroad to such odd-numbered sections within specified general limits as were free from pre-emption or "other claims or rights" at the date of definite location, and authorizing the company to select other lands in lieu of any found at that date to be "occupied by homestead settlers."
3. One who in good faith occupies unsurveyed public land within the exterior limits of the general route of the Northern Pacific Railroad Company, after an order of withdrawal based on the map of general route, but before the definite location of the road, is entitled to perfect his title under the homestead laws as soon as the land is surveyed, by act of Congress of May 14, 1880 (21 Stat. at L. 140, U. S. Comp. Stat. 1901, p. 1382), chap. 89, § 3, in force when the occupancy was begun, which allows one who has settled or "shall hereafter" settle on public lands, with a view to acquiring them under the homestead laws, the same time to file his homestead application and perfect his original entry as is allowed to settlers under the pre-emption laws, and declares that his rights shall relate back to the date of settlement.

NOTE.—*As to land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

[No. 44.]

*Argued October 16, 17, 1902. Decided January 26, 1903.*

IN ERROR to the Supreme Court of the State of Washington to review a judgment which reversed a judgment of the Superior Court of Kittitas County in favor of defendant in a suit to recover the possession of real property. *Reversed.*

See same case below, 22 Wash. 521, 61 Pac. 703.

The facts are stated in the opinion.

*Mr.* **James Hamilton Lewis** argued the cause, and, with *Messrs. C. H. Aldrich, Thomas B. Hardin,* and *Ralph Kaufman,* filed a brief for plaintiffs in error:

Manifestly it was contemplated by the act of July 2, 1864, chap. 217, § 3 (13 Stat. at L. 365), that rights of pre-emption, or other claims or rights, might accrue or become attached to the land after the general route was fixed and before the line of definite location was established.

*Northern P. R. Co.* v. *Sanders,* 166 U. S. 636, 41 L. ed. 1145, 17 Sup. Ct. Rep. 671.

The filing of the map of general route gave the railroad no claim to any specific lands within the exterior limits of such route on either side of the road, and title does not attach to specific sections until they are identified by an accepted map of definite location of the line of road to be constructed.

*Menotti* v. *Dillon,* 167 U. S. 720, 42 L. ed. 338, 17 Sup. Ct. Rep. 945; *Northern P. R. Co.* v. *McCormick,* 36 C. C. A. 560, 94 Fed. 936.

Therefore, with an honest settlement for homestead purposes, an honest improvement preceding the filing of the accepted map of location gave a precedent right to the settler. It was a "right," or claim of right, as contradistinguished from claims attached (which latter word is not in the section now referred to).

*Menotti* v. *Dillon,* 167 U. S. 722, 42 L. ed. 339, 17 Sup. Ct. Rep. 945; *Grubbs* v. *United States,* 40 C. C. A. 513, 105 Fed. 314.

No declaration or promulgation by the department officer could affect these rights of the settler theretofore attaching to him,—particularly where the granting act of Congress reserved no such power or privilege in such administrative officer.

*Northern P. R. Co.* v. *Smith,* 171 U. S. 269, 43 L. ed. 161, 18 Sup. Ct. Rep. 794; *Northern P. R. Co.* v. *Sanders,* 166 U. S. 636, 41 L. ed. 1144, 17 Sup. Ct. Rep. 671.

The words of these acts should be con-

strued in the most limited manner possible, so as to give the settler the greatest opportunity to enjoy the object and purpose of the acts.

*Tarpey* v. *Madsen*, 178 U. S. 219, 44 L. ed. 1044, 20 Sup. Ct. Rep. 849.

No word can be construed into the act when apparently purposely omitted.

*Sioux City & St. P. R. Co.* v. *United States*, 159 U. S. 349, 40 L. ed. 177, 16 Sup. Ct. Rep. 17.

The words "free from . . . claims or rights" mean free from any claim of right or right of claim to the land.

*Northern P. R. Co.* v. *Musser-Sauntry Land, Logging & Mfg. Co.* 168 U. S. 608, 42 L. ed. 598, 18 Sup. Ct. Rep. 205.

In the absence of any express provision indicating otherwise, a grant of public lands only applied to lands which are free from existing claims.

*Northern P. R. Co.* v. *McCormick*, 36 C. C. A. 560, 94 Fed. 938.

If there were at the time of the filing of the map of definite location an actual existing claim, even though it might turn out to be wholly unfounded, the land thus claimed would not pass by the grant.

*Northern P. R. Co.* v. *DeLacey*, 174 U. S. 635, 43 L. ed. 1115, 19 Sup. Ct. Rep. 791.

No order made by the commissioner could be effective in discriminately holding up land anywhere from entry. The law is that the land attaching to the Northern Pacific could only so happen when definite map of location had been filed and accepted.

*Southern P. R. Co.* v. *United States*, 46 C. C. A. 712, 109 Fed. 921; *United States* v. *Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261.

The mere filing of the general route only indicated, for the company's purpose, the line through and to which it would ultimately file its map, taking along such route, now suggested, such land as may be free from claim at the time of the filing of the map of definite location.

*Northern P. R. Co.* v. *Musser-Sauntry Land, Logging & Mfg. Co.* 168 U. S. 608, 42 L. ed. 598, 18 Sup. Ct. Rep. 205; *Menotti* v. *Dillon*, 167 U. S. 720, 42 L. ed. 338, 17 Sup. Ct. Rep. 945; *Northern P. R. Co.* v. *McCormick*, 36 C. C. A. 560, 94 Fed. 939.

This court has inclined to treat such a withdrawal order as of no value, or as most limited in its effect, being contrary to the purpose of the law and inconsistent with the spirit of the granting acts.

*Hewitt* v. *Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; *Powers* v. *Slaght*, 180 U. S. 173, 45 L. ed. 479, 21 Sup. Ct. Rep. 319; *Southern P. R. Co.* v. *Bell*, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232.

*Mr.* **James B. Kerr** argued the cause, and, with *Mr. C. W. Bunn*, filed a brief for defendant in error:

Upon the fixing of the general route of the Northern Pacific Railroad, in 1873, and the issuance of the order of withdrawal by the Commissioner of the General Land Office, the land in question was no longer subject to homestead entry.

*Buttz* v. *Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100; *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United States* v. *Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Northern P. R. Co.* v. *Amacker*, 175 U. S. 564, 44 L. ed. 274, 20 Sup. Ct. Rep. 236; *Hewitt* v. *Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309.

The action of the Interior Department in rejecting Nelson's application upon the ground that when he made his settlement, in 1881, the land had been for many years withdrawn from entry, is in accordance with the construction of the Department placed on this and similar grants. This construction has been unchanged from the beginning.

*Northern P. R. Co.* v. *Pressey*, 2 Land Dec. 551; *Northern P. R. Co.* v. *Miller*, 7 Land Dec. 100; *McClure* v. *Northern P. R. Co.* 9 Land Dec. 155; *Northern P. R. Co.* v. *Collins*, 14 Land Dec. 484; *Central P. R. Co.* v. *Beck*, 19 Land Dec. 100; *Re Northern P. R. Co.* 27 Land Dec. 505; *Re Southern P. R. Co.* 30 Land Dec. 247.

The decisions of this court are uniform that no rights can be acquired, under the public land laws, to lands withdrawn.

*Wolsey* v. *Chapman*, 101 U. S. 755, 25 L. ed. 915; *Wood* v. *Beach*, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410; *Northern P. R. Co.* v. *Musser-Sauntry Land, Logging, & Mfg. Co.* 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205.

The court will not overrule the construction placed upon acts of Congress by the executive officers of the government charged with their administration, except for cogent reasons, or unless that construction is manifestly erroneous.

*United States* v. *Johnston*, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; *United States* v. *Alabama G. S. R. Co.* 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306; *Hewitt* v. *Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309.

Mere occupancy at the date of definite location is insufficient to except land from a railroad grant.

*Northern P. R. Co.* v. *Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; *Tarpey* v. *Madsen*, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849.

Mr. Justice **Harlan** delivered the opinion of the court:

*The Northern Pacific Railway Company [110] brought this action in one of the courts of the state of Washington to recover from the plaintiffs in error the southeast quarter of section twenty-seven, township twenty, north of range fourteen, east of the Willamette meridian, in Kittitas county, in that state,—the company claiming to be the owner in fee, and alleging that the defendants were in unlawful possession of the land.

The defendants denied each of the allegations of the petition, and the case was tried under a stipulation of facts, which for the

purpose of the trial were conceded to be true. The facts so conceded were as follows:

The company is a corporation of Wisconsin, and succeeded, prior to the commencement of this action, to whatever right, title, or claim the Northern Pacific Railroad Company had, if any, to the land in dispute. The latter corporation was created by an act of Congress approved July 2d, 1864, chap. 217, granting lands in aid of the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route, and by the acts and joint resolutions of Congress supplemental thereto and amendatory thereof. 13 Stat. at L. 365. We will hereafter refer to those sections of the act, upon the construction of which the decision of this case mainly depends.

The railroad company duly accepted in writing the terms of the act of Congress, and on the 29th day of December A. D. 1864, such acceptance was served on the President of the United States.

The company fixed the *general* route of its road extending coterminous with said land, and within 40 miles thereof, by filing a plat of such route with the Commissioner of the General Land Office August 20th, 1873. Thereafter, on November 1st, 1873, that officer transmitted to the register and receiver of the land office for the district in which the land was situate the following letter of instructions:

[111] *"Gentlemen:—The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line, from Puget sound to a connection with their main line near Lake Pend d'Oreille in Idaho territory, I have caused to be prepared a diagram which is herewith transmitted, showing the 40-mile limits of the land grant along said line, extending through your district, and you are hereby directed to withhold from *sale* or *entry* all the odd-numbered sections falling within these limits not already included in the withdrawal for the main-line period. The even sections are increased in price to $2.50 per acre, subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15th, 1873, the date when the map was filed by the company with the Secretary of the Interior, as required by the 6th section of the act of July 2d, 1864, organizing said company."

The letter of the Commissioner and the diagram therein referred to were received and filed in the local land office November 17th, 1873.

The land in dispute was within the 40-mile limit of the land grant as designated in the diagram.

On December 6th, 1884, the railroad company *definitely located* the line of its railroad, coterminous with and within less than 40 miles of the land in controversy, by filing a plat of such line, approved by the Secretary of the Interior, in the office of the Commissioner of the General Land Office; and prior to November 18th, 1886, it constructed and completed a section of 40 miles of railroad and telegraph line extending over the line of definite location and coterminous with the land here in controversy. The President of the United States having appointed three commissioners to examine the same, and the commissioners, having performed that duty, reported to the Secretary on the 18th day of November, 1886, that the lines were completed in all respects as required by the act of Congress.

On the 30th of November, 1886, the Secretary transmitted that report to the President with a recommendation that the railroad and telegraph line be accepted, and on the 7th day of December, 1886, the President approved that recommendation.

*The United States executed and deliv- [112] ered, May 10th, 1895, to the railroad company its letters patent, purporting to convey to the company the above tract under the terms and provisions of the act of 1864, and the various acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

In the year 1881, *three* years *before* the *definite location* of the road, the defendant Henry Nelson went upon the above land and *occupied* it, and has since *continuously resided* thereon. It is agreed that he was at the time qualified to enter public lands under the act of Congress approved May 20th, 1862 (12 Stat. at L. 392, chap. 75), entitled "An Act to Secure Homesteads to Actual Settlers on the Public Domain," and under the various acts supplemental thereto and amendatory thereof.

The land when occupied was unsurveyed, and was not surveyed until 1893. But *as soon as surveyed* Nelson attempted to enter it under the homestead laws of the United States in the proper United States district land office. His application was, however, rejected by the register and receiver because, in their opinion, it conflicted with the grant to the Northern Pacific Railroad Company.

The defendant Peter Nelson is in the occupancy of a portion of the land in question under license from his codefendant Henry Nelson.

Upon the facts so stipulated, the judgment was that the railroad company was not the owner, had no claim to, and was not entitled to the possession of the land in dispute, and that the defendant Henry Nelson was entitled to remain in possession by virtue of the homestead laws of the United States. Upon appeal to the supreme court of Washington that judgment was reversed, and the cause remanded with directions to enter judgment for the company.

*1. Before considering the merits of the [113] case it is proper to remark that although the railroad company holds the patent of the United States for the land in controversy, the defendant, according to the laws of the state, was entitled to judgment, if it appeared that he was equitably entitled to possession as against the plaintiff. Hill's Anno. Codes & Statutes, 530 *et seq.; Burmeister* v. *Howard*, 1 Wash. Terr. 208.

2. We have seen that the Northern Pacific Railroad Company was created by the act of Congress of July 2d, 1864, chap. 217, making a grant of lands in aid of the construction of the road from Lake Superior to Puget sound. When that grant was made substantially the entire country between those points was untraveled as well as uninhabited except by Indians, very few of whom, at that time, were friendly to the United States. The principal object of the grant, as will appear from its language, was to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, by means of a railroad and telegraph, and to that end, and in order to bring the public lands into market, it was deemed important to encourage the settlement of the country along the proposed route. The public lands in that vast region were unsurveyed, and it was not known when they would be surveyed. Congress, of course, knew that if immigrants accepted the invitation of the government to establish homes upon the unsurveyed public lands, they would do so in the belief that the lands would be surveyed, that their occupancy would be respected, and that they would be given an opportunity to perfect their titles in accordance with the homestead laws.

Such was the situation when the act of July 2d, 1864, was passed. Necessarily the act must be interpreted in the light of that situation. It should not be so interpreted as to justify the charge that the government laid a trap for honest immigrants who risked the dangers of a wild, unexplored country, in order that they might establish homes for themselves and their families. And it should not be supposed that Congress [114] had in view *only the interests of the company, which, with the aid of a munificent grant of lands, was empowered to connect Lake Superior and Puget sound with a railroad and telegraph line.

Let us now see what is the fair import of the act of 1864, under which both parties claim possession.

By the 3d section of that act, it was, among other things, provided as follows, to wit: "That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, *and* whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, *and free* from pre-emption *or other claims or rights* at the time the line of said road is *definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, *prior to said time* [of definite location], any of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or pre-empted, or otherwise disposed of, *other lands* shall be selected by said company *in lieu thereof*, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections. . . ."

By the 6th section of the act it was, among other things, provided as follows:

"§ 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of *land hereby granted shall not be [115] liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act." The stipulation of facts omits the latter part of § 6; but of the words omitted this court will take judicial notice. They are as follows: "But the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

The railroad company insists that after the order of withdrawal from "sale or entry" made in 1873 by the Commissioner of the Land Office, and based upon its map of general route, no right could be acquired by a settler upon any odd-numbered alternate section of land within the 40-mile limit indicated by the map of general route. As the lands in question were not surveyed until 1893, the company's contention means that during the twenty years succeeding the withdrawal in 1873 *all* the sections covered by the map of general route which would, upon a survey, appear to be odd-numbered alternate sections, were absolutely excluded from occupancy by any settler having in view the homestead laws.

The defendant insists that the act of 1864 recognized the right of an immigrant to occupy any section of the public lands on the general route up to the time of the definite location of the road, provided it was done in good faith with the intention to perfect his title under the homestead laws whenever it became possible to do so, and that if at the time of *definite location* it appeared that he was in the occupancy of an odd-

numbered alternate section the railroad company could not disturb him.

By the 6th section of the act of July 2d, 1864, it was declared that the odd sections "hereby granted," that is, by that act granted, should not be liable to sale, entry, [116] or pre-emption before *or after they were surveyed, except by the company, as provided in the act. But we have also seen, looking at the 3d section, which was the granting section of the act, that Congress did not *grant* every odd-numbered alternate section within the general limits specified, but *only* the odd-numbered alternate sections to which the United States had full title, and which had *not* been previously reserved, sold, granted, or otherwise appropriated, *and* which were *free* from pre-emption or "other claims or rights" *at the time* the line of the road was *definitely fixed*—giving to the railroad company the right to select lands, within certain limits, in place of such as were found, *at the date of definite location*, to have been disposed of or to be "*occupied by homestead settlers.*"

The first inquiry is whether the railroad company acquired any *vested* interest in the land in dispute by reason merely of the acceptance by the Land Department of its map of *general* route, or by reason merely of the withdrawal order of 1873. In other words, Did the land, after the *general* route was established, become segregated from the public domain and cease to be a part of the public lands, so as not to be subject to occupancy, in good faith, by homestead settlers, prior to definite location? These questions have a direct bearing on the present issues; for, if Congress did not intend—as, we think, it did not—that the railroad company should acquire any *vested* interest in these lands, prior to definite location, we can understand why it excluded from its grant any lands "occupied by homestead settlers" at the time of the *definite location* of the road.

The above questions are, we think, distinctly answered in the negative by recent decisions of this court. Let us see if such be not the case.

In *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 5, 35 L. ed. 77, 79, 11 Sup. Ct. Rep. 389, it was held that, after a map of a *general* route was filed and *up to definite location*, the grant to the railroad company was in the nature of a "float," and land which previously to definite location had been reserved, sold, granted, or otherwise appropriated, or upon which there was a pre-emption "or other claim or right," *did not pass by the grant* of Congress.

In *United States* v. *Northern P. R. Co.* 152 U. S. 284, 296, 298, 38 L. ed. 443, 448, 14 Sup. Ct. Rep. 598, 603, 604, *the court said: "The act of 1864 granted to the Northern Pacific Railroad Company *only* public land, . . . free from pre-emption *or* other claims or rights *at the time its line of road was definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office."

In *Northern P. R. Co.* v. *Sanders*, 166 U. S. 620, 634, 636, 41 L. ed. 1139, 1144, 17 Sup. Ct. Rep. 671, 676, it was adjudged that the railroad company "acquired, by fixing its *general* route, *only* an *inchoate* right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was *definitely located* and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper." In the same case the court, after observing that as the lands there in dispute were not free from claims at the date of definite location, it was of no consequence what was done with them after date, proceeded: "The only ground upon which a contrary view can be rested is the provision in the 6th section of the act of 1864, that 'the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided by this act.' But this section is not to be construed without reference to other sections of the act. It must be taken in connection with § 3, which manifestly contemplated that rights of pre-emption *or other claims and rights might accrue or become attached to the lands granted after the general route of the road was fixed and before the line of definite location was established.* Literally interpreted, the words above quoted from § 6 would tie the hands of the government so that even it could not sell any of the odd-numbered sections of the lands after the general route was fixed,—an interpretation wholly inadmissible in view of the provisions in the 3d section. The 3d and 6th sections must be taken together, and so taken it must be adjudged that nothing in the 6th section prevented the government from disposing of any of the lands prior to the fixing of the line of definite location, or, for the reasons stated, from receiving, under the existing statutes, applications to purchase such lands as mineral lands."

*The principles announced in the *Sanders* [118] *Case* were reaffirmed in *Menotti* v. *Dillon*, 167 U. S. 703, 720, 42 L. ed. 333, 338, 17 Sup. Ct. Rep. 945, 951, the court adding: "It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry, and sale, lands within the general route of a railroad, is to preserve the lands, unencumbered, until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines, 'not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed,' the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving, or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such defi-

nite location, the property of the railroad company."

In *United States* v. *Oregon & C. R. Co.* 176 U. S. 28, 43, 44 L. ed. 358, 364, 20 Sup. Ct. Rep. 261, 266, which involved the conflicting claims of two railroad companies to certain lands, and required the court to determine the effect of a map of general route filed by the Northern Pacific Railroad Company, as well as the extent of the grant made to it, the court said: "If, therefore, the Perham map of 1865 were conceded for the purposes of the present discussion to have been sufficient as a map of 'general route,'—and nothing more can possibly be claimed for it,—these lands could not be regarded as having been brought by that map (even if it had been accepted) within the grant to the Northern Pacific Railroad Company, and thereby have become so segregated from the public domain as to preclude the possibility of their being earned by other railroad companies under statutes enacted by Congress after the filing of that map and before any definite location by the company of its line." In the same case: "In opposition to the views we have expressed, it may be said that the clause in the act of July 25th, 1866 (14 Stat. at L. 239, chap. 242), providing for the selection under the direction of the Secretary of the Interior of lands for the Oregon company in lieu of any that should 'be found to have been granted, sold, reserved, occupied by [119] homestead settlers, *pre-empted, or otherwise disposed of.' shows that Congress did not intend to include in, but intended to exclude from, the grant to that company any lands that could have been earned by the Northern Pacific Railroad Company by definitely fixing its route and filing its map of definite location. Undoubtedly those lands would be regarded as having been appropriated when the route of the Oregon road was definitely located, if prior to that date the route of the Northern Pacific Railroad had been definitely fixed, and if such lands were within the exterior lines of that route. But, as we have said, these lands were within the limits of the grant of July 25th, 1866, and had not, *at that time* or when the route of the Oregon road was definitely located, been appropriated for the benefit of the Northern Pacific Railroad Company, for the reason that the latter company had not then filed any map of definite location. *The Northern Pacific Railroad Company could take no lands except such as were unappropriated at the time its line was definitely fixed.* It accepted the grant of 1864 subject to the possibility that Congress might, before its line was definitely fixed, authorize other railroad corporations to appropriate lands within its general route, allowing it to select other lands in lieu of any so appropriated. The lands here in dispute were consequently subject to be disposed of by Congress when the act of 1866 was passed; and (the line of the Northern Pacific railroad not having been definitely located prior to the passage of the forfeiture act of 1890 (26 Stat. at L. 496, chap. 1040, U. S. Comp. Stat. 1901, p. 1598), the Oregon Company became entitled to take the lands and to receive patents therefor in virtue of its accepted map of definite location." See also *Wilcox* v. *Eastern Oregon Land Co.* 176 U. S. 51, 44 L. ed. 368, 20 Sup. Ct. Rep. 269, and *Messinger* v. *Eastern Oregon Land Co.* 176 U. S. 58, 44 L. ed. 370, 20 Sup. Ct. Rep. 271.

The cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location as shown by an accepted map of its line; and that until definite location the land covered by the map of general route was a "float," that is, at large.

In support of the proposition that the railroad company acquired an interest in the lands in dispute, upon its general route being established, reference has been made to some expressions *in the opinion of Mr. [120] Justice Field in *Buttz* v. *Northern P. R. Co.* 119 U. S. 55, 71, and 72, 30 L. ed. 330, 336, 7 Sup. Ct. Rep. 100, 197, to the effect that when the general route of that road was made known by a map duly filed and accepted, "the *law* withdraws from sale or preemption the odd sections to the extent of 40 miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted." But it is evident, in view of both prior and subsequent decisions, that this language is not to be taken literally or apart from the other portions of the opinions of the eminent jurist who delivered the judgment of the court. If, upon the filing and acceptance of the map of *general* route, the *law* withdrew the odd-numbered sections, then the previous holding in many cases that until definite location the grant was a float, with no interest in specific sections being acquired by the railroad company, would be meaningless; and there would be some difficulty in Congress appropriating such lands prior to definite location. Indeed, it is manifest that the court did not mean to announce any new doctrine in the *Buttz Case;* for Mr. Justice Field, when delivering judgment in that case, said that the charter of the Northern Pacific Railroad Company contemplated "the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the *definite location* of the line of its road, and *limits* the *grant* to *such* alternate odd sections as have not *at that time* been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant *or other claims or rights.* . . . Nor is there anything inconsistent with this view of the 6th section as to the general route, in the clause in the 3d section making the grant operative *only* upon such odd sections as have *not* been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, *when a map of the definite location has been filed.*"

Further, we had occasion in *Northern P.*

*R. Co.* v. *Sanders* and *United States* v. *Oregon & C. R. Co.* above cited, to limit the broad language in the *Buttz Case* which implied that after the general route was fixed the land was withdrawn by the *law* for the [121] railroad company. We *said in the last-named case: "This language was too broad if it is construed to express the thought that public lands, when within the exterior lines of a 'general route,' are 'appropriated' from the time the map of such route is filed, so as to prevent them from being granted by Congress to and from being earned by another railroad corporation prior to the filing of a map of definite location by the company designating such general route."

It results that the railroad company did not acquire any *vested* interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such map; and if such land was not "free from pre-emption or other claims or rights," or was "occupied by homestead settlers" at the date of the definite location on December 8th, 1884, it did not pass by the grant of 1864. Now, prior to that date, that is, in 1881, Nelson, who is conceded to have been qualified to enter public lands under the homestead act of May 20th, 1862, went upon and occupied this land and has continuously *resided* thereon. The land was not surveyed until 1893, but as soon as it was surveyed he attempted to enter it under the homestead laws of the United States, but his application was rejected, solely because, in the judgment of the local land officers, it conflicted with the grant to the Northern Pacific Railroad Company. He was not a mere trespasser, but went upon the land in good faith, and, as his conduct plainly showed, with a view to residence thereon, not for the purposes of speculation, and with the intention of taking the benefit of the homestead law by perfecting his title under that law, whenever the land was surveyed. And for fourteen years before the railroad company by an *ex parte* proceeding, and without notice to him, so far as the record shows, obtained from the Land Office a recognition of its claim, and for sixteen years before this action was brought, he maintained an actual residence on this land. It is so stipulated in this case. As the railroad had not acquired any vested interest in the land where Nelson went upon it, his continuous occupancy of it, with a view, in good faith, to acquire it under the homestead laws as soon as it was surveyed, constituted, in our opinion, a [122] *claim* upon the land *within the meaning of the Northern Pacific act of 1864; and as that claim existed when the railroad company definitely located its line, the land was, by the express words of that act, excluded from the grant.

This view protects the bona fide settler in his home, established upon the invitation of the government under great difficulties, and does no injustice to the railroad company; for, after restricting the grant to such odd-numbered sections of lands, within specified lateral limits, as were free from pre-emption or "other claims or rights" at the time the line of the road was definitely fixed; Congress, in the act of 1864, as we have seen, proceeded: "And whenever, prior to said time [of definite location] *any* of said sections or parts of sections shall have been granted, sold, reserved, *occupied by homestead settlers*, or pre-empted or otherwise disposed of, *other lands shall be selected by said company in lieu thereof*," etc. The words "occupied by homestead settlers" show that Congress intended by the charter of the Northern Pacific Railroad Company —whatever it may have intended as to other companies receiving grants of public lands—that occupancy by a homestead settler, with the intention to take the benefit of the homestead laws, constituted a *claim* which, existing at the date of definite location, would exclude from the grant land that might otherwise be covered by it. If Congress did not intend thus to protect the occupancy of homestead settlers, the reference to lands being "occupied by homestead settlers," at date of definite location, was meaningless, and it was useless to reserve to the company the privilege of selecting lands in lieu of those lost by such occupancy. Congress knew, when passing the act of 1864, that one going west to establish his home could not know whether the unsurveyed land occupied by him would be an even-numbered or odd-numbered section. Hence, the provision in § 3 in relation to odd-numbered sections "occupied by homestead settlers." The efficacy of such a provision could not be destroyed except by further legislation. It is as if Congress had in words declared that among the "other claims or rights" of which the land must be free at the time of definite location in order that the railroad company might take, were claims arising *out of occupancy by [123] homestead settlers. Such settlers Congress, in effect, declared should be protected in their rights, and the railroad company should be reimbursed by lieu lands near by. Nelson's occupancy, we have seen, commenced in 1881, while the definite location of the road occurred in 1884. That he occupied and continuously resided upon the land in dispute as a homestead settler after 1881 is admitted.

If it be said that Nelson's claim was that of mere occupancy, unattended by formal entry or application for the land, the answer is that that was a condition of things for which he was not in anywise responsible, and his rights, in law, were not lessened by reason of that fact. The land was not surveyed until twelve years after he took up his residence on it, and under the homestead law he could not initiate his right by formal entry of record until such survey. He acted with as much promptness as was possible under the circumstances.

In *Ard* v. *Brandon*, 156 U. S. 537, 543, 39 L. ed. 524, 526, 15 Sup. Ct. Rep. 406, 409, this court said: "The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute

prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application." In the same case the court quoted with approval these words from *Clements* v. *Warner*, 24 How. 394, 397, 16 L. ed. 695, 696: "The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person."

In the recent case of *Tarpey* v. *Madsen*, 178 U. S. 215, 219, 44 L. ed. 1042, 1044, 20 Sup. Ct. Rep. 849, 850,—which was a contest between the Central Pacific Railroad Company and a pre-emptor who sought to avail himself of the act of September, 1841, —it was found as a fact that the land in dispute had on it, at the date of definite location (which was on October 20th, 1868), the improvements of a bona fide settler; and one of the questions in the case was how far the rights of the settler, based upon a bona fide occupancy, were affected [124] by *the absence of a local land office in which could be made some record of his application or entry. This court said: "It is true that there was then no local land office in which those seeking to make pre-emption or homestead entries could file their declaratory statements or make entries, and the want of such an office is made by the supreme court of the state one of the main grounds for holding that the land did not pass to the railroad company. We agree with that court fully in its discussion of the general principles involved in the failure of the government to provide a local land office. The right of one who has *actually occupied, with an intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent*. . . . If Olney was in possession of this tract before October 20, 1868 [date of definite location], *with a view of entering it as a homestead or pre-emption claim*, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could, undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights." In the present case, the settler waited from 1881 to 1893 for the land to be surveyed, and as soon as that was done he attempted to enter it under the homestead law in the proper office, but his claim was overruled upon the theory, unfounded in law, that the land was covered by the railroad grant.

So far we have proceeded on the ground that, as the act of 1864 granted to the railroad company the alternate sections to which at the time of definite location the United States had full title, not reserved, sold, granted, or appropriated, *and* which were *free* from pre-emption or other claims or rights at date of definite location, and authorized the company to select other lands in lieu of those then found to be "occupied by homestead settlers," Congress excluded from the grant any land so occupied with the intention to perfect the title under the homestead laws whenever the way to that end was opened by a survey.

3. But the case of the appellant does not depend entirely upon this view of the act of 1864. It is placed on impregnable ground by the act of May 14th, 1880, chap. 89, entitled, "An Act for the Relief of Settlers on Public Lands," and which was in force when, *in 1881, Nelson settled upon the [125] land in dispute. The act is as follows: "1. That when a pre-emption homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office. § 2. In all cases where any person has contested, paid the land-office fees, and procured the cancelation of any pre-emption, homestead, or timber-culture entry he shall be notified by the register of the land office of the district in which such land is situated of such cancelation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported. § 3. That any settler who has settled, or who shall *hereafter settle*, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws." 21 Stat. at L. 140, U. S. Comp. Stat. 1901, p. 1392.

The 3d section of this statute is a distinct confirmation of the rights of a qualified person who had theretofore settled or should *thereafter* settle "on *any* of the public lands of the United States, whether *surveyed or unsurveyed*, with the intention of claiming the same under the homestead laws;" though, of course, no lands could be deemed of that character which had prior to such settlement become vested in a railroad company in virtue of an accepted map of *definite location*. It is, as we have seen, a fixed principle in the law relating to the administration of the public lands that a railroad grant is a mere float until definite location, and that prior to that date all lands, within the exterior limits of a general route, are entirely at the disposal of the government, to be appropriated as it desires. The railroad company, as already shown, acquired, by its accepted map of general route, no interest in any specific

[126]lands, but *only a right to take those to which, at the date of definite location, the United States had full title, and upon which there was no claim, and which were not "occupied by homestead settlers." It was, therefore, competent for the United States by the act of 1880—which was four years prior to the definite location of the Northern Pacific railroad—to give additional rights to those who had then settled or might thereafter in good faith settle upon any of the public lands. Some who have made comments on this act seem to overlook the broad language of § 3, and to forget that that section embraces, not only those who had theretofore, but those who might *thereafter*, settle on the public lands, whether surveyed or *unsurveyed*. Nelson settled on unsurveyed public land, in which the railroad company had no vested or specific interest, and the 3d section of the act of 1880 was purposeless if it did not allow him to perfect his title under the homestead laws, *as soon as the land was surveyed*.

The meaning we have given to the words "occupied by homestead settlers" in the act of 1864, and what has been said about the act of 1880, finds support in decisions of the Land Department. It will be well, in view of the far-reaching consequences of the decision in the present case, to refer to some of those decisions.

In *Southern P. R. Co.* (*Branch*) v. *Lopez* (1884) 3 Land Dec. 130, 131, Secretary Teller said that the act of July 27th, 1866, 14 Stat. at L. 292, chap. 278, relating to the Southern Pacific Railroad Company, "granted only such lands as were 'not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or *other claims or rights*,' at date of definite location; and provided that 'whenever, prior to said time, any of said sections or parts of sections shall have been *occupied by homestead settlers*, pre-empted,' etc., lieu lands might be taken." It will be observed that this was the language of the Northern Pacific act of 1864. The Secretary proceeded: "Now a homestead entry, which must be made on surveyed lands, would be within the descriptive terms 'other claims' without doubt; but the question material to the case before me, wherein the land was not surveyed, is whether a homestead settlement on [127]unsurveyed *land, with a view to entering it when surveyed, is within said terms. I think it is. Construing together the granting words and those respecting the lieu land selection, it is evident that one of the 'other claims or rights' excepting land from the operation of the grant was 'occupation [occupied] by homestead settlers.' The word 'occupied' and the idea conveyed by it were foreign to the homestead law at date of this act, as an essential element in the reservation of land. I need not recite the numerous decisions of the courts and of the Land Department, which settle the principle that under the homestead law it is the 'entry' which reserves land (except for the short period during which it is reserved by settlement under the act of May 14th, 1880), and not any occupation by the claimant before or after it. The language of the granting act is therefore peculiar in this respect, and we are to suppose that it was used deliberately, with knowledge of then-existing law, and for a special and important purpose. We must interpret it in accordance with this evident purpose. *Congress was aware that by this act it was making grants of land far beyond the line of the government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims.* By § 6 the homestead law was extended to the even sections after survey, and expressly withheld from the odd sections before and after survey, and yet in § 3 land *'occupied by homestead settlers'* was *excepted from the grant. Congress knew that unsurveyed land could not be 'entered' as homestead; it had in terms prohibited homestead 'entry' on these lands; it was aware that only by such 'entry' could a claim be appropriated and reserved from the grant, without express exception; and therefore in the use of the words 'occupied by homestead settlers' it intended to make such express exception, and to indicate a different kind of appropriation by a class of settlers not within the letter of the homestead law, though clearly within its spirit, namely, those who had made a home on the public domain in advance of the surveys, with the intention of subsequently claiming it under said law.* If this was not the purpose, then the employment of the peculiar language referred to was a vain and useless thing; and such a *thing we are not to sup-]128] pose Congress had done (92 U. S. 733, 23 L. ed. 634). It therefore follows that the land claimed by Lopez, whose proofs are not questioned in any particular, and who preferred his claim promptly upon survey, was 'occupied by a homestead settler' *when the grant to this company took effect, and hence excepted from the operation of the grant.*"

In *Northern P. R. Co.* v. *Anrys* (1890) 10 Land Dec. 258, 259, which was a contest between the Northern Pacific Railroad Company and a homesteader who had settled on unsurveyed public lands, Secretary Noble said: "It is urged that the land was not subject to the operation of the homestead law at the date of Newland's settlement, because unsurveyed, and that the homestead claim could have attached only by entry. But it must be remembered that the rights of the parties here must be determined by a proper construction of the *railroad grant* rather than of the general *homestead law*. It must be admitted that the ruling in the case at bar is in line with those of the Department for many years. In the case of *Southern P. R. Co.* (*Branch*) v. *Lopez*, 3 Land Dec. 130, the question here presented was fully discussed in connection with a grant framed in words identical with those used in the grant for the Northern Pacific company, and it was held that a homestead settlement on unsurveyed land with a view to entering it when surveyed is within the

term 'other claims,' and that 'it is evident that one of the "other claims or rights" excepting land from the operation of the grant was "occupation by homestead settlers."' In support thereof it was urged that Congress was aware that by the act in aid of a road extending across the western half of the continent, it was making a grant far beyond the line of government surveys, in regions occupied and to be occupied largely by settlers awaiting the advent of the surveyor to prefer their claims. In this view I concur. It seems beyond question that it was to protect such settlers as described above that Congress excepted from the operation of the grant tracts 'occupied by homestead settlers.' Had Congress intended to extend its protection only to those who had made entry, it would have said so in other and appropriate words. The ordi-[129]nary exception of 'lands to which a *homestead right has attached' would have fully protected that class of settlers. But Congress went further and made occupation the test instead of entry. I do not deem it necessary to cite cases to show that the views of the Department on this point have not changed."

In *Spicer* v. *Northern P. R. Co.* 10 Land Dec. 440, 443, the rights of an Indian were disputed by the Northern Pacific Railroad Company under the act of March 3d, 1875, 18 Stat. at L. 402, 420, chap. 131 (U. S. Comp. Stat. 1901, pp. 1419, 1420), extending the benefit of the homestead laws of the United States, with certain restrictions upon the title when obtained, to Indians twenty-one years of age, or the head of a family having abandoned the tribal relations. Secretary Noble said: "The provisions of this act were in force at the date when the company's rights attached on definite location of its road, and, if the matters alleged relative to the claim of the Indian, Enoch, be true, he was *at that date, and had been for many years prior thereto, living upon the land in question, as his home, with the intention to acquire title thereto, as a homestead; he had valuable and permanent improvements thereon, and had cultivated the same for many years, during all of which time he claimed it as his home.* Such a claim, it seems to me, is clearly covered by the excepting clause of the grant to the company, and, if proven, would be sufficient, in my judgment, to defeat the claim of the company to the land. True, the Indian had put no claim of record for the land, but it is well settled by departmental rulings that while such omission might defeat the claim as against a subsequent settler who duly places his claim of record, it will not defeat such claim as against the United States, and the land covered thereby *will be excepted from the operation of any grant for the benefit of a railroad company attaching subsequently to the inception of the settlement right. Northern P. R. Co.* v. *Evans*, 7 Land Dec. 131, *and authorities there cited.* It is also well settled that a claim *resting on settlement, residence, and improvements,* acquired prior to the date when the company's rights attached under its grant, is sufficient to except the land covered thereby from the operation of such grant."

In *Northern P. R. Co.* v. *McCrimmon*, 12 Land *Dec. 554, it was said: "In support[130] of this appeal, counsel for the railroad company contend that Thomas did not claim the land as government land, but as railroad land, and that, although the land was excepted from the withdrawal on general route, yet Thomas did not insist upon the right to take it as government land, but was satisfied to claim it under the railroad company. Under the ruling of the Department, as announced in the cases of *Northern P. R. Co.* v. *Bowman*, 7 Land Dec. 238, and *Northern P. R. Co.* v. *Potter*, 11 Land Dec. 531, the only question to be determined, is, *whether there was a settlement on the land at date of definite location* by *one having the qualification to enter the land under the settlement laws*, and, if these facts are shown, *the land would be excepted from the operation of the grant*, although such settler might not have known of his right, but held the land under the belief that it was railroad land."

In *Northern P. R. Co.* v. *Plumb*, 16 Land Dec. 80, it appeared that the land in dispute was within the primary limits of the company's grant as shown by map of definite location filed July 6th, 1882, and was also within the limits of the withdrawal on map of general route filed February 21st, 1872. Secretary Noble said: "The only question raised by the appeal is as to whether the occupancy shown by Plumb was sufficient to defeat the grant. It appears that in 1881 Plumb took possession of the tract in question, together with an adjoining 40-acre tract, upon which he resided. In the spring of 1882 he broke the entire tract in question and inclosed it with a fence, and has since had possession of and improved the land. He had never exercised the pre-emption right, and was therefore duly qualified to claim the land under his settlement right. In 1886 he contracted to purchase the adjoining 40 acres, upon which he had resided, from the company, and at the hearing it was sought to show that he also claimed the land in question under the grant at the date of the definite location of the road, but the testimony will not warrant such a finding. *Being in possession of the land in question at the date of the definite location of the road with valuable improvements thereon, and duly qualified to assert a right thereto under the settlement *laws, he had such a right*[131] *to the land as served to defeat the grant*, and the fact that the claim subsequently asserted by him was under a different law from those providing for settlement can in nowise affect his rights in the premises. Being excepted from the grant by reason of his settlement, Plumb was at liberty to seek title from the government under any law under which such lands might be taken."

In *Northern P. R. Co.* v. *Benz*, 19 Land Dec. 229, the land in dispute was within

the limits of the grant to the company, as shown by map of definite location filed July 6th, 1882, and was covered by the withdrawal upon general route of February 21st, 1872. Secretary Smith said: "The present contest is between the railroad company on one part and Hoy and Benz on the other. If it can be made to appear affirmatively by good and sufficient testimony that either of these parties, Hoy or Benz, was *in possession of* said land July 6, 1882, *when the line of the road opposite thereto was definitely fixed, and, at the same time, had the right to perfect title to the same under the pre-emption or homestead laws, such possession excepted the land from the grant to the railroad company* and reduced the contest to one between Hoy and Benz; or, rather, to one between Hoy and the legal representatives of Benz, he having died since entering his appeal." It was found that on July 6th, 1882, Hoyt was a competent entryman under the homestead laws.

What has been said as to the meaning and scope of the acts of 1864 and 1880 is not inconsistent with anything decided in *Maddox* v. *Burnham*, 156 U. S. 544, 39 L. ed. 527, 15 Sup. Ct. Rep. 448, and *Wood* v. *Beach*, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410.

In *Maddox* v. *Burnham* the question was as to the rights of a homestead occupant as against a certain railway company. Referring to the 3d section of the act of 1880, the court said: "By this section for the first time the right of a party entering land under the homestead law was made to relate back to the time of his settlement. But this act was passed *long after the rights of the railway company had accrued and the legal title had passed to it.* It is not operative, therefore, to devest such legal title, or enlarge, *as against such title*, any equitable rights which the defendant theretofore [132] had." This was a case, therefore, in *which the claim based upon occupancy accrued after the legal title had become vested in the railroad company, not a case in which the grant was, as here, a float with no right attached to any specific section.

In *Wood* v. *Beach*—which was a contest between a homestead settler and a railway company—it appeared that the map of the line of definite location was filed December 6th, 1866, and a withdrawal followed in 1867, while the occupation and settlement of the homesteader did not commence until June 8th, 1870. Of course, the legal title to the sections granted vested in the railway company upon the filing and acceptance of the map of definite location. Besides the withdrawal in 1867 was pursuant to the express command of the act of Congress of July 26th, 1866, 14 Stat. at L. 290, chap. 270, § 4, which provided that as soon as the railway company should "file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purposes of this act and subserve the public interest." It might well be, therefore, that one whose right, resting upon occupancy, had accrued, as in *Maddox* v. *Burnham*, after the legal title passed to the railroad company, or one who, as in *Beach* v. *Wood*, did not settle upon the public lands until after the railroad company had definitely located its road, and after the lands had been withdrawn from market pursuant to the directions of an express act of Congress, could not, as against the railroad company, acquire an interest in them by virtue of the act of 1880.

Nor is there any conflict between the decision now rendered and *Northern P. R. Co.* v. *Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; for, as appears from the opinion and record in that case, the land there claimed to have been occupied by a homestead settler, at the date of definite location, was *surveyed* public land, and the good faith of the occupation was not manifested by an entry, or an attempt at entry, at any time in the local land office. It was held that the inchoate right of the homesteader must be initiated by a filing in the land office. In the present case, as we have seen, the land occupied was unsurveyed, and at the *time of such occupancy, the land [133] being unsurveyed, there could not then have been any filing or entry in the land office.

The case before us is altogether different. Nelson's occupancy occurred after the passage of the act of 1880. While that act did not apply to a railroad company which had acquired the legal title, by definite location of its road, it distinctly recognized the right prior to such time to settle upon the public lands, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws. In occupying the land here in dispute Nelson did not infringe upon any *vested* right of the railroad company; for there had not been at the date of such occupancy in 1881 any definite location of the line of the railroad, and the land, so occupied, with other lands embraced by the map of *general* route, constituted only a "float," the company having, at most, only an inchoate interest in them, a right to acquire them, *if, at the time of definite location*, it was not "occupied by homestead settlers" nor encumbered with "other claims or rights." The withdrawal merely from "sale or entry" in 1873, based only on a map of the general route of the road, did not identify any specific sections, was not expressly directed or required by the act of 1864, was made only out of abundant caution and in accordance with a practice in the Land Department, and did not and could not affect any rights given to homestead occupants by Congress in the acts of 1864 and 1880. Besides, the order made in 1873 to withhold from *sale* or *entry* all the odd-numbered sections falling within the limits of the general route was without practical value so far as the land in dispute was concerned; for such land had not been surveyed, and there could not have been any sale or entry of unsurveyed lands. At any rate, the order of withdraw-

al directing the local land office to withhold from "sale or entry" the odd-numbered sections within the limits of the *general* route could not prevent the *occupancy* of one of those sections prior to definite location by one who in good faith intended to claim the benefit of the homestead law; this, because such right of occupancy was distinctly recognized by the act of 1864. But if this were not so, the act of 1880, in its application to public lands, which had [134] not become already vested in some *company or person, must be held to have *so modified the order of withdrawal based merely on general route, that such order would not affect any occupancy or settlement made in good faith, as in the case of Nelson, after the passage of that act, and prior to definite location.* This conclusion cannot be doubted, because the act of 1880 made no exception of public lands covered by orders of withdrawal from sale or entry based merely on general route, and because also public lands, which had not become vested in the railroad company, by the definite location of its line, were subject to the power of Congress.

It results that the Supreme Court of the State of Washington erred in not affirming the judgment of the court of original jurisdiction in favor of the defendants.

The judgment must be reversed, and the cause remanded for such further proceedings as may not be inconsistent with this opinion.

*Reversed.*

Mr. Justice **Brewer**, with whom Mr. Justice **Brown** and Mr. Justice **Shiras** concur, dissenting:

I dissent from the judgment in this case. It overrules a unanimous judgment of this court, one which for nearly twenty years has been a guide to the Land Department in the construction of the Northern Pacific railroad grant. Further, in effect it declares that an entire section in the act of Congress making the grant, a section which from the inception of the work of construction has always been regarded by the parties interested as a provision intended to secure to the company the full measure of lands granted, is meaningless, and gave the company absolutely no protection whatever.

It is admitted that the company fixed the general route of its road coterminous with the road in controversy and within 40 miles thereof, by filing a plat of such route with the Commissioner of the General Land Office on August 20, 1873, and that on November 1, 1873, the odd-numbered sections within the 40-mile limits of this route were by the Land Department withdrawn from sale or entry and the even-numbered sections increased in price to $2.50, notice of [135] which *order was immediately filed in the local land office. In 1881, eight years thereafter, the plaintiff in error for the first time entered upon the lands and commenced its occupation. It is also admitted that by construction of its road the company has perfected its title to its land grant. Now, when the company filed its map of general route and obtained from the Land Department the order of withdrawal, it believed that it acquired something. It did not suppose that it was doing a vain and useless thing. It did not believe that Congress had cheated it with a delusive expectation of a benefit which it did not intend to give.

Was it justified in such belief? To answer this it is well to look back to the condition of things at the time the granting act was passed. In 1862, Congress created the Union Pacific Railroad Company to build a railroad from the Mississippi river to the Pacific ocean along the only then frequented line of travel. It made to the company a land grant, one fourth the size of the Northern Pacific grant, and agreed to lend it $16,000 and upwards per mile to aid in the construction, taking a first mortgage on the road as security for the loan. Notwithstanding this grant of land, this loan of money, and the fact that the road was to be along the only frequented line of travel, capital could not be induced to invest in the enterprise. Two years thereafter, and in 1864, Congress passed an amendatory act which doubled the land grant, making it half as large as that of the Northern Pacific, and agreed to take as security for its loan a second mortgage, giving to the company the right to place a first mortgage on the road in an amount equal to the government loan. And only after this large financial assistance and increased land grant was the work of construction commenced. On the same day Congress passed the act incorporating the Northern Pacific Railroad Company and making to it its grant. It promised no assistance in money, but only in lands. In order to give the company assurance that it would obtain its full grant it placed in the act § 6, the section which this court now holds is absolutely ineffectual therefor. That section reads:

"*And be it further enacted*, That the President of the United *States shall cause [136] the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An Act to Secure Homesteads to Actual Settlers on the Public Domain,' approved May, twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

At the time of the passage of the act the entire body of the country from the western boundary of Minnesota to the Cascade Range was unoccupied, untraveled, and almost wholly unexplored. As said by Senator Hendricks, when the bill was before the Senate: "Everybody can see at a glance that it is a work of national importance. It proposes to grant lands in a northern latitude where, without the construction of a work like that, the lands are comparatively without value to the government. No person acquainted with the condition of that section of country supposes that there can be very extensive settlements until the government shall encourage those settlements by the construction of some work like this." And by Senator Harlan, the chairman of the Committee on Public Lands: "The Committee on Public Lands agree to report this bill favorably on account of the vast consequence that will attach to the completion of the road. The land is to be conveyed to the company only as the road progresses. The committee were of opinion that if the road should be built the government could well afford to give one half the land, for the distance of 40 miles on each side of the road, to secure its completion. If it should not be built, no lands will have been conveyed." In other words, the proposition was to give half of the lands [137] within 40 miles *of the road to the company, —not to give as much land as would be equal to half the lands within 40 miles of the road, but to give half of those lands. The difference is obvious. The construction of a railroad increases the value of contiguous lands. Congress doubles the price of the even-numbered sections which it retains. It makes no little difference to a company whether it receives lands along the line of the road which it constructs, lands which have been increased in value by reason thereof, or an equal amount of lands hundreds of miles away, and not so increased in value.

The withdrawal was not left to the discretion of the company, but was to be made by the President, after the general route had been fixed, and "as fast as may be required by the construction of said railroad." True, the language is that he "shall cause the lands to be surveyed;" but this, coupled with the prohibition against sale or entry, was tantamount to a direction to withdraw, and has always been so regarded by the Land Department and all parties interested. Thus he was to determine whether the time had arrived for a withdrawal. The withdrawal was in fact made. The President exercised his judgment and decided that the time had arrived for a withdrawal, and the Land Department through all its officials proceeded to act accordingly. The direction in the withdrawal was "to withhold from sale or entry all the odd-numbered sections falling within these limits." Surely this action of the President and the Land Department is entitled to the highest consideration. As said by Chief Justice Marshall, in *Cohen* v. *Virginia*, 6 Wheat. 264, 418, 5 L. ed. 257, 294: "Great weight has always been attached, and very rightly attached, to cotemporaneous exposition." See the many authorities on this proposition collected in *Fairbank* v. *United States*, 181 U. S. 283, 307, 45 L. ed. 862, 872, 21 Sup. Ct. Rep. 648.

But notwithstanding this section, notwithstanding the action of the executive officers in directing a withdrawal of this land from sale or entry, it is now held by the court that it was subject to homestead entry, and that the entryman acquired a right to obtain title by an entry made eight years after the withdrawal. Of course, as I said, such a ruling nullifies the section. A withdrawal from sale or entry which leaves unaffected *the right of purchase or entry is an [138] irreconcilable contradiction. But can there be any reasonable doubt as to the meaning of § 6, or that Congress intended exactly what was done by the executive officers, to wit, the withdrawal of all the odd sections within the 40-mile limit from sale, entry, or pre-emption? The significant words are these: "The odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption, before or after they are surveyed, except by said company." Now it is said in the opinion of the majority that § 3 defines what is "hereby granted" as "every alternate section" to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed," that those lands, and those only, are the ones not liable to sale, entry, or pre-emption, except by the company. It will help to write out the sentence with a substitution for the words "hereby granted" of the definition thereof which is presented, and it will read substantially as follows: The odd sections of land within the withdrawal limits to which the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of the road is definitely fixed, shall not from the time of the withdrawal until the filing of the map of definite location be liable to sale, entry, or pre-emption before or after they are surveyed, except by the company. Or, to put it in another form, the odd sections within the withdrawal limits, which no one purchases or enters before the filing of the map of definite location, shall not be purchased or entered by anybody except the company. It would be a failure of due respect to Congress to use language adequately expressive of the absurdity of such legislation. But Congress never meant any such thing. While it may be that the use of the words "hereby granted" was unfortunate, yet what was intended is clear. Congress intended to grant the odd-numbered sections and retain the even-numbered, and while in the granting clause some qualifications were placed in respect to the odd-numbered sections, in order to protect individual rights then existing, or which Congress might

[139] *thereafter specifically create, yet as Congress was here not attempting a precise definition of what should pass by the grant, it used the term "granted lands" as descriptive generally of the odd-numbered sections, to distinguish them from the lands retained, the even-numbered sections. It obviously intended that no rights should be acquired, either by sale, entry, or pre-emption, to any of the odd-numbered sections after the filing of the map of general route, and this whether the lands were surveyed or unsurveyed. This is made clear by the last sentence in the paragraph. It says, "and the reserved alternate sections shall not be sold by the government at a price less than $2.50 per acre." Clearly that meant all the even-numbered sections, and not simply those which happened to be alternate to odd-numbered sections passing to the company. The truth is that in § 3 Congress defines specifically and carefully the lands which it granted. Its attention was directed in that clause to the matter of definition. While in § 6 it was not attempting to define, but to provide for a withdrawal before the filing of the map of definite location, and was simply endeavoring to make effective rights which it intended should accompany such withdrawal.

Again, in *Hewitt* v. *Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309, it was held that the withdrawal directed by Congress in § 6 coupled with the provision extending homestead and pre-emption rights to all other lands on the line of the road, created an implied prohibition of any withdrawal of lands within the indemnity limits provided in § 3. It is unquestioned that, whenever a grant had been made of lands, the power of the Land Department to withdraw such body of lands, as might seem reasonably necessary for the satisfaction of the grant, had been frequently upheld by this court. See the long list of cases cited in the dissenting opinion on page 159. There is no express prohibition of like action by the Land Department in respect to lands within the Northern Pacific indemnity limits, and the judgment was based solely on the implied prohibition above referred to. The opinion of the court rested mainly on the rulings of the Land Department, as primarily expressed in the opinion of Secre-
[140] tary Vilas in *Northern P. R. Co.* v. **Miller*, 7 Land Dec. 100, from whose opinion large quotations were made, and in respect to rulings of the Land Department generally, it was said, conceding that the question involved was one of doubt (p. 157, L. ed. p. 472, Sup. Ct. Rep. p. 315):

"'It is the settled doctrine of this court,' as was said in *United States* v. *Alabama Great Southern R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306, 308, 'that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.'"

Turning to the opinion of Mr. Secretary Vilas, we find him saying (pp. 110, 111, 113, 119):

"But a peculiarity in legislation of this character is found in the 6th section of the act, in which a provision authorized the 'general route' to be fixed, and required lands to be surveyed for 40 miles in width on both sides of the entire line so fixed, and directed that the odd-numbered sections granted by the act should not be liable to sale or entry or pre-emption before or after they were surveyed, except by said company. In the language of the Supreme Court, in *Buttz* v. *Northern P. R. Co.* 119 U. S. 71, 30 L. ed. 336, 7 Sup. Ct. Rep. 100: The act of Congress not only contemplates the filing by the company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or right, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within 40 miles on each side until the definite location is made.

"The facts which have been recited show beyond all reasonable question that the privilege given to the company of fixing, first, a line of general route, upon the basis of which the odd-numbered sections within 40-mile limits on either side were *to be [141] withdrawn from sale or entry or pre-emption before and after survey, was fully exercised by the company in Washington territory, from the eastern boundary to the mouth of the Walla Walla river, and thence along the Columbia to the first range line west of the Willamette principal meridian, and thence north to the international boundary, by its filing and the department's approval of its maps of location on the 30th of July, 1870. These maps and the action taken thereon fully met every requirement of the statute in that behalf. The company, by resolution, fixed this line as the basis of withdrawal, made its formal request that the land should be withdrawn thereon, the line was plainly and sufficiently described, the department accepted it, and applied the statutory consequence by directing the local land officers in Washington territory to withdraw the odd-numbered sections along that line as far north as the town of Steilacoom, first, for a width of 20 miles on either side, and, later in the same year, within the limit of an additional 20 miles; and also by increasing the minimum price of the even-numbered sections within the same limits to $2.50 per acre. Thus, the action of the company and of the department co-operated to give official determination to the fact upon which the statute became applicable, both to withdraw the

odd-numbered sections and to double the minimum price of the even-numbered sections, and both effects were formally recognized and declared. It cannot be doubted that, had no other action been taken before the line of the road for construction was definitely located, this action in regard to the line of the general route of 1870 must have remained continuously operative upon all lands within the limit of 40 miles on either side of the line so established. So obvious is this, indeed, that from the mouth of the Walla Walla river, westwardly along the Columbia, that withdrawal remains to this day obligatory and operative by force of the statute and of that location. . . . By virtue of that withdrawal the odd-numbered sections within 40 miles of all that portion of the route lying east of the Columbia remained for nearly two years at least segregated from the public domain, and all purchasers of the even-numbered [142] sections *were required to pay the double minimum price for the land they bought. . . . Having provided the condition upon which a withdrawal of the public domain should be operative upon a preliminary general route for the benefit of this company, without any latitude of authority for any other, the legislative will must be regarded as exclusive of any other. . . . Thus, *the meaning of the act appears to be that the provisional line of general route should, in the first place, be taken as the line upon which the grant was made, and, during the period while no other line was fixed than such line of general route, the lands in the odd-numbered sections within 40 miles should be taken as the granted lands, and, therefore, they are declared by the statute to be the 'hereby granted' lands.*" (The italics are mine.)

Thus the court held that, because by § 6 the odd-numbered sections were withdrawn from sale or entry, and at the same time it was declared that the homestead and preemption laws should apply to all other lands, there was an implied prohibition upon the Land Department's withdrawal of odd-numbered sections within the indemnity limits. Now it is held that the withdrawal directed by § 6 and made by the Secretary of the Interior was absolutely meaningless and secured nothing to the company. If the withdrawal directed by § 6 intended nothing, accomplished nothing, it should not have been made the basis for an implied prohibition of the hitherto unquestioned power of the Land Department to withdraw lands in indemnity limits. There is an incongruity in the two decisions which, to my mind, is, to use no stronger expression, both sad and startling.

Further, the Land Department did in fact withdraw from sale or entry all the odd-numbered sections within the 40-mile limits of the general route,—and this withdrawal included the tract in controversy as well as the other odd-numbered sections,—and notice thereof was filed in the local land office, and this many years before the plaintiff in error went upon the land. As heretofore stated, the power of the Land Department to withdraw from private entry lands which it has reason to believe may be necessary to satisfy a land grant has never been denied. *It is a power which has been [143] exercised again and again from the inception of land grants. In one case (*Wolcott* v. *Des Moines Nav. & R. Co.* 5 Wall. 681, 18 L. ed. 680), we sustained a withdrawal made by the department beyond the real terminus of the grant on the ground that there was some doubt where the grant terminated, and therefore the department was justified in making the withdrawal cover any possible conclusion as to such terminus. There was in the Northern Pacific act no prohibition on the Land Department's exercise of this customary power. Indeed, as I have shown, it was held in *Hewitt* v. *Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309, that the express direction to withdraw lands in the place limits was the foundation of an implied prohibition on a withdrawal of lands within the indemnity limits. The purpose and effect of a withdrawal are not to vest any title in the beneficiary of the grant, but to preserve the lands from private entry in order that when the time arrives the grantee may receive the full measure of its grant. As said in *Mcnotti* v. *Dillon*, 167 U. S. 703, 720, 721, 42 L. ed. 333, 339, 17 Sup. Ct. Rep. 945, 951:

"It is true, as said in many cases, that the object of an executive order withdrawing from pre-emption, private entry, and sale lands within the general route of a railroad, is to preserve the lands, unencumbered, until the completion and acceptance of the road. . . . That order took these lands out of the public domain as between the railroad company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road."

This language was quoted with approval in *United States* v. *Oregon & C. R. Co.* 176 U. S. 28, 48, 44 L. ed. 358, 366, 20 Sup. Ct. Rep. 261.

Again, in *Northern P. R. Co.* v. *Musser-Sauntry Land, Logging & Mfg. Co.* 168 U. S. 604, 607, 42 L. ed. 596, 597, 18 Sup. Ct. Rep. 205, 206, we said:

"The withdrawal by the Secretary in aid of the grant to the state of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the Secretary was in effect a reservation."

And the same doctrine has been affirmed in many cases.

*Turning to the rulings of the Land De- [144] partment, in *Hestetun* v. *St. Paul, M. & M. R. Co.* 12 Land Dec. 27, 28, it was said by Secretary Noble:

"The legal effect of the withdrawal is to preclude the disposal of the land covered thereby under any of the land laws. In other words, so long as the withdrawal remains in force, the land covered thereby is

simply held for the purpose for which the withdrawal was made."

And again, in the same volume, in *Re Chicago, St. P. M. & O. R. Co.* (pp. 259, 261):

"In the case of *Riley* v. *Welles* [154 U. S. 578 and 19 L. ed. 648, 14 Sup. Ct. Rep. 1166], referred to and quoted in the *Shire Case* [10 Land Dec. 85], it was said by the Supreme Court that settlement upon and possession of land within the limits of an executive withdrawal were 'without right,' and that the subsequent recognition by the land officers of such settlement and possession, and the permission to the party to make proof and entry under the pre-emption law, and the issuing patent 'were acts in violation of law and void.' This case of *Riley* v. *Welles* has never been overruled or modified, but has been referred to and approved in a number of the decisions of the Supreme Court, and must therefore be accepted as expressing the opinion of that tribunal as to the absolute invalidity of settlements upon lands withdrawn by executive order."

In *Re Hans Oleson*, 28 Land Dec. 25, 31, Secretary Bliss thus defined the word "withdrawal:"

"In the nomenclature of the public land laws the word 'withdrawal' is generally used to denote an order issued by the President, Secretary of the Interior, Commissioner of the General Land Office, or other proper officer, whereby public lands are withheld from sale and entry under the general land laws, in order that presently or ultimately they may be applied to some designated public use, or disposed of in some special way. Sometimes these orders are not made until there is an immediate necessity therefor, but more frequently the necessity for their making is anticipated."

And in the same volume (*Inman* v. *Northern P. R. Co.*) the same Secretary uses this language (pp. 95, 100):

"From the authorities cited the following [145] rules are clearly *deducible: First. Subject only to the control and power of disposition remaining in Congress, an anticipatory withdrawal, whether legislative or executive, during the time it remains in force, withholds the lands embraced therein from other appropriation or disposition, and prevents the acquisition of any legal or equitable title or right by settlement or entry in violation of such withdrawal."

Similar declarations may be found in almost every volume of the Land Decisions.

In the execution of this Northern Pacific land grant many withdrawals were made as called for from time to time along the line of general route, and the Land Department has uniformly recognized the validity and effect of such withdrawals. In *Northern P. R. Co.* v. *Pressey*, 2 Land Dec. 551, it appeared that Pressey settled upon a tract within 40 miles of the line of general route; that the lands at the time of his settlement were unsurveyed; that after survey he made application for a homestead entry, and it was held that he acquired no rights by his settlement, inasmuch as the land had been withdrawn by order of the Land Department, Secretary Teller saying (p. 553):

"The settlement by Pressey upon the odd section was clearly in violation of the order of withdrawal, and he could acquire no rights or equities under such a settlement."

In *Northern P. R. Co.* v. *Miller*, 7 Land Dec. 100, a case in which the implied prohibition of the withdrawal of indemnity lands was first distinctly decided in the Land Department, Secretary Vilas said (p. 110) in reference to the withdrawal of lands within the place limits of the line of general route:

"Thus the action of the company and of the department co-operated to give official determination to the fact upon which the statute became applicable, both to withdraw the odd-numbered sections and to double the minimum price of the even-numbered sections, and both effects were formally recognized and declared. It cannot be doubted that, had no other action been taken before the line of the road for construction was definitely located, this action in regard to the line of the general route of 1870 must have remained continuously operative upon all *lands within the limit of 40 miles on [146] either side of the line so established. So obvious is this, indeed, that from the mouth of the Walla Walla river, westwardly along the Columbia, that withdrawal remains to this day obligatory and operative by force of the statute and of that location.

"If authority be wanting to so manifest a proposition, it is found in the following language of the Supreme Court in the case already referred to."

In *McClure* v. *Northern P. R. Co.* 9 Land Dec. 155, in an opinion by Secretary Noble, it was held that, "when the map of general route was filed, the withdrawal thereunder became at once effective, and reserved from general disposal the odd-numbered sections embraced therein."

In *Northern P. R. Co.* v. *Collins*, 14 Land Dec. 484, it was again decided by the same secretary that "lands withdrawn for the benefit of said grant are not subject to settlement."

In *Central P. R. Co.* v. *Beck*, 19 Land Dec. 100, which was also a settlement upon unsurveyed land within the place limits of the general route of the road, and in which a withdrawal had been ordered in accordance with the provisions of the act making the grant, Secretary Smith, sustaining the title of the railroad company, said (p. 103):

"I am clearly of the opinion that, after the withdrawal made upon the map of general route, no rights could be acquired adverse to the company by settlement upon the land, and that a settlement so made, even though it existed at the date of the filing of the map of definite location, would not serve to except the land settled upon from the operation of the grant to said company."

In the very last volume of the Land Decisions (vol. 30, p. 247), in respect to the

Southern Pacific Railroad Company, whose granting act contained a similar provision in reference to withdrawal on the filing of a map of general route, it was said by Secretary Hitchcock (p. 249):

"As between individual claimants and the company no claim could be predicated upon settlement or entry made after the filing of the map of general route, and as against [147] such claims *the grant in effect was operative from April 3, 1871, the date upon which the map of general route was filed."

So that from the beginning until the present time in construing this grant and others containing like provision there has been an unbroken line of decisions in the Land Department to the effect that a withdrawal made on the filing of the map of general route prevents any private claims attaching to the odd-numbered sections of land; and this whether the lands were surveyed or unsurveyed. Indeed, when Congress in the 6th section expressly declared that the lands "shall not be liable to sale or entry or preemption before or after they are surveyed," it would seem as though it had made every provision which language was capable of expressing to reserve from private entry for the benefit of the railroad company all odd-numbered sections, surveyed or unsurveyed, within the place limits of the line of general route.

I have already quoted from *Hewitt* v. *Schultz* in reference to the duty of following, in case of ambiguity, the construction given to a statute by the department charged with the execution of such statute. That doctrine was there applied although it appeared that the practice of the department during the building of the railroad had been one way and only changed after its completion, and the latter construction was upheld by this court as the ruling of the department. It was said (p. 156, L. ed. p. 472, Sup. Ct. Rep. p. 315):

"It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done it is to be apprehended that great, if not endless, confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the preemption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed."

[148] *Now we have a case in which the ruling of the department has been unchanged from the commencement to the present time,—a ruling which Secretary Vilas in 7 Land Dec. *supra*, called "so manifest a proposition," and it is wholly disregarded. The recent and temporary ruling of the Land Department was in the former case sustained in order, as was said, to protect the settler. Here the continuous practice of the department is disregarded, and the patent issued by it to the railroad company is overthrown.

Still again, the company, by reason of § 6, believing that a withdrawal was to be made which should operate to its benefit, filed a map of general route, and a withdrawal was made of the odd-numbered sections of land. It is now held that such withdrawal did not withdraw the odd-numbered sections from entry and sale, but they remained still open to entry or purchase under the land laws. If that be the true construction, it follows that, whereas, if the company had filed no map of general route, no one would know where its line of road was to be until after it filed the map of definite location, and then the title would attach to all odd-numbered sections not burdened with existing claims. But by filing the map of general route, as it did eleven years before filing the map of definite location, it notified everybody of the proposed route, and so all settlers could take advantage of that knowledge and enter the odd-numbered sections contiguous thereto. Having this knowledge of where the line was to be located, of course settlers would come as near to that line as possible, in order to take advantage of the increased value coming from the construction of the road, and so taking advantage of the notice given would deplete the grant of lands which Congress had intended for the benefit of the company.

But this question has been definitely decided by this court. *Buttz* v. *Northern P. R. Co.* 119 U. S. 55, 30 L. ed. 330, 7 Sup. Ct. Rep. 100. That was an action brought by the railroad company for the possession of a tract of land within 40 miles of the general route as also of the line of definite location of plaintiff's road. The defendant entered upon the land in October, 1871, he at the time possessing all the qualifications of a pre-emptor and intending *to obtain title by [149] pre-emption. At that time the tract was, with others, in the occupation of the Sioux Indians. An agreement for the surrender by the Indians of all their rights was ratified on May 19, 1873. On May 26, 1873, the company filed in the Land Department its map of definite location. The defendant was therefore in occupation of the tract with intent to pre-empt it for seven days after the rights of the Indians had ceased and before the filing of the map of definite location. So if the opinion of the court now announced had prevailed the defendant was entitled to hold that tract as against the company. On the 11th of August, 1873, he presented his application for entry, which was refused, and refused because it was within the 40-mile limit, as shown by a map of general route filed on February 21, 1872. This presents the precise question here involved. The unanimous opinion of the court sustained the action of the Land Department in refusing defendant's application to enter, and confirmed the title of the railroad company. In the course of the opinion, by Mr.

Justice Field, it was said (p. 72, L. ed. p. 336, Sup. Ct. Rep. p. 108):

"When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of 40 miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. . . . Nor is there anything inconsistent with this view of the 6th section as to the general route, in the clause in the 3d section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The 3d section does not embrace sales and pre-emptions in cases where the 6th section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable."

This decision, rendered seventeen years [150]ago, has never hitherto *been overruled. It was reaffirmed in *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 17, 18, 35 L. ed. 77, 84, 11 Sup. Ct. Rep. 389, 394, 395, in which, speaking for a unanimous court, Mr. Justice Field said:

"Besides the withdrawal made by the Secretary of the Interior of lands within the 40-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed 40 miles in width on both sides of the entire line of the road, after the general route should be fixed and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry, or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road. . . . After such withdrawal no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed."

In the opinion of the majority some later cases are referred to which are said to qualify the decision in *Butts* v. *Northern P. R. Co.* But even the slightest attention to what was decided in those cases shows that in no manner do they qualify or limit that decision so far as it affects the present question. Before noticing those cases it is well to consider what was the purpose and effect of § 6. It was not a granting section. It did not purport to give title to anything to the company. Its whole scope and effect was to withdraw from sale, entry, or pre-emption the odd-numbered sections in order that when the company filed its map of definite location it might secure those odd-numbered sections. The grant was *made only by § 3 and attached to particular [151] lands when the map of definite location was filed, but the proposition laid down in the *Butts Case*—and the proposition I am contending for here—is that this plaintiff in error could acquire nothing by his entry upon an odd-numbered section after the filing of the map of general route and the withdrawal; that the tract was therefore free from a claim of any kind when the map of definite location was filed, and so there was nothing to prevent the railroad company from receiving title.

Now the cases referred to are *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389; *United States* v. *Northern P. R. Co.* 152 U. S. 284, 38 L. ed. 443, 14 Sup. Ct. Rep. 598; *Northern P. R. Co.* v. *Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; *Menotti* v. *Dillon*, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945; *United States* v. *Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261; *Wilcox* v. *Eastern Oregon Land Co.* 176 U. S. 551, 44 L. ed. 368, 20 Sup. Ct. Rep. 269, and *Messinger* v. *Eastern Oregon Land Co.* 176 U. S. 58, 44 L. ed. 370, 20 Sup. Ct. Rep. 271. After quoting from the opinions in some,—the court sums up by saying: "The cases above cited definitely determine that the railroad company acquired no vested interest in any particular section of land until after a definite location was shown by an accepted map of its line." This is a proposition among the A, B, C's of public land law and needed no authorities in support thereof. But that proposition throws no light on the question as to the scope of the withdrawal given by § 6, and when the cases themselves are referred to not one of them conflicts with the proposition I have heretofore laid down. I have already shown what was decided in *St. Paul & P. R. Co.* v. *Northern P. R. Co.* and need not repeat. In *United States* v. *Northern P. R. Co.* it appeared that the Northern Pacific Railroad Company had attempted to locate a line from Portland directly north to Puget sound, and in 1865 had filed a map of the general route thereof. Such a line was not within the authority granted by the act of Congress incorporating the Northern Pacific Railroad Company. On May 4, 1870, Congress made a land grant to the Oregon Central Railroad Company which included some of the lands within the 40-mile limits of the above-mentioned general route. On May 31, 1870, and twenty-seven days after the grant to the Oregon Central Railroad *Company, Congress passed [152]

an act which authorized the Northern Pacific company to construct a line from Portland to Puget sound, with the privileges and grants provided for in the original act of incorporation, and it was held that the rights of the Oregon Central Railroad Company antedated and were superior to those of the Northern Pacific. First in time, first in right, is as to lands within place limits the settled rule of railroad land grants. What possible bearing this decision can have upon the case before us it is hard to conceive. In *Northern P. R. Co.* v. *Sanders* the lands in controversy were claimed as mineral lands, and applications for entry of them as such were pending in the Land Department. The court had held in *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030, that mineral lands did not pass under the grant to the railroad company, and that whether they were known or not known to be mineral lands at the time of the filing of the map of definite location was immaterial. Of course, it followed that whether they were known or not known at the time of the filing of the map of the general route was also immaterial. The lands were of such a character as could not in any event pass to the railroad company any more than the even-numbered sections. They were not withdrawn by filing the map of general route; they did not pass by filing the map of definite location. The four remaining cases all proceeded upon the one proposition that the mere filing of the map of general route does not preclude Congress from making subsequently thereto and prior to the filing of the map of definite location—that is, prior to the time when title vested in the company—any other specific grant of the reserved lands. In other words, until the proposed grantee shall have done all that is necessary to vest title in it, there remains in Congress the power to make other disposition of the lands. But this was no new doctrine in the public land law. It was laid down in *Frisbie* v. *Whitney*, 9 Wall. 187, 19 L. ed. 668; in the well-known *Yosemite Valley Case*, 15 Wall. 77, *sub nom. Hutchings* v. *Low*, 21 L. ed. 82; and has been followed in many cases since. Of course, Congress could, at any time before the filing of the map of definite location and while the title of the com-[153] pany was still inchoate, reserve any *of the lands for military or other purposes, or make a specific grant of them to individuals or corporations. But, as said in *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389, "after such withdrawal no interest in the lands granted can be acquired against the rights of the company, except by special legislative declaration," and in this case there has been no such legislative declaration.

But it is said that the case of the plaintiff in error is "placed on impregnable ground by the act of May 14, 1880 (chap. 89 [21 Stat. at L. 140, U. S. Comp. Stat. 1901, p. 1392])." I pass the proposition that this is a general act for the relief of settlers on public lands and the familiar doctrine that a general law passed after a special act does not interfere with the provisions of that act, provided there is room for the operation of both, and there is ample room for the operation of this act on public lands generally without interfering with the special provisions made in the Northern Pacific grant. But the act itself has no force whatever as applied to the present question. The provision is that one who is a settler on any of the public lands of the United States "with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he had settled under the pre-emption laws." If we turn to the pre-emption law we find (Rev. Stat. § 2264) that a person intending to pre-empt shall, "within thirty days after the date of such settlement, file with the register of the proper district a written statement." That is, the pre-emptioner had thirty days after settlement within which to make his entry, while when we turn to the homestead law (Rev. Stat. § 2290) we find that a party seeking to homestead "shall, upon application to the register of the land office in which he is about to make such entry, make affidavit . . . that his entry is made for the purpose of actual settlement and cultivation." In other words, his right is initiated by the application to enter, and does not relate back to any settlement, and this statute simply gives him a right of thirty days' occupancy before *making his[154] application to enter. How such a statute, equalizing the rights of one seeking to make a homestead entry with those of one seeking to make pre-emption, can have any pertinency to the question before us, passes my comprehension.

Again, several pages of the opinion are taken up with references to quotations from opinions in the Land Department as to the meaning of the term "occupied by homestead settlers." Here, again, I am unable to see the pertinency of these references. If there had been no withdrawal, and the question arose as to the effect of plaintiff in error's occupancy of the land as against the rights of the company obtained by the map of definite location, these authorities might be worth considering, but they throw no light upon the effect of the withdrawal, which is the question before us.

The fact that this tract was not surveyed at the time the plaintiff in error entered upon it, nor until after the completion of the road, is immaterial. By the terms of § 6 the prohibition against sale, entry, or pre-emption extended to lands "before or after they are surveyed." Reference is made to several cases in which we held that the rights of a settler were not lost by the failure of the government to make a survey prior to his occupation. But those deci-

sions were to the effect that the settler loses nothing by the neglect of the government. Here it is held that he gains something. If the survey had been completed before he commenced his occupation, and he could not then enter an odd-numbered section, surely he could not, in face of the prohibition of the section, enter the land after it had been surveyed. If, instead of going upon lands that had been surveyed, the settler chose to go into unsurveyed territory, he took his chances of placing his improvements upon an odd or even-numbered section. If he placed them upon what proved to be an odd-numbered section, he acquired no right as against the grant to the company. If he put them on what proved to be an even-numbered section, he would be compelled to pay the government double price. In the latter event does anyone for a moment suppose that it would be an answer to the demand for a double price that the government had failed to make a survey before he [155] chose to occupy the land and make *improvements thereon? The construction placed by the majority, not only takes from the railroad company the land which was granted to it, but deprived the government of that which it intended to obtain, a double price for the lands it reserved for sale.

Finally, I may say this decision clouds the title to all the lands granted to the railroad company. At the time the map of definite location was filed, as well as at the time the road was completed, there was not on the records of the Land Department a single word or mark which indicated to anybody that plaintiff in error was on the land or claiming it, or that the title of the railroad company was other than perfect. But because plaintiff in error was on the land it is held that the patent of the government to the railroad company conveyed to it no title, and that this occupant by parol testimony may show the fact of his occupancy and overthrow the record title. Yet this court unanimously held in *Northern P. R. Co.* v. *Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98, that mere occupation, unaccompanied by the filing of a claim in the land office, did not exclude a tract from the operation of the land grant. And that there was no oversight or lack of attention to this particular matter is shown by the fact that the United States promptly filed a brief of thirty-six pages, quoting the principal land decisions referred to in the opinion of the majority, and asked the court to reconsider its decision, which application was denied without dissent. Indeed, as appears from the authorities cited in that opinion, the conclusion was in accord with prior rulings, to the effect that there must be something of record in the Land Department to support the contention of an adverse right. That unanimous opinion of the court is put one side by the assertion that the land there in controversy had been surveyed, while in this it had not been. No distinction was made in the discussion between surveyed and unsurveyed lands, no suggestion that it affected the question in the slightest degree, and, as we have seen, the prohibition against sale, entry, or preemption in § 6 extended to lands unsurveyed as well as surveyed. How can one say in respect to any tract claimed by the railroad company that it was not at the time of the filing of the map of definite *location in the [156] occupation of someone intending to preempt or homestead it? If such occupation is sufficient to avoid the patent of the United States, has the company sure title to any lands?

I think the judgment ought to be affirmed.

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ANDREW W. SMYTHE, William H. Byrnes, Administrator of the Succession of Edward Conery, Deceased, *et al.*, *Plffs. in Err.*,

*v.*

UNITED STATES.

(See S. C. Reporter's ed. 156-183.)

*Official bond—of superintendent of Mint—destruction of Treasury notes by fire—measure of damages—form of judgment.*

1. The destruction of moneys in the custody of the superintendent of the Mint at New Orleans by a fire occurring without his fault or negligence is no defense to a suit upon his official bond, conditioned for the faithful discharge of his duties according to the laws of the United States, which require him safely to keep such moneys as come to his hands by virtue of his office.
2. The amount of Treasury notes charred by fire, but in condition to be identified as to amount and date of issue, cannot be allowed as a credit in a suit on the official bond of the superintendent of the Mint at New Orleans to recover the amount of a shortage in his accounts, where no claim for such credit was first presented to the accounting officers of the Treasury, as is required by U. S. Rev. Stat. §§ 951, 957 (U. S. Comp. Stat. 1901, pp. 695, 698), in order to make a claim for a credit available on the trial.
3. The face value of Treasury notes destroyed by fire while in the custody of the superintendent of the Mint at New Orleans, and not the cost to the United States government of issuing new notes, is the measure of damages in an action on his official bond, conditioned for the safe keeping of the moneys in his custody, to recover the amount of a shortage in his accounts caused by the destruction of such notes.
4. The sureties on the bond of the superintendent of the Mint at New Orleans, conditioned for the faithful discharge of his duties according to the laws of the United States, must be deemed to have signed it in view of the requirement of U. S. Rev. Stat. § 3624 (U. S. Comp. Stat. 1901, p. 2418), that interest on any unpaid balance due from one accountable for public moneys shall be computed from the time when he received such moneys.

NOTE.—*On the liability of sureties on bonds of public officers*—see notes to Postmaster General v. Early, 6 L. ed. U. S. 577; and American Surety Co. v. Pauly, 42 L. ed. U. S. 987.

**3.** An absolute judgment against the administrator of a surety on the official bond of a Federal official, rendered by a Federal court sitting in Louisiana, is not objectionable on the theory that it should have been against the administrator, payable only in due course of administration, since, if by the law of that state the judgment is so payable, it will be thus interpreted and enforced, subject to the priority given to the Federal government by U. S. Rev. Stat. §§ 3466, 3467 (U. S. Comp. Stat. 1901, p. 2314), in the distribution of the proceeds of the estate of any person indebted to the United States, whose estate is insufficient to pay all debts against it.

[No. 88.]

*Argued November 12, 1902. Decided January 26, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of a Circuit Court in favor of the United States in a suit upon the official bond of the superintendent of the Mint at New Orleans. *Affirmed.*

See same case below, 46 C. C. A. 354, 107 Fed. 376.

The facts are stated in the opinion.

*Mr.* **Walker Brainerd Spencer** argued the cause, and, with *Messrs. William Grant, J. D. Rouse, B. McCloskey,* and *E. Howard McCaleb,* filed a brief for plaintiffs in error:

The liability of a fiscal officer of the United States is that of a simple bailee.

*United States* v. *Thomas,* 15 Wall. 337, 21 L. ed. 89.

A bailee is excused from liability for property destroyed in his possession by fire.

2 Am. & Eng. Enc. Law, 2d ed. p. 748; Story, Bailments, § 29; *Meridian Fair & Exposition Asso.* v. *North Birmingham Street R. Co.* 70 Miss. 808, 12 So. 555.

Loss of public money by shipwreck will relieve an officer from liability to account therefor.

*United States* v. *Humason,* 6 Sawy. 199, Fed. Cas. No. 15,421.

The sums stipulated, in a bond of the ordinary form, to be paid by the obligor, are a penalty or security for the performance of the condition, and not liquidated damages, or an amount absolute to be paid upon its breach.

*Davis* v. *Gillett,* 52 N. H. 126; *Astley* v. *Weldon,* 2 Bos. & P. 346; *Street* v. *Rigby,* 6 Ves. Jr. 815; *Price* v. *Green,* 16 Mees. & W. 346; *Davies* v. *Penton,* 6 Barn. & C. 216; *Higginson* v. *Weld,* 14 Gray, 165; *Smith* v. *Wainwright,* 24 Vt. 97; *Richards* v. *Edick,* 17 Barb. 260; *Tayloe* v. *Sandiford,* 7 Wheat. 13, 5 L. ed. 384; *Wallis* v. *Carpenter,* 13 Allen, 19.

If the contract be to perform several acts, or else to pay the sum specified, that sum will always be regarded by the courts as a penalty, and not as liquidated damages.

*Swift* v. *Crow,* 17 Ga. 609; *Astley* v. *Weldon,* 2 Bos. & P. 346; *Kemble* v. *Farren,* 6 Bing. 141; *Davies* v. *Penton,* 6 Barn. & C. 216; *Niver* v. *Rossman,* 18 Barb. 50.

Where bonds are given for the performance of covenants, and the breach does not imply the payment of a sum certain, and damages do not follow as a mathematical sequence, as in case of interest, "the bond ascertains the damage by consent of the parties. If, therefore, the defendant pays the plaintiff the whole stated damages, what can he desire more?"

*Brangwin* v. *Perrot,* 2 W. Bl. 1190; *Clark* v. *Bush,* 3 Cow. 151; *Higginson* v. *Weld,* 14 Gray, 165.

The officers of the government have always construed the condition of such bonds to be an obligation to indemnify.

*Bosbyshell* v. *United States,* 23 C. C. A. 581, 39 U. S. App. 474, 77 Fed. 944; *United States* v. *Prescott,* 3 How. 578, 11 L. ed. 734; *United States* v. *Dashiel,* 4 Wall. 182, 18 L. ed. 319; *United States* v. *Keehler,* 9 Wall. 83, 19 L. ed. 574; *Boyden* v. *United States,* 13 Wall. 17, 20 L. ed. 527; *Bevans* v. *United States,* 18 Wall. 56, 20 L. ed. 531; *United States* v. *Thomas,* 15 Wall. 337, 21 L. ed. 89.

A bond for the faithful performance of the duties of a public office is an obligation to indemnify against loss.

*United States* v. *Morgan,* 11 How. 154, 13 L. ed. 643; *United States* v. *Moore,* 2 Brock. 317, Fed. Cas. No. 15, 802.

*Mr.* **William A. Maury** also argued the cause for plaintiffs in error.

*Assistant Attorney General* **Beck** argued the cause, and, with *Mr. Charles H. Robb,* filed a brief for defendant in error:

A custodian of the public funds under his contract evidenced by a penal bond is something more than an ordinary bailee.

Throop, Pub. Off. §§ 222, 223; 2 Am. & Eng. Enc. Law, p. 466; *United States* v. *Prescott,* 3 How. 578, 11 L. ed. 734; *United States* v. *Morgan,* 11 How. 154, 13 L. ed. 643; *United States* v. *Dashiel,* 4 Wall. 182, 18 L. ed. 319; *United States* v. *Keehler,* 9 Wall. 83, 19 L. ed. 574; *Boyden* v. *United States,* 13 Wall. 17, 20 L. ed. 527; *United States* v. *Thomas,* 15 Wall. 337, 21 L. ed. 89; *Bosbyshell* v. *United States,* 23 C. C. A. 581, 39 U. S. App. 474, 77 Fed. 944, Affirming 73 Fed. 616; *State ex rel. Mississippi County* v. *Moore,* 74 Mo. 413, 41 Am. Rep. 322; *State* v. *Nevin,* 19 Nev. 162, 7 Pac. 650; *Com.* v. *Comly,* 3 Pa. St. 372; *Hancock* v. *Hazzard,* 12 Cush. 112, 59 Am. Dec. 171; *New Providence* v. *McEachron,* 33 N. J. L. 339; *State use of Wyandot County* v. *Harper,* 6 Ohio St. 607, 67 Am. Dec. 363; *Halbert* v. *State,* 22 Ind. 125; *Morbeck* v. *State,* 28 Ind. 86; *Ross* v. *Hatch,* 5 Iowa, 149; *Taylor Dist. Twp.* v. *Morton,* 37 Iowa, 551.

There is an established difference between a duty created merely by law, and one to which is added the obligation of an express undertaking.

*Bevans* v. *United States,* 13 Wall. 56, 20 L. ed. 531.

Only two defenses are sufficient to discharge from liability. These defenses are

"the act of God" and "the act of a public enemy." Even robbery is not regarded as sufficient.

*Boyden* v. *United States*, 13 Wall. 17, 20 L. ed. 527; *New Providence* v. *McEachron*, 33 N. J. L. 339; *State use of Wyandot County* v. *Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Halbert* v. *State*, 22 Ind. 125.

The plea *non est damnificatus* does not avail against an obligation to do specific things.

3 Enc. Pl. & Pr. p. 663, note 1; 4 Am. & Eng. Enc. Law, 2d ed. pp. 694, 695, note 1; *Hicks* v. *Hoos*, 44 Mo. App. 579.

Defendants were not entitled in this action to a credit for the charred notes.

*Yates* v. *United States*, 32 C. C. A. 507, 61 U. S. App. 124, 90 Fed. 57; *United States* v. *Fletcher*, 147 U. S. 664, 37 L. ed. 322, 13 Sup. Ct. Rep. 434.

Mr. Justice **Harlan** delivered the opinion of the court:

This was an action upon the official bond of Andrew W. Smythe as superintendent of [157] the Mint of the United States at *New Orleans to recover the sum of $25,000 with 6 per cent interest from April 1st, 1893, until paid,—that being the amount found due to the United States at the date of the examination, adjustment, and statement of his accounts by the proper officers of the Treasury. The sureties on the bond were Edward Conery and David Chambers McCan.

The bond was conditioned that the superintendent should "faithfully and diligently perform, execute, and discharge, all and singular, the duties of said office according to the laws of the United States, then this obligation to be void and of no effect, otherwise to remain in full force and value."

When this bond was executed it was provided by § 3500 (U. S. Comp. Stat. 1901, p. 2339) that every officer of the Mint, before entering upon the duties of his office, should take an oath faithfully and diligently to perform the duties thereof; by § 3501 (U. S. Comp. Stat. 1901, p. 2339), that the superintendent, before entering upon his office, should become bound to the United States, with one or more sureties, in a named sum, "with condition for the faithful and diligent performance of the duties of his office;" by § 3503 (U. S. Comp. Stat. 1901, p. 2340), that the superintendent of each Mint "shall have the control thereof, the superintendence of the officers and persons employed therein, and the supervision of the business thereof, subject to the approval of the director of the Mint;" by § 3504 (U. S. Comp. Stat. 1901, p. 2340), that "he shall keep and render quarter-yearly to the director of the Mint, for the purpose of adjustment according to such forms as may be prescribed by the Secretary of the Treasury, regular and faithful accounts of the transactions with the other officers of the Mint and the depositors;" and by § 3506 (U. S. Comp. Stat. 1901, p. 2341), that "the superintendent of each Mint shall receive and safely keep, until legally withdrawn, all moneys or bullion which shall be for the use or the expenses of the Mint."

It appeared in the evidence that the defendant Smythe, as superintendent of the Mint, received various sums of money in United States Treasury notes, and that upon a statement of his accounts by the proper officers of the Treasury there was a deficit of $25,000.

The defense was that the $25,000 of Treasury notes was placed by the superintendent in a tin box in the steel vault *pro- [158] vided by the government for the safe keeping of public funds in his custody, and that the notes while in that box were charred, burnt, and destroyed by fire that occurred in the vault, without any negligence on the part of the superintendent, or his agents or employees.

The government insisted at the trial that, even if the Treasury notes were destroyed, in the manner and to the amount claimed, without negligence on the part of the superintendent, nevertheless he was liable on his bond,—its contention being that he was under the obligations, practically, of an insurer in respect of all public funds coming to his hands, and could not be relieved, unless the loss occurred by the act of God or the public enemy. This view was approved by the circuit court, which, at the conclusion of the evidence, directed a verdict against the defendants, and judgment was accordingly rendered for the full amount claimed by the United States. The court added the following words to its memorandum of reasons for that direction: "In this cause there has been no charge or intimation that Dr. Smythe was personally at fault or blameable in any way. Such fault or negligence as may have been shown in the cause is attributable to his subordinates, and in no manner to him."

The circuit court of appeals approved the view taken by the circuit court, and affirmed the judgment. The opinion of the former court is reported in 46 C. C. A. 354, 107 Fed. 376.

*As the circuit court and the circuit court [163] of appeals both held that the question of the liability of Smythe was determined for the government by the decisions of this court,—which view the defendants controverted,—we must ascertain the import of those decisions. This course is made necessary by the contention of the defendants that the latest decision of this court, to which reference will be presently made, modified the earlier decisions upon which the government relies.

The first case is that of *United States* v. *Prescott*, 3 How. 578, 587, 11 L. ed. 734, 738. That was an action on the bond of a receiver of public moneys, conditioned for the faithful performance of his duties, and that he "shall well, truly, and faithfully, keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same had been, or should be, ordered by the proper department

or officer of the government to be transferred or paid out," etc.

The defense was that the money for the nonpayment of which the United States sued had been feloniously stolen, taken, and carried away from his possession by some unknown person or persons without fault or negligence on his part, and notwithstanding he had used ordinary care and diligence in keeping it. The receiver contended that he was liable only as a depositary for hire, unless his liability was enlarged by the special contract to keep safely, which he insisted was not the case.

The court said: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant Prescott arises out of his of-[164]ficial bond, and *principles which are founded upon public policy." Again: "The condition of the bond has been broken, as the defendant Prescott failed to pay over the money received by him when required to do so; and the question is whether he shall be exonerated from the condition of his bond on the ground that the money has been stolen from him. The objection to this defense is that it is not within the condition of the bond, and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the government. How, then, can Prescott be discharged from his bond? He knew the extent of his obligation when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied, and nothing but the payment of it when required can discharge the bond. . . . Public policy requires that every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practised with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others, who receive more or less of the public funds, and what losses might not be anticipated by the public? No such principle has been recognized or admitted as a legal defense. . . . As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

The next case is that of *United States* v. *Morgan*, 11 How. 154, 158, 13 L. ed. 643, 645. That was an action upon the bond of a collector of customs, conditioned that he "has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute *and discharge, all the du-[165]ties of the said office." The condition was alleged to have been broken in that the collector had not paid over large sums of money collected for the United States, and by not making seasonable returns of his accounts.

The court characterized as an erroneous impression that the collector "was acting as a bailee, and under the responsibilities of only the ordinary diligence of a depositary as to the canceled notes, when in truth he was acting under his commission and duties by law, as collector, and under the conditions of his bond. The collector is no more to be treated as a bailee in this case than he would be if the notes were still considered for all purposes as money. He did not receive them as a bailee, but as a collecting officer. He is liable for them on his bond, and not on any original bailment or lending. And if the case can be likened to any species of bailment in forwarding them, by which they were lost, it is that of a common carrier to transmit them to the Treasury, and in doing which he is not exonerated by ordinary diligence, but must answer for losses by larceny, and even robbery. 2 Salk. 919; 8 Johns. 213; Angell, Carr. §§ 1, 9."

In *United States* v. *Dashiel*, 4 Wall. 182, 18 L. ed. 319,—which was an action on the bond of a paymaster in the army for not paying over or accounting for public money that came into his hands,—the defense was that without any want of proper care and vigilance on the part of the paymaster a certain part of the moneys had been stolen from him. The trial court held that the theft or robbery, if satisfactorily proved, was a good defense. But this court held otherwise upon the authority of *United States* v. *Prescott* and *United States* v. *Morgan*, above cited, and reversed the judgment.

Substantially the same question arose in *United States* v. *Keehler*, 9 Wall. 83, 19 L. ed. 574, which was an action upon a bond of a postmaster in North Carolina. The bond was conditioned, among other things, that the obligor would well and truly discharge the duties of postmaster, and keep safely, without lending, using, depositing in banks, or exchanging for other funds than as allowed by law, all the public money at any time in his custody, till the same was ordered by the Postmaster General to be *transferred or paid out. In the spring of[166] 1861, after the Civil War commenced, the postmaster was still in office, and had in his hands $330 of postoffice money belonging to the United States. At that time the United States was indebted to one Clemmens, a mail contractor in that region, for postal service, in a sum exceeding $300. In August, 1861, the Confederate Congress passed an act appropriating the balances in the hands of such postmasters of the United States as at the commencement of the war resided within the limits of the Confederate

states, to the *pro rata* payment of claims against the United States for postal service. The postmaster paid the $330 in his hands to Clemmens—relying upon the above act of the Confederate Congress and an official order from the Confederate Postoffice Department directing him to make such payment. It was admitted in the case that throughout the year 1862 the Confederate government had force sufficient at its command to enforce its orders, and did enforce the orders of such government, in that part of North Carolina in which Salem was situated, and "that no protection was afforded to the citizens of that part of the state by the government of the United States during that term."

After observing that the postmaster had no right to select a creditor of the United States and pay what he might suppose the government owed him, the court said that "the acts of the Confederate Congress can have no force as law in devesting or transferring rights, or as authority for any act opposed to the just authority of the Federal government." Referring to the statement of facts made in the case, and which were substantially as above recited, it said: "This statement falls far short of showing the application of any physical force to compel the defendant to pay the money to Clemmens. Nor is it in the least inconsistent with the fact that he might have been desirous and willing to make the payment. It shows no effort or endeavor to secure the funds in his hands to the government, to which he owed both the money and his allegiance. Nor does it prove that he would have suffered any inconvenience, or been punished by the Confederate authorities, if he had refused to pay the draft of the in-[167]surrectionary postoffice *department on him. We cannot see that it makes out any such loss of the money, by inevitable overpowering force, as could, even on the mere principle of bailment, discharge a bailee. We cannot concede that a man who, as a citizen, owes allegiance to the United States, and as an officer of the government holds its money or property, is at liberty to turn over the latter to an insurrectionary government, which only demands it by ordinances and drafts drawn on the bailee, but which exercises no force or threat of personal violence to himself or property in the enforcement of its illegal orders." The court, reaffirming the doctrine of the *Prescott*, *Morgan* and *Dashiel Cases*, held that in an action on the bond of an officer receiving public funds the right of the government to recover does not rest on an implied contract of bailment, but on the express contract in the bond to pay over the funds.

In *Boyden* v. *United States*, 13 Wall. 17, 24, 20 L. ed. 527, 529, which was an action upon the bond of a receiver of public moneys,—the defense being that the receiver had been by irresistible force robbed of the moneys sued for,—the court said: "Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more, except in the case of common carriers, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible *by reason of[168] anything occurring after the contract was made, though unforeseen by the contracting party and not within his control, he will not be excused." Again, in the same case: "It is true that in *Prescott's Case* the defense set up was that the money had been stolen, while the defense set up here is robbery. But that can make no difference unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it."

At the same term of the court the case of *Bevans* v. *United States*, 13 Wall. 56, 60, 20 L. ed. 531, 532, was determined. That was a suit upon a bond executed by Bevans, a receiver of public moneys, in a land district of Arkansas. The court reaffirmed the rule announced in the *Prescott Case*, and said that "it is not to be overlooked that Bevans was not an ordinary bailee of the government. Bailee he was undoubtedly, but by his bond he had insured the safe keeping and prompt payment of the public money which came to his hands. His obligation was therefore not less stringent than that of a common carrier, and in some respects it was greater,"—citing *United States* v. *Prescott*. In the same case the court said, in reference to that part of the defense attributing the loss of the money in question to the action of the Confederate power: "It may be a grave question whether the forcible taking of money belonging to the United States from the possession of one of her officers or agents lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a state, would not work a discharge of such officers or agents, if they were entirely free from fault, though they had given bond to pay the money to

the United States. This question has been thoroughly argued, but we do not propose to consider it, for its decision is not necessary to the case."

The question thus reserved from decision arose and was decided in *United States* v. *Thomas*, 15 Wall. 337, 341, 342, 346, 347, 350, 352, 21 L. ed. 89, 91-94. That was an [169] action on the bond of a surveyor of *customs at Nashville, he being also a depositary of public moneys at that city. The special defense was that the moneys in question were seized by the Confederate authorities against the will and consent of the surveyor, and by the exercise of force which he was unable to resist, he being a loyal citizen and endeavoring faithfully to perform his duty. The court said: "This case brings up squarely the question whether the forcible seizure, by the rebel authorities, of public moneys in the hands of loyal government agents, against their will and without their fault or negligence, is or is not a sufficient discharge from the obligations of their official bonds. The precise question has not as yet been decided by this court. As the Rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the government in the hands of a public officer, against his will and without his fault, a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty and to have the property forthcoming when required?

"That overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and, aside from such a bond as exists in this case, seems almost self-evident. . . . These provisions [prescribing the conditions of the bonds of receivers, etc.] show that it is the manifest policy of the law to hold all collectors, receivers, and depositaries of the public money to a very strict accountability. The legislative anxiety on the subject culminates in requiring them to enter into bond, with sufficient sureties, for the performance of their duties, and in imposing criminal sanctions for the unauthorized use of the moneys. Whatever duty can be inferred from this course of legislation is justly exacted from the officers. No ordinary excuse can be allowed for the nonproduction of the money committed to their hands. Still, they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the pub- [170] lic money except as *directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract, and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same." Referring to the adjudged cases, the court said: "It appears from them all (except, perhaps, the New York case) that the official bond is regarded as laying the foundation of a more stringent responsibility upon collectors and receivers of public moneys. It is referred to as a special contract by which they assume additional obligations with regard to the safe keeping and payment of those moneys and as an indication of the policy of the law with regard to the nature of their responsibility. But, as before remarked, the decisions themselves do not go the length of making them liable in cases of overruling necessity." The opinion concludes: "No rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy without any fault or neglect on his part."

We think the government is quite correct in its conclusion that the *Thomas Case* does not materially modify the decisions in previous cases. The general rule announced in those cases—and the question need not be discussed anew—is that the obligations of a public officer, who received public moneys under a bond conditioned that he would discharge his duties according to law, and safely keep such moneys as came to his hands, by virtue of his office, are not to be determined by the principles of the law of bailment, but by the special contract evidenced by his bond conditioned as above stated; consequently, it is no defense to a suit brought by the government upon such a bond that the moneys, which were in the custody of the officer, had been destroyed by fire occurring without his fault or negligence. This rule, so far from being modified by the *Thomas Case*, is reaffirmed by it, subject, however, to the exception (which, indeed, some of the prior cases had, in effect, *intimated) that it was a valid defense [171] that the failure of the officer to account for public moneys was attributable to overruling necessity or to the public enemy. The case now before us is not embraced by either exception. The result is that the special defense here made cannot, in view of former adjudications, avail the superintendent or his sureties.

It is appropriate here to say that the rule established by this court in the *Prescott Case* has been enforced by numerous decisions in state courts. In *Com.* v. *Comly*, 3 Pa. St. 372, which was an action on the bond of a collector of tolls, conditioned that he would "account for and pay over all moneys he may receive for tolls," and in which the defense was that the moneys sued for had been stolen from the collector, the court said: "The opinion of the court in the case of the *United States* v. *Prescott* is founded in sound policy and sound law. The responsibility of a public receiver is determined, not by the law of bailment, which is called in to supply the place of a special

agreement where there is none, but by the condition of his bond. The condition of it in this instance was to account for and pay over the moneys to be received; and we would look in vain for a power to relieve him from the performance of it. . . . The keepers of the public moneys, or their sponsors, are to be held strictly to their contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case; and his discretion, were he at liberty to use it, would be influenced by considerations of general policy." To the same effect are *Hancock* v. *Hazzard*, 12 Cush. 112, 59 Am. Dec. 171; *New Providence* v. *McEachron*, 33 N. J. L. 339; *State ex rel. Wyandotte County* v. *Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Halbert* v. *State ex rel. Martin County*, 22 Ind. 125; *Morbeck* v. *State ex rel. Jackson Twp.* 28 Ind. 86; *Ross* v. *Hatch*, 5 Iowa, 149; *Taylor Dist. Twp.* v. *Morton*, 37 Iowa, 551.

We hold that, as the accounts of the defendant Smythe showed a deficit of $25,000 in the moneys in his custody as superintendent of the Mint, the government was entitled to a judgment for that amount, unless, as the defendants contend, they were entitled to at least a credit for $1,182, which, it is alleged, was the amount of [172] Treasury notes not entirely destroyed *by the fire, but were only charred and were taken possession of by government agents after the fire, and found to be in condition to be identified as to amount and date of issue.

A complete answer to this suggestion is to be found in §§ 951 and 957 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 695, 698) reproduced from the act of March 3d, 1797 (1 Stat. at L. 514, chap. 20). Those sections are as follows:

§ 951. "In suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

§ 957. "When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court (the United States Attorney being present), makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury, and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract, or other paper certified in the affidavit. And no continuance shall be granted except as herein provided."

[173] *The defendants do not appear to have submitted to the accounting officers of the Treasury any request or claim for a credit for the $1,182, and no such claim could be made for the first time at the trial. Before it could have been made there should have been affirmative proof by the defendants that it was presented to the proper accounting officer, and rejected, unless, indeed, such facts had appeared from the exemplified accounts produced and relied upon by the government. If such claim had been presented to the proper officers before suit, and been disallowed, it would still have been open to the defendants at the trial to insist upon its being recognized and allowed. These conclusions are unavoidable in view of the former decisions of this court. *United States* v. *Giles*, 9 Cranch, 212, 216, 3 L. ed. 708, 710; *Thelusson* v. *Smith*, 2 Wheat. 396, 4 L. ed. 271; *United States* v. *Wilkins*, 6 Wheat. 135, 143, 5 L. ed. 225, 227; *Walton* v. *United States*, 9 Wheat. 651, 6 L. ed. 182; *Cox* v. *United States*, 6 Pet. 202, 8 L. ed. 370; *United States* v. *Ripley*, 7 Pet. 25, 8 L. ed. 595; *United States* v. *Fillebrown*, 7 Pet. 48, 8 L. ed. 603; *United States* v. *Robeson*, 9 Pet. 319, 9 L. ed. 142; *United States* v. *Hawkins*, 10 Pet. 125, 9 L. ed. 369; *United States* v. *Laub*, 12 Pet. 1, 9 L. ed. 977; *United States* v. *Bank of the Metropolis*, 15 Pet. 377, 10 L. ed. 774; *Gratiot* v. *United States*, 4 How. 112, 11 L. ed. 898; *United States* v. *Buchanan*, 8 How. 105, 12 L. ed. 1006; *De Groot* v. *United States*, 5 Wall. 431, 18 L. ed. 703; *United States* v. *Eckford*, 6 Wall. 484, *sub nom. United States* v. *Tillon*, 18 L. ed. 920; *United States* v. *Gilmore*, 7 Wall. 491, 19 L. ed. 282; *Halliburton* v. *United States*, 13 Wall. 63, 20 L. ed. 533.

It is said, however, that the government has not suffered any substantial damage by the destruction of its own obligations, and that in no event is it entitled to a judgment for more than nominal damages, or at most for only such amount in damages as would meet the cost of reprinting new Treasury notes to take the place of those destroyed by fire. If this view be sound, a public officer, receiving United States Treasury notes for the government, under a bond to safely keep them and pay them over to the United States whenever required by law or ordered

to do so, could deliberately destroy or burn them, and, then admitting that he had done so, could prevent any judgment against him, except one that would cover merely the cost and trouble of printing new notes. Such a proposition cannot be entertained for a moment. The plea of *non damnificatus* has *no place in such a case as this. [174] The Treasury notes that came to the hands of superintendent Smythe was money belonging to the United States, and could be used, at its pleasure, in the business of the government. By their destruction, if they were destroyed by fire in the manner claimed, the United States was deprived of so much money, and the condition of the officer's bond that he would safely keep the moneys in his custody and turn them over to the government, when required, cannot be met by the suggestion that the government, if it so elects, can replace the notes destroyed by other notes, and thus make itself whole, less the cost of printing new notes. It is for the government, guided by the legislation of Congress, to determine when it shall or may issue new Treasury notes, and it cannot be compelled to issue them in order to reimburse itself for the loss of those in the hands of an officer who was required, by the terms of his bond, to deliver them to the Treasury, but did not do so. The government can stand upon the terms of its special contract with the superintendent, and insist that he has not discharged his duties by safely keeping the moneys that came to his hands, and which he undertook to pay over, when required. It is sufficient in this case to say that the loss of the notes here in question cannot be attributed to overruling necessity, or to any public enemy, and as they came to the hands of superintendent Smythe, and as he did not keep the condition of his bond, the government can look for reimbursement to that bond.

This view, it is contended, is not consistent with what was said in *United States* v. *Morgan*, 11 How. 154, 158, 13 L. ed. 643, 645, above cited. It appeared in evidence in that case that the collector received nearly $100,000 for duties in Treasury notes, and canceled them. The notes were then put up in a bundle to be sent to the Treasury Department, through the postoffice, and orders were given to the servant accustomed to deliver packages there to deliver those. But the bundle was stolen or lost. It appeared, also, that two of the notes for $500 each were altered and soon afterwards presented to the collector in payment of other duties, and were received by him as genuine. The court, in that case, as already shown, reaffirmed the principle announced in *United States* v. *Prescott*. [175] After observing that the duty of the collector was to return the canceled notes to the Treasury Department, and that he was technically liable for not having done so, the court said: "The rule of damage would be the amount of the notes,—unless it appeared, as here, that they had been canceled, and unless it was shown that the government had suffered, or was likely to suffer, damage less than their amount. How much is the real damage, under all the circumstances, is a question of fact for the jury, and should be passed on by them at another trial. Only that amount, rather than the whole bond, need, in a liberal view of the law, and of his bond, be exacted; and that amount neither he nor his sureties can reasonably object to paying, when he, by the neglect of himself or his agent, has caused all the injury which he is in the end required to reimburse. And if any equities exist to relieve him from that, none of which are seen by us, it must be done by Congress, and not the courts of law. Anything less than this—any less strict rule, in the public administration of the finances—would leave everything loose or unsettled, and cause infinite embarrassments in the accounting offices, and numerous losses to the government. . . . Finally, we decide on this last question as a matter of law this, and this only, namely, that the collector is liable for all the actual damages sustained by his not returning the notes as required by law and official circulars; or for not putting them in the postoffice so as to be returned. 5 Stat. at L. 203, chap. 2. But how much this damage was is a matter of proof before the jury, fixing the real amount likely to happen from their getting into circulation again, as two of them did here, from delay and inconvenience in obtaining the proper vouchers to settle accounts, from the want of evidence at the Department that the notes had been redeemed, or from any other direct consequence of the breach of the condition of his bond and of his instructions under it." The court had previously said, in its opinion: "We doubt whether, under all the circumstances, after canceled, they [the Treasury notes] can be regarded as money or money's worth, for the purpose of sustaining this action; yet it is clear that they still possess some value as vouchers, and as evidence for the Treasury Department *that they have been re- [176] deemed. It is still clear, also, that though canceled, the Treasury Department, unless having possession of them, is exposed to expense and loss by their being altered, and the cancelation removed or extracted, and their getting again into circulation, as two did here, and being twice paid by the government."

The injury that might probably have come to the government by reason of the neglect of the collector in the *Morgan Case* was such that the court could not, as in the present case, give any peremptory instruction to the jury. It could not have said, in the former case, that canceled Treasury notes were to be regarded as money, or that the government was entitled to judgment for the face amount of those notes, prior to their being canceled. Nor could it say, as matter of law, that the government was, in fact, damaged by not having the canceled Treasury notes as vouchers. Such being the case, it was held that it was for the jury, under such evidence as might be ad-

duced, to say what actual injury, if any, accrued to the United States by reason of the nondelivery of the canceled Treasury notes.

The present case cannot be controlled by the rule laid down in the *Morgan Case*. Here the Treasury notes received by Smythe were not canceled, and could be used as money. They were not safely kept, nor were they destroyed through overruling necessity or by the public enemy. Hence, there was a breach of his bond, and as the amount of the Treasury notes which he failed to deliver to the government was clearly shown, there was nothing in this case to refer to the jury. There was no question of damage to be ascertained by a jury; for if under the circumstances disclosed the defendants were liable at all, the government, as matter of law, was entitled to a judgment for the full amount shown to have been received by the superintendent and not paid over by him, as required by his bond.

It remains to consider some minor objections to the judgment. It is contended that it was error to give interest on the amount of the judgment from April 1st, 1893, the date from which the accounts of the superintendent were stated at the Treasury Department.

[177] *The alleged fire occurred June 24th, 1893, and on February 9th, 1894, notice of the deficiency in the superintendent's account was given to his sureties, as required by the act of August 8th, 1888 (25 Stat. at L. 387, chap. 787, U. S. Comp. Stat. 1901, p. 1208). And this action was brought August 7th, 1894. Interest, it is insisted, was recoverable, at most, only from the date of the notice to the sureties. This objection is met by § 3624 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2418), which provides: "Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of 6 per centum per annum, from the time of receiving the money until it shall be repaid into the Treasury."

This statute is mandatory, and the sureties on the bond of superintendent Smythe must be held to have signed it in view of the requirement as to the date from which interest should be computed. It is not denied that the Treasury notes in question were received at least as early as April 1st, 1893.

It is also said that it was error, under the law of Louisiana, to have rendered an absolute judgment against Byrnes, the administrator of the succession of Conery, deceased; that if any judgment was rendered it should have been against the administrator, payable only in due course of administration. This objection is quite technical. If by the law of Louisiana the judgment is so payable, it will be thus interpreted and enforced, subject, of course, to the priority given to the government in the distribution of the proceeds of the estate of any person indebted to the United States whose estate is insufficient to pay all debts against it. Rev. Stat. §§ 3466, 3467 (U. S. Comp. Stat. 1901, p. 2314).

*The judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, is affirmed.*

*Mr. Justice **Peckham**, dissenting: [178]

I dissent from the conclusion arrived at in the opinion of the court, and from the judgment thereon. I agree as to the general character and extent of the liability of an officer intrusted with the care and custody of public moneys, as stated in the cases cited in the opinion upon that subject. But those cases do not touch the question involved. It is undisputed that the property, for the loss of which the defendants have been held, consisted of $25,000 of Treasury notes of the government of the United States; in other words, it consisted of the written promise of the government to pay money upon presentation of the notes. There was evidence also, at least sufficient to go to the jury, to prove that most of these notes were wholly destroyed by fire, so that there was no possibility of their being thereafter presented for payment or redemption. Treasury notes amounting to about $1,100 were not so far destroyed as to be incapable of identification or presentation for payment, and they were taken possession of and retained by the government, and yet the government also recovered judgment for their amount. Assuming the liability of the obligors in the bond to respond for all the damage sustained by the government by reason of this destruction by fire, the question is, What damage has the government suffered?

Within the case of *United States* v. *Morgan*, 11 How. 154, 13 L. ed. 643, cited in the opinion of the court, that question should have been submitted to the jury under instructions that the defendant was not liable for the amount of the face of the notes in case they had been totally destroyed by the fire, but only for such cost and expense as the government might incur by reason of the replacing of the notes destroyed, including cost of paper, printing, engraving, and the trouble and inconvenience caused the government, etc., together with the cost, if necessary or more convenient to the government, of the transportation of other notes to take the place of those destroyed.

This suit is upon the bond, which, as it seems to me, is plainly one of indemnity. The legal purport of such a bond is to indemnify the government from any loss occasioned by any *dereliction of the obligor. In [179] case of a breach of the bond, the amount which the government would be entitled to recover would be measured by the loss incurred. If the loss were shown to have been the sum of $5 or merely nominal, the plaintiff could not recover $1,000, or the penalty

of the bond. It is conceded in the present case that what the defendant and his sureties have been adjudged to answer for, as a breach of the bond, was because $25,000 (less about $1,100) of Treasury notes of the United States, in the custody of the superintendent, had been burnt and destroyed by fire. I concede that the bondsmen would be responsible for any loss thereby occasioned to the United States, even though without negligence on the part of the officer in whose custody the money had been placed.

In *Morgan's Case*, 11 How. 154, 13 L. ed. 643, there was a suit by the United States against a collector of revenue. It appeared in evidence that the collector had collected about $100,000 for duties in Treasury notes, and had canceled them. The notes were then put in a bundle and sent to the Treasury Department through the postoffice, but the bundle was lost or stolen. The circuit court gave judgment to the government in the amount of the penalty of the bond, which judgment this court reversed, and in its opinion said:

"The rule of damage would be the amount of the notes, unless it appeared, as here, that they had been canceled, and unless it was shown that the government had suffered, or was likely to suffer, damage less than their amount. How much is the real damage, under all the circumstances, is a question of fact for the jury, and should be passed on by them at another trial. Only that amount, rather than the whole bond, need, in a liberal view of the law, and of his bond, be exacted; and that amount neither he nor his sureties can reasonably object to paying, when he, by the neglect of himself or his agent, has caused all the injury which he is in the end required to reimburse. . . . Finally, we decide on this last question as a matter of law this, and this only, namely, that the collector is liable for all the actual damages sustained by his not returning the notes as required by law and [180] official circulars; or for not putting *them in the postoffice so as to be returned. 5 Stat. at L. 203, chap. 2. But how much this damage was, is a matter of proof before the jury, fixing the real amount likely to happen from their getting into circulation again, as two of them did here, from delay and inconvenience in obtaining the proper vouchers to settle accounts, from the want of evidence at the department that the notes had been redeemed, or from any other direct consequence of the breach of the condition of his bond, and of his instructions under it."

The attempt made to distinguish the present case from that of *United States* v. *Morgan* does not seem to me to be successful. Indeed the case before us presents a stronger case of a substantial defense than that of Morgan's.

To refuse this defense of a burning and total destruction of the notes leaves the strange and anomalous spectacle of a recovery by the government on account of a damage which in fact and in law it has not sustained. The recovery must be upon the contract, evidenced by the bond, to safely keep and pay over, and in default to pay the damage up to the penalty of the bond. This is the contract, and that there has been a breach may be admitted at once, but the question on the part of the obligors in the bond then comes back, What damage has the government suffered by reason of the failure to keep the contract? for it is only the damage which the government in fact has sustained that we have contracted to pay. How can it be said, with the slightest reference to fact, that the damage amounts to the face of the notes when those notes are simply the promise of the government to pay upon their presentation, and the possibility of such presentation has ceased to exist?

But the right to set up and prove a defense of this character seems to be denied on some view of public policy, the propriety of which I admit I fail to recognize, and I also fail to recognize the legal power of the court to deny to the obligors the validity of a defense which shows that no damage, or a less amount than claimed, has been sustained, because of any assumed public policy. It is a case of contract, and not of policy.

The denial of the sufficiency of the defense seemingly rests upon the ground that it is against the interests of the government, *and [181] therefore is against the public policy of the United States, to permit any defense to be interposed in an action upon this kind of a bond; that, no matter how clearly it may be proved that no damage has been sustained by the government, and therefore there is nothing which the obligors have contracted to pay, still the full amount of the face of the notes must be paid to the government in order to reimburse it for a loss it has never in fact sustained. And it is proof of this very fact which is refused on the ground of public policy. Can the government maintain the proposition that if it has suffered in truth no loss it can nevertheless recover either the penalty of the bond or any less sum? This is to change the legal import of the bond. But it is nevertheless maintained that it is against public policy to permit proof of a fact which if it really existed would undoubtedly constitute a defense to the claim made by the government. That kind of a public policy which prevents a legal defense I cannot understand. I can and do appreciate a public policy that refuses to admit the sufficiency of a defense that the property was lost by or stolen from the officer without any fault on his part. The officer and his sureties have frequently endeavored to have the government bear the loss which has actually been sustained, because it happened without any fault on the part of the officer; but the courts have held that such defense is insufficient on the ground that it is against public policy to recognize it as an answer to defendant's obligation to pay over, because it would tend to diminish the care which the officer would otherwise take of the property intrusted to his custody, and would lead the government

into an investigation of the facts surrounding or causing the loss, under very great disadvantages, and therefore as the loss had in fact occurred, and one or the other of the parties must bear it, the courts have said he must bear it in whose custody it had been placed by the government when it was stolen or destroyed, and the proffered answer has been held to be no defense to the contract to pay over, existing in the bond, which has therefore been enforced. The courts simply decided what the contract between the parties meant, but they did not decide that a legal defense, showing there was no damage, could not be interposed.

[182] *Here, however, it seems to me plain there is no question of public policy as to what should constitute a defense. The amount of damage is what the defendants have promised to pay, and nothing more. Consequently, what is damage must be shown. Now that is a question of fact, and if no damage has in fact been sustained, it is the legal right of the defendant to prove it, and it cannot, as I think, be denied him on any question of public policy. This is to me a new application of the doctrine of public policy to a strictly legal defense to the obligation contained in a contract sued upon, where both parties acknowledge the validity of such contract, and the defense is founded upon the terms of the contract about whose legal meaning there cannot, as it seems to me, be any difference of opinion.

Upon the other branch of the subject, the case shows that at least $1,182 in Treasury notes were saved, although charred, and were taken possession of by the agents of the government, and were identified as to the amount and date of issue. The defendants insisted there could be no recovery for this sum, as the government already had the notes in its possession, but this objection was overruled. The sections of the Revised Statutes of the United States (951, 957 [U. S. Comp. Stat. 1901, pp. 695, 698]), set forth in the opinion, are said to render this defense insufficient, for the reason that the defendants had not submitted their claim for audit to the accounting officers of the Treasury. These sections are, as stated, simply reproductions of the act of 1797, which was in force when the *Morgan Case*, 11 How. 154, 13 L. ed. 643, was decided, and it is not mentioned therein as an answer to the defense set up by defendants. Probably the provision was not regarded as applicable, although it must be admitted the record does not affirmatively show the nonpresentation of the matter to the Treasury officials. But, in my judgment, the sections have no application to this case. The defendants are not seeking a claim or credit against the government, and the provision applies to such a case, while here the question is as to how much the government has been damaged, and when it is shown that, in any event, it has in fact received $1,182 of the $25,000 it claimed, it seems to me that, upon any basis of liability, such fact reduces the claim on the part of the government, not [183] by reason *of a credit, but because the defendant never was liable to the extent claimed, and in proving the facts which show there never was any such liability, it cannot, as it seems to me, be said that the defendants thereby claim a credit. They claim no such thing, but they do claim, first, that the government has failed to prove a cause of action for any more than a nominal sum; or, second, for any greater sum than $23,818, being the difference between $25,000 and the $1,182 already received, and this is the extent of the cause of action proved by the government, after all the facts are in evidence.

The recovery in this case was not for the whole penalty of the bond, which was $100,000, but judgment was prayed for and recovered to the extent of $25,000, the whole amount of the notes, not deducting the $1,182 already received by the government. This shows that the recovery was at least based upon the amount of the damage, and not upon the penalty; and it therefore further shows that it was indemnity, pure and simple, which the government claimed. Therefore it was necessary for it to prove the damage, and in proving the defense, at least as to $1,182, the defendants were not proving a credit, but disproving to that extent the cause of action of the plaintiff.

For the reasons thus stated, I am in favor of reversing the judgment of the court below, and I dissent from the opinion of this court directing an affirmance.

I am authorized to state that Mr. Justice **Shiras** concurs in this dissent.

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*JOSEPH H. BEALS, *Plff. in Err.*, [184]
*v.*
JAMES J. CONE and Lyman Robison, *Dfts. in Err.*

(See S. C. Reporter's ed. 184-188.)

*Error to state court — Federal question — suit as to mining claim — questions of general law—estoppel—res judicata.*

1. The mere fact that an action is brought in a state court, under U. S. Rev. Stat. §§ 2325, 2326 (U. S. Comp. Stat. 1901, pp. 1429, 1430), in support of an adverse mining claim, does not of itself entitle the defeated party to a writ of error from the Supreme Court of the United States.
2. Whether statements made on a hearing, before the Land Department, of a protest against a mineral entry, work an estoppel *in pais* which amounts to a defense to a claim of title under a subsequent entry, involves no Federal question which will give the Supreme Court of the United States jurisdiction to review the judgment of a state court.
3. A ruling of a state court adverse to plaintiff's claim that the decision by the Land Department of a question of fact on the hearing

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

of a protest filed by him and others against defendants' original mineral entry was *res judicata* in an adverse suit in which defendants rely on a subsequent entry is not the decision of a Federal question which will give the Supreme Court of the United States jurisdiction to review the judgment of the state court.

[No. 84.]

*Argued November 11, 12, 1902. Decided January 26, 1903.*

IN ERROR to the Supreme Court of the State of Colorado to review a judgment which affirmed a judgment of the District Court of the County of El Paso in favor of defendants in a suit in support of an adverse mining claim. *Dismissed.*

See same case below, 27 Colo. 473, 62 Pac. 948.

Statement by Mr. Justice **Brewer:**

This is what is known in the mining regions as an "adverse suit," brought under the authority of §§ 2325 and 2326, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 1429, 1430), in the district court of the county of El Paso, Colorado, to contest the right of defendants to a patent for the Ophir lode mining claim. The plaintiff claimed a portion of this ground as a part of his own mining claim, and the question presented was as to the priority of right thereto of the respective parties by virtue of discovery and location. Judgment was rendered in the district court in favor of the defendants, which judgment was affirmed by the supreme court of the state. 27 Colo. 473, 62 Pac. 948. Thereupon the case was brought here on writ of error.

In the complaint, plaintiff averred that on or about January 1, 1893, and ever since, he was the owner and in possession of the Tecumseh lode mining claim; that on or about April 1, 1896, the defendants wrongfully entered upon a parcel of said claim, to wit, all that part thereof included within the exterior lines of the Ophir lode mining [185] claim, and that they have ever since *wrongfully withheld the possession of said parcel from the plaintiff. The answer denied the allegations of the complaint, and pleaded as a second defense that before the alleged discovery of the Tecumseh lode mining claim, to wit, on February 3, 1892, the defendants or their grantors were and defendants still are the owners of the Ophir lode mining claim: and that by reason of such ownership they are entitled to the possession of the ground in dispute. To this answer a replication was filed, setting forth that defendants on February 10, 1893, made a mineral entry which included said Ophir lode; that subsequently plaintiff, with others, filed a protest against that portion of the entry which related to the Ophir lode,—such protest charging, among other things, that there had been no discovery of any vein, lode, ledge, or deposit of mineral therein; that on a hearing there was an adjudication by the Commissioner of the General Land Office, affirmed by the Secretary of the Interior, that no discovery had been made, and canceling the entry. Plaintiff also alleged that at the hearing on said protest Cone, one of the defendants, testified that no vein had been discovered in the Ophir claim and no work done on any lode therein during the year 1893, and that the plaintiff was induced by such testimony to go to large expenditures in exploring for mineral in the ground in conflict between the two claims, the defendants knowing at all times that such expenditures were being made in reliance upon the truth of such testimony. In other words, the plaintiff in his replication pleaded two defenses to defendants' claim of title: First, *res judicata* by reason of the action of the Secretary of the Interior in setting aside the original application for entry of the Ophir lode; and, second, estoppel by reason of the testimony given by one of the defendants. A demurrer to this replication was sustained, and the case went to trial upon the complaint and answer.

*Mr.* **H. B. Johnson** argued the cause and filed a brief for plaintiff in error:

A defense based upon laws of the United States gives rise to a Federal question, as much as a claim asserted in a complaint.

*Anderson* v. *Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Murdock* v. *Memphis*, 20 Wall. 590, 22 L. ed. 429.

A Federal question was involved.

*Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

This court will review the decision of the lower court on both the law and the facts, so far as it may be necessary to determine the validity of any right set up or claimed under an act of Congress.

*Republican River Bridge Co.* v. *Kansas P. R. Co.* 92 U. S. 315, 23 L. ed. 515.

Federal questions, even if raised for the first time by petition for a rehearing, will be reviewed by this court where they were considered and determined by the state court.

*Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730.

A claim that to construe the act of Congress allowing and requiring a vein to be discovered at any place within the limits of the claim, as in harmony with a state statute requiring this vein to be in the discovery shaft, would prejudice our title, right, privilege, and immunity claimed under that act, makes a case arising under the laws of the United States.

*Cooke* v. *Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340.

The refusal to consider the question as to whether the state statute construed as requiring the discovery of a vein in the discovery shaft is in conflict with the act of Congress allowing such discovery at any place within the limits of the claim was equivalent to denying the right, title, privilege, and immunity claimed under and by virtue of such conflict.

*Des Moines Nav. & R. Co.* v. *Iowa Home-*

*stead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

It clearly appears that the supreme court of Colorado regarded the pleadings, offers of instructions, objections to instructions, offers of evidence, and objections to evidence, as sufficient forms by which to assert claims of right, title, privilege, and immunity under the various acts of Congress to which we have alluded, and, in the main, has actually decided these questions, and denied such right, title, privilege, and immunity; and this operates to give jurisdiction to this court.

*F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

A Federal question raised for the first time in the supreme court, and actually decided on its merits by that court, is reviewable here, notwithstanding it may not have been raised in the trial court.

*Sully* v. *American Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935.

No particular form of words or phrases in which the claim of Federal rights must be asserted has ever been declared necessary. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring them to the attention of the court.

*Green Bay & M. Canal Co.* v. *Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

*Mr.* **Charles S. Thomas** argued the cause, and, with *Messrs. William H. Bryant* and *Harry H. Lee*, filed a brief for defendants in error:

If the Federal question was not called to the attention of the state court, and prior to any motion or petition for rehearing, no writ of error can lie to such court.

*Loeber* v. *Schroeder*. 149 U. S. 581, 37 L. ed. 858, 13 Sup. Ct. Rep. 934; *Texas & P. Co.* v. *Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Butler* v. *Gage*, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235; *Winona & St. P. R. Co.* v. *Plainview*, 143 U. S. 391, 36 L. ed. 200, 12 Sup. Ct. Rep. 530; *Bushnell* v. *Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Lamar Canal Co.* v. *Amity Land & Irrig. Co.* 26 Colo. 380, 58 Pac. 600; *Armstrong* v. *Athens County Treasurer*, 16 Pet. 281, 10 L. ed. 965.

This court will not resort to forced inferences and conjectural reasoning, or to even probable suppositions of the points raised and decided, in order to sustain jurisdiction.

*Ocean Ins. Co.* v. *Polleys*, 13 Pet. 157, 10 L. ed. 105.

A mention of a Federal question in the petition for the writ of error is insufficient to give the supreme court jurisdiction.

*Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Tripp* v. *Santa Rosa Street R. Co.* 144 U. S. 126, 36 L. ed. 372, 12 Sup. Ct. Rep. 655.

The record must show affirmatively that some Federal question was involved.

*Brown* v. *Colorado*, 106 U. S. 95, 27 L. ed. 132, 1 Sup. Ct. Rep. 175; *Boughton* v. *American Exch. Nat. Bank*, 104 U. S. 427, 26 L. ed. 765; *Michigan C. R. Co.* v. *Michigan Southern R. Co.* 19 How. 378, 15 L. ed. 689.

The definitions given by the state court to the term "vein or lode" in the Federal mining statute, and the necessity of their presence in the discovery shaft of a mining claim, do not invest this court with power to review the decision.

*Bushnell* v. *Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771.

No jurisdiction to review can attach to this court simply because the plaintiffs in error may have claimed a right under a Federal statute.

*Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 586, 44 L. ed. 283, 20 Sup. Ct. Rep. 222; *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Gillis* v. *Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131.

A suit to quiet title to a mining claim involves no Federal question.

*California Oil & Gas Co.* v. *Miller*, 96 Fed. 17.

A suit brought in support of an adverse claim is not one arising under the laws of the United States in such sense as to confer Federal jurisdiction.

*Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

When a Federal question is raised in the state courts, the party who brings the case to this court cannot raise here another Federal question which was not raised below.

*Chapin* v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

If the decision of the state court is based upon a state of facts which remove the alleged Federal question out of the case, this court has no jurisdiction to review.

*Missouri, K. & T. R. Co.* v. *Ferris*, 179 U. S. 602, 45 L. ed. 337, 21 Sup. Ct. Rep. 231; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256.

If the decision of the state court rests on an independent ground of law not involving any Federal question, or on a ground broad enough to sustain it without reference to such a question, the Supreme Court has no jurisdiction.

*Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Dower* v. *Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Osborne* v. *Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Wade* v. *Lawder*, 165 U. S. 624, 41 L. ed. 851, 17 Sup. Ct. Rep. 425; *Hale* v. *Lewis*, 181 U. S. 473, 45 L. ed. 959, 21 Sup. Ct. Rep. 677.

Questions of fact, when once settled in the courts of a state, are not subject to review in this court.

*Western U. Teleg. Co.* v. *Call Pub. Co.* 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561; *Dower* v. *Richards*, 151 U. S. 658, 38

L. ed. 305, 14 Sup. Ct. Rep. 452; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Hedrick* v. *Atchison, T. & S. F. R. Co.* 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; *Gardner* v. *Bonestell*, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399.

On error to a state court, this court cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not by adequate specification been called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the case.

*Yazoo & M. Valley Co.* v. *Adams*, 180 U. S. 41, 45 L. ed. 415, 21 Sup. Ct. Rep. 256; *Powell* v. *Brunswick County*, 150 U. S. 440, 37 L. ed. 1137, 14 Sup. Ct. Rep. 166; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

[186] *Mr. Justice **Brewer** delivered the opinion of the court:

The jurisdiction of this court is denied. The validity of a treaty or statute of or authority exercised under the United States was not drawn in question in the state courts, nor was the validity of a statute of or authority exercised under the state of Colorado challenged on the ground of being repugnant to the Constitution, treaties, or laws of the United States. So that the jurisdiction of this court depends on whether some title, right, privilege, or immunity of a Federal nature was specially set up and claimed by the plaintiff in error and denied by the state courts. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575).

The mere fact that this is an action brought under §§ 2325 and 2326, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 1429, 1430), in support of an adverse claim, does not of itself entitle the defeated party to a writ of error. Although brought under the authority of a Federal statute, the questions involved may be only of general or local law. *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

Two questions of law arose on the pleadings. Both were presented by the demurrer to the replication; one, a question of estoppel: the other, of *res judicata*. The estoppel was not one of record, but *in pais*, arising, as contended, from contradictory statements made by one of the defendants at a different time and place. Whether such statements work an estoppel depends, not upon the Constitution or any law of Congress, involves no Federal question, but is determined by rules of general law.

With respect to the other question, this may be said: The validity of the denial of the original application for entry was not challenged. It was accepted as conclusive, and a subsequent entry was relied upon. The rule of *res judicata* was, however, invoked by plaintiff on the ground that a question of fact had been decided in the first application, which, as alleged, was conclusive between the parties in this action. But the applicability of the rule depends on the fact that the parties to the two actions or proceedings are the same, and also acting in the same right. Here the parties to the prior proceeding were the applicants *for the [187] patent and the United States, and the matters decided bound them, and them only. The fact that this plaintiff, with others, filed a protest against the entry did not make them parties to the application to the extent that they were concluded by a decision either way. There is no suggestion in the pleadings that the protestants were in any way interested in the ground applied for, or that they were acting other than as good citizens, seeking to prevent a wrong upon the government. Their standing in the proceeding was in the nature of *amici curiæ*. As such, whatever the result, no rule of *res judicata* could be invoked by or against them. Hence, the ruling on the demurrer was not concerning the effect of a decision made by the Land Department upon the parties to the proceeding, but a mere determination that one who was not a party could not claim the advantages of a party. It is not open to question that the trial court properly sustained the demurrer to this portion of the replication. To call this the decision of a Federal question adverse to the plaintiff is so manifestly without foundation that it may rightfully be disregarded.

The record of the trial, which took place before a jury, is voluminous,—the bill of exceptions, containing the testimony, the instructions, and the proceedings on the motion for a new trial, filling 436 printed pages. The testimony was mainly directed to such matters of fact as the time and place of discovery of mineral, the character of the veins, the per cent of mineral, and the general nature of the rock formations in which the veins were alleged to have been discovered. From the beginning of the trial to the end of the testimony there appears no single distinct claim based upon the Constitution or statutes of the United States. No statute of the state of Colorado was questioned, nor was any title, right, privilege, or immunity under the Constitution or laws of the United States specially set up or claimed. In the instructions asked and refused, as well as in those given, there is only a general mention of the laws of the United States, and none of any particular statute. In the motion for a new trial, as well as in the assignments of error in the supreme court of the state, there is not the slightest reference to the Constitution, the laws of the United States, or *any section or [188] part thereof. And in the opinion of the supreme court, outside of the matters of estoppel and *res judicata* before referred to, there is nothing to even suggest that it was requested to consider any question of a title, right, privilege, or immunity under the Constitution or laws of the United States.

Indeed, while this case has evidently been hotly contested, yet the matters which were subjects of controversy and determination were questions of fact concerning the time, extent, and effect of the alleged discoveries of mineral, and also alleged wrongs in respect to the jury. To those matters, and to those alone, was the attention of the parties and the courts directed. Counsel for plaintiff in error has filed an elaborate brief of 249 printed pages, which is able and exhaustive, both on questions of mining law and the conduct of the trial. One cannot, however, fail to be impressed, after a perusal thereof, with the fact of a failure to recognize that there is no general right to a writ of error from this court to the courts of a state; that there is but a special right, a right to bring such cases, and such cases only, as disclose a Federal question distinctly ruled adversely to the plaintiff in error. We fail to see that any title, right, privilege, or immunity of a Federal nature was specially set up and claimed. Very likely the construction and the effect of Federal statutes were, in a general way, discussed and considered, but nowhere do we find that special setting up or claiming of a Federal right which justifies us in taking jurisdiction. As we have stated, the validity of no Federal statute was denied in the state courts. Neither did the plaintiff in error, prior to the judgment of affirmance in the supreme court, challenge the validity of any state statute on the ground of its repugnance to paramount Federal law.

*The writ of error is dismissed.*

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[189] *ISABELLA F. BLACKSTONE, Individually and as Executrix of the Last Will and Testament of Timothy B. Blackstone, Deceased, *Plff. in Err.*,

*v.*

NATHAN L. MILLER, Comptroller of the State of New York, and Edward M. Grout, Comptroller of the City of New York.

(See S. C. Reporter's ed. 189–207.)

*Taxation — succession taxes — debts due nonresident decedent — contracts — impairment of obligation — constitutional law — double taxation — full faith and credit — privileges and immunities.*

1. A state may tax the transfer, under the will of a nonresident, of debts due the decedent by its citizens.
2. The obligation of a contract cannot be said to be impaired by a statute in force when the contract was made.
3. The beneficiaries under the will of a nonresident cannot invoke the Federal Constitution to prevent the taxation, under the New York inheritance-tax law, of the transfer, under such will, of debts due the decedent by its citizens, because the entire inheritance is taxable in the state of the decedent's domicil.
4. Full faith and credit are not denied a judgment of an Illinois court taxing the entire inheritance under the will of a resident of that state, by a tax imposed under the New York inheritance-tax law on the transfer, under such will, of debts due the decedent by citizens of the latter state.
5. None of the privileges and immunities of citizens of the state of New York are denied the beneficiaries under the will of a nonresident by a tax imposed under the New York inheritance-tax law, on the transfer, under such will, of debts due the decedent by citizens of that state.
6. The imposition of a tax, under the New York inheritance-tax law, on the transfer, under the will of a nonresident, of debts due the decedent by residents of that state, does not violate the 14th Amendment to the Federal Constitution.

[No. 423.]

*Argued January 5, 6, 1903. Decided January 26, 1903.*

IN ERROR to the Surrogates' Court of New York County, in the State of New York, to review a decree of that court imposing an inheritance tax on property passing under the will of a nonresident, which decree was entered in pursuance of an order of the Appellate Division of the Supreme Court of that State, which was affirmed by the Court of Appeals. *Affirmed.*

See same case below in Appellate Division of Supreme Court, 69 App. Div. 127, 74 N. Y. Supp. 508; and in Court of Appeals, 171 N. Y. 682, 64 N. E. 1118.

The facts are stated in the opinion.

*Mr.* **Edward W. Sheldon** argued the cause and filed a brief for plaintiff in error:

The established principles of taxation prohibit the taxation of intangible property owned by nonresidents.

*M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Northern C. R. Co.* v. *Jackson*, 7 Wall. 262, 19 L. ed. 88; *State Tax on Foreign-held Bonds*, 15 Wall. 300, *sub nom. Cleveland, P. & A. R. Co.* v. *Pennsylvania*, 21 L. ed. 179; *Savings & Loan Soc.* v. *Multcha*

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NOTE.—*On inheritance and succession taxes*—see notes to *Re* Howe (N. Y.) 2 L. R. A. 824; Wallace v. Myers (C. C. S. D. N. Y.) 4 L. A. R. 171; Com. v. Ferguson (Pa.) 10 L. R. A. 240; *Re* Romaine (N. Y.) 12 L. R. A. 401; and Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

*As to what laws are void as impairing obligation of contracts*—see notes to Franklin County Grammar School v. Bailey (Vt.) 10 L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

*As to full faith and credit to be given to state records and judicial proceedings*—see Lindley v. O'Reilly (N. J.) 1 L. R. A. 79, and note; Cummington v. Belchertown (Mass.) 4 L. R. A. 131, and note; Rand v. Hanson (Mass.) 12 L. R. A. 574, and note. And see notes to Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; and Mills v. Duryee, 3 L. ed. U. S. 411.

*nomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; *Bristol* v. *Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *San Francisco* v. *Mackey*, 22 Fed. 602; *Walker* v. *Jack*, 31 C. C. A. 462, 60 U. S. App. 124, 88 Fed. 576; *Kirtland* v. *Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 546, Affirmed in 100 U. S. 491, 25 L. ed. 558; *Balk* v. *Harris*, 124 N. C. 467, 45 L. R. A. 260, 32 S. E. 799; *Scripps* v. *Fulton County Bd. of Review*, 183 Ill. 278, 55 N. E. 700; *Hayward* v. *Christian County Bd. of Review*, 189 Ill. 235, 59 N. E. 601; *Matzenbaugh* v. *People*, 194 Ill. 108, 62 N. E. 546; *South Nashville Street R. Co.* v. *Morrow*, 87 Tenn. 438, 2 L. R. A. 853, 11 S. W. 348; *Howell* v. *Gordon*, 127 Mich. 517, 86 N. W. 1042; *Ellsworth* v. *Brown*, 53 Me. 519; *Catlin* v. *Hull*, 21 Vt. 152; *Flanders* v. *Cross*, 10 Cush. 514; *State, Potter, Prosecutor*, v. *Ross*, 23 N. J. L. 517; *Hopkins* v. *Baker*, 78 Md. 363, 22 Atl. 477, 28 Atl. 284; *Balk* v. *Harris*, 124 N. C. 467, 45 L. R. A. 260, 32 S. E. 799; *Mobile* v. *Baldwin*, 57 Ala. 61, 29 Am. Rep. 712; *Augusta* v. *Dunbar*, 50 Ga. 387; *Johnson* v. *DeBary-Baya Merchants' Line*, 37 Fla. 499, 37 L. R. A. 518, 19 So. 640; *State* v. *Smith*, 68 Miss. 79, 8 So. 294; *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors*, 51 La. Ann. 1028, 45 L. R. A. 524, 25 So. 970; *Court* v. *O'Connor*, 65 Tex. 334; *Prairie Cattle Co.* v. *Williamson*, 5 Okla. 488, 49 Pac. 937; *Worthington* v. *Sebastian*, 25 Ohio St. 1; *Buck* v. *Miller*, 147 Ind. 586, 37 L. R. A. 384, 387, 45 N. E. 647, 47 N. E. 8; *Louisville* v. *Shirley*, 80 Ky. 71; *Hutchinson* v. *Oskaloosa Bd. of Equalization*, 67 Iowa, 183, 25 N. W. 121; *Finch* v. *York County*, 19 Neb. 50, 56 Am. Rep. 741, 26 N. W. 589; *Sanford* v. *Spencer*, 62 Wis. 230, 22 N. W. 465; *Re Jefferson*, 35 Minn. 215, 28 N. W. 256; *Arapahoe County* v. *Cutter*, 3 Colo. 349; *Holland* v. *Silver Bow County*, 15 Mont. 460, 27 L. R. A. 797, 39 Pac. 575; *Johnson* v. *Oregon City*, 2 Or. 327; *Walla Walla* v. *Moore*, 16 Wash. 339, 47 Pac. 753; *Re Fair*, 128 Cal. 607, 61 Pac. 184; *Barnes* v. *Woodbury*, 17 Nev. 383, 30 Pac. 1068; Cooley, Taxn, 2d ed. pp. 21, 22; Rorer, Interstate Law, p. 281; Judson, Taxn. 1893, § 397, p. 507.

These principles have been embodied in the New York statutory scheme.

*People ex rel. Lemmon* v. *Feitner*, 167 N. Y. 1, 60 N. E. 265; *Re Hellman*, 77 App. Div. 355, 79 N. Y. Supp. 201; *New York* v. *McLean*, 170 N. Y. 374, 63 N. E. 380; *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Bristol* v. *Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *People* v. *Equitable Trust Co.* 96 N. Y. 387; *Re Enston*, 113 N. Y. 174, *sub nom. People* v. *Sherwood*, 3 L. R. A. 464, 21 N. E. 87.

The principles apply with equal force to transfer or succession taxes.

*Kintzing* v. *Hutchinson*, 7 W. N. C. 226, Fed. Cas. No. 7,834; *Re Bronson*, 150 N. Y. 1, 34 L. R. A. 238, 44 N. E. 707; *Re Preston*, 75 App. Div. 250, 78 N. Y. Supp. 91; *Re Phipps*, 77 Hun, 325, 28 N. Y. Supp. 330, Affirmed in 143 N. Y. 641, 37 N. E. 823; *Re Chabot*, 44 App. Div. 340, 60 N. Y. Supp. 927; *Re Abbett*, 29 Misc. 567, 61 N. Y. Supp. 1067; *Coleman's Estate*, 159 Pa. 231, 28 Atl. 137.

If the indebtedness of the trust company could upon any theory be regarded as property within the state of New York, it was not taxable in that state because it was only transitorily there.

*Hays* v. *Pacific Mail S. S. Co.* 17 How. 596, 15 L. ed. 254; *People ex rel. Parker Mills* v. *New York Tax Comrs.* 23 N. Y. 242; *People ex rel. Hoyt* v. *New York City & County Tax & A. Comrs.* 23 N. Y. 224; 24 Am. & Eng. Enc. Law, p. 435; 25 Am. & Eng. Enc. Law, pp. 142, 143; *State Metropolitan L. Ins. Co., Prosecutor*, v. *Newark*, 62 N. J. L. 74, 40 Atl. 573; *Herron* v. *Keeran*, 59 Ind. 472, 26 Am. Rep. 87; *Standard Oil Co.* v. *Bachelor*, 89 Ind. 1; *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Corning* v. *Masonville Twp.* 74 Mich. 177, 41 N. W. 831; *State, Detmold, Prosecutor*, v. *Engle*, 34 N. J. L. 425; *State, Lehigh & W. Coal Co., Prosecutor*, v. *Carrigan*, 39 N. J. L. 35; *Com.* v. *American Dredging Co.* 122 Pa. 386, 1 L. R. A. 237, 2 Inters. Com. 221, 15 Atl. 443; *Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759; *Re Leopold*, 35 Misc. 370, 71 N. Y. Supp. 1032; *State Trust Co.* v. *Chehalis County*, 24 C. C. A. 584, 48 U. S. App. 190, 79 Fed. 282.

In attempting to assess the property of a nonresident, the burden is upon the taxing authority to establish the jurisdictional conditions.

*Corn* v. *Cameron*, 19 Mo. App. 573; *McLean* v. *Jephson*, 123 N. Y. 142, 9 L. R. A. 493, 25 N. E. 409.

A construction of the statute which permits double taxation should be avoided.

2 Cook, Corp. § 567; *Tennessee* v. *Whitworth*, 117 U. S. 129, 29 L. ed. 830, 6 Sup. Ct. Rep. 645; *People ex rel. Savings Bank* v. *Coleman*, 135 N. Y. 231, 31 N. E. 1022; *People ex rel. Hoyt* v. *New York City & County Tax & A. Comrs.* 23 N. Y. 224; *People ex rel. Darrow* v. *Coleman*, 119 N. Y. 137, 7 L. R. A. 407, 23 N. E. 488; *Re James*, 144 N. Y. 6, 38 N. E. 961; *Detroit Citizens' Street R. Co.* v. *Detroit*, 125 Mich. 673, 85 N. W. 96, 86 N. W. 809.

Where any doubt exists as to liability to a succession tax, the doubt should be resolved in favor of the person sought to be taxed.

*Re Enston*, 113 N. Y. 174, *sub nom. People* v. *Sherwood*, 3 L. R. A. 464, 21 N. E. 87; *Re James*, 144 N. Y. 6, 38 N. E. 961; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850; *United States* v. *Wigglesworth*, 2 Story, 369, Fed. Cas. No. 16,690; *Re Bronson*, 150 N. Y. 6, 34 L. R. A. 238, 44 N. E. 707; *Re Vassar*, 127 N. Y. 1, 27 N. E. 394; *Re Stewart*, 131 N. Y. 274, 14 L. R. A. 836, 30 N. E. 184; *Re Fayerweather*, 143 N. Y. 114, 38 N. E. 278; *United States* v. *Isham*, 17 Wall. 496, 21 L. ed. 728; *Ruckgaber* v. *Moore*, 104 Fed. 947; *Hooper* v. *Shaw*, 176 Mass. 190, 57 N. E. 361.

The taxation, in this proceeding, of the debts due Mr. Blackstone from residents of New York, would be unconstitutional.

*Vanhorne* v. *Dorrance*, 2 Dall. 304, 1 L. ed. 391; *Calder* v. *Bull*, 3 Dall. 386, 1 L. ed. 648; *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot* v. *Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, dissenting opinion; *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

The proceedings under review impair the obligation of the contracts made between Mr. Blackstone and the Trust Company and Cuyler, Morgan & Co.

*State Tax on Foreign-held Bonds*, 15 Wall. 300, *sub nom. Cleveland, P. & A. R. Co.* v. *Pennsylvania*, 21 L. ed. 179; *Tappan* v. *Merchants' Nat. Bank*, 19 Wall. 490, 22 L. ed. 189; *Murray* v. *Charleston*, 96 U. S. 432, 24 L. ed. 760; *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *New Orleans* v. *Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Re Bronson*, 150 N. Y. 1, 34 L. R. A. 238, 44 N. E. 707; *Central Trust Co.* v. *Chattanooga, R. & C. R. Co.* 68 Fed. 685; *Walker* v. *Jack*, 31 C. C. A. 462, 60 U. S. App. 127, 88 Fed. 576; *Goldgart* v. *People*, 106 Ill. 25; *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors*, 51 La. Ann. 1028, 45 L. R. A. 524, 25 So. 970; *Detroit* v. *Lewis*, 109 Mich. 155, 32 L. R. A. 439, 66 N. W. 958.

The proceedings under review deny full faith and credit to the public acts and judicial proceedings of the state of Illinois.

*Hilton* v. *Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139; *Hampton* v. *M'Connel*, 3 Wheat. 234, 4 L. ed. 378; *Mills* v. *Duryee*, 7 Cranch, 481, 3 L. ed. 411.

The proceedings under review deny to citizens of Illinois some of the privileges and immunities of citizens of New York.

*Ward* v. *Maryland*, 12 Wall. 418, 20 L. ed. 449.

The privileges and immunities of citizens of the United States are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.

*Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

Where there is discrimination in favor of resident as against nonresident taxpayers, the latter are denied the equal protection of the laws.

*Savings & Loan Soc.* v. *Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; *Lowe* v. *Kansas*, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047. See also *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Tinsley* v. *Anderson*, 171 U. S. 101, 43 L. ed. 91, 18 Sup. Ct. Rep. 805.

As it is attempted in this proceeding to assess a tax on property which is not within the jurisdiction of the state of New York, and to enforce that tax against the legatees, they are threatened with forcible deprivation of their property without due process of law.

*Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *Scott* v. *McNeal*, 154 U. S. 46, 38 L. ed. 902, 14 Sup. Ct. Rep. 1108.

If jurisdiction to tax is absent, the statute and the machinery to execute it do not constitute due process of law.

*St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 20 L. ed. 192; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; Cooley, Const. Lim. 607.

*Mr.* **Louis Marshall** argued the cause, and, with *Mr. Julius Offenbach*, filed a brief for defendants in error:

Legatees and devisees take their bequests and devises subject to this tax imposed upon the succession to property.

*Re Merriam*, 141 N. Y. 479, 36 N. E. 505; *Re Hoffman*, 143 N. Y. 329, 38 N. E. 311; *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073; *Scholey* v. *Rew*, 23 Wall. 331, 23 L. ed. 99; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Plummer* v. *Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774.

The constitutionality of a tax on the succession to property is no longer open to question.

*Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The courts of New York have had occasion frequently to apply this statute to the succession to personal property of nonresidents which at the time of the death of the decedent was within the state.

*Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759; *Re Houdayer*, 150 N. Y. 37, 34 L. R. A. 235, 44 N. E. 718.

Deposits in banks have been held assessable under this system of legislation, in other cases.

*Re Burr*, 16 Misc. 89, 38 N. Y. Supp. 811; *Re Morejon*, N. Y. Law Journal, July 3, 1891; *Re Bondon*, N. Y. Law Journal, March 1, 1892; *Re Speers*, 6 Ohio S. & C. P. Dec. 398.

The construction by the court of appeals of New York of this statute is to be regarded as an authoritative declaration of what the law of New York is, which will be adopted by this court.

*Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261; *Randall* v. *Brigham*, 7 Wall. 523, 19 L. ed. 285; *Morley* v. *Lake Shore & M. S.*

*R. Co.* 146 U. S. 167, 36 L. ed. 928, 13 Sup. Ct. Rep. 54; *Burgess* v. *Seligman*, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Flash* v. *Conn*, 109 U. S. 379, 27 L. ed. 970, 3 Sup. Ct. Rep. 263; *Bucher* v. *Cheshire R. Co.* 125 U. S. 584, 31 L. ed. 799, 8 Sup. Ct. Rep. 974; *German Sav. Bank* v. *Franklin County*, 128 U. S. 538, 32 L. ed. 524, 9 Sup. Ct. Rep. 159; *Amy* v. *Watertown*, 130 U. S. 318, 32 L. ed. 952, 9 Sup. Ct. Rep. 530; *Gormley* v. *Clark*, 134 U. S. 348, 33 L. ed. 914, 10 Sup. Ct. Rep. 554; *Detroit* v. *Osborne*, 135 U. S. 500, 34 L. ed. 262, 10 Sup. Ct. Rep. 1012; *Halsted* v. *Buster*, 140 U. S. 277, 35 L. ed. 485, 11 Sup. Ct. Rep. 782; *Bauserman* v. *Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Balkam* v. *Woodstock Iron Co.* 154 U. S. 189, 38 L. ed. 957, 14 Sup. Ct. Rep. 1010; *Hartford F. Ins. Co.* v. *Chicago, M. & St. P. R. Co.* 175 U. S. 108, 44 L. ed. 92, 20 Sup. Ct. Rep. 33; *Wade* v. *Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715; *Williams* v. *Eggleston*, 170 U. S. 311, 42 L. ed. 1050, 18 Sup. Ct. Rep. 617; *New Orleans* v. *Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110.

This principle has even been applied in cases where the jurisdiction of this court has been invoked because of an asserted impairment of contract rights arising from the effect given to subsequent legislation, in respect to which the duty is imposed upon this court to exercise an independent judgment as to the nature and scope of the contract.

*Board of Liquidation of City Debt* v. *Louisiana*, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. Rep. 263; *Yazoo & M. Valley R. Co.* v. *Adams*, 181 U. S. 580, 45 L. ed. 1011, 21 Sup. Ct. Rep. 729.

For all practical purposes the deposits of the decedent which have been made the basis of the assessment of the tax under consideration are moneys within the state of New York.

*Bluefields Banana Co.* v. *Board of Assessors*, 49 La. Ann. 43, 21 So. 627; *Parker* v. *Strauss*, 49 La. Ann. 1173, 22 So. 329.

The deposit with the United States Trust Company did not partake of the nature of a general deposit, but was a special deposit in trust.

*Jenkins* v. *Neff*, 163 N. Y. 320, 57 N. E. 408, Affirmed in 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905.

But treating the deposit of the proceeds of these shares of stock as an ordinary deposit, it is nevertheless believed that it was property of the decedent within the state of New York.

*Downes* v. *Phœnix Bank*, 6 Hill, 297; *Payne* v. *Gardiner*, 29 N. Y. 146; *Howell* v. *Adams*, 68 N. Y. 321; *Munger* v. *Albany City Nat. Bank*, 85 N. Y. 587; *Boughton* v. *Flint*, 74 N. Y. 482; *Smiley* v. *Fry*, 100 N. Y. 265, 3 N. E. 186; *Dickinson v. Leominster Sav. Bank*, 152 Mass. 49, 25 N. E. 12; *Girard Bank* v. *Penn Twp. Bank*, 39 Pa. 92, 80 Am. Dec. 507; *United States* v. *Wardwell*, 172 U. S. 48, 43 L. ed. 360, 19 Sup. Ct. Rep. 86; *Parker* v. *Strauss*, 49 La. Ann. 1173, 22 So. 329.

Under the law of New York, debts owing by a resident of the state to a nonresident are attachable in an action brought against the latter, and the domicil of the debtor is treated as the situs of the property.

*Dunlop* v. *Paterson F. Ins. Co.* 12 Hun, 627, Affirmed in 74 N. Y. 145, 30 Am. Rep. 283; *Douglass* v. *Phœnix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 110, 33 N. E. 938; *Embree* v. *Hanna*, 5 Johns. 101; *Williams* v. *Ingersoll*, 89 N. Y. 508; *Chicago, R. I. & P. R. Co.* v. *Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

An executor or administrator appointed in one state cannot as such sue or be sued in his representative capacity in another.

*Hopper* v. *Hopper*, 125 N. Y. 402, 12 L. R. A. 237, 26 N. E. 457; *Lawrence* v. *Lawrence*, 3 Barb. Ch. 74; *Re Webb*, 11 Hun, 124; *Flandrow* v. *Hammond*, 13 App. Div. 325, 43 N. Y. Supp. 143; *Johnson* v. *Wallis*, 112 N. Y. 230, 2 L. R. A. 828, 19 N. E. 653; *Petersen* v. *Chemical Bank*, 32 N. Y. 22, 88 Am. Dec. 298; *Judy* v. *Kelley*, 11 Ill. 211, 50 Am. Dec. 455; *McGarvey* v. *Darnall*, 134 Ill. 367, 10 L. R. A. 861, 25 N. E. 1005; *Johnson* v. *Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; *Vaughan* v. *Northrup*, 15 Pet. 1, 10 L. ed. 639; *Aspden* v. *Nixon*, 4 How. 467, 11 L. ed. 1059; *Reynolds* v. *Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Lawrence* v. *Nelson*, 143 U. S. 222, 36 L. ed. 134, 12 Sup. Ct. Rep. 440; *Overby* v. *Gordon*, 177 U. S. 222, 44 L. ed. 745, 20 Sup. Ct. Rep. 603; *Wyman* v. *Halstead*, 109 U. S. 654, *sub nom. Wyman* v. *United States*, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; *Chicago, R. I. & P. R. Co.* v. *Sturm*, 174 U. S. 714, 43 L. ed. 1146, 19 Sup. Ct. Rep. 797.

A tax of the kind now under consideration "has some of the characteristics of a duty on the administration of the estates of deceased persons."

*Minot* v. *Winthrop*, 162 Mass. 113, 26 L. R. A. 259, 38 N. E. 512; *Frothingham* v. *Shaw*, 175 Mass. 59, 55 N. E. 623.

Such duties are levied in respect of the control which every government has over property within its jurisdiction, irrespective of the domicil of the decedent.

*Laidlay* v. *Lord Advocate*, L. R. 15 App. Cas. 468; Hanson. Death Duties, 2, 63.

It must be conceded that it was within the power of the New York legislature to place a succession tax upon the tangible property within the state of a nonresident decedent.

*Callahan* v. *Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759; *Re Whiting*, 150 N. Y. 27, 34 L. R. A. 232, 44 N. E. 715; *Alvany* v. *Powell*, 55 N. C. (2 Jones Eq.) 51.

It is within the power of the state to which resort must be had for the purpose of reducing to possession property of a decedent, whether a resident or a nonresident, by those succeeding to his ownership, to impose such restrictions and conditions on the rights of succession as it may see fit to create, whether the property to be reduced to possession is tangible or intangible, real

or personal, and even though it may be a mere credit.

*People ex rel. Hoyt* v. *New York City & County Tax & A. Comrs.* 23 N. Y. 224; *People ex rel. Westbrook* v. *Ogdensburgh*, 48 N. Y. 390; *Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759; *People ex rel. Jefferson* v. *Smith*, 88 N. Y. 576; *Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Savings & Loan Soc.* v. *Multnomah County*, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; *Re Whiting*, 150 N. Y. 30, 34 L. R. A. 232, 44 N. E. 715; *Hervey* v. *Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Warner* v. *Jaffray*, 96 N. Y. 254, 48 Am. Rep. 616; *Walworth* v. *Harris*, 129 U. S. 365, 32 L. ed. 715, 9 Sup. Ct. Rep. 340; *Security Trust Co.* v. *Dodd*, 173 U. S. 628, 43 L. ed. 835, 19 Sup. Ct. Rep. 545; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Chicago, R. I. & P. R. Co.* v. *Sturm*, 174 U. S. 714, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797; *New Orleans* v. *Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Clason* v. *New Orleans*, 46 La. Ann. 1, 14 So. 306; *Bristol* v. *Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; *Re Jefferson*, 35 Minn. 215, 28 N. W. 256; *Eidman* v. *Martinez*, 184 U. S. 578, 46 L. ed. 697, 22 Sup. Ct. Rep. 515; *Moore* v. *Ruckgaber*, 184 U. S. 593, 46 L. ed. 705, 22 Sup. Ct. Rep. 521; *Greves* v. *Shaw*, 173 Mass. 205, 53 N. E. 372; *Small's Estate*, 151 Pa. 1, 25 Atl. 23, 28; *People ex rel. Hoyt* v. *New York City & County Tax & A. Comrs.* 23 N. Y. 224; *Kingman County* v. *Leonard*, 57 Kan. 531, 34 L. R. A. 810, 46 Pac. 960; *Allen* v. *National State Bank*, 92 Md. 509, 52 L. R. A. 760, 48 Atl. 78.

The sovereign to whom resort must be had for authority to reduce the deposit to possession may impose a tax upon the right to reduce such property to possession, in lieu of absorbing the entire deposit.

*Mager* v. *Grima*, 8 How. 490, 12 L. ed. 1168; *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073. See also *State* v. *Dalrymple*, 70 Md. 294, 3 L. R. A. 372, 17 Atl. 82; *Plummer* v. *Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 288, 42 L. ed. 1041, 18 Sup. Ct. Rep. 594.

The statute on which the tax is predicated does not impair the obligation of the contract.

*Pinney* v. *Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52; *Lehigh Water Co.* v. *Easton*, 121 U. S. 388, 30 L. ed. 1059, 7 Sup. Ct. Rep. 916. See also *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *McCullough* v. *Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134.

The tax is not rendered unconstitutional because there is a possibility that the decedent's estate may be subjected to double taxation.

*Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Dyer* v. *Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *Frothingham* v. *Shaw*, 175 Mass. 59, 55 N. E. 623; *People* v. *Home Ins. Co.* 92 N. Y. 347; *Home Ins. Co.* v. *New York*, 119 U. S. 129, 30 L. ed. 350, 8 Sup. Ct. Rep. 1385; *Coe* v. *Errol*, 116 U. S. 524, 29 L. ed. 718, 6 Sup. Ct. Rep. 475; *Knowlton* v. *Moore*, 178 U. S. 53, 44 L. ed. 975, 20 Sup. Ct. Rep. 747.

The decision sought to be reviewed does not deny full faith and credit to any public acts, records, or judicial proceedings in the state of Illinois.

*Bonaparte* v. *Baltimore City Appeal Tax Ct.* 104 U. S. 592, 26 L. ed. 845; *C. N. Nelson Lumber Co.* v. *Loraine*, 22 Fed. 60; *Johnson* v. *Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; *Stacy* v. *Thrasher*, 6 How. 44, 12 L. ed. 337.

The statute does not deprive the plaintiff in error of any of the privileges and immunities of citizens of the state of New York.

*Mager* v. *Grima*, 8 How. 490, 12 L. ed. 1168; *Wallace* v. *Myers*, 4 L. R. A. 171, 38 Fed. 184, Appeal Dismissed, in 154 U. S. 523, 38 L. ed. 1080, 14 Sup. Ct. Rep. 1155; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091.

The act does not deny the equal protection of the law.

*Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Orr* v. *Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.

It does not deprive the plaintiff in error of her property without due process of law.

*Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Spencer* v. *Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Palmer* v. *McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Lent* v. *Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 168, 41 L. ed. 392, 17 Sup. Ct. Rep. 56; *Merchants' & Mfrs. Nat. Bank* v. *Pennsylvania*, 167 U. S. 467, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a writ of error to the surrogates' court of the county of New York. It is brought to review a decree of the court, sustained by the appellate division of the supreme court (69 App. Div. 127, 74 N. Y. Supp. 508), and by the court of appeals (171 N. Y. 682, 64 N. E. 1118), levying a tax on the transfer by will of certain property of Timothy B. Blackstone, the testator, who died domiciled in Illinois. The property consisted of a debt of $10,692.24, due to the deceased by a firm, and of the net sum of $4,843,456.72, held on a deposit account by the United States Trust Company of New York. The objection was taken seasonably upon the record that the transfer of this property could not be taxed in New York consistent-

ly with the Constitution of the United States.

The deposit in question represented the proceeds of railroad stock sold to a syndicate and handed to the trust company, which, by arrangement with the testator, held the proceeds subject to his order, paying interest in the meantime. Five days' notice of withdrawal was required, and if a draft was made upon the company it gave [203] its check upon one of its banks *of deposit. The fund had been held in this way from March 31, 1899, until the testator's death on May 26, 1900. It is probable, of course, that he did not intend to leave the fund there forever, and that he was looking out for investments, but he had not found them when he died. The tax is levied under a statute imposing a tax "upon the transfer of any property, real or personal. . . . 2. When the transfer is by will or intestate law, of property within the state, and the decedent was a nonresident of the state at the time of his death." Laws 1896, chap. 908, § 220, amended, Laws 1897, chap. 284, 3 Rev. Stat. Codes & Gen. Laws, 3d ed. 1901, p. 3592. The whole succession has been taxed in Illinois, the New York deposit being included in the appraisal of the estate. It is objected to the New York tax that the property was not within the state, and that the courts of New York had no jurisdiction; that if the property was within the state it was only transitorily there (*Hays* v. *Pacific Mail S. S. Co.* 17 How. 596, 599, 600, 15 L. ed. 254, 255), that the tax impairs the obligation of contracts, that it denies full faith and credit to the judgment taxing the inheritance in Illinois, that it deprives the executrix and legatees of privileges and immunities of citizens of the state of New York, and that it is contrary to the 14th Amendment.

In view of the state decisions it must be assumed that the New York statute is intended to reach the transfer of this property if it can be reached. *New Orleans* v. *Stempel*, 175 U. S. 309, 316, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 166, 36 L. ed. 925, 928, 13 Sup. Ct. Rep. 54. We also must take it to have been found that the property was not *in transitu* in such a sense as to withdraw it from the power of the state, if otherwise the right to tax the transfer belonged to the state. The property was delayed within the jurisdiction of New York an indefinite time, which had lasted for more than a year, so that this finding at least was justified. *Kelley* v. *Rhoads*, 188 U. S. 1, *ante*, 359, 23 Sup. Ct. Rep. 259. Both parties agree with the plain words of the law that the tax is a tax upon the transfer, not upon the deposit, and we need spend no time upon that. Therefore the naked question is whether the state has a right to tax the transfer of such deposit by will.

] *The answer is somewhat obscured by the superficial fact that New York, like most other states, recognizes the law of the domicil as the law determining the right of universal succession. The domicil, naturally, must control a succession of that kind. Universal succession is the artificial continuance of the person of a deceased by an executor, heir, or the like, so far as succession to rights and obligations is concerned. It is a fiction, the historical origin of which is familiar to scholars, and it is this fiction that gives whatever meaning it has to the saying *mobilia sequuntur personam*. But being a fiction it is not allowed to obscure the facts, when the facts become important. To a considerable, although more or less varying, extent the succession determined by the law of the domicil is recognized in other jurisdictions. But it hardly needs illustration to show that the recognition is limited by the policy of the local law. Ancillary administrators pay the local debts before turning over the residue to be distributed, or distributing it themselves, according to the rules of the domicil. The title of the principal administrator, or of a foreign assignee in bankruptcy,—another type of universal succession,—is admitted in but a limited way or not at all. See *Crapo* v. *Kelly*, 16 Wall. 610, 21 L. ed. 430; *Chipman* v. *Manufacturers' Nat. Bank*, 156 Mass. 147–149, 30 N. E. 610.

To come closer to the point, no one doubts that succession to a tangible chattel may be taxed wherever the property is found, and none the less that the law of the situs accepts its rules of succession from the law of the domicil, or that by the law of the domicil the chattel is part of a *universitas* and is taken into account again in the succession tax there. *Eidman* v. *Martinez*, 184 U. S. 578, 586, 587, 592, 46 L. ed. 697, 702, 704, 22 Sup. Ct. Rep. 515. See *Mager* v. *Grima*, 8 How. 490, 493, 12 L. ed. 1168; *Coe* v. *Errol*, 116 U. S. 517, 524, 29 L. ed. 715, 717, 6 Sup. Ct. Rep. 475; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 22, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *New Orleans* v. *Stempel*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 110; *Bristol* v. *Washington County*, 177 U. S. 133, 44 L. ed. 701, 20 Sup. Ct. Rep. 585; and for state decisions, *Re Romaine*, 127 N. Y. 80, 12 L. R. A. 401, 27 N. E. 759; *Callahan* v. *Woodbridge*, 171 Mass. 595, 51 N. E. 176; *Greves* v. *Shaw*, 173 Mass. 205, 53 N. E. 372; *Allen* v. *National State Bank*, 92 Md. 509, 52 L. R. A. 760. 48 Atl. 78.

No doubt this power on the part of two states to tax on different *and more or less [205] inconsistent principles leads to some hardship. It may be regretted, also, that one and the same state should be seen taxing on the one hand according to the fact of power, and on the other, at the same time, according to the fiction that, in successions after death, *Mobilia sequuntur personam* and domicil governs the whole. But these inconsistencies infringe no rule of constitutional law. *Coe* v. *Errol*, 116 U. S. 517, 524, 29 L. ed. 715, 717, 6 Sup. Ct. Rep. 475; *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

The question, then, is narrowed to whether a distinction is to be taken between tangible chattels and the deposit in this case. There is no doubt that courts in New York and elsewhere have been loath to recognize a distinction for taxing purposes between what commonly is called money in the bank and actual coin in the pocket. The practical similarity more or less has obliterated the legal difference. *Re Houdayer*, 150 N. Y. 37, 34 L. R. A. 235, 44 N. E. 718; *New Orleans* v. *Stempel*, 175 U. S. 309, 316, 44 L. ed. 174, 178, 20 Sup. Ct. Rep. 110; *City Nat. Bank* v. *Charles Baker Co.* 180 Mass. 40, 42, 61 N. E. 223. In view of these cases and the decision in the present case, which followed them, a not very successful attempt was made to show that by reason of the facts which we have mentioned, and others, the deposit here was unlike an ordinary deposit in a bank. We shall not stop to discuss this aspect of the case, because we prefer to decide it upon a broader view.

If the transfer of the deposit necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the state of New York, then New York may subject the transfer to a tax. *United States* v. *Perkins*, 163 U. S. 625, 628, 629, 41 L. ed. 287, 288, 16 Sup. Ct. Rep. 1073; *M'Cullough* v. *Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607. But it is plain that the transfer does depend upon the law of New York, not because of any theoretical speculation concerning the whereabouts of the debt, but because of the practical fact of its power over the person of the debtor. The principle has been recognized by this court with regard to garnishments of a domestic debtor of an absent defendant. *Chicago, R. I. & P. R. Co.* v. *Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797. See *Wyman* v. *Halstead*, 109 U. S. 654, *sub nom. Wyman* v. *United States ex rel. Halstead*, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417. What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will [206] make him pay. It does not *matter that the law would not need to be invoked in the particular case. Most of us do not commit crimes, yet we nevertheless are subject to the criminal law, and it affords one of the motives for our conduct. So, again, what enables any other than the very creditor in proper person to collect the debt? The law of the same place. To test it, suppose that New York should turn back the current of legislation, and extend to debts the rule still applied to slander, that *actio personalis moritur cum persona*, and should provide that all debts hereafter contracted in New York and payable there should be extinguished by the death of either party. Leaving constitutional considerations on one side, it is plain that the right of the foreign creditor would be gone.

Power over the person of the debtor confers jurisdiction, we repeat. And this being so, we perceive no better reason for denying the right of New York to impose a succession tax on debts owed by its citizens than upon tangible chattels found within the state at the time of the death. The maxim, *Mobilia sequuntur personam*, has no more truth in the one case than in the other. When logic and the policy of a state conflict with a fiction due to historical tradition, the fiction must give way.

There is no conflict between our views and the point decided in the case reported under the name of *State Tax on Foreign-held Bonds*, 15 Wall. 300, *sub nom. Cleveland, P. & A. R. Co.* v. *Pennsylvania*, 21 L. ed. 179. The taxation in that case was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by a tradition which comes down from more archaic conditions. *Bacon* v. *Hooker*, 177 Mass. 335, 337, 58 N. E. 1078. Therefore, considering only the place of the property, it was held that bonds held out of the state could not be reached. The decision has been cut down to its precise point by later cases. *Savings & L. Soc.* v. *Multnomah County*, 169 U. S. 421, 428, 42 L. ed. 803, 805, 18 Sup. Ct. Rep. 392; *New Orleans* v. *Stempel*, 175 U. S. 309, 319, 320, 44 L. ed. 174, 180, 20 Sup. Ct. Rep. 110.

In the case at bar the law imposing the tax was in force before the deposit was made, and did not impair the obligation of the contract, if a tax otherwise lawful ever can be said to have that effect. *Pinney* v. *Nelson*, 183 U. S. 144, 147, 46 L. ed. 125, 127, 22 Sup. Ct. Rep. 52. The fact *that two [207] states, dealing each with its own law of succession, both of which the plaintiff in error has to invoke for her rights, have taxed the right which they respectively confer, gives no cause for complaint on constitutional grounds. *Coe* v. *Errol*, 116 U. S. 517, 524, 29 L. ed. 715, 718, 6 Sup. Ct. Rep. 475; *Knowlton* v. *Moore*, 178 U. S. 53, 44 L. ed. 975, 20 Sup. Ct. Rep. 747. The universal succession is taxed in one state, the singular succession is taxed in another. The plaintiff has to make out her right under both in order to get the money. See *Adams* v. *Batchelder*, 173 Mass. 258, 53 N. E. 824. The same considerations answer the argument that due faith and credit are not given to the judgment in Illinois. The tax does not deprive the plaintiff in error of any of the privileges and immunities of the citizens of New York. It is no such deprivation that if she had lived in New York the tax on the transfer of the deposit would have been part of the tax on the inheritance as a whole. See *Mager* v. *Grima*, 8 How. 490, 12 L. ed. 1168; *Brown* v. *Houston*, 114 U. S. 622, 635, 29 L. ed. 257, 261, 5 Sup. Ct. Rep. 1091; *Wallace* v. *Myers*, 4 L. R. A. 171, 38 Fed. 184. It does not violate the 14th Amendment. See *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594. Matters of state procedure and the correctness of the New York decree or judgment, apart from specific constitutional objections, are not open here. As we have said, the question

whether the property was to be regarded as *in transitu*, if material, must be regarded as found against the plaintiff in error.

*Decree affirmed.*

Mr. Justice **White** dissents.

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[208] *CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, *Petitioner*,
*v.*
SALLIE E. HILLMON.

(See S. C. Reporter's ed. 208-220.)

*Appeal — objection to peremptory challenges — when available — sufficiency of exception — instructions — evidence — declarations of conspirators.*

1. The objection that plaintiff on the trial of two consolidated cases was allowed six, instead of three, peremptory challenges, is not available to a defendant who used but two of the three peremptory challenges to which, under U. S. Rev. Stat. § 815 (U. S. Comp. Stat. 1901, p. 629), it was entitled.
2. An exception to the refusal to give a requested instruction is sufficient to raise the question of the propriety of that portion of the general charge which affirms the contrary of such request.
3. A requested instruction that an affidavit produced by defendant on cross-examination, to impeach the credibility of the witness who made it, may be considered, in connection with the affiant's deposition, as evidence against the plaintiff of the facts therein stated under oath, with like effect as his deposition,—should be given where such affidavit is introduced in evidence by plaintiff on the cross-examination of another witness.
4. Declarations of the parties to an alleged conspiracy by an insured and others to defraud an insurance company, which relate to their purpose and were made about the time the policy was taken out, are, where there is evidence of the existence of the conspiracy, admissible in evidence against the beneficiary in a suit on such policy, although she is not alleged to have been a party to such conspiracy.

[No. 94.]

*Argued November 13, 14, 1902. Decided February 2, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Kansas in favor of plaintiff in a suit on a policy of life insurance.

NOTE.—*On the sufficiency of exceptions*—see notes to State v. Hope (Mo.) 8 L. R. A. 608; Shinners v. Proprietors of Locks & Canals (Mass.) 12 L. R. A. 554; and Moore v. Bank of Metropolis, 10 L. ed. U. S. 172.

*On the admissibility of acts and declarations of conspirators*—see notes to Casey v. Cincinnati Typographical Union No. 3 (C. C. S. D. Ohio) 12 L. R. A. 197; People v. McQuade (N. Y.) 1 L. R. A. 273; and Lincoln v. Claflin, 19 L. ed. U. S. 106.

*Reversed* and remanded, with instructions to grant a new trial.

See same case below, 46 C. C. A. 668, 107 Fed. 834.

Statement by Mr. Justice **Brown**:

This was an action begun July 13, 1880, by Sallie E. Hillmon, in the circuit court of the United States for the district of Kansas, to recover the amount of a policy of insurance ($5,000), issued by the company March 4, 1879, upon the life of John W. Hillmon, her husband, in which the plaintiff was named as beneficiary. Plaintiff made the usual allegations of compliance with the terms of the policy, and averred that the assured had died March 17, 1879, thirteen days after the policy was issued, and that due proofs had been forwarded to the company. Other actions were also brought against the New York Life Insurance Company and the Mutual Life Insurance Company of New York, upon policies of insurance issued by them *upon the same [209] life, which actions were subsequently compromised.

Defendant interposed a general denial, and for a special defense set up, in substance, that on or before November 30, 1878, John W. Hillmon, John H. Brown, Levi Baldwin, and divers other persons to defendant unknown, fraudulently conspiring to cheat and defraud defendant, procured a large amount of insurance on the life of Hillmon, to wit: $10,000 in the New York Life, by policy dated November 30, 1878; $10,000 in the Mutual Life, by policy dated December 10, 1878; and $5,000 in the Connecticut Mutual Life, by the policy in suit, dated March 4, 1879; that thereafter, in pursuance of such conspiracy, Hillmon, Brown, and Baldwin falsely represented to defendant and others that said Hillmon had died, and that a certain dead body which they had procured was that of Hillmon, whereas in truth Hillmon "was not and is not dead," but has kept himself concealed under assumed names for the purpose of consummating the conspiracy.

As a third defense the company set up a release by plaintiff of all her claims against it under the policies.

Actions having been begun upon all three of these policies, an order was entered July 14, 1882, consolidating them for trial. Two trials of the three consolidated cases resulted in disagreements of the jury. On February 29, 1888, judgments in each were rendered for the plaintiff, which, upon writs of error, were reversed by this court and the cases remanded for a new trial. 145 U. S. 285, 36 L. ed. 707, 12 Sup. Ct. Rep. 909. The material facts of the case are fully set forth in that report, and will not be here repeated, except so far as they are pertinent to the questions before this court for consideration. After two more trials of the consolidated cases, which resulted in disagreements of the jury, a compromise was effected between the plaintiff and the New York Life, which was followed by dismissal of the action against that company. There-

after, and on January 9, 1895, an order previously entered consolidating the two remaining actions for trial was continued in force against the objection of each defendant, and the consolidated cases again came on for trial, resulting in separate judgments November 18, 1899, against both [210] companies. To reverse *this, defendant sued out a writ of error from the circuit court of appeals, and upon hearing in that court the judgment was affirmed with one dissent. 46 C. C. A. 668, 107 Fed. 834. The Mutual Life sued out a similar writ of error, but compromised the case before it was heard in the circuit court of appeals.

*Mr.* **William G. Beale** argued the cause, and, with *Messrs. Buell McKeever, Gilbert E. Porter,* and *James W. Green,* filed a brief for petitioner:

If, as between the plaintiff and each defendant, the parties could not, as to the same jury, be given their exact rights on the one hand and limited to their exact rights on the other, the only alternative was to sever the causes and try them separately.

*Stroh* v. *Hinchman,* 37 Mich. 490; *State* v. *Stoughton,* 51 Vt. 365; *Cruce* v. *State,* 59 Ga. 90.

If one consenting to a joint trial does not waive a right, *a fortiori* one who is compelled against his will to a joint trial ought not to be deprived of it.

*State* v. *Durein,* 29 Kan. 691.

The right of peremptory challenge on the part of defendants cannot be abridged by uniting cases for trial.

*United States* v. *Marchant,* 12 Wheat. 480, 6 L. ed. 700.

Equally the conclusion has been repudiated that the peremptory challenges of the state or of a plaintiff can be multiplied by the same process.

Thompson, Trials, § 45; Proffatt, Jury Trial, § 164; *Savage* v. *State,* 18 Fla. 909; *Wiggins* v. *State,* 1 Lea, 738; *Mahan* v. *State,* 10 Ohio, 234; *State* v. *Earle,* 24 La. Ann. 38, 13 Am. Rep. 109; *Schoeffler* v. *State,* 3 Wis. 823.

By the error committed in granting the plaintiff below too many challenges it is to be presumed, in the absence of proof to the contrary, that petitioner was injured. An error will not be regarded as harmless unless it affirmatively appears so clearly as to be beyond doubt that it was not and could not have been prejudicial.

*Deery* v. *Cray,* 5 Wall. 795, 18 L. ed. 653; *Gilmer* v. *Higley,* 110 U. S. 47, 28 L. ed. 62, 3 Sup. Ct. Rep. 471.

The connection of the individuals in the unlawful enterprise being shown, every act and declaration of each member of the confederacy in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence as against each of them.

1 Greenl. Ev. § 184a; *King* v. *Hardwick,* 11 East, 578; *Lincoln* v. *Claflin,* 7 Wall. 132, 19 L. ed. 106; *Wiborg* v. *United States,* 163 U. S. 632, 41 L. ed. 289, 16 Sup. Ct. Rep. 1127, 1197; *State* v. *Johnson,* 40 Kan. 266, 19 Pac. 749; *State* v. *Rogers,* 54 Kan. 683, 39 Pac. 219; *Cuyler* v. *McCartney,* 40 N. Y. 221; *Walsh* v. *People,* 88 N. Y. 458; *Smith* v. *National Ben. Soc.* 123 N. Y. 85, 9 L. R. A. 616, 25 N. E. 197; *State* v. *Thompson,* 69 Conn. 720, 38 Atl. 868; *State* v. *Spalding,* 19 Conn. 237, 48 Am. Dec. 158; *People* v. *Bentley,* 75 Cal. 407, 17 Pac. 436; *State* v. *Walker,* 98 Mo. 95, 9 S. W. 646, 11 S. W. 1133; *Hart* v. *Hicks,* 129 Mo. 99, 31 S. W. 351; *State* v. *Winner,* 17 Kan. 298; *Spies* v. *People,* 122 Ill. 1, 229, 12 N. E. 865, 17 N. E. 898.

Under this rule all evidence is relevant and admissible, which tends to show motive and preparation for what was done, or which furnishes indications of what was passing in the party's mind upon that subject.

Stephen, Digest of Ev. p. 19.

Concurrently with this runs this principle in most cases, that statements or other utterances are admissible where the material point is that under the circumstances the statement was made, and not that in itself it was true or false.

1 Greenl. Ev. § 101; *Mutual L. Ins. Co.* v. *Hillmon,* 145 U. S. 296, 36 L. ed. 710, 17 Sup. Ct. Rep. 909.

This conspiracy is still pending, and will so continue as long as these suits to enforce the fraudulent contract are being prosecuted by this plaintiff.

*Jack* v. *Mutual Reserve Fund Life Asso.* 51 C. C. A. 36, 113 Fed. 49.

The defendant having carefully reserved exception to the ruling of the court in refusing an instruction asked for, it was not then necessary to except again to that portion of the charge which embodied a contrary statement of the law.

*Long-Bell Lumber Co.* v. *Stump,* 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574.

When the plaintiff put in evidence, and the court admitted without objection, the sworn statement of a witness, the plaintiff then represented the witness to be credible as to that statement, assumed the responsibility for his veracity, and became estopped to impeach his allegations.

1 Greenl. Ev. § 442.

*Messrs. Gilbert E. Porter, William G. Beale, James W. Green,* and *Edward S. Isham* filed a brief in support of the petition for certiorari.

*Mr.* **L. B. Wheat** argued the cause, and, with *Messrs. C. F. Hutchings* and *John H. Atwood,* filled a brief for respondent:

After the jury were all in the box, the plaintiff in error still had, but waived, a peremptory challenge, and thereby accepted the twelve men in the box; this was tantamount to a waiver of all objections to any thereof.

*Florence, E. D. & W. V. R. Co.* v. *Ward,* 29 Kan. 354.

There is a wide difference between overruling a challenge that a party is entitled to, and sustaining a challenge that a party

is not entitled to; and it is generally held that it is not substantial error to excuse a juror upon a challenge based upon insufficient grounds, where an unexceptionable jury has been obtained,—and especially where the complaining party has not exhausted his peremptory challenges.

*Stout* v. *Hyatt*, 13 Kan. 232; *Atchison, T. & S. F. R. Co.* v. *Franklin*, 23 Kan. 74; *Northern P. R. Co.* v. *Herbert*, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; *Hopt* v. *Utah*, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; *Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21.

A written statement which only purports to be a narrative of past transactions cannot be evidence, either of a conspiracy, or of anything therein stated.

*Logan* v. *United States*, 144 U. S. 309, 36 L. ed. 445, 12 Sup. Ct. Rep. 617; *State* v. *Johnson*, 40 Kan. 268, 19 Pac. 749; *Connecticut Mut. L. Ins. Co.* v. *Hillmon*, 46 C. C. A. 668, 107 Fed. 839; *People* v. *Collum*, 122 Cal. 186, 54 Pac. 589; *State* v. *Hinkle*, 33 Or. 93, 54 Pac. 155; *Sparf* v. *United States*, 156 U. S. 56, 39 L. ed. 345, 15 Sup. Ct. Rep. 273.

A matter, the validity of which is at issue in legal proceedings, cannot be set up as a bar thereto.

Broom, Legal Maxims, 4th London ed. 6th Am. ed. p. 128.

A transaction between two parties ought not to operate to the disadvantage of a third.

Broom, Legal Maxims, 4th London ed. 6th Am. ed. p. 704.

The supposed statements of Baldwin were mere hearsay, and not admissible.

2 Jones, Ev. 673–681, §§ 299–302; 1 Greenl. Ev. § 124.

The opening statement is conclusive against plaintiff in error that it did not claim, and went into the trial on the proposition and statement that it did not claim, that defendant in error was party to any fraud or conspiracy.

*Lindley* v. *Atchison, T. & S. F. R. Co.* 47 Kan. 432, 28 Pac. 201; *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539.

The excluded statements of Levi Baldwin were not competent against defendant in error under any rule of law in relation to conspiracy.

*State* v. *Johnson*, 40 Kan. 268, 19 Pac. 749; *Logan* v. *United States*, 144 U. S. 309, 36 L. ed. 445, 12 Sup. Ct. Rep. 617; *Connecticut Mut. L. Ins. Co.* v. *Hillmon*, 46 C. C. A. 668, 107 Fed. 839.

The declarations of co-conspirators, to be admissible against other than the one making them, must of course be made in furtherance of, and not in frustration of, the common object; and the existence of the conspiracy cannot be shown by the admission or declaration of one conspirator.

1 Jones, Ev. § 255.

To make the declarations of one conspirator evidence against the others, they must be made in furtherance of the common criminal design. Mere admissions or narrations of what has taken place, which have no tendency to promote the common criminal intent, are inadmissible against anyone but him who made it.

*State* v. *Johnson*, 40 Kan. 268, 19 Pac. 749.

It was not competent to prove by conversation between Baldwin and Crew that Baldwin had previously paid part of the premiums; that would be a narrative of past transactions.

*Ibid.*

It was not competent to prove by anything he said that he was or had been the agent of defendant in error. Agency cannot be thus proved.

*Donaldson* v. *Everhart*, 50 Kan. 718, 32 Pac. 405; *St. Louis & S. F. R. Co.* v. *Kinman*, 49 Kan. 631, 31 Pac. 126.

Mr. Justice **Brown** delivered the opinion of the court:

We shall have occasion to notice but few of the 108 assignments of errors in this case.

1. Several of these relate to an order of consolidation, and to the ruling of the court giving to the plaintiff six peremptory challenges to the jury, while each defendant had but three.

On June 14, 1882, the three original cases were first consolidated for trial, and so remained through all the trials which took place prior to the settlement with the New York Life. The propriety of this consolidation was affirmed by this court upon its first appearance here in 145 U. S. 285, 36 L. ed. 707, 12 Sup. Ct. Rep. 909. A stipulation appears to have been entered into October 16, 1899, between the attorneys for the plaintiff and the attorneys for the three defendants, to set aside the order of consolidation, and a motion was made for an order to that effect, which was overruled, and the order of consolidation was continued in force as to the two remaining defendants. It would seem that the court refused to be controlled by the stipulation. We see no reason to doubt the propriety of this order, nor does it appear to have been seriously contested. But its effect upon the number of peremptory challenges to which the defendant was entitled is made the subject of dispute. Upon the former hearing of this case it was held that the consolidation of the three cases there considered *did not im- [211] pair the right of each of the three defendants to three peremptory challenges under Rev. Stat. § 819 (U. S. Comp. Stat. 1901, p. 629). But the question was left undecided whether the right of the plaintiff was multiplied, so that she became entitled on the last trial to six peremptory challenges, or only to three.

The circuit court was of opinion that, as, under our ruling, the two defendants were, under Rev. Stat. § 819 (U. S. Comp. Stat. 1901, p. 629), each entitled to three peremptory challenges, or six in the aggregate, the plaintiff was also entitled to six. This is the converse of the proposition established by this court when the case was first here.

The argument of the defendant in this connection is that under the ruling of the court each defendant was treated as one party and the plaintiff as two parties; that it gave the plaintiff more challenges than she would have had in one case, treating the causes of action as distinct, and the plaintiff entitled to her three challenges in each case, with the result that each defendant, without its consent, and against its protest, was compelled to try its own cause before a jury to which it was given only one half as many peremptory challenges as were given to the plaintiff. The consequence was that each defendant was prejudiced by the fact that every additional peremptory challenge allowed to the plaintiff beyond three makes arbitrarily a vacancy which may be filled in spite of the defendant by a juror, whom it might and would have challenged if it had an opportunity to do so. The substance of the argument is that, it having been held upon the former hearing here, that each defendant lost no right by the consolidation, and was entitled to as many challenges as if no such consolidation had taken place, the plaintiff was not entitled to any more challenges than she would have been entitled to in case the consolidation had not taken place. Quite a number of cases are cited in support of this proposition: *Savage* v. *State*, 18 Fla. 909; *Wiggins* v. *State*, 1 Lea, 738; *Mahan* v. *State*, 10 Ohio, 234; *State* v. *Earle*, 24 La. Ann. 38, 13 Am. Rep. 109; *Schoeffler* v. *State*, 3 Wis. 823; Thompson, Trials, § 45; Proffatt, Trial by Jury, § 164. The case of *Spies* v. *People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, is to the contrary.

Conceding that the great weight of au-[212]thority supports the *proposition of the defendant, we are still of opinion that it is not entitled to take advantage of it, inasmuch as it made but two peremptory challenges, waiving its right to a third, and thereby acquiesced in the composition of the jury. The only effect of allowing the plaintiff six peremptory challenges was to put three additional men upon the jury, which the defendant could not challenge, and if it had exhausted its peremptory challenges it might perhaps claim to have been prejudiced by the fact that three men had been put upon the jury which it was not entitled to challenge; but, having failed to exhaust its peremptory challenges, it stands in no position to complain that it was deprived of the right to challenge others. *Stout* v. *Hyatt*, 13 Kan. 232, 241; *Atchison, T. & S. F. R. Co.* v. *Franklin*, 23 Kan. 74; *Florence, E. D. & W. Valley R. Co.* v. *Ward*, 29 Kan. 354; *Atlas Min. Co.* v. *Johnston*, 23 Mich. 36; *Grand Rapids Booming Co.* v. *Jarvis*, 30 Mich. 308.

2. Error is charged in the refusal to instruct the jury that "the statement signed and sworn to by John H. Brown on the 4th day of September, 1879, having been introduced in evidence by the plaintiff, may be considered in connection with the deposition of John H. Brown as evidence of the facts stated under oath, against the plaintiff, with like effect as the deposition of John H. Brown, and may also be considered as affecting the credibility of said Brown as a witness."

In lieu thereof the court charged the jury that Brown's statement, signed and sworn to by him, was not affirmative evidence of the truth of any matter therein contained or mentioned, and that it should not be considered by the jury except as affecting the credibility of the evidence of Brown in his deposition. To determine the correctness of this construction, it is necessary to consider the circumstances under which the evidence was produced. The alleged death of Hillmon was said to have occurred in March, 1879. Upon the trial plaintiff offered and read in evidence the deposition of John H. Brown, taken on December 30, 1881, who swore generally that he was employed by Hillmon driving a team, and afterwards in taking care of and feeding hogs; that he started with him from Lawrence for Wichita for the purpose of locating a cattle ranch, and that *Hillmon was acci-[213]dentally killed by the discharge of a gun in the hands of Brown. To contradict this testimony William J. Buchan, a witness put upon the stand by the defendants, swore that in the spring or summer of 1879, but a few months after the alleged death, he met Brown by appointment at Lexington, and was told by him that he was uneasy about the affair, that it was not Hillmon that was killed, but another man, but that Hillmon had got away and they were hunting for him; that he wanted to get out of it himself and to turn state's evidence, and that he wanted witness to see the attorney for the insurance company and let up on hunting for him if he would go on the stand and tell the truth about the whole affair. Upon the cross-examination of Buchan the *plaintiff* offered in evidence an affidavit made by Brown on September 4, 1879, in which he repeated the substance of the conversation testified to by Buchan, and stated that instead of Hillmon being killed it was another man whom Hillmon shot. This affidavit had already been produced, though not formally put in evidence by the *defendant* on the cross-examination of Brown. It was under these circumstances that the court ruled that the affidavit was not affirmative evidence of any truth or matter contained in it, and should not be considered, except as affecting the credibility of the evidence of Brown given in his deposition.

It is insisted in behalf of the plaintiff that, as no exception was taken to this part of the charge, its propriety cannot be questioned at this time; but as an exception was properly taken to the refusal of the court to charge that the statement, having been introduced in evidence by the plaintiff, may be considered, in connection with Brown's deposition, as evidence of the facts therein stated under oath, with like effect as his deposition, we think there was sufficient to raise the point that the affidavit was not to be treated merely as affecting Brown's

credibility, but as substantial evidence in favor of the plaintiff. Having excepted to the refusal to give a certain instruction, it was not necessary to repeat such exception when the contrary of such request was given in the general charge. As defendant had raised the point in one form, it was not necessary to repeat it in another.

[214] *As this statement of Brown's had already been produced by the defendant upon the cross-examination of Brown, to impeach his credibility as a witness, and he had been cross-examined as to its contents, it is difficult to see why it was introduced by the plaintiff in connection with the cross-examination of Buchan. It was evidently put in for some purpose, and it is difficult to assign any other than to make it a piece of independent testimony, since, in view of Brown's deposition to the contrary, the plaintiff might still have argued that the statement or affidavit, if ever made, was false. As now claimed, it was introduced for the purpose of explaining why the plaintiff consented to release her claim against the insurance company, though it seems to have been quite unnecessary in this connection, since its statements were already in evidence as part of Brown's cross-examination. Conceding that, as a piece of independent testimony, a mere affidavit was not admissible, it was competent for the defendant to waive this objection, and to treat it as other testimony in the case offered by the plaintiff. Under such circumstances, it is something more than an admission by the witness that he had made statements inconsistent with his testimony upon the subject. For whatever purpose it was introduced, and in view of the fact that it was offered generally and without limitation as to its purpose, it became a piece of plaintiff's evidence, to be weighed and considered like any other testimony in the case. We do not undertake to say that the plaintiff was absolutely bound by it and estopped to deny its truth, in view of Brown's deposition to the contrary, but we think it was giving it too little effect to charge the jury that it could only be considered as impeaching the credibility of Brown; and we do not think defendant was asking too much in instruction number 44, that it might be considered in connection with the deposition of Brown as evidence of the facts therein stated under oath, against the plaintiff, with like effect as the deposition. 1 Greenl. Ev. § 442. The words "with like effect" were evidently intended to instruct the jury that the deposition and the affidavit were each independent of the other and each affirmative testimony—not, however, that they were of equal weight.

[215] *Suppose, for example, the only evidence of the identity of the body found had been the testimony of Brown. It doubtless would have been correct to charge that the utmost effect of his affidavit, if it had been formally introduced upon cross-examination, would be to destroy his testimony as given in the deposition. His credit as a witness being thus destroyed, the fact of Hillmon's death would be regarded as not proven, and the plaintiff would be considered as having failed to establish her case. But, upon the other hand, as the affidavit had not been put in upon the cross-examination of Brown, and the plaintiff read it as part of her case, it must necessarily be considered as a piece of independent evidence to be weighed in connection with the deposition, and the jury was necessarily left to consider which of the two, when taken in connection with the other testimony in the case, was to be considered as the more credible. The general rule undoubtedly is that, when a party offers a witness, he thereby generally represents him as worthy of belief, and while, under the peculiar circumstances of the case, this rule would not apply any more to the affidavit than to the deposition, the plaintiff, by putting both in evidence, without restriction as to the purpose of so doing, places them on the same level, and cannot be heard to say that the affidavit may not be considered as testimony of the facts therein sworn to as well as the deposition.

3. Several assignments are based upon the exclusion of the testimony of the witnesses Phillips, Blythe, Crew, and Carr, as to acts performed and declarations made by the alleged coconspirators John W. Hillmon, John H. Brown, and Levi Baldwin, after evidence had been introduced establishing such conspiracy. That considerable evidence of a conspiracy between these three parties had been introduced and at a very considerable length is not denied, and the main objection to the introduction of the acts and declarations of the above witnesses was based upon the ground that the plaintiff, the wife of Hillmon, was not alleged to have been a party to such conspiracy.

The proposed testimony of Phillips, who was a physician, and had been called professionally by Baldwin to his house in the summer or fall of 1878, related to certain inquiries made *by Baldwin as to the effect [216] of death upon bodies. In this connection defendant offered to prove that Baldwin asked the witness if he had any insurance upon his life, and said he had been thinking about taking out some himself, and in the same conversation asked Phillips how long before a dead body would decompose after it was buried. He further asked if it "would not be a good scheme to get a good insurance on your life and go down south and get the body of some Greaser and pawn it off as your body and get the money?"

The witness Blythe, a lawyer and fire insurance agent, an acquaintance of John W. Hillmon and Levi Baldwin, testified that they had called at his office in the autumn of 1878, asked him concerning life insurance, how to get it, what were good companies, how they should make application, whether a person could travel in different countries without forfeiting the insurance, what proceedings were necessary to collect insurance upon death, what length of time would be required, etc., and that a week or ten days before this conversation he had

met Baldwin alone on the street. Defendant thereupon asked what was said by Baldwin at that time, and offered to prove that Baldwin asked the witness if he knew anything about life insurance and about the companies; and that a friend, a relative or connection, wanted to get some insurance; and he wanted to know if witness could recommend some good company to him. Whereupon witness told him how to do it.

By the witness Crew the defendant offered to prove the following testimony, all of which was excluded by the court, namely, that witness resided in the spring of 1879 in Lawrence, Kansas; was acquainted with both Mrs. Hillmon and Baldwin, and that, as receiver of a local bank, he had several notes of Baldwin's for collection, all of which were overdue. Two of the notes were secured by mortgage on real estate and one by chattel mortgage; that he had talked of foreclosing the mortgages, as he had been unable to collect either principal or interest; that Baldwin told him a part of the money represented by his indebtedness had been furnished to insure the life of John W. Hillmon; that in the latter part of March of that year (the conversation having taken [217] place a few days before the first of *March) he had heard of Hillmon's death; that at this time he had a conversation with Baldwin regarding the latter's indebtedness to the bank, in which Baldwin told him to let his matters rest, as he was then on his way west after the body of Hillmon; that he had arranged for a portion of the insurance on the life of Hillmon, and that as soon as he got it he would be able to straighten up all his affairs; that Baldwin stated that he was to have $10,000 of this insurance; that witness had acquainted himself thoroughly with Baldwin's financial condition and found him in very straitened circumstances, having some property, but all mortgaged, and mostly all mortgaged twice, and that his indebtedness was pressing him severely.

The witness Alexander Carr testified that he knew both Baldwin and Hillmon, and that in March, 1879, he and Baldwin were out together buying stock some time after the 10th of March. The witness was then asked what conversation he had with Baldwin in regard to any business transaction between him and Hillmon, and offered to prove that witness was talking one day to Baldwin about himself and Carr going into a sheep ranch together; "and one day he was speaking about that he was under 'brogue' with John W. Hillmon, and he said he and Hillmon had a scheme under 'brogue,' and he said that if that worked out all right he was all right."

All this testimony was ruled out, apparently upon the ground that declarations made by Baldwin were not admissible against the other conspirators to prove the existence of the conspiracy if not made in their presence; that these declarations were mere admissions or narrations of what had already taken place and were not made in furtherance of a common design, while it was under way or in process of execution so as to form a part of the *res gestæ;* and for the further reason that the testimony was not admissible against the plaintiff, who was not alleged by the insurance company to have ever become a party to the alleged combination to defraud the insurance company, either by an original participation in the scheme, or by subsequently adopting it.

While we are not called upon to express an opinion upon the question whether the mere proof of a conspiracy to defraud the *defendant by the procurement of an insur- [218] ance upon Hillmon's life with the view of ultimately collecting the amount of the policies by a false pretense of his death would be sufficient to avoid the policies as having been obtained by fraud, without proof that such conspiracy had been consummated by compassing the death of another party and passing off the body of the deceased as that of Hillmon, the fact still remains that there was evidence of a conspiracy to procure a large amount of insurance upon the life of Hillmon and to procure in some way the body of another man to pass off as that of Hillmon, and thereby to obtain the amount of these policies, nominally, at least, for the benefit of Hillmon's wife. It is true the plaintiff is not alleged to have been a party to such conspiracy, although she was named as beneficiary in the policies, but her husband is alleged to have been a party, and any fraud perpetrated by him at the time the policies were taken out was available as a defense by the company in an action by her.

These questions and declarations of Baldwin to the four witnesses above stated were made either just before or just after the policy was taken out. They were not so much narratives of what had taken place as of the purpose Baldwin had in view, and we know of no substantial reason why they do not fall within the general rule stated by Greenleaf (1 Greenl. Ev. § 111), that every act and declaration of each member of the conspiracy, in pursuance of the original concerted plan, and with reference to the common object, is, in contemplation of law, the act and declaration of them all, and is therefore original evidence against each of them. The conspiracy then existed and was still pending. *Smith* v. *National Ben. Soc.* 123 N. Y. 85, 9 L. R. A. 616, 25 N. E. 197.

These declarations, taken together, tend to show that Baldwin, who seems to have taken the most active part in the transactions connected with this policy, was heavily indebted, and being pressed by his creditors; that he expected in some way to obtain a large part of Hillmon's insurance, and that he was also desirous of going into a sheep ranch with Hillmon, with whom he declared he had a scheme under consideration by which they could raise the necessary funds; that such scheme consisted in obtaining *insurance upon Hillmon's life, [219]

and then going south and getting the body of some other person and pass it off as the body of the insured, and thus recover the amount of the policy. This testimony was certainly corroborative of other testimony in the case, which both courts below agreed as establishing prima facie evidence of a conspiracy, and which was to the effect that Baldwin and Hillmon had been intimate acquaintances for eight or ten years prior to 1879; that Baldwin, who appears to have been a man of considerable means, had employed Hillmon in various capacities connected with his farm, and that during his visits at Lawrence, Hillmon generally stayed at his house. Hillmon there first met his wife, who was a cousin of Baldwin's, and worked at his house. Hillmon was a man of no property, and after his marriage he and his wife occupied a single room in the house of one Mary Judson, and did their cooking upon her stove. Baldwin and Hillmon became interested in life insurance, and consulted various agents as to their companies and about methods of collection in case of loss. In a conversation with one Wiseman in February, 1879, Hillmon stated that he was going west on business and might get killed; asked about proofs of death; what the widow must do to get her insurance money and what evidence she would have to furnish if he were killed. Under these circumstances he took out insurance for $25,000, the annual premium for which amounted to $600. There were various other items of testimony of the same character, which the courts below regarded as sufficient prima facie evidence of a conspiracy.

Under the circumstances we think the evidence of the four witnesses in question should have been submitted to the jury, and that such testimony was admissible as against the plaintiff, though she was not alleged to be a party to the conspiracy, upon the theory that any fraudulent conduct on the part of the insured in procuring the policy, or in procuring the dead body of another to impersonate himself, was binding upon her. It is well settled that the fraud of the insurer's agent in the procurement of the policy is binding upon the principal. *Millville Mut. M. & F. Ins. Co.* v. *Collerd*, 38 N. J. L. 480; *National L. Ins. Co.* v. *Minch*, 53 N. Y. 144; *Oliver* v. *Mutual Commercial Marine Ins. Co.* 2 Curt. C. C. 277, Fed. Cas. No. 10,498; *Burruss* v. *National Life Asso.* 96 Va. 543, 32 S. E. 49.

[220] *A number of other alleged errors are embraced in the assignments, but we see none to which we find it desirable to call attention. For the error in the instruction regarding Brown's affidavit and in ruling out the declarations of the four witnesses named, *the judgment of the Court of Appeals is reversed*, and the case remanded to the Circuit Court for the District of Kansas, with instructions to grant a new trial.

Mr. Justice **Brewer** and Mr. Justice **White** dissented.

JAMES H. EASTON, *Plff. in Err.*
*v.*
STATE OF IOWA.

(See S. C Reporter's ed. 220-239.)

*National banks—state regulation—receiving deposits when insolvent.*

So far as Iowa Code, §§ 1884, 1885, attempts to prohibit national banks from receiving deposits when insolvent, and prescribes a punishment for a violation of such prohibition by any officer or agent thereof, it is invalid as an attempt to control and regulate the business operations of national banks.

[No. 92.]

*Argued January 14, 15, 1903. Decided February 2, 1903.*

IN ERROR to the Supreme Court of the State of Iowa to review a judgment which affirmed a conviction in the District Court of Winneshiek County for the offense of having received, as president of a national bank, a deposit with knowledge of the insolvency of such bank. *Reversed.*

See same case below, 113 Iowa, 516, 85 N. W. 795.

Statement by Mr. Justice **Shiras:**

In 1898, in the district court of Winneshiek county, state of Iowa, James H. Easton was indicted, *tried, and found guilty, [221] and sentenced to imprisonment in the penitentiary of Iowa at hard labor for a term of five years, under the provisions of a statute of that state, for the offense of having received, as president of the First National Bank of Decorah, Iowa, a deposit of $100 in money in said bank, at a time when the bank was insolvent, and when such insolvency was known to the defendant.

At the trial it was contended, on behalf of the defendant, that the statute of Iowa, upon which the indictment was found, did not, and was not intended to, apply to national banks, organized and doing business under the national bank acts of the United States, or to the officers and agents of such banks; and that, if the state statute should be construed and held to apply to national banks and their officers, the statute was void in so far as made applicable to national banks and their officers. Both these contentions were overruled by the trial court, and thereupon an appeal was taken to the supreme court of the state of Iowa, and by that court, on April 12, 1901, the judgment of the district court was affirmed. The cause was then brought to this court by a writ of error allowed by the Chief Justice of the supreme court of Iowa.

*Mr.* **H. T. Reed** argued the cause, and, with *Mr. C. W. Reed*, filed a brief for plaintiff in error:

Where an act is authorized to be done by

NOTE.—*As to criminal liability for receiving deposit in bank with knowledge of its insolvency*—see note to Com. v. Junkin (Pa.) 81 L. R. A. 124.

a valid law of the United States, such act is thereby withdrawn from the operation of the criminal laws of the state; such a law excludes any by the state upon the subject unless expressly permitted by the law of Congress; and the performance of such an act in pursuance of and as authorized by such law cannot be punished by the state as an offense against any of its laws.

*M'Culloch* v. *Maryland*, 4 Wheat. 425, 4 L. ed. 606; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Ohio* v. *Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 455; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; *Brown* v. *Maryland*, 12 Wheat. 449, 6 L. ed. 689; *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 23 L. ed. 196; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Re Loney*, 134 U. S. 372, *sub nom. Thomas* v. *Loney*, 33 L. ed. 949, 10 Sup. Ct. Rep. 584; *Re Neagle*, 135 U. S. 1, *sub nom. Cunningham* v. *Neagle*, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Cook County Nat. Bank* v. *United States*, 107 U. S. 445, 27 L. ed. 537, 2 Sup. Ct. Rep. 561; *Re Waite*, 81 Fed. 359; *Com. ex rel. Torrey* v. *Ketner*, 92 Pa. 372, 37 Am. Rep. 692; *Allen* v. *Carter*, 119 Pa. 192, 13 Atl. 70; *State* v. *Menke*, 56 Kan. 77, 42 Pac. 350; *People* v. *Fonda*, 62 Mich. 401, 29 N. W. 26.

If a person does only that which an act of Congress or the Federal Constitution authorizes or recognizes as a legitimate act, the state has no power to say that such act constitutes a crime.

*Ohio* v. *Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453; *Re Waite*, 81 Fed. 359; *Re Neagle*, 135 U. S. 1, *sub nom. Cunningham* v. *Neagle*, 34 L. ed. 55, 10 Sup. Ct. Rep. 658; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; *Hall* v. *DeCuir*, 95 U. S. 499, 24 L. ed. 552; *Brown* v. *Maryland*, 12 Wheat. 436, 6 L. ed. 684; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Rhodes* v. *Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664. See also *Re Loney*, 134 U. S. 372, *sub nom. Thomas* v. *Loney*, 33 L. ed. 949. 10 Sup. Ct. Rep. 584; *Re Blackbird*, 109 Fed. 139; *Peters* v. *Malin*, 111 Fed. 244.

The effect of the national banking act upon state laws is to suspend the operation of those previously enacted, and to render invalid those subsequently enacted, in so far as they affect the persons and subject-matter covered by the acts of Congress.

*Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Tua* v. *Carriere*, 117 U. S. 201, 29 L. ed. 855, 6 Sup. Ct. Rep. 565; *Harbaugh* v. *Costello*, 184 Ill. 110, 56 N. E. 363.

State legislation which conflicts or in any manner interferes with a law of Congress, or attempts to regulate or control rights or privileges granted thereby, is impotent, no matter under what power of the state it is claimed to have been enacted.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Crandall* v. *Nevada*, 6 Wall. 42, 18 L. ed. 747; *Henderson* v. *New York*, 92 U. S. 259, *sub nom. Henderson* v. *Wickham*, 23 L. ed. 543; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

In all cases where it is necessary to determine whether or not a right secured by the Constitution or some law of the United States has been violated by a state statute or municipal ordinance, the Supreme Court of the United States will place its own independent construction upon such state law.

*Jefferson Branch Bank* v. *Skelly*, 1 Black. 436, 17 L. ed. 173; *Proprietors of Bridges* v. *Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571; *Delmas* v. *Merchants' Mut. Ins. Co.* 14 Wall. 661, 20 L. ed. 757; *Butz* v. *Muscatine*, 8 Wall. 575, *sub nom. United States ex rel. Butz* v. *Muscatine*, 19 L. ed. 490; *Northwestern University* v. *Illinois*, 99 U. S. 309, 25 L. ed. 387; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108.

The bank had the legal right to continue its business in the usual manner, though actually insolvent and known to be so by its managing officers, until the Comptroller of the Currency should take possession of its assets and place them in the hands of a receiver.

*McDonald* v. *Chemical Nat. Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787.

A bank or other corporation is not prevented from continuing its business, in the absence of a statute, simply because it is insolvent, but it may continue its business in the usual manner until it is prevented from doing so by the proper tribunal, and its affairs put in process of liquidation as authorized by the law creating it.

*Sutton Mfg. Co.* v. *Hutchinson*, 11 C. C. A. 320, 24 U. S. App. 145, 63 Fed. 501; *Coler* v. *Allen*, 52 C. C. A. 389, 114 Fed. 609; *American Exch. Nat. Bank* v. *Ward*, 55 L. R. A. 350, 49 C. C. A. 611, 111 Fed. 782.

*Mr.* **Charles F. Brown** also argued the cause, and, with *Mr. John J. Crawford*, filed a brief for plaintiff in error:

Congress is the sole judge of the necessity for the incorporation of national banks, and of all matters pertaining to the extent of their powers, the manner of conducting and transacting business, and the regulation thereof.

*M'Culloch* v. *Maryland*, 4 Wheat. 425, 4 L. ed. 606; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Legal Tender Case*, 110 U. S. 421, *sub nom. Julliard* v. *Greenman*, 28 L. ed. 204, 4 Sup. Ct. Rep. 122.

An attempt of a state to define the duties of national banks or control the conduct of their officers is absolutely void when such attempted exercise of authority conflicts with the law of the United States, and either frustrates the purpose of the national legislation, or impairs the efficiency of the Federal government to discharge the duties for the purpose of which they were created.

*Davis* v. *Elmira Sav. Bank*, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502.

A national bank is an instrument or agency of the Federal government in everything that it does as a bank.

*Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204.

The national banking act does not prohibit or forbid the receipt of deposits by a bank when insolvent, at any time before it is taken out of the control of its officers by the Comptroller of the Currency acting under the provisions of the national banking act.

*State* v. *Fields*, 98 Iowa, 748, 62 N. W. 653; *McDonald* v. *Chemical Nat. Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787.

A state has no power to legislate in reference to national banks, or to alter or supplement any of the provisions of the national banking act.

*United States* v. *Fisher*, 2 Cranch, 358, 2 L. ed. 304; *M'Culloch* v. *Maryland*, 4 Wheat. 425, 4 L. ed. 606; *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 23 L. ed. 196; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060; *Hall* v. *De Cuir*, 95 U. S. 499, 24 L. ed. 552; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

To continue business when insolvent is not necessarily a fraud or a crime on the part of a bank or an individual engaged in business.

*McDonald* v. *Chemical Nat. Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787; *Fusz* v. *Spaunhorst*, 67 Mo. 256.

The means and agencies provided and selected by the Federal government as necessary and convenient to the exercise of its functions cannot be subject to the taxing power of the states; and the Federal government is without power to tax the corresponding means and agencies of the states.

Cooley, Taxn. chap. 3, pp. 56–58.

States cannot tax a bank chartered by Congress as a fiscal agent of the government.

*M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204.

Nor the loans of the United States contracted under the power conferred by the government to borrow money.

*Weston* v. *Charleston*, 2 Pet. 449, 7 L. ed. 481; *New York ex rel. Bank of Commerce* v. *New York City & County Tax Comrs.* 2 Black, 620, 17 L. ed. 451.

Nor the revenue stamps issued by the United States.

*Palfrey* v. *Boston*, 101 Mass. 329, 3 Am. Rep. 364.

Nor the salary or emoluments of Federal officers.

*Dobbins* v. *Erie County*, 16 Pet. 435, 10 L. ed. 1022.

The Federal government cannot tax the salaries of state officers.

*Ward* v. *Maryland*, 12 Wall. 418, 20 L. ed. 449; *The Collector* v. *Day*, 11 Wall. 117, *sub nom. Buffington* v. *Day*, 20 L. ed. 122; *Freedman* v. *Sigel*, 10 Blatchf. 327, Fed. Cas. No. 5,080.

Nor the judicial processes of state courts.

*Moore* v. *Quirk*, 105 Mass. 49, 7 Am. Rep. 499; *Carpenter* v. *Snelling*, 97 Mass. 455; *People ex rel. Barbour* v. *Gates*, 43 N. Y. 40; *Green* v. *Holway*, 101 Mass. 243, 3 Am. Rep. 339.

Nor require stamps upon bonds of state officers.

*State ex rel. Lakey* v. *Garton*, 32 Ind. 1, 2 Am. Rep. 315. See also Cooley, Const. Lim. pp. 481–484.

The states can exercise no concurrent or independent power in reference to the management of such institutions, where, by reason of the nature of the institution or the purpose to be served, such power must necessarily be exercised by the national government exclusively.

*Gilman* v. *Philadelphia*, 3 Wall. 730, 16 L. ed. 101.

*Mr.* **Charles W. Mullan** argued the cause and filed a brief for defendant in error:

The construction of a state statute by the highest court of the state in which it is enacted will be followed by the Federal courts.

*Bucher* v. *Cheshire R. Co.* 125 U. S. 582, 31 L. ed. 798, 8 Sup. Ct. Rep. 974; *Bacon* v. *Northwestern Mut. L. Ins. Co.* 131 U. S. 264, 33 L. ed. 131, 9 Sup. Ct. Rep. 787; *Ankeny* v. *Clark*, 148 U. S. 354, 37 L. ed. 479, 13 Sup. Ct. Rep. 617; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 219, 41 L. ed. 695, 17 Sup. Ct. Rep. 305.

The receipt of a deposit of money by an insolvent bank is a fraud.

*Meadowcroft* v. *People*, 163 Ill. 65, 35 L. R. A. 176, 45 N. E. 303; *St. Louis & S. F. R. Co.* v. *Johnston*, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390; *Anonymous*, 67 N. Y. 598; *Cragie* v. *Hadley*, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; *New York Breweries Co.* v. *Higgins*, 79 Hun, 250, 29 N. Y. Supp. 416; *Wasson* v. *Hawkins*, 59 Fed. 233; *American Trust & Sav. Bank* v. *Gueder & P. Mfg. Co.* 150 Ill. 340, 37 N. E. 227; *First Nat. Bank* v. *Strauss*, 66 Miss. 479, 6 So. 232.

The Constitution of the United States does not secure to anyone the privilege of defrauding the public.

*Plumley* v. *Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154.

National banks organized under the acts of Congress are subject to state legislation, except where such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks as agents or instrumentalities of the United States, or interferes with the purpose of their creation.

*First Nat. Bank* v. *Kentucky*, 9 Wall. 361, 19 L. ed. 703; *McClellan* v. *Chipman*, 164 U. S. 356, 41 L. ed. 461, 17 Sup. Ct. Rep. 85; *Waite* v. *Dowley*, 94 U. S. 533, 24 L. ed. 182.

The existence of the states is absolutely necessary to the existence of the Federal government as at present constituted.

*Lane County* v. *Oregon*, 7 Wall. 76, 19 L. ed. 104; *Union P. R. Co.* v. *Peniston*, 18

Wall. 31, 21 L. ed. 792; *Texas* v. *White*, 7 Wall. 725, 19 L. ed. 237.

Any theory, therefore, which, in its logical conclusion, leads to the destruction of a state government, and of the sovereign right of that state to exercise control over the persons and property within its boundaries, equally tends to the destruction of the Federal Union.

No doctrine can be recognized by this court as a sound principle of law, which takes from the state its sovereign rights and powers; as the destruction of such rights and powers is a menace to the existence of the national government.

*Union P. R. Co.* v. *Peniston*, 18 Wall. 31, 21 L. ed. 787.

The power to punish an officer of a national bank for the commission of a fraud in receiving deposits when the bank is insolvent and is known by him to be insolvent, has been left by Congress wholly to the states.

*Cross* v. *North Carolina*, 132 U. S. 139, 33 L. ed. 290, 10 Sup. Ct. Rep. 47; *Teal* v. *Felton*, 12 How. 284, 13 L. ed. 990; *Moore* v. *Illinois*, 14 How. 13, 14 L. ed. 306; *Com.* v. *Tenney*, 97 Mass. 50; *Hoke* v. *People*, 122 Ill. 511, 13 N. E. 823; *Com.* v. *Luberg*, 94 Pa. 85.

All that the Federal authority can do is to see that the states do not, under cover of the police power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the Constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution.

Cooley, Const. Lim. 6th ed. 704, 706; *United States* v. *Dewitt*, 9 Wall. 41, 19 L. ed. 593; *License Cases*, 5 How. 504, 12 L. ed. 256; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Patterson* v. *Kentucky*, 97 U. S. 503, 24 L. ed. 1116; *United States* v. *Cruikshank*, 92 U. S. 555, 23 L. ed. 592; *State* v. *Noyes*, 47 Me. 189.

The police power of a state cannot be alienated even by an express grant. It is a power and responsibility which legislatures cannot devest themselves of, if they would.

*Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 33, 24 L. ed. 992; *Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079.

The 14th Amendment to the Federal Constitution does not take from the states the police powers reserved at the time of the adoption of the Constitution.

*Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

The police power of a state is coextensive with self-protection, and is not inaptly termed "the law of overruling necessity." It is that inherent plenary power in the state which enables it to prohibit all things hurtful to the welfare and comfort of society.

*Lake View* v. *Rose Hill Cemetery*, 70 Ill. 191, 22 Am. Rep. 71.

Fraud is a trespass upon the rights of others, and may therefore always be punished.

Tiedeman, Pol. Power, 291.

An insolvent bank has no right to continue business or to receive deposits. When it becomes insolvent it is the duty of its officers to at once close its doors, decline deposits, and discontinue business.

*Anonymous*, 67 N. Y. 598; *Cragie* v. *Hadley*, 99 N. Y. 133, 52 Am. Rep. 9, 1 N. E. 537; *St. Louis & S. F. R. Co.* v. *Johnston*, 133 U. S. 566, 33 L. ed. 683, 10 Sup. Ct. Rep. 390; *American Trust & Sav. Bank* v. *Gueder & P. Mfg. Co.* 150 Ill. 336, 37 N. E. 227; *First Nat. Bank* v. *Strauss*, 66 Miss. 479, 6 So. 232.

Mr. Justice **Shiras** delivered the opinion of the court:

Those portions of the Iowa statute whose validity is the question in this case consist of §§ 1884 and 1885 of the Code of that state, and are in the following terms:

"Sec. 1884. No bank, banking house, exchange broker, deposit office, firm, company, corporation, or person engaged in the banking, brokerage, exchange, or deposit business, shall, when insolvent, accept or receive on deposit, with or without interest, any money, bank bills or notes, United States Treasury notes or currency, or other notes, bills, checks, or drafts, or renew any certificate of deposit.

"Sec. 1885. If any such bank, banking house, exchange broker, deposit office, firm, company, corporation, or person shall receive or accept on deposit any such deposits, as aforesaid, when insolvent, any owner, officer, director, cashier, manager, member, or person knowing of such insolvency, who shall knowingly receive or accept, be accessory, or permit, or connive at receiving or accepting on deposit therein, or thereby, any such deposits, or renew any certificate of deposit, as aforesaid, shall be guilty of a felony, and, upon conviction, shall be punished by a fine not exceeding ten thousand dollars, or by imprisonment in the penitentiary for a term of not more than ten years, or by imprisonment in the county jail not more than one year, or by both fine and imprisonment."

At the trial evidence was adduced tending to show, and the jury found, that the defendant, being engaged in the banking business, as an officer, to wit, president of the First National Bank of Decorah, on the 21st day of August, A. D. 1896, did, as president of said bank, receive and accept on deposit in said *bank the sum of $100 in law- [228] ful paper money and of the value of $100, from one John French, the bank being then and there insolvent, and the defendant then and there well knowing that the said bank was insolvent.

It will be observed that national banks or banking associations are not specifically named in the statute; and it was, hence, argued, on behalf of the defendant, that such institutions are not within the enactment. As, however, the state courts, following a

previous decision of the supreme court of Iowa, in the case of *State* v. *Field*, 98 Iowa, 748, 62 N. W. 653, held that the statute was applicable to all banks, whether organized under the laws of the state or the acts of Congress, we must accept that construction as correct, and confine our consideration to the question whether, as so construed, the act is within the jurisdiction of the state.

It is obvious that the two sections of the statute, above quoted, must be read together as one enactment. If § 1884, regarded as applicable to national banks, is a valid exercise of power by the state, then the penalties declared in § 1885 can be properly enforced; but if § 1884 must be held invalid as an attempt to control and regulate the business operations of national banks, then the penal provisions of § 1885 cannot be enforced against their officers. In other words, the validity of the mandatory and of the penal parts of the statute must stand or fall together.

What, then, is the character of a state law which forbids national banks, when insolvent, from accepting or receiving on deposit, with or without interest, any money, bank bills or notes, United States Treasury notes or currency, or other notes, bills, checks, or drafts, or renewing any certificate of deposit?

The answer given by the supreme court of Iowa to this question is as follows:

"The acts of Congress provide no penalty for the fraudulent receiving of deposits, and the statute under consideration operates upon the person who commits the crime. And it is not a material question to determine whether it will be necessary to investigate the financial condition of the bank to prove that the bank was insolvent when [229] the deposit was received. This *statute is in the nature of a police regulation, having for its object the protection of the public from the fraudulent acts of bank officers. The mere fact that in violating the law of the state the defendant performed an act pertaining to his duty as an officer of the bank does not in any manner interfere with the proper discharge of any duty he owes to any power, state or Federal. Surely, it was not intended by any act of Congress that officers of a national bank should be clothed with the power to cheat and defraud its patrons. National banks are organized and their business prosecuted for private gain, and we can conceive of no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking."

We think that this view of the subject is not based on a correct conception of the Federal legislation creating and regulating national banks. That legislation has in view the erection of a system extending throughout the country, and independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states. Having due regard to the national character and purposes of that system, we cannot concur in the suggestions that national banks, in respect to the powers conferred upon them, are to be viewed as solely organized and operated for private gain. The principles enunciated in *M'Cullough* v. *Maryland*, 4 Wheat. 425, 4 L. ed. 606, and in *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, though expressed in respect to banks incorporated directly by acts of Congress, are yet applicable to the later and present system of national banks.

In the latter case it was said by Chief Justice Marshall:

"The bank is not considered as a private corporation whose principal object is individual trade and individual profit, but as a public corporation created for public and national purposes. That the mere business of banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake or for private purposes. It has never been supposed that Congress could create such a corporation. *The whole opinion of [230] the court in the case of *M'Cullough* v. *Maryland* is founded on, and sustained by, the idea that the bank is an instrument which is 'necessary and proper for carrying into effect the powers vested in the government of the United States.'"

A similar view of the nature of banks organized under the national bank laws has been frequently expressed by this court. Thus, in *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 23 L. ed. 196, it was said:

"National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end."

Such being the nature of these national institutions, it must be obvious that their operations cannot be limited or controlled by state legislation, and the supreme court of Iowa was in error when it held that national banks are organized and their business prosecuted for private gain, and that there is no reason why the officers of such banks should be exempt from the penalties prescribed for fraudulent banking. Nor is it altogether true, as asserted by that court, that there is no act of Congress prohibiting the receipt of deposits by national banks or their officers, when a bank is insolvent. It is true that there is no express prohibition contained in the Federal statutes, but there are apt provisions, sanctioned by severe penalties, which are intended to protect the depositors and other creditors of national banks from fraudulent banking. It is not necessary to quote at length those provisions, but it will be sufficient to say that banks organized under the national bank act are authorized to make contracts; to prescribe, by its board of directors, by-laws regulating the manner in which their general business shall be conducted, and the privileges granted by law exercised and en-

joyed; to exercise by its board of directors, or duly authorized officers, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes and drafts, bills of exchange; by receiving deposits; by buying and selling exchange; by loaning money on personal security. And they are [231] required to deposit *with the Treasurer of the United States, as security for their circulating notes, United States bonds in an amount not less than one fourth of its capital; to report to the Treasurer of the United States twice each year the average amount of its deposits, and to pay to said Treasurer each half year a tax upon such deposits; and to make to the Comptroller of the Currency not less than five reports during each year (and special reports as often as he may require), according to such form as he may require, verified by the oath or affirmation of the president or cashier, which reports shall exhibit in detail the resources and liabilities of the association. The Comptroller is directed to appoint suitable persons to make examination of the affairs of every banking association, who shall have power to make a thorough examination into all the affairs of the association, and in doing so to examine any of the officers or agents thereof, and to make a full and detailed report of the condition to the Comptroller. Whenever the Comptroller becomes satisfied of the insolvency of such bank he may, after due examination of its affairs, appoint a receiver, who shall take possession of the assets of the association, wind up its affairs, and make ratable distribution of its assets. And severe penalties are imposed upon any officer or agent of such association who violates any of the provisions of the national bank act.

It thus appears that Congress has provided a symmetrical and complete scheme for the banks to be organized under the provisions of the statute.

It is argued by the learned Attorney General on behalf of the state of Iowa that "the effect of the statute of Iowa is to require of the officers of all banks within the state a higher degree of diligence in the discharge of their duties. It gives to the general public greater confidence in the stability and solvency of national banks, and in the honesty and integrity of their managing officers. In enables them better to accomplish the purposes and designs of the general government, and is an aid, rather than impediment, to their utility and efficiency as agents and instrumentalities of the United States."

But we are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare [232] *and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control possessed and exercised by two independent authorities.

Nor can we concede that by such legislation of a state as was attempted in this instance, the affairs of a national bank, or the security of its creditors, would be advantageously affected. The provision of the state statute is express that it is the duty of the officers of the bank, when they know it is insolvent, to at once suspend its active operations; for it is obvious that to refuse to accept deposits would be equivalent to a cessation of business. Whether a bank is or is not actually insolvent may be, often, a question hard to answer. There may be good reason to believe that, though temporarily embarrassed, the bank's affairs may take a fortunate turn. Some of the assets that cannot at once be converted into money may be of a character to justify the expectation that, if actual and open insolvency be avoided, they may be ultimately collectible, and thus the ruin of the bank and its creditors be prevented. *McDonald* v. *Chemical Nat. Bank*, 174 U. S. 610, 43 L. ed. 1106, 19 Sup. Ct. Rep. 787. But, under the state statute, no such conservative action can be followed by the officers of the bank except at the risk of the penalties of fine and imprisonment. In such a case the provisions of the Federal statute would permit the Comptroller to withhold closing the bank, and to give an opportunity to escape final insolvency. It would seem that such an exercise of discretion on the part of the Comptroller would, in many cases, be better for all concerned than the unyielding course of action prescribed by the state law. However, it is not our province to vindicate the policy of the Federal statute, but to declare that it cannot be overridden by the policy of the state.

Similar legislation to that of the state of Iowa has been considered and disapproved by the supreme courts of several of the other states.

Thus, in *Com. ex rel. Torrey* v. *Ketner*, 92 Pa. 372, 37 Am. Rep. 692, one Torrey was indicted and found guilty under a charge that, as the cashier of the First National Bank of Ashland, organized under *the laws [233] of the United States, he had embezzled the moneys of the said bank contrary to the form of the act of assembly of the state of Pennsylvania, prescribing a penalty of fine and imprisonment. A writ of habeas corpus was allowed by the supreme court of the state, and the accused was discharged. That court, having quoted the acts of assembly relied on, said:

"We are spared further comment upon these acts, for the reason that they have no application to national banks. Neither of them refers to national banks in terms, and we must presume that when the legislature used the words 'any bank' that it referred to banks created under and by virtue of the laws of Pennsylvania. The national banks are the creatures of another sovereignty. They were created and are now regulated by the acts of Congress. When our acts of 1860 and 1861 were passed there were no national banks, nor even a law to authorize their creation. When the act of 1878 was passed. Congress had already defined and punished the offense of embezzlement by

the officers of such banks. There was therefore no reason why the state, even if it had the power, should legislate upon the subject. Such legislation could only produce uncertainty and confusion, as well as a conflict of jurisdiction. In addition, there would be the possible danger of subjecting an offender to double punishment, an enormity which no court would permit, if it had the power to prevent it. An act of assembly prescribing the manner in which the business of *all* banks shall be conducted, or limiting the number of the directors thereof, could not by implication be extended to national banks, for the reason that the affairs of such banks are exclusively under the control of Congress. Much less can we, by mere implication, extend penal statutes like those of 1861 and 1878 to such institutions. The offense for which the relator is held is not indictable, either at common law or under the statutes of Pennsylvania. We therefore order him to be discharged."

In *Allen* v. *Carter*, 119 Pa. 192, 13 Atl. 70, the question was whether a state law, which forbade "any cashier of any bank from engaging, directly or indirectly, in the purchase or sale of stock, or in any other profession, occupation, or calling other than his duty as cashier," and which declared [234] the same to be a misdemeanor, *was applicable to the cashier of a national bank, and it was held that it was not so applicable, the court saying, among other things:

"The national banking act and its supplements create a complete system for the government of those institutions. Conceding the power of Congress to create this system, I am unable to see how it can be regulated or interfered with by state legislation. The act of 1860, if applied to national banks, imposes a disqualification upon cashiers of such institutions where none has been imposed by act of Congress. If the state may impose one qualification upon the cashiers, why not another? If upon the cashier, why not upon the president or other officer? Nay, further, suppose the legislature should declare that no person should be a bank director unless he has arrived at fifty years of age, or should be the owner of one hundred shares of stock, could we apply such an act to national banks? If so, such institutions would have a precarious existence. They would be liable to be interfered with at every step, and it might not be long before the whole national banking system would have to be thrown aside as so much worthless lumber."

*People* v. *Fonda*, 62 Mich. 401, 29 N. W. 26, was a case wherein a clerk of a national bank was prosecuted in a state court and found guilty of larceny and embezzlement of the funds of the bank under the statute of the state. But it was held by the supreme court of the state that the offense was within the laws of the United States, and that, accordingly, the state court was without jurisdiction. It was said by the court—in view of § 711 of chapter 12 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 577), in the following terms: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states: First, of all crimes and offenses cognizable under the authority of the United States"—that Congress, by law, created the national banking system, and provided for its internal workings, and prescribed a punishment for the offense charged against the defendant. It seems, clearly, the case is one falling within § 711, above quoted, and that by the Federal law *itself the jurisdiction of the [235] state is expressly excluded. Chancellor Kent, in his Commentaries (1 Com. 400), says: "In judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal courts; and that, without an express provision to the contrary, the state courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter;" and accordingly the judgment of the trial court was reversed and the prisoner discharged.

In *Com.* v. *Felton*, 101 Mass. 204, the defendant was charged with being an accessory to an embezzlement by an officer of a national bank, and it was said by the court:

"The difficulty in the way of holding the defendant upon the present indictment is that the act of Congress has taken the crime of the principal out of our jurisdiction. Our courts cannot deal with him upon that charge."

A law of the state of Kansas provided that no bank should receive deposits when it was insolvent, and prescribed a punishment for a violation of that provision by any officer or agent of such bank; but it was held by the supreme court of that state that the provisions of the state law had no application to national banks, and that the penalties prescribed were not operative as against officers of national banks. *State* v. *Menke*, 56 Kan. 77, 42 Pac. 350.

The same view has prevailed in the lower Federal courts. In *Sutton Mfg. Co.* v. *Hutchinson*, 11 C. C. A. 320, 24 U. S. App. 145, 63 Fed. 501, it was said by the circuit court of appeals, through Mr. Justice Harlan:

"A corporation is not required by any duty it owes to creditors to suspend operations the moment it becomes financially embarrassed, or because it may be doubtful whether the objects of its creation can be attained by further effort upon its part. It is in the line of right and of duty when attempting, in good faith, by the exercise of its lawful powers and by the use of all *le- [236] gitimate means, to preserve its active existence, and thereby accomplish the objects for which it was created."

In *Re Waite*, 81 Fed. 359, it was held by the circuit court of the United States for the district of Iowa that a pension examiner of

the United States was not liable to a criminal prosecution in the courts of a state for acts done by him in his official capacity. In the opinion it was said:

"The question which marks the limit of the state jurisdiction is whether the person sought to be called to account was acting under the authority of the United States when the acts complained of were done, in and about a subject-matter within Federal jurisdiction, . . . for the criminal statutes of the state are not applicable to acts done within the plane of Federal jurisdiction and under the authority of the United States. Whenever it is made to appear in a criminal case pending in the state court that the acts charged in the indictment were done by the defendant as an officer or agent of the United States in and about a matter within Federal control, . . . then it is made to appear that the state court is asked to assume a jurisdiction which it cannot rightfully exercise; and if that court entertains the case and proceeds to adjudicate on the question of the extent of the authority possessed by the officers of the United States, . . . testing the same by the provisions of state statutes, . . . it proceeds at the peril of having its jurisdiction questioned and denied."

So, in *Re Thomas*, 82 Fed. 304, it was held by the circuit court of the United States for the southern district of Ohio that the governor of the soldiers' home at Dayton, Ohio, in serving to the inmates, as food, oleomargarine furnished by the government, is not subject to the law of the state prescribing the manner in which oleomargarine shall be used in eating houses, because his act is that of the government of the United States within its constitutional powers, and wholly beyond the control or regulation of the legislature of the state.

This judgment was affirmed by this court in *Ohio* v. *Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 Sup. Ct. Rep. 453.

A leading case in which this court had occasion to consider the limitation of legislation by a state affecting a subject within [237] *the scope of action by Congress is that of *Prigg* v. *Pennsylvania*, 16 Pet. 539, 10 L. ed. 1060, from which we quote the following observations:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner and in a certain form, it cannot be that the state legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

On the immediate subject of control over national banks, it was said, in *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 23 L. ed. 196:

"The states can exercise no control over them [national banks], nor in anywise affect their operation, except in so far as Congress may see proper to permit. Anything beyond this is 'an abuse, because it is the usurpation of power which a single state cannot give.' . . . 'The states have no power, by taxation or otherwise, to . . . burden, or in any manner control, the operation of constitutional laws enacted by Congress to carry into execution the powers vested in the general government.'"

This subject has received recent and careful consideration in the case of *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275, 40 L. ed. 700, 16 Sup. Ct. Rep. 502, twice argued in this court. The legislature of the state of New York had provided by law that savings banks, organized under the laws of that state, should have a preference as depositors in banks in case of the insolvency of such banks, and it was sought to apply this provision to the case of a deposit by a savings bank in a national bank which had subsequently become insolvent. But this court held that such a provision could not be extended by a state to national banks, because it was repugnant to that provision of the national banking act which requires the assets of an insolvent national bank *to [238] be ratably distributed among its creditors. In the opinion of the court, by Mr. Justice White, it was said:

"National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt by a state to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties for the performance of which they were enacted. These principles are axiomatic, and are sustained by the repeated adjudications of this court."

Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by Federal officers; that

it is not competent for state legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government.

*Cross* v. *North Carolina*, 132 U. S. 131, 33 L. ed. 287, 10 Sup. Ct. Rep. 47, was a case wherein this court pointed out the distinction between crimes defined and punishable at common law or by the general statutes of a state and crimes and offenses cognizable under the authority of the United States; and accordingly it was held that the crime of forging promissory notes, purport-
[239] ing to be made by individuals, *and made payable to or at a national bank, was a distinct and separate offense, indictable under the laws of the state.

Undoubtedly a state has the legitimate power to define and punish crimes by general laws applicable to all persons within its jurisdiction. So, likewise, it may declare, by special laws, certain acts to be criminal offenses when committed by officers or agents of its own banks and institutions. But it is without lawful power to make such special laws applicable to banks organized and operating under the laws of the United States.

It was by failing to observe the distinction between the two classes of cases that, we think, the courts below fell into error.

*The judgment of the Supreme Court of Iowa is reversed*, and the cause is remanded to that court to take further action not inconsistent with the opinion of this court.

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GEORGE BLEISTEIN, John W. Bridgman, John A. Rudolph, Ansley Wilcox, Gerritt B. Lansing, and Edwin Fleming, Doing Business under the Name of The Courier Company and the Courier Lithographing Company, *Plffs. in Err.*,

*v.*

DONALDSON LITHOGRAPHING COMPANY.

(See S. C. Reporter's ed. 239–253.)

*Copyright — printing and engraving — pictorial illustrations—circus posters.*

1. Printing and engraving, though not for a mechanical end, are not excluded from the useful arts, which Congress is empowered by the Constitution to promote by copyright laws.
2. Pictorial illustrations are none the less within the protection of the copyright law (U. S. Rev. Stat. § 4952; U. S. Comp. Stat. 1901, p. 3406), because they are drawn from real life.
3. Chromolithographic advertisements of a circus, portraying a ballet, a number of persons performing on bicycles, and groups of men and women whitened to represent statues, are proper subjects of copyright, under U. S. Rev. Stat. § 4952 (U. S. Comp. Stat. 1901, p. 3406), as amended by the act of 1874, § 3 (18 Stat. at L. 78, 79, chap. 301, U. S. Comp. Stat. 1901, p. 3412), as "pictorial illustrations," even assuming that only such illustrations as are "connected with the fine arts" are within the protection of such laws.

NOTE.—*As to what matter is subject to copyright*—see notes to Amberg File & Index Co. v. Shea Smith & Co. 27 C. C. A. 248; and Belford, C. & Co. v. Scribner, 36 L. ed. U. S. 514.

[No. 117.]

*Argued January 13, 14, 1903. Decided February 2, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Kentucky in favor of defendant in a suit to recover the penalties prescribed for infringements of copyrights. *Reversed* and remanded, with directions to set aside the verdict and grant a new trial.

See same case below, 44 C. C. A. 296, 104 Fed. 993.

The facts are stated in the opinion.

*Messrs.* **Ansley Wilcox** and **Arthur Von Briesen** argued the cause, and, with *Messrs. Wilcox & Miner*, filed a brief for plaintiffs in error:

The words "authors" and "writings," in the copyright law, are not confined to literary writers and their works, but include, among others, designers, engravers, and lithographers, as well as photographers.

*Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; *Trade-Mark Cases*, 100 U. S. 82, *sub nom. United States* v. *Steffens*, 25 L. ed. 550.

The courts have uniformly disclaimed the right to act as literary or artistic critics, in passing upon the degree of originality or of merit which is shown.

*Brightley* v. *Littleton*, 37 Fed. 103; *Carlisle* v. *Colusa County*, 57 Fed. 979; *Drury* v. *Ewing*, 1 Bond, 540, Fed. Cas. No. 4,095; *Henderson* v. *Tompkins*, 60 Fed. 758.

If a copyrighted article has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection.

Drone, Copyright, p. 212; *Henderson* v. *Tompkins*, 60 Fed. 758.

See also *Church* v. *Linton*, 25 Ont. Rep. 131.

There was, at least, a question of fact for the jury.

*Hegeman* v. *Springer*, 49 C. C. A. 86, 110 Fed. 374; *Bolles* v. *Outing Co.* 46 L. R. A. 712, 23 C. C. A. 594, 45 U. S. App. 449, 77 Fed. 966, 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94.

To deprive pictures or publications of the protection of the copyright law, "it must appear either that there is something immoral, pernicious, or indecent in the things *per se*, or that they are incapable of any use except in connection with some illegal and immoral act."

*Richardson* v. *Miller*, 12 Off. Gaz. 3, Fed. Cas. No. 11, 791.

These pictures were not barred from copy-

right because they were "mere matter of advertising."

*Yuengling* v. *Schile*, 20 Blatchf. 452, 12 Fed. 97; *Schumacher* v. *Schwencke*, 25 Fed. 466; *Lamb* v. *Grand Rapids School Furniture Co.* 39 Fed. 474; Drone, Copyright, pp. 164, 165. See also to same effect: *Grace* v. *Newman*, L. R. 19 Eq. 623; *Maple* v. *Junior Army & Navy Stores*, L. R. 21 Ch. Div. 369; *Church* v. *Linton*, 25 Ont. Rep. 131.

*Mr.* **Edmund W. Kittredge** argued the cause, and, with *Mr. Joseph Wilby*, filed a brief for defendant in error:

The copyright law being penal, if the language is ambiguous the court will lean more strongly in favor of the defendant than it would if the statute were remedial.

*Bolles* v. *Outing Co.* 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94.

The language which declares that in the construction of this act the words "engraving," "cut," and "print" shall be applied only to pictorial illustrations or works connected with the fine arts, has been held to be a limitation upon the right to copyright prints, cuts, or engravings.

*Rosenbach* v. *Dreyfuss*, 2 Fed. 217; *Ehret* v. *Pierce*, 18 Blatchf. 302, 10 Fed. 554; *Higgins* v. *Kueffel*, 140 U. S. 428, 35 L. ed. 470, 11 Sup. Ct. Rep. 731; *J. L. Mott Iron Works* v. *Clow*, 72 Fed. 168.

A picture representing a young woman holding a bouquet of flowers, to be printed on labels for cigar boxes, is not the subject of copyright.

*Schumacher* v. *Wogram*, 35 Fed. 210.

A catalogue of furniture containing pictorial illustrations of furniture and decorations, intended as an advertisement, and not as a work of art, is not entitled to protection under the copyright law.

*Cobbett* v. *Woodward*, L. R. 14 Eq. 407.

The copyright law does not protect what is immoral in its tendency.

*Broder* v. *Zeno Mauvais Music Co.* 88 Fed. 74; *Dunlop* v. *United States*, 165 U. S. 501, 41 L. ed. 804, 17 Sup. Ct. Rep. 375; *Martinetti* v. *Maguire*, 1 Abb. (U. S.) 356, Fed. Cas. No. 9,173.

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes here from the United States circuit court of appeals for the sixth circuit by writ of error. Act of March 3, 1891 (26 Stat. at L. 828, chap. 517, § 6, U. S. Comp. Stat. 1901, pp. 549, 550). It is an action brought by the plaintiffs in error to recover the penalties prescribed for infringements of copyrights. Rev. Stat. §§ 4952, 4956, 4965 (U. S. Comp. Stat. 1901, pp. 3406, 3407, 3414), amended by act of March 3, 1891 (26 Stat. at L. 1109, chap. 565), and act of March 2, 1895 (28 Stat. at L. 965, chap. 194). The alleged infringements consisted in the copying in reduced form of three chromolithographs prepared by employees of the plaintiffs for advertisements of a circus owned by one Wallace. Each of the three contained a portrait of Wallace in the corner, and lettering bearing some slight relation to the scheme of decoration, indicating the subject of the design and the fact that the reality was to be seen at the circus. One of the designs was of an ordinary ballet, one of a number of men and women, described as the Stirk family, performing on bicycles, and one of groups of men and women whitened to represent statues. The circuit court directed a verdict for the defendant on the ground that the chromolithographs were not within the protection of the copyright law, and this ruling was sustained by the circuit court of appeals. *Courier Lithographing Co.* v. *Donaldson Lithographing Co.* 44 C. C. A. 296, 104 Fed. 993.

There was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things. *Gill* v. *United States*, 160 U. S. 426, 435, 40 L. ed. 480, 483, 16 Sup. Ct. Rep. 322; *Colliery Engineer Co.* v. *United* [249] *Correspondence Schools Co.* 94 Fed. 152; *Carte* v. *Evans*, 27 Fed. 861. It fairly might be found, also, that the copyrights were taken out in the proper names. One of them was taken out in the name of the Courier Company and the other two in the name of the Courier Lithographing Company. The former was the name of an unincorporated joint-stock association formed under the laws of New York (Laws of 1894, chap. 235), and made up of the plaintiffs, the other a trade variant on that name. *Scribner* v. *Clark*, 50 Fed. 473, 474, 475, S. C., *sub nom. Belford, C. & Co.* v. *Scribner*, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734.

Finally, there was evidence that the pictures were copyrighted before publication. There may be a question whether the use by the defendant for Wallace was not lawful within the terms of the contract with Wallace, or a more general one as to what rights the plaintiff reserved. But we cannot pass upon these questions as matter of law; they will be for the jury when the case is tried again, and therefore we come at once to the ground of decision in the courts below. That ground was not found in any variance between pleading and proof, such as was put forward in argument, but in the nature and purpose of the designs.

We shall do no more than mention the suggestion that painting and engraving, unless for a mechanical end, are not among the useful arts, the progress of which Congress is empowered by the Constitution to promote. The Constitution does not limit the useful to that which satisfies immediate bodily needs. *Burrow-Giles Lithographing Co.* v. *Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279. It is obvious also that the plaintiff's case is not affected by the fact, if it be one, that the pictures represent actual groups,—visible things. They seem from the testimony to have been composed from hints or description, not from

sight of a performance. But even if they had been drawn from the life, that fact would not deprive them of protection. The opposite proposition would mean that a portrait by Velasquez or Whistler was common property because others might try their hand on the same face. Others are free to copy the original. They are not free to copy the copy. *Blunt* v. *Patten*, 2 Paine, 397, 400, Fed. Cas. No. 1,580. See *Kelly* v. [250]*Morris, L. R. 1 Eq. 697; *Morris* v. *Wright*, L. R. 5 Ch. 279. The copy is the personal reaction of an individual upon nature. Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright unless there is a restriction in the words of the act.

If there is a restriction it is not to be found in the limited pretensions of these particular works. The least pretentious picture has more originality in it than directories and the like, which may be copyrighted. Drone, Copyright, 153. See *Henderson* v. *Tompkins*, 60 Fed. 758, 765. The amount of training required for humbler efforts than those before us is well indicated by Ruskin. "If any young person, after being taught what is, in polite circles, called 'drawing,' will try to copy the commonest piece of real *work*, — suppose a lithograph on the title page of a new opera air, or a woodcut in the cheapest illustrated newspaper of the day,—they will find themselves entirely beaten." Elements of Drawing, first ed. 3. There is no reason to doubt that these prints in their *ensemble* and in all their details, in their design and particular combinations of figures, lines, and colors, are the original work of the plaintiffs' designer. If it be necessary, there is express testimony to that effect. It would be pressing the defendant's right to the verge, if not beyond, to leave the question of originality to the jury upon the evidence in this case, as was done in *Hegeman* v. *Springer*, 40 C. C. A. 86, 110 Fed. 374.

We assume that the construction of Rev. Stat. § 4952 (U. S. Comp. Stat. 1901, p. 3406), allowing a copyright to the "author, designer, or proprietor . . . of any engraving, cut, print . . . [or] chromo" is affected by the act of 1874 (18 Stat. at L. 78, 79, chap. 301, § 3, U. S. Comp. Stat. 1901, p. 3412). That section provides that, "in the construction of this act, the words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts." We see no reason for taking the words "connected with the fine arts" as qualifying anything except the word "works," but it would not change our decision if we should assume further that they also qualified "pictorial illustrations," as the defendant contends.

[251] *These chromolithographs are "pictorial illustrations." The word "illustrations" does not mean that they must illustrate the text of a book, and that the etchings of Rembrandt or Müller's engraving of the Madonna di San Sisto could not be protected today if any man were able to produce them. Again, the act, however construed, does not mean that ordinary posters are not good enough to be considered within its scope. The antithesis to "illustrations or works connected with the fine arts" is not works of little merit or of humble degree, or illustrations addressed to the less educated classes; it is "prints or labels designed to be used for any other articles of manufacture." Certainly works are not the less connected with the fine arts because their pictorial quality attracts the crowd, and therefore gives them a real use,—if use means to increase trade and to help to make money. A picture is none the less a picture, and none the less a subject of copyright, that it is used for an advertisement. And if pictures may be used to advertise soap, or the theatre, or monthly magazines, as they are, they may be used to advertise a circus. Of course, the ballet is as legitimate a subject for illustration as any other. A rule cannot be laid down that would excommunicate the paintings of Degas.

Finally, the special adaptation of these pictures to the advertisement of the Wallace shows does not prevent a copyright. That may be a circumstance for the jury to consider in determining the extent of Mr. Wallace's rights, but it is not a bar. Moreover, on the evidence, such prints are used by less pretentious exhibitions when those for whom they were prepared have given them up.

It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke. It may be more than doubted, for instance, whether the etchings of Goya or the paintings of Manet would have been sure of protection when seen for the first time. At the other end, copyright would be denied to *pictures which appealed [252] to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value,—it would be bold to say that they have not an æsthetic and educational value,—and the taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change. That these pictures had their worth and their success is sufficiently shown by the desire to reproduce them without regard to the plaintiffs' rights. See *Henderson* v. *Tompkins*, 60 Fed. 758, 765. We are of opinion that there was evidence that the plaintiffs have rights entitled to the protection of the law.

*The judgment of the Circuit Court of Appeals is reversed; the judgment of the Cir-*

cuit Court is also reversed and the cause remanded to that court with directions to set aside the verdict and grant a new trial.

Mr. Justice **Harlan**, dissenting:

Judges Lurton, Day, and Severens, of the circuit court of appeals, concurred in affirming the judgment of the district court. Their views were thus expressed in an opinion delivered by Judge Lurton: "What we hold is this: That if a chromo, lithograph, or other print, engraving, or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision, to protect the 'author' in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible. If a mere label simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright, it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the [253] obvious meaning of the Constitution. *It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874 (18 Stat. at L. 78, chap. 301, U. S. Comp. Stat. 1901, p. 3411), amending the provisions of the copyright law. We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show. No evidence, aside from the deductions which are to be drawn from the prints themselves, was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error. Many other points have been urged as justifying the result reached in the court below. We find it unnecessary to express any opinion upon them, in view of the conclusion already announced. The judgment must be affirmed." *Courier Lithographing Co.* v. *Donaldson Lithographing Co.* 44 C. C. A. 296, 104 Fed. 993, 996.

I entirely concur in these views, and therefore dissent from the opinion and judgment of this court. The clause of the Constitution giving Congress power to promote the progress of science and useful arts, by securing for limited terms to authors and inventors the exclusive right to their respective works and discoveries, does not, as I think, embrace a mere advertisement of a circus.

Mr. Justice **McKenna** authorizes me to say that he also dissents.

*UNITED STATES, *Appt.*, [254]
*v.*
GEORGE DEWEY, Admiral U. S. Navy, etc. (No. 309.)

GEORGE DEWEY, Admiral U. S. Navy, *Appt.*,
*v.*
THE DON JUAN de AUSTRIA *et al.* (No. 310.)

EDWIN F. STOVELL, on Behalf of Himself and Officers and Crew of the U. S. Steamship Nanshan, *Appt.*,
*v.*
GEORGE DEWEY, Admiral U. S. Navy, etc. (No. 311.)†

(See S. C. Reporter's ed. 254-283.)

*Prize—vessels appropriated to government use—outfit of destroyed vessel—naval stores captured on land—effect of restoration to enemy—barges and wrecking boats not prize—distribution of prize money—vessels entitled to participate.*

1. An enemy's war vessels, run ashore in battle and sunk by their own commanders, though left in such condition as not to be floated by any of the means ordinarily possessed by a naval force, cannot be said to have been "sunk or otherwise destroyed," within the meaning of the bounty provisions of U. S. Rev. Stat. § 4635 (U. S. Comp. Stat. 1901, p. 3134), where they are afterwards raised, reconstructed, and commissioned in the United States Navy, but are vessels captured and appropriated to the use of the United States, within the meaning of §§ 4624, 4625 (U. S. Comp. Stat. 1901, p. 3130), and are therefore lawful prize of war for the benefit of the captors.
2. Appliances and outfit taken from an enemy's vessels of war sunk or otherwise destroyed in battle by naval vessels of the United States are not the subject of prize, but are included within the words "ship or vessel of war," as used in U. S. Rev. Stat. § 4635 (U. S. Comp. Stat. 1901, p. 3134), awarding a bounty for the destruction of an enemy's vessels.
3. Naval stores captured at a naval station by a naval force of the United States, as the result of a naval engagement, are no less subject to condemnation as prize of war because taken on land, since, if the rights of captors were confined to the proceeds of ship and cargoes by the act of July 17, 1862 (12 Stat. at L. 600, chap. 204), § 2, providing for distribution among the captors of the proceeds "of all ships and vessels, and the goods taken on board them, which shall be adjudged good prize," such restriction was so far removed by the act of June 30, 1864 (13 Stat. at L. 306, chap. 174), which, in addition to the repeal of such section, provided that captors should be entitled to "the net proceeds of all property condemned

† These cases are reported by the Official Reporter under the title of "The Manila Prize Cases."

NOTE.—*As to what is lawful prize of war*—see note to The Mary & Susan, 4 L. ed. U. S. 32. *As to what vessels are entitled to share in the distribution of prize money*—see note to United States v. Farragut, 22 L. ed. U. S. 879.

as prize," as to permit such statute to extend to other property fairly coming within the accepted rules of prize.

4. The government of the United States was absolved from all liability, under its prize statutes, to the captors of property of an enemy susceptible of condemnation as prize of war, by the restoration of such property to the enemy before condemnation.

5. Barges propelled by sweeps and by poling, and nonseagoing floating derricks or wrecking boats without means of propulsion, the property of private citizens, are not the subject of capture as prize of war.

6. Vessels used by the Navy of the United States as colliers, manned principally by unenlisted men, and armed only for purposes of defense, are not, though within signal distance of a capture, entitled to participate in the prize money awarded, under U. S. Rev. Stat. § 4632 (U. S. Comp. Stat. 1901, p. 3133), to "all vessels of the Navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required."

[Nos. 309, 310, 311.]

*Argued October 28, 29, 1902. Decided February 23, 1903.*

APPEALS from the Supreme Court of the District of Columbia to review a decree of that court sitting as a district court of the United States in admiralty in a suit in prize in which an intervening libel was filed. Affirmed as to the decree on the intervening libel. Reversed as to the decree on the libel, and remanded for the entry of a decree in accordance with the opinion.

Statement by Mr. Chief Justice **Fuller:**

[255] *These are appeals taken from a decree of the supreme court of the District of Columbia, sitting as a district court of the United States in admiralty, in a suit in prize brought by Admiral Dewey in behalf of himself and the officers and crew of the naval forces on the Asiatic station, taking part in the battle of Manila bay.

May 1, 1898, Admiral Dewey, being then a Commodore in the United States Navy, with a fleet under his command, engaged a Spanish fleet consisting of the Reina Cristina, Castilla, Don Juan de Austria, Don Antonio de Ulloa, General Lezo, Marques del Duero, Argos, Velasco, Isla de Cuba, Isla de Luzon, Isla de Mindanao, Manila, and two torpedo boats, supported by shore batteries, submarine mines, and torpedoes. At the close of the battle all these vessels were confessedly destroyed except the Manila, which was captured, and the Don Juan de Austria, Isla de Cuba, and Isla de Luzon, in respect of which the facts were these: Under the severe fire of the American fleet they steamed to a position of greater safety, and, after the battle, backed ashore, and when in shallow water their sea valves were opened and they settled on the bottom. They, and other armed vessels, were afterwards set on fire by a detachment from the United States fleet, in obedience to a signal from the flagship when the firing ceased. All captured vessels not destroyed were appraised and appropriated to the use of the United States, except one or more private vessels, which were restored to their owners, and not including the Don Juan de Austria, the Isla de Cuba, and the Isla de Luzon.

May 3, 1898, Commodore Dewey took possession of the Cavite arsenal, containing a large quantity of naval stores and supplies, and some boats, and he also took possession of certain land batteries. Some of the property taken at the arsenal, besides that taken from the sunken vessels, was included in the appraisement.

The protocol between the United States and Spain, signed August 12, 1898, provided as follows: "The United States will occupy and hold the city, bay, and harbor of Manila, pending the conclusion of a treaty of peace, which shall determine the control, disposition, and government of the Philippines. . . . *Upon the conclusion and [256] signing of this protocol, hostilities between the two countries shall be suspended." [30 Stat. at L. 1742, arts. 3, 6.]

About the first of September, 1898, an examination was made of the Don Juan de Austria, the Isla de Cuba, and the Isla de Luzon, and the commander-in-chief advertised for bids for raising, repairing, and fitting them out. In October, he contracted, on behalf of the United States, with a dock company to effect this purpose. The work of raising the vessels was begun on October 29 and finished on November 24. They were then overhauled sufficiently to enable them to proceed to Hong Kong, where they were reconstructed and refitted for use in the United States Navy, of which they became a part.

Full report was made to the Navy Department in July, 1899, of the condition of each of these vessels, upon being raised, and of the progress of reconstruction, including estimates of the value of the vessels when completed, exclusive of armament, and of the cost of raising, fitting out, and repairing them. And an appraisement was made in that department of the three vessels when completed, giving the value, and the cost of repairs, from which it also appears that they were first commissioned in the United States Navy in 1900.

Some of the other sunken vessels might probably have been raised to advantage, but no attempt was made to do so, though a small amount of property was taken from them for government use. They were all advertised for sale in September, 1898, but no bids were received.

Shortly after the battle, the commander-in-chief took possession for government use of some cascoes or cargo boats, and two floating derricks belonging to private parties.

The treaty of peace between the United States and Spain provided: "Stands of colors, uncaptured war vessels, small arms, guns of all calibers, with their carriages and accessories, powder, ammunition, live stock, and materials and supplies of all kinds, belonging to the land and naval

forces of Spain in the Philippines and Guam, remain the property of Spain." [30 Stat. at L. 1757, art. 5.]

By virtue of this provision, so much of the public property captured at the Cavite arsenal, and elsewhere on land, remaining unused at the date of the exchange of ratifications, was subsequently restored to Spain.

[257] *Actions were instituted for bounty under § 4635 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3134), on account of all the vessels other than the Don Juan de Austria, the Isla de Cuba, the Isla de Luzon, and those enumerated in the appraisement, and bounty has been granted under that section for the destruction of those vessels. *Dewey* v. *United States*, 35 Ct. Cl. 172; *S. C.* 178 U. S. 510, 44 L. ed. 1170, 20 Sup. Ct. Rep. 981.

July 20, 1899, this libel was filed against the Don Juan de Austria, the Isla de Cuba, the Isla de Luzon, all the property taken from them and from the sunken vessels, all the vessels and other property taken afloat, and all the property captured ashore.

The United States filed an answer denying that the Don Juan de Austria, the Isla de Cuba, and the Isla de Luzon, the property captured on board of them, the property captured on land, and the cargo boats were subject to condemnation as prize. March 26, 1901, an intervening libel was filed by Edwin F. Stovell, on behalf of himself and the officers and crew of the Nanshan, to which an answer was filed by libellant. The case having been heard, a decree of condemnation and distribution was made November 5, 1901, which adjudged the Isla de Cuba, the Isla de Luzon, and the Don Juan de Austria, and the Manila and all other captured vessels named in the appraisement, except such as might have been returned to private owners, and all property captured upon or belonging to any of these vessels, or any vessels sunk or destroyed on May 1, 1898, to be lawful prize of war. All property captured ashore and all nonseagoing craft belonging to the arsenal, as well as all cascoes and the floating derricks, not belonging to the King of Spain, were held not to be prize, and as to such property the libel was dismissed. The Nanshan, and the Zafiro, a vessel in the same situation, were held not entitled to share in any of the prize property; and the hostile fleet was held to have been of inferior force to the vessels making the capture. An appeal was taken by the United States, a cross appeal by libellant, and an appeal by the intervener.

Errors were assigned:

By the United States, that the district court erred in holding (1) that the vessels of war raised and reconstructed for the

[258] *Navy, with guns, munitions, equipment, stores, and other articles found upon them, were lawful prize of war for the benefit of the captors; (2) as also guns, munitions, equipment, stores, and other articles on board the Spanish vessels of war sunk or otherwise destroyed, and not restored.

By libellant, that the district court erred in holding (1) that the property captured at the naval station at Cavite was not lawful prize; (2) that the cascoes were not lawful prize.

By the intervener, in holding that the Nanshan (and with her the Zafiro) was not entitled to share in the prize property.

*Messrs.* **Charles C. Binney** and *Assistant Attorney General* **Hoyt** argued the cause and filed a brief for the United States:

No citizen can have any right to have any vessel or property condemned as prize for his benefit, except by authority of an act of Congress. If a vessel or other property is taken from the enemy under such circumstances as bring the case within the true intent and meaning of the prize statutes, then the captors have a right to prize money; but if not, then such vessel or property belongs to the United States alone.

*The Siren*, 13 Wall. 389, *sub nom. United States Ships of War* v. *United States*, 20 L. ed. 505; *The Emulous*, 1 Gall. 563, Fed. Cas. No. 4,479; *Mrs. Alexander's Cotton*, 2 Wall. 404, *sub nom. United States* v. *Alexander*, 17 L. ed 915.

Bounty is given as a reward for the injury inflicted upon the enemy's naval fighting force; for which injury a reward was considered to be due whether the hostile vessel of war was captured or destroyed.

*The Selma*, 1 Low. Dec. 30, Fed. Cas. No. 12,647; *Porter* v. *United States*, 106 U. S. 607, *sub nom. United States* v. *Steam Vessels of War*, 27 L. ed. 286, 1 Sup. Ct. Rep. 539.

To hold that the words "sunk or otherwise destroyed" necessarily mean annihilated or sunk beyond the possibility of recovery by any human means would be as unreasonable as to hold that "permanent" means "lasting forever." It has repeatedly been held that a covenant for the permanent establishment of an institution in a certain place does not bind the covenantor never to remove it. It is enough that he should, at the time of establishing the institution, have no intention of removing it.

*Mead* v. *Ballard*, 7 Wall. 290, 19 L. ed. 190; *Newton* v. *Mahoning County*, 100 U. S. 548, 25 L. ed. 710; *Texas & P. R. Co.* v. *Marshall*, 136 U. S. 393, 34 L. ed. 385, 10 Sup. Ct. Rep. 846; *Sumner* v. *Darnell*, 128 Ind. 38, 13 L. R. A. 173, 27 N. E. 162; *Hardy* v. *Wiley*, 87 Va. 125, 12 S. E. 233.

All statutes "relating to the same subject-matter shall be considered together."

*United States* v. *Babbit*, 1 Black, 55, 17 L. ed. 94.

Captures made by a naval force when conducting operations in conjunction with a land force are not prizes at all.

*The Siren*, 13 Wall. 389, *sub nom. United States Ships of War* v. *United States*, 20 L. ed. 505.

The words "sunk or otherwise destroyed" are equivalent to "rendered incapable of service as a vessel of war without extensive reconstruction," and also "rendered incapable of being floated by ordinary means such as a naval force is provided with."

*Dewey* v. *United States*, 178 U. S. 510, 44 L. ed. 1170, 20 Sup. Ct. Rep. 981, 35 Ct. Cl. 172; *Sampson* v. *United States*, 35 Ct. Cl. 578.

A rather striking analogy is furnished by the cases of constructive total loss of a vessel, such as justifies an abandonment to the underwriters. If a vessel has been injured by any of the perils insured against, to such an extent that the cost of repairs would be more than 50 per cent of her value, the owner may abandon her and claim a total loss.

*Peters* v. *Phœnix Ins. Co.* 3 Serg. & R. 25; 3 Kent, Com. 14th ed. 329.

If a vessel be no longer afloat, however, and cannot readily be made afloat, the owner may abandon her, even if the cost of floating and repairing her would not necessarily be 50 per cent of her value.

*Peele* v. *Merchants' Ins. Co.* 3 Mason, 27, Fed. Cas. No. 10,905; *Bradlie* v. *Maryland Ins. Co.* 12 Pet. 378, 9 L. ed. 1123.

Except where a statute or other writing makes a plain distinction between the hull of a ship and the various articles which may be attached thereto or contained therein for the purposes for which the ship is employed, these latter articles are always understood as included in the term "ship" or "vessel."

*Genoa and its Dependencies*, 2 Dodson Adm. 444; *The Dundee*, 1 Hagg. Adm. 109, 5 Barn. & C. 156; *Hall* v. *Ocean Ins. Co.* 21 Pick. 472; *The Witch Queen*, 3 Sawy. 201, Fed. Cas No. 17,916; *The Edwin Post*, 11 Fed. 602.

Cargo is distinguishable from outfit or supplies.

*Wolcott* v. *Eagle Ins. Co.* 4 Pick. 429.

Bounty was given "in lieu of" prize money.

*Porter* v. *United States*, 106 U. S. 607, *sub nom. United States* v. *Steam Vessels of War*, 27 L. ed. 286, 1 Sup. Ct. Rep. 539; *The Selma*, 1 Low. Dec. 30, Fed. Cas. No. 12,647.

In attempting to make the libel in this case cover property taken on land, the libellant has confounded prize with booty.

Bouvier, Law Dict.; Roberts, Admiralty & Prize, 464; Risley, War, 144; 2 Baker's Halleck, International Law, 74; Pothier, Droit de Domaine de Propriété, pt. 1, chap. 2; *The Two Friends*, 1 C. Rob. 271; *Genoa and its Dependencies*, 2 Dodson Adm. 444; *Mrs. Alexander's Cotton*, 2 Wall. 404, *sub nom. United States* v. *Alexander*, 17 L. ed. 915.

Property on land is not, without the aid of the statute, liable to capture and condemnation as prize of war.

*Brown* v. *United States*, 8 Cranch, 110, 3 L. ed. 504: *United States* v. *269 1-2 Bales of Cotton*, 1 Woolw. 236, Fed. Cas. No. 16,583; *The Cotton Plant*, 10 Wall. 577, 19 L. ed. 983; 2 Halleck, International Law, 1893, p. 81.

The right of a government to release captured property, not merely before the filing of a libel, but at any time until the decree of condemnation is entered, is absolute and complete. No title vests in the captors until there has been a final adjudication in the prize court.

*Home* v. *Camden*, 2 H. Bl. 533; *The Elsebe*, 5 C. Rob. 173.

Cascos and flatboats cannot be within the operations of the prize statutes, which apply to seagoing vessels provided with the ordinary ship's papers.

*Ex parte Ferguson*, L. R. 6 Q. B. 280; *United States* v. *An Open Boat*, 5 Mason, 120, Fed. Cas. No. 15,967; *Birkbeck* v. *Hoboken Horse Ferry Boats*, 17 Johns. 54; *Farmer's Delight* v. *Lawrence*, 5 Wend. 564; *Hicks* v. *Williams*, 17 Barb. 523; *Philadelphia & R. R. Co.* v. *Adams*, 89 Pa. 31, 33 Am. Rep. 721; *Fischer* v. *Camden & P. S. B. Ferry Co.* 124 Pa. 154, 16 Atl. 634; *Cope* v. *Vallette Dry Dock Co.* 119 U. S. 625, 30 L. ed. 501, 7 Sup. Ct. Rep. 336; *The Paquete Habana*, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

*Messrs.* **William B. King** and **Benjamin Micou** argued the cause, and, with *Messrs. Hilary A. Herbert* and *George A. King*, filed a brief for Dewey *et al.*:

Capture is the first essential of prize.

*Miller* v. *The Resolution*, 2 Dall. 4, 1 L. ed. 264.

The vessels were not "sunk or otherwise destroyed."

*United States* v. *The Albemarle*, reported in *Swan* v. *United States*, 19 Ct. Cl. 51.

Decisions relating to the abandonment of vessels to insurers by the insured are based upon the fundamental idea that the changing of the status of the ship and the passing of the title from the insured to the insurer, by abandonment, is a matter entirely within the control of the parties.

*Columbian Ins. Co.* v. *Ashby*, 4 Pet. 139, 7 L. ed. 809; Smith, Mercantile Law, 3d ed. by Holcomb & Gholson, pp. 475, note, 480.

The English law of prize, so far as it is adapted to the altered circumstances and conditions of the country and has not been modified by the proper national authorities, is the law which governs the prize courts of the United States.

*The Siren*, 13 Wall. 389, *sub nom. United States Ships of War* v. *United States*, 20 L. ed. 505; *30 Hogsheads of Sugar* v. *Boyle*, 9 Cranch, 198, 3 L. ed. 703; *1,253 Bags of Rice*, Blatchf. Prize Cas. 211, Fed. Cas. No. 10,535; *United States* v. *703 Casks of Rice*, Fed. Cas. No. 16,253a; *Brown* v. *United States*, 8 Cranch, 128, 3 L. ed. 510.

Land captures are the subject of prize.

*Brown* v. *United States*, 8 Cranch, 128, 3 L. ed. 510; *The Emulous*, 1 Gall. 575, Fed. Cas. No. 4,479; *680 Pieces of Merchandise*, 2 Sprague, 233, Fed. Cas. No. 12,915; *1,253 Bags of Rice*, Blatch. Prize Cas. 211, Fed. Cas. No. 10,535; *282 Bales of Cotton*, Blatch. Prize Cas. 304, Fed. Cas. No. 14,291; *United States* v. *269 1-2 Bales of Cotton*, Woolw. 236, Fed. Cas. No. 16,583; *Lindo* v. *Rodney*, 2 Doug. 613n; *Mitchell* v. *Rodney*, 2 Brown P. C. 423; *Camden* v. *Home*, 4 T. R. 386; *The French Guiana*, 2 Dodson Adm. 151; *The Rebeckah*, 1 C. Rob. 227; Story, Additional Note on the Principles and Practices in Prize Courts.

The scope of the word "prize" is so long settled and well recognized that it can only be considered as having been used in a technical sense when employed in the framing of this statute.

Bishop, Written Laws, p. 127.

Cascos and wrecking boats should properly be included as vessels.

Century Dict.; *Chaffe* v. *Ludeling*, 27 La. Ann. 607; 2 Bouvier, Law Dict. p. 1193; *United States* v. *Steever*, 113 U. S. 747, 28 L. ed. 1133, 5 Sup. Ct. Rep. 765; Benedict, Admiralty, 215; *The St. Louis*, 48 Fed. 312; *Cope* v. *Vallette Dry Dock Co.* 119 U. S. 629, 30 L. ed. 502, 7 Sup. Ct. Rep. 336; *Wood* v. *Two Barges*, 46 Fed. 204; *Endner* v. *Greco*, 3 Fed. 413; *The Starbuck*, 61 Fed. 502; *Saylor* v. *Taylor*, 23 C. C. A. 343, 42 U. S. App. 206, 77 Fed. 476; *The International*, 83 Fed. 840.

*Messrs.* **Conrad H. Syme** and **Charles W. Clagett** argued the cause and filed a brief for Stovell *et al.*:

The Nanshan was a vessel of the Navy.

*The Georgiana*, 1 Dodson Adm. 401; *The Ceylon*, 1 Dodson Adm. 115.

The Nanshan was entitled to share in prize money.

*The Guilliaume Tell*, Edw. Adm. 11; *The Empress*, 1 Dodson Adm. 373; *The Vryheid*, 2 C. Rob. 20; *La Melanie*, 2 Dodson Adm. 125.

The original crew was entitled to share in prize money.

*United States* v. *Steever*, 113 U. S. 753, 28 L. ed. 1136, 5 Sup. Ct. Rep. 765; *The Rita*, 89 Fed. 766.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Captures in war inure to the government and can become private property only by its grant. The right of the citizen to demand condemnation of vessels or property as prize for his benefit must be derived from acts of Congress, and their scope is not to be enlarged in his favor by construction. *The Siren*, 13 Wall. 389, *sub nom. United States Ships of War* v. *United States*, 20 L. ed. 505. Although, in matters of detail, where there is no controversy in respect of the existence of the grant, a more liberal construction may be applied in carrying the intention of Congress into effect.

The correctness of the decree so far as it related to Spanish seagoing vessels with their equipment and the property found *on [259] board of them, captured at the battle or soon afterward, and not restored to their owners, is conceded.

1. The first question to be determined is whether the Don Juan de Austria, the Isla de Cuba, and the Isla de Luzon were properly adjudicated as prize for the benefit of captors, in view of their condition immediately after the engagement, and their being subsequently raised, reconstructed, and commissioned in the Navy.

In the consideration of that question we assume that "capture" and "prize" are not convertible terms, and that for the subject of capture to be made prize for the benefit of the captors the taking must meet the conditions imposed by the statutes.

The statutory provisions bearing on the case are to be found in Title LIV. of the Revised Statutes, entitled *Prize*, embracing §§ 4613 to 4652, inclusive (U. S. Comp. Stat. 1901, pp. 3126–3139), some of which are given below, together with certain of the "Instructions to Blockading Vessels and Cruisers," issued by General Order, June 20, 1898.†

†Sec. 4613 (U. S. Comp. Stat. 1901, p. 3126). The provisions of this title shall apply to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.

Sec. 4615 (U. S. Comp. Stat. 1901, p. 3127). The commanding officer of any vessel making a capture shall secure the documents of the ship and cargo, including the log book, with all other documents, letters, and other papers found on board, and make an inventory of the same, and seal them up and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found, and are in the condition in which they were found; or explaining the absence of any documents or papers, or any change in their condition. He shall also send to such court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send the prize, with the documents, papers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient in view of the interest of probable claimants, as well as of the captors. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the Assistant Treasurer of the United States most accessible to such court, and subject to its order in the cause.

Sec. 4624 (U. S. Comp. Stat. 1901, p. 3130). Whenever any captured vessel, arms, munitions, or other material are taken for the use of the United States before it comes into the custody of the prize court, it shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings are to be had; and if taken afterward, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize property taken for or appropriated for the use of the government, the department for whose use it is taken or appropriated shall deposit the value thereof with the Assistant Treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.

[260] *Ordinarily, the property must be brought in for adjudication, as the question is one of title, which does not vest until condemnation, but it will be seen that, by § 4615 (U. S. Comp. Stat. 1901, p. 3127), if the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey and appraisement shall be had, the property sold, and the proceeds deposited subject to the order of the court; and by §§ 4624 and 4625, captured vessels and property may be appropriated to the use of the United States, and the money value stand in place of the prize. And proceedings may be had where property which might have been brought in has been entirely lost or destroyed. Adjudication is contemplated in all cases.

By § 4635 (U. S. Comp. Stat. 1901, p. 3134), a bounty is given for each person on board a vessel of the enemy which is "sunk or otherwise destroyed" in an engagement, of $100 if the hostile fleet is of inferior, and of $200 if of equal or superior, force; and $50 for every person on board at the time of [261] such capture, where the vessels *taken are immediately destroyed in the public interest, but not in consequence of injuries received in action.

This bounty is to be divided in the same manner as prize money, and the prize money in the one case and the bounty in the other cover the entire results of success.

We agree with counsel for libellant that the words "sunk or otherwise destroyed" are equivalent to "destroyed by sinking or otherwise." There are two general classes, then, under the statute,—vessels destroyed, and vessels captured and condemned, or appropriated.

The facts before us are somewhat peculiar, and serve to illustrate the variant circumstances that may occur in naval engagements, and create modifications of the general classification. These vessels were run ashore and sunk by their own commanders, with the result that they were only temporarily disabled, and the commanding officer of our fleet, in the public interest, as the engagement closed, directed their destruction to be completed *by burn- [262] ing. In the report of the action, dated May 4, 1898, they were included among the vessels reported as burnt, but they were not included in the appraisement made by the board of appraisal and survey ordered in accordance with § 4624, and following, of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3130), to survey, appraise, and take a careful inventory of "enemy's property captured and appropriated for the uses of the United States government." After hostilities were suspended an examination of the wrecks of the Don Juan de Austria, the Isla de Cuba, and the Isla de Luzon was made, and subsequently the vessels were raised,

Sec. 4625 (U. S. Comp. Stat. 1901, p. 3130). If, by reason of the condition of the captured property, or if, because the whole has been appropriated to the use of the United States, no part of it has been or can be sent in for adjudication, or if the property has been entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate; and in any such case the proceeds of anything sold, or the value of anything taken or appropriated for the use of the United States, shall be deposited with the Assistant Treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the Secretary of the Navy shall not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district. And if, in any case of capture, no proceedings for adjudication are commenced within a reasonable time, any parties claiming the captured property may, in any district court, as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified.

Sec. 4630 (U. S. Comp. Stat. 1901, p. 3132). The net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one half shall be decreed to the United States and the other half to the captors, except that in case of privateers and letters of marque, the whole shall be decreed to the captors unless it shall be otherwise provided in the commissions issued to such vessels.

Sec. 4634 (U. S. Comp. Stat. 1901, p. 3134). Whenever a decree of condemnation is rendered, the court shall consider the claims of all vessels to participate in the proceeds, and for that purpose shall, at as early a stage of the cause as possible, order testimony to be taken tending to show what part should be awarded to the captors, and what vessels are entitled to share; and such testimony may be sworn to before any judge or commissioner of the courts of the United States, consul or commercial agent of the United States, or notary public, or any officer of the Navy highest in rank, reasonably accessible to the deponent. The court shall make a decree of distribution, determining what vessels are entitled to share in the prize, and whether the prize was of superior, equal, or inferior force to the vessel or vessels making the capture. The decree shall recite the amount of the gross proceeds of the prize, subject to the order of the court, and the amount deducted therefrom for costs and expenses, and the amount remaining for distribution; and whether the whole of such residue is to go to the captors, or one half to the captors and one half to the United States.

Sec. 4635 (U. S. Comp. Stat. 1901, p. 3134). A bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot

under a contract entered into by the commander-in-chief for the government, and reconstructed. If the vessels had not been raised and saved, they would have remained abandoned as destroyed; but as they were saved and appropriated by the government, they cannot be said in fact to fall within that category. We attach no importance to the official reports referring to the vessels as destroyed, which was true in the [263] *sense in which the word was then used, for the question really is, whether, when salvage had been effected, the government can maintain that the captors did not take them, but that they were destroyed so that they could not be treated as prize.

The position of the government is that, as these vessels were sunk and destroyed to such an extent that libellant's naval force was powerless to salve them by its own resources, their subsequent reconstruction and appropriation by the government had no effect on their legal status, which had been determined immediately after the battle.

It is insisted that, if not prize then, they could not be prize afterwards, and yet it is not denied that when the question of title is settled by decree, it takes effect by relation as of the date of the capture. And because this is so, the fact that hostilities had ceased before the vessels were raised becomes immaterial.

The contention is that, if a vessel lies on the bottom in shallow water, but in such a condition that she cannot be floated *by any [264] of the means ordinarily possessed by a naval force, such vessel must be regarded as "sunk" within the meaning of the statute, even though she has received no structural injury; or if a vessel, though not sunk, be so structurally injured as to destroy her power of floating, and she cannot be repaired by any means possessed by the naval forces in the place where she lies, such vessel must be regarded as structurally "destroyed" within the meaning of the statute.

And it is said that a close analogy is furnished by the cases of constructive total loss of a vessel, such as justifies an abandonment to the underwriters. Nevertheless, counsel argues that there are differences between those cases and cases under § 4635 (U. S. Comp. Stat. 1901, p. 3134). Thus, while it is admitted that in the former the owner need not abandon unless he see fit to do so, the right of election on the part of captors as to whether the vessel should be treated as destroyed or as a prize is denied in the latter; and another difference suggested is that the owner of a submerged or stranded vessel could contract with a third party to *raise it, while captors can- [265] not. We think, however, that the alleged differences destroy the analogy altogether, or rather that its application, when correctly stated, leads to the opposite result.

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be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the Navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture.

Instructions:

20. Prizes should be sent in for adjudication, unless otherwise directed, to the nearest home port in which a prize court may be sitting.

21. The prize should be delivered to the court as nearly as possible in the condition in which she was at the time of seizure; and to this end her papers should be sealed at the time of seizure and kept in the custody of the prize master. Attention is called to articles Nos. 16 and 17 for the government of the United States Navy. (Exhibit A.)

22. All witnesses whose testimony is necessary to the adjudication of the prize should be detained and sent in with her, and, if circumstances permit, it is preferable that the officer making the search should act as prize master.

23. As to the delivery of the prize to the judicial authority, consult §§ 4615, 4616, and 4617, Revised Statutes of 1878 [U. S. Comp. Stat. 1901, p. 3127]. (Exhibit B.) The papers, including the log book of the prize, are delivered to the prize commissioners; the witnesses, to the custody of the United States marshal; and the prize itself remains in the custody of the prize master until the court issues process directing one of its own officers to take charge.

24. The title to property seized as prize changes only by the decision rendered by the prize court. But, if the vessel itself, or its cargo, is needed for immediate public use, it may be converted to such use, a careful inventory and appraisal being made by impartial persons and certified to the prize court.

28. If there are controlling reasons why vessels may not be sent in for adjudication,—as unseaworthiness, the existence of infectious disease, or the lack of a prize crew, they may be appraised and sold; and if this cannot be done, they may be destroyed. The imminent danger of recapture would justify destruction, if there was no doubt that the vessel was good prize. But, in all such cases, all the papers and other testimony should be sent to the prize court, in order that a decree may be duly entered.

Exhibit A.

Art. 16. No person in the Navy shall take out of a prize, or vessel seized as a prize, any money, plate, goods, or any part of her equipment, unless it be for the better preservation thereof, or unless such articles are absolutely needed for the use of any of the vessels or armed forces of the United States, before the same are adjudged lawful prize by a competent court; but the whole, without fraud, concealment, or embezzlement, shall be brought in, in order that judgment may be passed thereon; and every person who offends against this article shall be punished as a court martial may direct.

Art. 17. If any person in the Navy strips off the clothes of, or pillages, or in manner maltreats, any person taken on board a prize, he shall suffer such punishment as a court martial shall adjudge.

Exhibit B.

[§§ 4615, 4616, and 4617 Rev. Stat. (U. S. Comp. Stat. 1901, p. 3127).]

Abandonment rests on the election of the parties, and there was here neither a right of abandonment nor any acts from which abandonment on the one side and acceptance on the other could be fairly inferred.

The public interest required the United States and the captors to preserve the property, if that were possible; and it would be an anomalous conclusion to hold *in invitum* that the United States could pay bounty for these vessels as destroyed and at the same time retain and use them.

The vessels were not derelict, abandoned without hope of recovery, but, on the contrary, their preservation was recommended, and, in the circumstances, Commodore Dewey, having duly taken the steps prescribed by the statute in respect of vessels confessedly captured, was not obliged to determine at once at his peril into which class these particular vessels fell, and to literally comply with § 4615 (U. S. Comp. Stat. 1901, p. 3127), in regard to captured property "not in condition to be sent in for adjudication."

War is not waged for predatory purposes, but Congress chose to grant reward for success, and in doing so cannot be assumed to have intended that such reward should be subjected to the restrictions of close bargains. The intention was that either prize money or bounty should be paid. Of course, by capture without destruction the government might obtain distinct acquisitions, and the captors would be recompensed at the expense of the enemy.

Circumstances have frequently occurred in which the public interest has required the destruction of vessels capable in themselves of being brought in,—as, for example, at the battle of the Nile, when Nelson was obliged to burn prizes in order to avoid the delay in refitting them, and the loss of the service of other ships to convoy them to Gibraltar; but there his government could not assist him, or take the captured vessels off his hands.

Section 4635 (U. S. Comp. Stat. 1901, p. 3134) provided that bounty should be paid in all cases where an enemy vessel of war was sunk or otherwise destroyed, either in an engagement, or in consequence of injuries [266] received *in action, or after capture when the destruction was for the public interest; but the statute does not demand the construction that every vessel must be considered as destroyed, which, though susceptible of salvage and saved, could not have been, and was not saved, by the unaided resources of the capturing force.

It is true that when the government succeeded in raising and restoring the vessels, it saved them for itself, but it may reasonably be held that this was subject by relation to the right of the captors to an adjudication giving them, after the costs and expenses were deducted, a share in the residue of value.

If the effort at salvage had failed, or if the cost had equaled or exceeded the value, the captors would still be entitled to bounty, for it was not intended that the grant should be defeated by laying them under a rigid rule of election. And, on the other hand, these vessels were not "appropriated to the use of the United States" by the mere effort of the government to raise them.

The act of raising was not the use contemplated by the statute. Such use was dependent on the success of the effort at salvage. The loss, which might have been total, became, on success, partial,—that is, confined to the extent of the expenditure; and the taking possession to accomplish that result, became, by success, appropriation to use.

The case of the Albemarle is in point, although apparently no opinion ruled the question in terms.

The Albemarle was sunk by Lieutenant Cushing on the night of October 27, 1864; was raised in March, 1865; reached Norfolk, April 27, 1865, and was appropriated to the use of the United States. She was appraised by a duly-appointed board of naval officers and the value found was deposited by the Secretary of the Navy with the Assistant Treasurer of the United States at Washington. Proceedings to condemn the Albemarle as prize were instituted in the district court of the United States for the District of Columbia and went to a decree of condemnation. The case was not reported, but the proceedings will be found in *Swan* v. *United States*, 19 Ct. Cl. 51, in the course of subsequent litigation; as also in *United States* v. *Steever*, 113 U. S. 747, 28 L. ed. 1133, 5 Sup. Ct. Rep. 765. No appeal was taken, and the conclusion that a *vessel thus situated could be decreed to be [267] prize was accepted by all the departments. We perceive no adequate reason to depart from that precedent.

2. As to the property taken from the vessels raised and reconstructed, and that taken from the vessels destroyed, we think its legal status must be regarded as the same as that of the vessel to which it belonged.

By § 4613 (U. S. Comp. Stat. 1901, p. 3126) it is declared that the provisions of Title LIV. shall apply to "all captures made as prize by authority of the United States or adopted and ratified by the President of the United States."

The taking must be under such conditions as make the subject of the capture prize, and the sections preceding § 4635 (U. S. Comp. Stat. 1901, p. 3134) recognize that property other than vessels may be prize, using the words "ship and cargo," "vessel, arms, munitions, or other material," "captured property," "prize property." But § 4635 (U. S. Comp. Stat. 1901, p. 3134) refers to the destruction of "a ship or vessel of war," which could not be "sunk or otherwise destroyed" under that section, and be "prize" under the preceding sections, and, as we have already said, the grant of bounty, to be divided "in the same manner as prize money," appears obviously to have been "intended as a substitute for the prize itself," as ruled by Lowell, J., in *The Selma*, 1 Low. Dec. 30, Fed. Cas. No. 12,647, or as given in lieu of prize money, as observed by Mr. Justice Field, in *Porter* v. *United*

*States*, 106 U. S. 607, *sub nom. United States* v. *Steam Vessels of War*, 27 L. ed. 286, 1 Sup. Ct. Rep. 539.

No question of cargo is involved. Cargo is the lading of a ship or vessel, and may be prize when the vessel is not, or the vessel may be when the cargo is not. The inquiry here relates to things belonging to the outfit of vessels of war, for whose capture prize money is paid, and for whose destruction bounty is paid. The injury to the enemy is the same in either case, but the reward cannot be the same, as it is arbitrary in the one case, and not in the other, and arrived at in accordance with the general rules prescribed as required by the circumstances. The statute did not contemplate a division of the grant and an award of prize money and bounty in respect of the same transaction, unless, indeed, the capture embraced distinct and separate properties.

[268] *What is included then by the term "a ship or vessel of war," under § 4635 (U. S. Comp. Stat. 1901, p. 3134)? Whatever the toleration extended in courts of admiralty to the use, in practice, of words apparently superfluous, the word "ship" embraces her boats, tackle, apparel, and appurtenances, because part of the ship as a going concern, and, for the same reason, "ship or vessel of war" includes her armament, search lights, stores,—everything, in short, attached to or on board the ship in aid of her operations.

The first congressional legislation regulating prize was the act of March 2, 1799 (1 Stat. at L. 715, chap. 24), providing:

"Sec. 5. *And be it further enacted*, That all captured national ships or vessels of war shall be the property of the United States,—all other ships or vessels, being of superior force to the vessel making the capture, in men or guns, shall be the sole property of the captors,—and all ships or vessels of inferior force shall be divided equally between the United States and the officers and men of the vessel making the capture.

"Sec. 6. *And be it further enacted*, That the produce of prizes taken by the ships of the United States, and bounty for taking the ships of the enemy, be proportioned and distributed in the manner following, to wit:

[Then followed twelve subdivisions in respect of the distribution of prize money.]

"13. The bounty given by the United States on any national ship of war, taken from the enemy and brought into port, shall be, for every cannon mounted, carrying a ball of twenty-four pounds, or upwards, two hundred dollars; for every cannon carrying a ball of eighteen pounds, one hundred and fifty dollars; for every cannon carrying a ball of twelve pounds, one hundred dollars; and for every cannon carrying a ball of nine pounds, seventy-five dollars; for every smaller cannon, fifty dollars; and for every officer and man taken on board, forty dollars, —which sums are to be divided agreeably to the foregoing articles."

These sections admit of no other meaning than that the tackle, sails, apparel, stores, guns, ammunition, and other appurtenances of captured national vessels of war should be the property of the United States, as well as the ships themselves, and so of ships or vessels going to the captors.

*And the acts of April 23, 1800 (2 Stat. [269] at L. 45, chap. 33), July 17, 1862 (12 Stat. at L. 600, chap. 204), June 30, 1864 (13 Stat. at L. 306, chap. 174), and the Revised Statutes, contain nothing inconsistent with that view.

Parsons, in his work on Marine Insurance, says that "insurance on the ship covers all that belongs to it, as hull, sails, rigging, tackle, apparel, or furniture;" and he quotes from Emérigon (chap. 10, § 2, p. 234): "The expression 'on the body' embraces, in its generality, as I have just said, all that regards the ship. Such are the hull of the vessel, its rigging and apparel, munitions of war, stores and victualing, advances to the crew, and all that has been expended in the fitting it out." 1 Marine Ins. 524.

And in his work on Shipping and Admiralty, vol. 1, p. 78, the same author says: "How much passes by the word 'ship,' or the phrase 'ship and her appurtenances,—or apparel,—or furniture,'—or the like, cannot be positively determined by any definition. Stowell and Abbott agree that whatever is on board a ship for the objects of the voyage and adventure in which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances, within the meaning of the English statute of 53 Geo. III. chap. 159."

That was an act "to limit the responsibility of shipowners," and provided that owners should not be liable "further than the value of their own vessel, and the freight due or to grow due," and in several clauses of the act the responsibility was referred to as limited "to the value of the ship with all her appurtenances and freight."

In *The Dundee*, 1 Hagg. Adm. 109, the question arose whether the value of certain fishing stores should be included. Lord Stowell held that it should, and that the word "appurtenances" distinguished between cargo, which was intended to be disposed of at the foreign port, and having a merely transitory connection with the ship, and those accompaniments that were indispensable instruments, without which the ship could not perform its functions. The owners declared in prohibition in the King's Bench, *Gale* v. *Laurie*, 5 Barn. & C. 156, and Abbott, Ch. J., afterwards Lord Tenterden, announced the same conclusion, and, among other things, said: "The fishing stores were not *carried on board the ship as mer- [270] chandise, but for the accomplishment of the objects of the voyage; and we think that whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owners, constitutes a part of the ship and her appurtenances within the meaning of this act [53 Geo. III. chap. 159], whether the object be warfare, the conveyance of passengers or goods, or the fishery. This construction furnishes a plain and intelligible general

rule; whereas, if it should be held that nothing is to be considered as part of the ship that is not necessary for her navigation or motion on the water, a door would be opened to many nice questions and much discussion and cavil."

In *The Witch Queen*, 3 Sawy. 201, Fed. Cas. No. 17,916, Judge Hoffman held that, where a vessel was supplied with a diving bell, air pump, and other apparatus for the accomplishment of the enterprise in which she was about to engage, the lien of the materialmen extended to all articles belonging to the owner, which, not being cargo, had been placed on board for the objects and purposes of the voyage. The decision proceeded on our 8th rule in admiralty, referring to "suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances;" and *The Dundee*, decided twenty years before the adoption of the rule, was cited as showing the sense in which the term "appurtenances" had been used.

To be sure, the words tackle, sails, apparel, boats, appurtenances, are not used in Title LIV., but we think that such minuteness was unnecessary, and that the words "ship or vessel of war belonging to the enemy" are sufficiently comprehensive to embrace not only everything essential to the ship's navigation, but to the purposes of her existence.

Necessarily, there is nothing in the distinction attempted to be drawn between the ship and her "appliances and outfit;" nor can we concur in the view that the latter may be regarded as cargo in any aspect.

It is said that the destroyed hostile vessel of war should be held the subject of bounty, and property taken from her the subject of prize money, because bounty alone would be an inadequate reward.

[271] *This, even if true, would not justify us in attributing to the statute a scope not permitted by its terms.

Section 4635 (U. S. Comp. Stat. 1901, p. 3134) is couched in the same language as when enacted July 17, 1862, after the battle between the Monitor and the Merrimac had admonished us of the impending change in the construction of vessels of war, yet the bounty provision was re-enacted in 1864, and incorporated into the Revised Statutes, and while, in these days, the amount of bounty may seem inconsiderable in comparison with the value of the vessel destroyed, we must take the statute as we find it.

3. The battle of Manila was fought on the 1st day of May, and on the 3d the enemy's forces evacuated the Cavite arsenal, which was taken possession of by a landing party. This naval station contained a considerable amount of arms, munitions, and material, for the repairing, equipment, and fitting out of ships, and some nonseagoing boats were in use there. The property was appraised in due course; some of it was used in the Navy prior to the exchange of ratifications of the treaty of peace, and the remainder restored to Spain thereafter. The district court declined to adjudicate this property to be prize, because captured on land.

These were naval stores taken at a naval station, by a naval force, as the result of a naval engagement, and the question is whether the fact that they were taken from a navy yard instead of from a vessel rendered the statute inapplicable.

Generally speaking, forts, cities, lands taken from the enemy, are called conquests; movables taken on land, booty; on the high seas, prize. And the high seas include coast waters without the boundaries of low-water mark, though within bays or roadsteads,—waters on which a court of admiralty has jurisdiction. *United States* v. *Ross*, 1 Gall. 624, Fed. Cas. No. 16,196.

Mr. Justice Story and Mr. Wheaton thought that the jurisdiction in prize extended "as well to goods taken on land by a naval force, or in consequence of the operations of a naval force, as to property captured on the water." Wheaton, Captures, 278; Pratt's Story, Notes on Prize Courts, 28; 2 Wheat. Appx. 1, 4 L. ed. 281. Both these learned authors cite English authorities, and among them the leading case of *Lindo* v. *Rodney*, 2 Dougl. 613, note.

*In that case the property was captured [272] on the island of St. Eustatius, and a writ of prohibition to restrain the prize court was applied for. It was stated that the only question was "whether the goods being taken on land, though in consequence of a surrender to ships at sea, excludes the only prize jurisdiction known in this kingdom." The question was answered in the negative in an elaborate opinion and the rule discharged. Lord Mansfield, among other things, said: "In short, every reason which created a prize court as to things taken upon the high seas, holds equally when they are *thus* taken at land. The original cause of taking is here at sea. The force which terrified the place into a surrender was at sea. If they had resisted, the force to subdue would have been from the sea. Mr. Piggott candidly said, it would be spinning very nicely to contend, if the enemy left their ship, and got ashore with money, were followed upon land, and stripped of their money, that this would not be a sea capture. I agree with him, but I cannot distinguish that case from this. Both takings are literally upon land. In both, the prey is, as it were, killed at sea, and taken upon land. Here the capture of the goods on land is the immediate consequence of the surrender at discretion to a sea force. Would a sum paid by capitulation upon land have made it a sea or a land prize? *Cui bono*, should all this subtlety be spun, when the reason for a jurisdiction to judge a capture at sea and such a capture at land is exactly the same?"

This reasoning shows that even though the general proposition may have been stated somewhat broadly by Story and Wheaton, circumstances may bring particular cases within it, and that mere contact with land does not *ipso facto* exclude jurisdiction in prize.

In *The Siren*, 13 Wall. 389, 392, *sub nom.*

*United States Ships of War* v. *United States*, 20 L. ed. 505, 506, Mr. Justice Swayne, speaking for the court, said: "While the American colonies were a part of the British Empire, the English maritime law, including the law of prize, was the maritime law of this country. From the close of the Revolution down to this time, it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities."

[273] *It was there decided that a seagoing vessel captured by the Army and Navy jointly was not subject of condemnation as prize, and that only captures made by naval force alone were so subject. "Whenever a claim is set up," said the court, "its sanction by an act of Congress must be shown. If no such act can be produced, the alleged right does not exist."

Hence, captures are made as prize for the benefit of captors when they come within the scope of our prize statutes, and not otherwise.

In *The Emulous*, 1 Gall. 575, Fed. Cas. No. 4,479, Mr. Justice Story said: "The admiralty, therefore, not only takes cognizance of all captures made at sea, in creeks, havens, and rivers, but also of all captures made on land where the same have been made by a naval force, or by co-operation with a naval force. This exercise of jurisdiction is settled by the most solemn adjudications."

The decree in *The Emulous* was reversed in *Brown* v. *United States*, 8 Cranch, 110, 3 L. ed. 504, but that was on the ground of the unlawfulness of the taking, and so referred to by Mr. Justice Gray in *The Paquete Habana*, 175 U. S. 711, 44 L. ed. 332, 20 Sup. Ct. Rep. 290.

In *United States* v. 269½ *Bales of Cotton*, Woolw. 236, Fed. Cas. No. 16,583, an officer of the Army embarked a battalion of cavalry on vessels of the United States, and in the service of the government, but not part of the naval force, and, proceeding by river and by land, penetrated into a certain district of Mississippi then held by the enemy, and by force of arms overpowered a body of hostile troops and took from their possession 269½ bales of cotton, which were subsequently libelled. And Mr. Justice Miller, on circuit, held that the cotton was captured by the Army, and not by the Navy, and dismissed the libel. While Mr. Justice Miller there remarked that the result of *Brown* v. *United States* was "that property on land is not, without the aid of the statute, liable to capture and condemnation as prize of war," yet, after considering many English cases at some length, and referring to *The Emulous* and the case of *680 Pieces Merchandise*, 2 Sprague, 233, Fed. Cas. No. 12,915, he said: "In every one of the cases where the court has sustained its jurisdiction in prize, it appears that the force making the capture, or co-operating in the act, was the naval arm, or, by its presence and [274] active assistance it *contributed immediately in effecting the capture; that it operated from the sea; that the place captured was an island, town, or fortress, itself established to resist naval attack, and to support and succor naval expeditions, and accessible from the sea, so that the attacking squadron could directly bring to bear upon it the stress of its armament." And, referring to property captured on land by land forces, he added: "However desirable it may be that, in a war between nations, there should exist a tribunal similar to the prize court, to administer the law of nations with reference to property captured on land, we find no warrant for asserting that any such authority exists in the admiralty courts of the United States, unless the circumstances of the capture show some element of a force operating from, or on, the water, which would bring it within the recognized rules on that subject."

In the case of *Mrs. Alexander's Cotton*, 2 Wall. 404, *sub nom. United States* v. *Alexander*, 17 L. ed. 915, a joint expedition of gunboats under Rear Admiral Porter and a body of troops under Major General Banks proceeded up the Red River, and, during its advance, seventy-two bales of cotton, the private property of Mrs. Alexander, were taken from her plantation, where they were stored in a cotton gin house about a mile from the river. by a party from one of the gunboats. The cotton was hauled by teams to the river bank, sent to Cairo, libelled as prize of war in the district court for the southern district of Illinois, May 18, 1864; claimed by Mrs. Alexander; sold *pendente lite*, and the proceeds decreed to her. The United States appealed and asked the reversal of the decree and the condemnation of the cotton as maritime prize. This court held that the capture was justified by legislation and by public policy, but that the property was not maritime prize; that there was no authority to condemn any property as prize for the benefit of the captors except under the act of July 17, 1862 (12 Stat. at L. 600, chap. 204); and that as the second section of that act provided that "the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize," should be the property of the captors, in whole or in part, property on land was excluded from the category of prize for the benefit of captors, and that this was decisive of the case *so far as claims of captors were concerned. [275] The decree was reversed and the cause remanded with directions to dismiss the libel.

In that case the capture was the result of a joint expedition; the property was private property; unprotected and stored at a distance from the river; valuable for domestic use, and so valuable as to be of peculiar assistance to the enemy, but not in any sense war material.

In the present case the capture was made by naval force alone; the property was public property, consisting of arms, munitions, and naval material; in a naval station taken through the operations of the fleet from the sea.

For the reasons indicated by Mr. Justice Miller, in harmony with the observations of

Lord Mansfield, the rulings in that case and in *The Siren* are not controlling in this, and, moreover, the terms of the applicable statute are not the same.

The sections constituting Title LIV. of the Revised Statutes were brought forward from the act of June 30, 1864 (13 Stat. at L. 306, chap. 174).

Section 2 of the act of July 17, 1862, referred to by Mr. Chief Justice Chase in the case of *Mrs. Alexander's Cotton*, reads as follows: "That the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be divided equally between the United States and the officers and men making the capture."

This section was identical with § 5 of the act of April 23, 1800, and was expressly repealed by § 35 of the act of June 30, 1864, while § 10 of the latter act, afterwards § 4630 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3132), provided: "That the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one half shall be decreed to the United States and the other half to the captors;" and § 33: "That the provisions of this act shall be applied to all captures made as prize by authority of the [276] United States, or adopted and ratified *by the President of the United States;" which was re-enacted as § 4613 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3126).

The effect of this legislation was not to revive § 5 of the act of 1800, as contended, nor to give jurisdiction in admiralty in respect of property captured on land by land forces, but, if the language of the act of 1862 confined the rights of captors to the proceeds of ships and cargoes, it seems clear that the language of the act of 1864, that the captors should be entitled to "the net proceeds of all property condemned as prize," operated to so far remove the restriction as to permit the statute to extend to other property fairly coming within accepted rules of prize.

The district court thought the words inadequate to produce this result, and carefully examined other sections of the act of 1864, which referred to vessels and cargoes as the usual subjects of prize. But we should remember that that statute, and Title LIV., into which it was carried, embraced prize in general, and that vessels and their cargoes most frequently constituted prize property brought in for adjudication. So that in making provision in that regard, Congress was obliged to use such terms as even to give color to the argument that an enemy's vessels of war could not be condemned at all for the benefit of captors, and that bounty was their only reward, as was the case under the act of 1799 [1 Stat. at L. 709, chap. 24]. But it is conceded that this is not so, and we think that these sections ought not to be given the restrictive force attributed to them.

We are also unable to see that the significance of the change in phraseology is lessened when considered with the other legislation referred to.

The act of March 12, 1863 (12 Stat. at L. 820, chap. 120), provided for the collection of all abandoned or captured property in insurrectionary districts, and "that such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other water craft, and the furniture, forage, military supplies, or munitions of war." Section 7 read: "That none of the provisions of this act shall apply to any lawful maritime prize by *the naval forces of the United [277] States." The property excepted had been declared "lawful subject of prize and capture wherever found;" and it was made the duty of the President "to cause the same to be seized, confiscated, and condemned," by the confiscation act of August 6, 1861 (12 Stat. at L. 319, chap. 60). This act referred to property taken when used, or intended to be used, in waging war against the United States, while the act of 1863 referred to property not so used or intended to be.

By the 2d section of the act of March 3, 1863, "further to regulate proceedings in prize cases" (12 Stat. at L. 759, chap. 86), it was provided that "any captured vessel, any arms or munitions of war, or other material," might be taken "for the use of the government," and the value deposited in the Treasury of the United States, and for prize proceedings. This act was expressly repealed by § 35 of the act of June 30, 1864, § 10 of which act, as already seen, provided that the captors might share in the net proceeds of all property condemned as prize.

Section 7 of the act of July 2, 1864 (13 Stat. at L. 377, chap. 225), reads: "That no property seized or taken upon any of the inland waters of the United States by the naval forces thereof shall be regarded as maritime prize; but all property so seized or taken shall be promptly delivered to the proper officers of the courts, or as provided in this act and in the said act approved March twelve, eighteen hundred and sixty-three." These various acts growing out of the civil war cannot be regarded as having any important bearing on the act of June 30, 1864, and Title LIV., in so far as the particular modification of the act of 1862 is concerned.

And neither these acts, nor §§ 5308 to 5311 (U. S. Comp. Stat. 1901, p. 3614), in respect of insurrection, and ¶ 9 of § 563 (U. S. Comp. Stat. 1901, p. 457), and ¶ 6 of § 629, Revised Statutes (U. S. Comp. Stat. 1901, p. 504), affect the result we have reached.

In our opinion it would be spinning altogether too nicely to hold that because enemy property on land cannot be taken in prize by land operations, public property de-

signed for hostile uses, and stored on the sea shore in an establishment for facilitating naval warfare, might not be made prize, under the statute, when captured by naval forces operating directly from the sea.

[278] *But while the property in question was, in general, susceptible of condemnation in prize, it was, nevertheless, taken subject to the exercise of the power of restitution. The right of the government is supreme, and when, in its judgment, the public interest demands it, prizes may be restored, and the courts cannot proceed to condemnation.

In *The Elsebe*, 5 C. Rob. 173, Lord Stowell, then Sir William Scott, decided that up to the period of final condemnation, the Crown can, by virtue of its prerogative, restore a prize to the enemy from whom it has been captured, and may take this step without consulting the captors.

The principle is fully discussed and sustained by unanswerable reasoning, and is not shaken by his subsequent observations in *The St. Ivan*, Edw. Adm. 376, that "captors bring in their prizes subject [in all cases] to such interposition on the part of the Crown; but it is of very rare occurrence, and speaking with all due reverence ought to be of rare occurrence, and only under very special circumstances; as, for instance, where the detention of the vessel may be detrimental to the general interests of the country."

Until condemnation, captors acquire no absolute right of property in a prize, though then the right attaches as of the time of the capture, and it is for the government to determine when the public interests require a different destination. In respect of whatever was restored under the treaty with Spain, the government must be regarded as absolved from liability.

It further follows from the views we entertain as justifying condemnation of a portion of this property, that the capturing naval force must be held to have been superior within the contemplation of the statute, according to previous decision.

4. The libel was amended some months after it was filed, so as to cover certain cascoes, or small native boats, and also two floating derricks or wrecking boats, the property of private citizens residing in the Philippine islands. These cascoes appear to have been large barges, propelled by sweeps and by poling, of from 30 to 60 tons capacity, of the value of from $1,500 to $1,800, Mexican, each, and used in discharging cargoes. The wrecking boats were flat boats, the largest being 40 feet long and 15 feet broad. They had no means of propul-

[279] sion, were *not seagoing boats in any sense, and could only be used in comparatively smooth water. All these boats may have been the private property of Filipinos, but that is not clear.

It may well be doubted if these craft came within the words "ship" or "vessel" as used in Title LIV. Whether, in the circumstances, they could justly be treated as technically enemy property, is a question not so presented as to require discussion. They were put to public use by the commanding officer, but what ultimately became of them does not appear from the record. If restitution was made, they have ceased to be within the jurisdiction. And in any view, we are of opinion that they came within the considerations set forth in *The Paquete Habana*, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290; and that the district court rightly held that they were not subject to condemnation.

We are of opinion that the district court committed no error in its decree in respect of the Don Juan de Austria, the Isla de Cuba, and the Isla de Luzon, and the property taken from them, as well as the vessels captured and their appurtenances, or in respect of the lighters and wrecking boats, but that a share in a portion of the naval stores and material captured in the Cavite arsenal, and the boats pertaining thereto, should have been awarded, and that the decree should not have included property taken from vessels sunk and destroyed.

And this brings us to consider:

5. The decree dismissing the intervention of Stovell.

This was an intervening libel filed by Edward F. Stovell as captain of the Nanshan, on behalf of its officers and crew, as well as himself, seeking to participate in the prize money that might be awarded on the main libel. Stovell had previously made an application in the court of claims to participate in the bounty awarded for vessels destroyed, under § 4635 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3134), which was dismissed by that court. 36 Ct. Cl. 392.

The record in the court of claims was made the record in the district court on the intervention of Stovell, and forms part of the record on this appeal. The facts are correctly summarized by Weldon, J., in the opinion of the court of claims, as follows:

*"The facts found by the court show that [280] the claimant was captain or master of the original crew of the Nanshan, which was a British merchant vessel, purchased by Admiral Dewey at Hong Kong, under authority of the Secretary of the Navy, in April, 1898. The vessel was not commissioned, but was registered as an American steamer, and the original crew was shipped in the American merchant service. The crew were employed to handle the ship, and the officers and men were promised and received double the wages they had theretofore been paid in the British merchant service. They were not rated in the United States Navy, and the double wages were not the rates of pay fixed by the President under authority of Rev. Stat. § 1569. The arrangement as to the employment and payment of the crew was the result of an agreement made by Admiral Dewey with the original officers of the Nanshan. A monthly list of the names and wages of the crew, in Mexican money, was made by the original captain or master, the aggregate amount of which was received by him from the pay inspector of the fleet in a lump sum, reduced to the value of Ameri-

can gold, which money the captain distributed to his original crew.

"Admiral Dewey placed on board a naval officer, Lieut. Benj. W. Hodges, and four enlisted men, and two mounted 1-pounder guns. The master of the Nanshan, Capt. Edwin F. Stovell, remained on board, and under him were shipped the seamen, as aforesaid. The naval officer exercised control over the vessel and gave all orders concerning her. The merchant captain was merely his executive officer, being familiar with the crew. The Nanshan did not approach the Spanish fleet during the battle of Manila near enough to enable her to be of any service. The guns were mounted on her as a protection from boat attacks, but not for offensive operations. At the time and during the battle of Manila, Lieut. Benj. W. Hodges had been detailed as aforesaid with four men of the Navy for duty on said vessel, and was so engaged on said vessel as above stated at and during the time of the battle. The Nanshan was loaded with 3,000 tons of coal. The Raleigh was detailed as a special guard in case the reserve division was attacked separately by [281] the enemy. *The duty of the naval captain on said ship was to take general charge of the vessel, execute all orders from the flagship controlling the movements of the Nanshan, the handling of the guns, and the signaling, but not to interfere with the internal management and discipline of the ship, and such things as loading and discharging cargo.

"After the vessel was bought by Admiral Dewey, the Nanshan crossed the China sea with the fleet and was a part thereof. She kept her position in the fleet. After the fleet stopped at Subig bay the Admiral ordered her commander to come on board the flagship for his final orders, afterwards returning to the Nanshan. The fleet started in single column, the Olympia leading, followed by the Baltimore, the Raleigh, the Petrel, the Concord, the Boston, the McCullough, the Nanshan, and Zafiro, passing the forts in that order. The forts on the south side of the channel fired upon the fleet as they were entering Manila bay, and the Nanshan passed through that fire. The Nanshan was in reserve during the action, within signaling distance. She had on board two 1-pounders, taken from the Olympia, with 360 rounds of ammunition for those guns; also 11 rifles from the Raleigh, and 11 revolvers, with a suitable amount of ammunition, and two boats rigged ready to lower to pick up men if it was found necessary to do so. The Nanshan was a heavy ship, being loaded to the underwriters' mark with coal.

"At the time and during the battle of Manila the Nanshan was between 4 and 5 miles of the Spanish fleet engaged in that action. She was within signaling distance of the fleet that effected the destruction of the Spanish vessels, but was not in such condition as to afford effective aid, her guns not being able to produce any effect upon the Spanish vessels; she was ordered to lay off in the bay, clear of the fleet; she could not have been brought within effective range, because her guns were too light."

Section 4614 (U. S. Comp. Stat. 1901, p. 3126) provides: "The term 'vessels of the Navy,' as used in this title, shall include all armed vessels officered and manned by the United States, and under the control of the Department of the Navy."

Section 4632 (U. S. Comp. Stat. 1901, p. 3133: "All vessels of the Navy within signal distance *of the vessel or vessels making [282] the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize; and in case of vessels not in the Navy, none shall be entitled to share except the vessel or vessels making the captures; in which term shall be included vessels present at and rendering actual assistance in the capture."

The court of claims held, on the facts, that the Nanshan was not at the time of the battle of Manila in such a condition as to enable her to render effective aid, if required: that she was performing the functions of a collier, to be protected instead of to act aggressively; that her crew had never been enlisted in the Navy, but had been employed simply to perform manual labor; that the two 1-pounders and the small arms she had on board were for purposes of defense rather than attack; that "she was not kept in the relation which she sustained to the engagement for strategic purposes, but for the purpose of protection to herself, and the incident protection of the rest of the fleet as the source of their coal supply;" and that she could not participate in prize money awarded under § 4632 (U. S. Comp. Stat. 1901, p. 3133).

By the 5th clause of § 4631 (U. S. Comp. Stat. 1901, p. 3133), which treats of the distribution of prize money, after certain deductions the remainder is to be distributed "among all others doing duty on board, including the fleet captain, and borne upon the books of the ship, in proportion to their respective rates of pay in the service;" and under § 1569 (U. S. Comp. Stat. 1901, p. 1078) the pay to petty officers, seamen, and others must be fixed by the President. The court of claims further decided that as interveners were shipped and not enlisted, and their pay had not been fixed by the President, but was a matter of agreement with the officer who shipped them, this furnished an additional reason for holding that they were not entitled to share in the prize money.

It is agreed that the decision as to the Nanshan determines the case of the Zafiro.

The district court adjudged "that the Nanshan and Zafiro, not participating in any of said captures, and not being armed vessels of the United States within signal distance of the vessel or vessels making the capture, under such circumstances and in *such conditions as to be able to render ef- [283] fective aid, if required, are not entitled to share in any of the prize property."

Notwithstanding the ingenious argument on behalf of the intervention, we are [illegible]

able to arrive at any different conclusion, and to hold that the Nanshan and Zafiro were part of the fighting force of the Navy in the battle, or present under such circumstances and in such condition as to be able to render effective aid in that engagement, as prescribed by the statute. They participated neither actually nor constructively in the captures.

The rights to share of the commissioned officers and enlisted men of the United States Navy on board these two vessels depend on other considerations.

*The decree of the Supreme Court of the District of Columbia on the intervening libel is affirmed.* The decree on the libel is *reversed* and the cause remanded, with directions to enter a decree in accordance with this opinion.

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UNITED STATES, *Appt.*,
*v.*
HENRY C. TAYLOR, Rear Admiral, United States Navy, etc.†

(See S. C. Reporter's ed. 283-291.)

*Prize—property appropriated to government use—vessel raised in unsuccessful attempt to save—outfit of destroyed vessel.*

1. An enemy's war vessel, raised and floated after a naval engagement, in an attempt by the United States, with the advice and concurrence of the captors, to save her, but which by reason of the injuries received in action was lost in an endeavor to reach the nearest practicable point at which she could be reconstructed, was not appropriated to the use of the United States so as to be lawful prize of war for the benefit of the captors, under U. S. Rev. Stat. § 4625 (U. S. Comp. Stat. 1901, p. 3130), but such captors are entitled to bounty under § 4635 (U. S. Comp. Stat. 1901, p. 3134), for her destruction in the engagement.
2. The entire equipment of a vessel of war, including everything necessary to be used for the purposes of the vessel, is included in the words, "ship or vessel of war belonging to an enemy," as used in the provisions for bounty made by U. S. Rev. Stat. § 4635 (U. S. Comp. Stat. 1901, p. 3134), and is, therefore, not the subject of condemnation as prize of war.

[No. 273.]

*Argued October 27, 28, 1902. Decided February 23, 1903.*

APPEAL from the Supreme Court of the District of Columbia to review a decree of condemnation entered by that court sitting as a District Court of the United States in admiralty on a libel in prize. *Reversed* and remanded, with directions to dismiss the libel.

Statement by Mr. Chief Justice Fuller:

*This is an appeal from a decree of the [284] supreme court of the District of Columbia, sitting as a district court of the United States in admiralty, on a libel in prize filed by William T. Sampson, Rear Admiral, United States Navy, in behalf of himself and the officers and men of the naval force on the North Atlantic station who took part in the naval engagement off Santiago. During the pendency of the appeal in this court Admiral Sampson died, and, his death being suggested, Admiral Henry C. Taylor was substituted by direction of the court. 187 U. S. 436, *ante*, 248, 23 Sup. Ct. Rep. 216.

The engagement took place July 3, 1898, when the Spanish fleet, consisting of the Infanta Maria Teresa, Cristobal Colon, Viscaya, Almirante Oquendo, and the torpedo boats Furor and Pluton, which had been lying in the harbor of Santiago, made a sortie and attempted to force its way past the American fleet then blockading the port. None of the Spanish vessels were afloat at the close of the action. The least injured was the Cristobal Colon, which was sunk by her commander, and lay nearly on her beam ends. The vessel in the next best condition was the Infanta Maria Teresa, whose bottom had been pierced by a point of rock, while she was completely burned out above the protective deck. She lay nearly upright, being submerged to about her normal waterline aft, and a little less than this forward.

On July 6, 1898, a board of eight officers was designated by Admiral Sampson, the commander-in-chief, to make "a thorough examination of the condition of the wrecked Spanish vessels," and to consider and report on the possibility of saving any of them. July 13, 1898, the board reported that it was "possible and desirable to float the Infanta Maria Teresa," *and as to the [285] Cristobal Colon, "that if the weather continues favorable the probabilities are good for saving the vessel."

July 6, 1898, a contract was entered into between the Merritt-Chapman Derrick Wrecking Company and the United States, stating in its preamble that the United States was "desirous of raising and saving as many as possible of the Spanish vessels composing the fleet of Admiral Cervera," and providing that the contractors should, upon "arriving at the scene of the wreck of the Cristobal Colon, at once begin the work of raising that vessel," with so much of her armament, stores, etc., as it might be possible to recover, the vessel and appurtenances, if so required by the United States, to be transported to the Navy yard at Norfolk, Virginia. The contract further stated: "Inasmuch as it is believed that the Cristobal Colon is the least damaged of all the Spanish vessels above referred to, the party of the first part will endeavor to float her, and in case of success in that undertaking, or if it should, in the judgment of the senior United States naval officer present, be impossible to save that vessel, or if, in his

† This case is reported by the Official Reporter under the title of "The Infanta Maria Teresa."

NOTE.—*As to what is lawful prize of war*—see note to The Mary & Susan, 4 L. ed. U. S. 32.

judgment, during the work on the Cristobal Colon, it should be practicable to devote any time, attention, or labor to the saving of any of the other of the said vessels, then the party of the first part shall do all in its power towards the accomplishment of that end," etc. And further: "An officer of the Navy, to be designated by the commander-in-chief, and at all times subject to his orders, under the direction of the Secretary, shall be present at the scene of the work as the department's representative, to supervise and inspect the operations under this contract; and the party of the first part shall subsist such officer on board its vessel during the performance of such work and until the return to the Navy yard at Norfolk, if so required."

Soon after the report of the board convened by Admiral Sampson, the contractors began work on the Colon, and on July 29, 1898, a supplemental contract was made in regard to the work on that vessel. The operations were carried on for some time for the purpose of raising and floating both the Colon and the Teresa, but work on the Colon was stopped on or about August 31, [286] 1898, and the efforts were concentrated *on the Teresa, which was finally floated September 23, and reached Guantanamo, September 24. She there received certain temporary repairs, and on October 29, 1898, started for Norfolk, Virginia, convoyed by the U. S. S. Leonidas, and in tow of the United States repair ship Vulcan, and the wrecking tug Merritt, also using her own steam as far as the condition of her engines permitted. She was in charge of the wrecking company, but an officer of the Navy had charge of the government men and employees on board, at the request of the wreck master, to assist the company in taking the ship to Norfolk. On November 1 she encountered a severe storm, and, after some hours, being apparently in a sinking condition, she was cast off, and ultimately drifted on to Cat Island, where she struck on the rocks and became a hopeless wreck. The evidence showed that her inability to withstand the storm was because of injuries sustained in action. There was no contention as to negligence, and a naval court of inquiry made findings and a report to the effect that the ship was not prematurely abandoned, and that the abandonment was in nowise due to the fault or negligence of any officer of the Navy.

July 17, 1899, libellants filed a petition in the court of claims for bounty, under U. S. Rev. Stat. § 4635 (U. S. Comp. Stat. 1901, p. 3134), for the destruction of the Viscaya, Oquendo, Colon, Furor, and Pluton, which went to decree in their favor. 35 Ct. Cl. 578.

July 31, 1899, the libel in the present case was filed, setting forth that the Teresa, and all property taken from her, as well as that taken from the Colon and other sunken vessels, were prize of war, and had been appropriated to the use of the United States. The libel averred that the Teresa, "after being taken for and appropriated to the use of the United States, and while in the possession of the United States, under the control of the Secretary of the Navy, being in charge of contractors employed by him," was abandoned at sea, driven ashore, and finally abandoned, "and for that reason cannot be sent in for adjudication."

The district court entered a decree of condemnation, July 30, 1901, to the effect that the Infanta Maria Teresa and all the property taken from her and from the other vessels were lawful *prize of war, and direct- [287] ing, upon the ascertainment of their value, the amount should be deposited, subject to the further order of the court, and that libellants were entitled to receive a moiety thereof. This appeal was then taken.

*Mr.* **Charles C. Binney** and *Assistant Attorney General* **Hoyt** argued the cause and filed a brief for appellant.

For their contentions see their briefs as reported in *United States* v. *Dewey*, *ante*, 463.

*Mr.* **James H. Hayden** argued the cause, and, with *Mr. Joseph K. McCammon*, filed a brief for appellee:

The "Teresa" was captured *jure belli*.

1 Bouvier Law Dict. p. 284; 1 Standard Dict. p. 282; *The Grotius*, 8 Cranch, 456, 3 L. ed. 623, 9 Cranch, 368, 3 L. ed. 762; *The Atlanta*, 3 Wall. 425, *sub nom. The Weehawken* v. *The Atlanta*, 18 L. ed. 253.

The war between the United States and Spain continued until December 10, 1898, when the treaty of Paris was signed; and until then Cuba continued to be Spanish territory and hostile.

*Dooley* v. *United States*, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762.

By lying stranded on the beach near shore the vessel did not become Spanish property or Cuban property.

Story, Prize Courts, p. 29.

*Mr.* **William B. King** argued the cause, and, with *Mr. George A. King*, filed a brief for certain of the captors:

"Prize" is generally used as a technical term to express a legal capture.

*Miller* v. *The Resolution*, 2 Dall. 4, 1 L. ed. 264.

One exact precedent is found in this court.

*United States* v. *The Albemarle*, reported in *Swan* v. *United States*, 19 Ct. Cl. 51.

The cargo in prize is entirely separate from the vessel.

78 *Bales of Cotton*, 1 Low. Dec. 11, Fed. Cas. No. 12,679.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

After the engagement, the Teresa, as she lay shattered on the shore, was not in condition to be sent in for adjudication, and no survey and appraisement were thereupon had, nor was any sale directed by the commanding officer, as provided in § 4615, Revised Statutes (U. S. Comp. Stat. 1901, p. 3127); nor was the Teresa taken for, and appropriated to the use of the United States and the value deposited, under § 4624 (U. S. Comp. Stat. 1901, p. 3130); nor were proceedings for adjudication commenced un-

der § 4625 (U. S. Comp. Stat. 1901, p. 3130), until by this libel. But the attention of the government and of the commanding officer was directed from the first to the question of salvage. The commanding officer was of opinion that the Colon and the Teresa could both be raised and reconstructed, and the government was desirous that this should be done if possible. The proceedings to that end were conducted in perfect good faith, and there was no suggestion that by the attempt to save these ships the government was appropriating them or either of them to its use, within the intent and meaning of the statute. The government argues, and with great force, that the Teresa having been sunk and destroyed to such an extent that the naval force was powerless to save her by its own resources, her legal status as sunk or destroyed became fixed immediately after the engagement, and that nothing but bounty could be [288] *recovered. In *Dewey's Case* [188 U. S. 254, *ante*, 463, 23 Sup. Ct. Rep. 415], we ruled that this was applying too rigid a construction to the statute, and that, if an enemy's vessel of war, sunk in battle, was subsequently raised and reconstructed by the government, she might properly be adjudicated as prize, the result being to let in the captors for prize money after the expense and cost of reconstruction and refitting had been deducted.

But the facts in this case are wholly different. The Teresa was raised and floated, but she was lost before she reached the Norfolk Navy yard, which was the nearest practicable point at which she could be reconstructed.

We cannot concur in the view that the United States appropriated the Teresa to its own use within the meaning of the statute, by attempting, with the advice and concurrence of the captors, to save her, or by the mere act of raising, and as soon as she floated, for that was only a step in the effort at salvage, and until salvage was accomplished, she was not appropriated to use. And this is true of the Colon, though the effort to salve her was given up before she floated.

Libellant's counsel agree with counsel for the government that the question of prize or no prize must be determined as of the close of the engagement on July 3, 1898, but they contend that the Teresa was not sunk or destroyed as she lay stranded on the beach, and in her then condition could have been condemned as prize; that the Secretary of the Navy, in arranging to salve her, acted voluntarily, and "without the knowledge of the captors;" and that the latter, at least, yielded to his superior authority.

The statute makes no provision for adjudicating wrecks as prize. By § 4625 (U. S. Comp. Stat. 1901, p. 3130) proceedings may be had in respect of proceeds of property appraised and sold, in respect of the value of property appropriated to use, and in respect of property entirely lost or destroyed.

In this case there was no appraisal and sale; there was no appropriation to the use of the government in the meaning of the statute; the vessel had not been in condition to be sent in, and then been "entirely lost or destroyed."

And it must be remembered that the Teresa could never *have been raised and saved [289] by the captors alone. Yet her salvability seems to have been generally conceded. The commanding officer took no measures to have the wreck appraised and sold, but concurred with the government in the effort at salvage. In doing so he represented all who would have been interested if the ship had been saved, and while the chance of obtaining considerable prize money was quite good, no risk was run of losing bounty by taking that chance.

The government acted with due prudence in employing persons whose business it was to do such work, to raise and deliver the vessel at the Norfolk Navy yard. If no attempt had been made, the vessel would finally have gone to pieces where she lay.

Salvors are not held responsible for a loss when attempting salvage in good faith, and with reasonable judgment and skill (*The Laura*, 14 Wall. 336, *sub nom. Norcross* v. *The Laura*, 20 L. ed. 814), and we know of no reason why the government should be held to a more rigorous accountability, even if it could, in any case, be regarded from the standpoint of a mere salvor of the property of another.

Where a hostile vessel of war has been so far destroyed that she cannot be brought in by the naval force which reduced her to that condition, but she is raised, reconstructed, and appropriated to use by the government, the statute may be so construed as to permit the application of the doctrine of relation; but this case does not come within that view, and the claim for prize money in respect of the wreck itself is not sanctioned by the act of Congress. But libellants did not waive their right to bounty by seeking to recover prize money, and to bounty they are still entitled.

As to the property taken from the Teresa and the other wrecks, its disposition must follow the rule laid down in *United States* v. *Dewey*.

In our opinion the words "ship or vessel of war belonging to an enemy," as employed in § 4635 (U. S. Comp. Stat. 1901, p. 3134), covered armament, outfit, and appurtenances, including provisions, money to pay the crew or for necessary expenditures, everything necessary to be used for the purposes of the vessel, and as a vessel of war.

The grant of prize money and the grant of bounty were distinct *grants, and the ap- [290] plicable general rule ought not to be deprived of its force by particular exceptions.

*The decree is reversed*, without costs in this court, and the cause remanded, with a direction to dismiss the libel.

Mr. Justice **Brown**, with whom was Mr. Justice **Brewer**, dissenting:

I am unable to distinguish this case in principle from that of *United States* v. *Dewey*, just decided, 188 U. S. 254, *ante*, 463, 23 Sup. Ct. Rep. 415. In that case, the

vessels were sunk and partially destroyed, but were subsequently raised, hauled into the slip, sufficiently cleaned up and overhauled to put to sea for Hong Kong under their own steam. The repairs were completed at Hong Kong, and the vessels commissioned as a part of the Navy.

In the present case, the Infanta Maria Teresa was also sunk and partially destroyed, but was raised, taken to Guantanamo, temporarily repaired, a crew put on board, was started for a port in the United States under her own steam, and was subsequently lost in a gale of wind. All the operations connected with her raising and repair were conducted by contractors engaged by the Navy Department, and supervised by a board of that department.

I submit that the fact that the vessels in Manila bay were actually repaired and commissioned as vessels of the Navy, and the Infanta Maria Teresa was not, does not constitute a distinction in principle between the two cases; but the fact that in both cases the government elected to take possession of the vessels, and undertook to repair them for purposes of its own, is the turning point in the case. Had the vessels in Manila bay been abandoned after being raised, and before they were repaired temporarily, had the Infanta Maria Teresa been either abandoned or lost before reaching Guantanamo bay, or she had been there abandoned, I should have had no doubt that they could not either of them be considered as prizes of war. But the fact that, after being examined, the Maria Teresa was temporarily repaired at Guantanamo and sent to Norfolk, with a crew on board and under her [291] own steam, indicates clearly to my *mind that the government had elected to make the vessel its own property, and her subsequent loss was the loss of the government, and not of the captors. In fact, it is the election, and not the result of the election, which determines the ownership of the property.

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## MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Plff. in Err.*, *v.* ALPHONSINE McGREW.

(See S. C. Reporter's ed. 291-313.)

*Error to state court—Federal question—when raised in time—right specially set up or claimed.*

1. A Federal question first raised in a petition for rehearing in the highest state court is raised too late to confer jurisdiction upon the Supreme Court of the United States, where such petition was denied without opinion.
2. An averment in an answer in a suit by a divorced wife on a policy of insurance on her former's husband's life, that, by virtue of the Hawaiian laws and the decree of divorce thereunder, all her rights in such policy had passed to and become the property of her husband, is not the special assertion of a right or claim under the treaty with Hawaii, which is essential, under U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), to confer jurisdiction on the Supreme Court of the United States to review a judgment of a state court adverse to such right or claim.
3. A decision of a state court cannot be reviewed in the Supreme Court of the United States on the ground that by it full faith and credit were denied to an Hawaiian judgment, in violation of U. S. Const. art. 4, § 1, as carried out by U. S. Rev. Stat. § 905 (U. S. Comp. Stat. 1901, p. 677), where the judgment of the trial court was rendered prior to the act of April 30, 1900 (31 Stat. at L. 142, chap. 339), providing a government for Hawaii, and such contention was not brought to the attention of the highest state court in any form.

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

[No. 109.]

*Argued January 15, 16, 1903. Decided February 23, 1903.*

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the Superior Court of the City and County of San Francisco in favor of plaintiff in a suit on a policy of life insurance. *Dismissed.*

See same case below, 132 Cal. 85, 64 Pac. 103.

Statement by Mr. Chief Justice **Fuller**:

This is a writ of error to revise the judgment of the supreme court of the state of California, affirming a judgment of the superior court of the city and county of San Francisco in favor of Alphonsine McGrew and against the Mutual Life Insurance Company of New York. 132 Cal. 85, 64 Pac. 103.

*The action was brought on a policy of in- [292] surance payable to Alphonsine C. McGrew, and in the amended answer to the complaint the recovery of a decree of divorce was averred, and it was alleged: "That under and by virtue of the Hawaiian law in force at the time said decree of divorce was granted and now in force, it is provided: 'When a divorce is decreed for the adultery or other offense amounting thereto, of the wife, the husband shall hold her personal estate forever, and he shall hold her real estate so long as they shall live; and if he shall survive her, and there shall be issue of the marriage born alive, he shall hold her real estate for the term of his own life, as a tenant by the curtesy; provided that the court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her, as it may deem proper.' That under and by virtue of the foregoing provision of law, and decree of divorce, all rights of the said Alphonsine C. McGrew in and to said policy of insurance did pass to the said Henri Golden McGrew and become his absolute property, free and

clear of any claims of the said Alphonsine C. McGrew, plaintiff herein, whatsoever."

The amended answer also averred that after McGrew's death one Carter was duly appointed in Hawaii administrator of his estate; and as such administrator he commenced suit against the insurance company in a circuit court of Hawaii on the policy of insurance; recovered judgment October 15, 1895, for the full amount; that the supreme court of Hawaii affirmed the judgment, and subsequently denied an application for rehearing, and that the judgment was thereafter paid.

The trial court made findings of fact as follows:

"1. On the 14th day of September, 1892, this defendant made, executed, and delivered to Henri G. McGrew, a certain policy of insurance, being the same policy mentioned in the complaint herein, wherein and whereby the said defendant promised and agreed to pay unto the plaintiff, Alphonsine McGrew, the sum of five thousand dollars ($5,000.00), upon the death of the said Henri G. McGrew, during the continuance of said policy of insurance, provided said Alphonsine McGrew were living at the time of the death of said Henri G. McGrew, and [293] upon *acceptance of satisfactory proof of the death of said Henri G. McGrew, during the continuance of said policy.

"2. Henri G. McGrew died on the 22d day of October 1894, in Honolulu, Hawaiian islands, and said plaintiff survived him.

"3. Said Henri G. McGrew, upon said 14th day of September, 1892, and continuously and up to the time of his death, was a resident of, and domiciled in, the Hawaiian islands.

"4. On the 9th day of February, 1895, plaintiff presented to said defendant satisfactory proof of the death of said Henri G. McGrew, and demanded of said defendant the payment of the sum of five thousand ($5,000.00) dollars, under and in accordance with the terms of said policy of insurance, but defendant has never paid the same, or any part thereof.

"5. Subsequent to the said 14th day of September, 1892, and prior to the 8th day of February, 1894, the said Henri G. McGrew became of unsound mind, and thereafter, upon due proceedings had, Charles L. Carter, residing in the city of Honolulu, was duly appointed the guardian of the person and estate of said Henri G. McGrew, an incompetent person, and continued to hold such office of guardian at the time of the filing of the libel of divorce, and the proceedings thereunder hereinafter mentioned.

"6. On the 8th day of February, in the year 1894, Charles L. Carter, as guardian and on behalf of Henri G. McGrew, an incompetent person, filed in the circuit court of the first judicial circuit of the Republic of Hawaii, which said court has jurisdiction over said parties and over libels for divorce, a libel praying for a divorce from said plaintiff on the ground of her adultery; and thereafter, and on the 11th day of April, 1894, this plaintiff, being then a resident of, and domiciled in, said Hawaiian islands, appeared in said action and contested the same.

"7. On the 23d day of August, 1894, a decision was rendered, and on the 24th day of August, 1894, a decree was signed in said cause by the said circuit court, dissolving the bonds of matrimony theretofore existing between said Henri G. McGrew and this plaintiff, upon the ground of the adultery of this plaintiff.

"8. On the 5th day of April, 1894, this plaintiff left the Hawaiian *islands with the [294] intention of not returning to said islands, but of coming to the state of California and of making her home in, and permanently residing in, said state. And thereafter, and in due course of her voyage from the Hawaiian islands and in said month of April, this plaintiff arrived in the state of California, and with said intention above mentioned, thereupon took up her residence in, and made her home in, said state, and with said intention has ever since continuously remained in, and resided in, and made her home in, said state of California; and on the 23d and 24th days of August, 1894, was actually in, and residing in, said state, with the intention above mentioned of permanently residing and making her home in said state of California.

"9. Prior to said 5th day of April, 1894, this plaintiff had been excluded by said Charles L. Carter, as such guardian, from the home of said Henri G. McGrew, and was by him thereafter prevented from returning, and has ever since and until the death of said Henri G. McGrew been by him prevented from returning to the same, and was, on said 5th day of April, excluded from said home by said guardian.

"10. On said 5th day of April, 1894, this plaintiff had no home, and has never since had a home in the Hawaiian islands."

[Findings 11, 12, 13, 14, 16, and 17 referred to the filing of a bill of exceptions by Mrs. McGrew in the divorce suit, and the statute and rule of court of Hawaii in respect of the practice in relation thereto.]

"15. The following Hawaiian law was in force in the Hawaiian islands at the time said decree of divorce was granted, to wit: When a divorce is decreed for the adultery or other offense amounting thereto of the wife, the husband shall hold her personal estate forever."

And the court concluded, as matter of law, that the rights of Mrs. McGrew in and to the policy and the moneys due thereunder never passed to her husband, nor did the policy or money due thereunder ever become his property; and that the insurance company was indebted to Mrs. McGrew on said policy in the sum of $5,000 and interest. Judgment was rendered accordingly *October 11, [295] 1897, and the case was carried to the supreme court of the state, and the record filed therein December 13, 1897. The judgment was affirmed February 28, 1901, and a petition for rehearing denied. 132 Cal. 85, 64 Pac. 103. This writ of error was allowed by the chief justice of that court.

The supreme court of California held that

the construction given by the courts of the Republic of Hawaii to the statute of that Republic that permitted an action for a divorce to be maintained by the guardian of an incompetent person should be accepted, although such was not the law of California, and that the judgment of divorce rendered in that Republic, in pursuance of the statute so construed, should, by comity, be given effect by the courts of California as a decree of divorce; that the statute of Hawaii declaring that, where a divorce is decreed for the adultery of the wife, the husband shall take her personal estate, could have no operation pending the suit for divorce, and not until after the entry of judgment; that Mrs. McGrew was bound by the decree of divorce in Hawaii, so far as the dissolution of the bond of matrimony was concerned, she having appeared to the action; that when a husband commences a suit for divorce, the wife may acquire a separate actual domicil by change of residence from one country to another pending the suit; that Mrs. McGrew became domiciled in California prior to the entry of the decree, and that the statute of Hawaii declaring the forfeiture of her personal property to the husband could not operate in California to affect her, or to give to the husband a policy of insurance, which, by its terms, was payable to her, and which, at the time of the decree, was governed by the law of her domicil in California. No allusion whatever was made by the supreme court to the treaty between Hawaii and the United States.

The decisions of the supreme court of Hawaii are reported, *McGrew, a Person non compos, by his Guardian, Charles L. Carter*, v. *Alphonsine McGrew*, 9 Hawaii, 475; *McGrew, etc.*, v. *McGrew*, 10 Hawaii, 600; *Carter* v. *Mutual L. Ins. Co.* 10 Hawaii, 117, 559, 562.

In the opinion on the last hearing, De-
[296] cember 16, 1896, the *court observed: "The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits,—one by the administrator here, the other by the widow in California. It must now rely on the assumption that the two courts will take the same view of the law." The court also considered the point that the statute in question, § 1331 of the Civil Code, was repealed by implication by the married women's act of 1888. But it held that the section was not inconsistent with that act, and that it might "be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offense of adultery." And the court said that it was glad to know that the section had been repealed. Section 1331 was repealed May 12, 1896 (Hawaii Laws 1896, p. 70, act 24).

Article 8 of the treaty between the United States and the Kingdom of Hawaii was as follows:

"The contracting parties engage, in regard to the personal privileges, that the citizens of the United States of America shall enjoy in the dominions of his Majesty, the King of the Hawaiian islands, and the subjects of his said Majesty in the United States of America, that they shall have free and undoubted right to travel and to reside in the states of the two high contracting parties, subject to the same precautions of police which are practised towards the subjects or citizens of the most favored nations. They shall be entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind and description, . . . and their heirs or representatives, being subjects or citizens of the other contracting party, shall succeed to their personal goods, whether by testament or *ab intestato;* and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the heir and representative such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a *question should arise among several [297] claimants as to which of them said goods belonged, the same shall be decided finally by the laws and judges of the land wherein the said goods are. Where, on the decease of any person holding real estate within the territories of one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject," etc. 9 Stat. at L. 977.

*Messrs.* **Julien T. Davies and Frederic D. McKenney** argued the cause, and, with *Messrs. Edward Lyman Short, William H. Chickering*, and *Warren Gregory*, filed a brief for plaintiff in error:

The test of jurisdiction is, Was the mind of the state court directed to the fact that a right protected by treaty was relied upon?

*French* v. *Hopkins*, 124 U. S. 524, 31 L. ed. 536, 8 Sup. Ct. Rep. 589; *Brown* v. *Massachusetts*, 144 U. S. 579, 36 L. ed. 550, 12 Sup. Ct. Rep. 757; *Butler* v. *Gage*, 138 U. S. 61, 34 L. ed. 872, 11 Sup. Ct. Rep. 235; *Sayward* v. *Denny*, 158 U. S. 184, 39 L. ed. 942, 15 Sup. Ct. Rep. 777; *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 653, 41 L. ed. 1151, 17 Sup. Ct. Rep. 709.

The question is, Did the party bringing the case here intend to assert below a Federal right?

*Michigan Sugar Co.* v. *Dix*, 185 U. S. 113, 46 L. ed. 829, 22 Sup. Ct. Rep. 581.

This court has frequently taken jurisdiction where the judgment of a sister state is pleaded as *res judicata* in the state court, although no specification, in so many words, was made in the pleading that such judgment violates the faith and credit clause of the Constitution.

*Bell* v. *Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551.

The court has never required that the treaty or act of Congress under which the

party claims who brings the final judgment of a state court into review before this court should have been pleaded specially, or spread on the record.

*Hickie* v. *Starke*, 1 Pet. 98, 7 L. ed. 69.

This court has never held that the Federal question must appear in the record by direct language.

*Murray* v. *Charleston*, 96 U. S. 442, 24 L. ed. 761.

When a Federal question is necessarily involved in the state court's decision, this court has jurisdiction although the Federal right was not specifically called to the attention of the state court.

*Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Green Bay & M. Canal Co.* v. *Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97; *Roby* v. *Colehour*, 146 U. S. 153, 36 L. ed. 922, 13 Sup. Ct. Rep. 47; *Eureka Lake & Y. Canal Co.* v. *Yuba County Super. Ct.* 116 U. S. 410, 29 L. ed. 671, 6 Sup. Ct. Rep. 429; *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Furman* v. *Nichol*, 8 Wall. 44, 19 L. ed. 370; *Hickie* v. *Starke*, 1 Pet. 94, 7 L. ed. 67; *Martin* v. *Hunter*, 1 Wheat. 305, 4 L. ed. 97; *Craig* v. *Missouri*, 4 Pet. 410, 7 L. ed. 903; *New Orleans* v. *De Armas*, 9 Pet. 224, 9 L. ed. 109; *Crowell* v. *Randell*, 10 Pet. 368, 9 L. ed. 458.

If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words, "This paragraph of the Constitution is the one involved in this case."

*Proprietors of Bridges* v. *Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571.

The decision of the alleged Federal question was necessary to the judgment rendered, and hence gives jurisdiction.

*Brooks* v. *Missouri*, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; *Armstrong* v. *Athens County Treasurer*, 16 Pet. 281, 10 L. ed. 965.

It is sufficient if the trial court and state appellate court pass upon the Federal question, and such passing upon the question of itself suffices to present the Federal question, even if it had been otherwise ambiguously "raised on the record."

*Tullock* v. *Mulvane*, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372.

Raising the question on appeal is sufficient.

*Sweringen* v. *St. Louis*, 185 U. S. 45, 46 L. ed. 799, 22 Sup. Ct. Rep. 569.

A treaty and constitutional right "may be denied as well by evading a direct decision thereon as by positive action."

*Chapman* v. *Goodnow*, 123 U. S. 540, *sub nom. Chapman* v. *Crane*, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Des Moines Nav. & R. Co.* v. *Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

Raising the Federal question for the first time in the appellate state court, if it be there considered or necessarily involved in the decision, gives the right of review in this court.

*Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Maxwell* v. *Newbold*, 18 How. 511, 15 L. ed. 506; *Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Rothschild* v. *Knight*, 184 U. S. 339, 46 L. ed. 579, 22 Sup. Ct. Rep. 391; *King* v. *Cross*, 175 U. S. 396, 44 L. ed. 211, 20 Sup. Ct. Rep. 131; *Chicago, R. I. & P. R. Co.* v. *Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

If the mind of the state court is directed to the fact that a right protected by the treaty is relied upon, it is sufficient.

*Eastern Bldg. & L. Asso.* v. *Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531.

If the Federal question was raised for the first time by a petition for rehearing, this court has jurisdiction, provided the state court in denying the petition for rehearing noticed the Federal question and passed upon it.

*Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730.

*Mr.* **J. Hubley Ashton** argued the cause for defendant in error.

*Messrs. Richard Bayne* and *H. G. Platt* filed a brief for defendant in error:

There is no Federal question in this case, because plaintiff in error did not claim in or for itself any right under the treaty.

*Owings* v. *Norwood*, 5 Cranch, 344, 3 L. ed. 120; *Verden* v. *Coleman*, 1 Black, 472, 17 L. ed. 161; *Henderson* v. *Tennessee*, 10 How. 323, 13 L. ed. 439; *Hale* v. *Gaines*, 22 How. 160, 16 L. ed. 269; *Giles* v. *Little*, 134 U. S. 650, 33 L. ed. 1064, 10 Sup. Ct. Rep. 623; *Tyler* v. *Registration Court Judges*, 179 U. S. 407, 45 L. ed. 253, 21 Sup. Ct. Rep. 206.

The distinction between cases arising under the 1st and 2d clause of § 709, and those arising under the 3d clause of said section, must be kept in mind in considering the decisions upon this section.

*Tyler* v. *Registration Court Judges*, 179 U. S. 408, 45 L. ed. 253, 21 Sup. Ct. Rep. 206; *Columbia Water Power Co.* v. *Columbia Electric Street R. Light & P. Co.* 172 U. S. 488, 43 L. ed. 525, 19 Sup. Ct. Rep. 247; *Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 14, 45 L. ed. 404, 21 Sup. Ct. Rep. 240.

A Federal question under the 3d clause cannot be raised by inference or implication.

*F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 655, 41 L. ed. 1151, 17 Sup. Ct. Rep. 709; *Green Bay & M. Canal Co.* v. *Patten Paper Co.* 172 U. S. 67, 43 L. ed. 368, 19 Sup. Ct. Rep. 97.

The proper time and the proper way for setting up this right is in the trial court.

*Spies* v. *Illinois*, 123 U. S. 181, 31 L. ed. 91, 8 Sup. Ct. Rep. 21; *Baldwin* v. *Kansas*, 129 U. S. 57, 32 L. ed. 642, 9 Sup. Ct. Rep. 193; *Miller* v. *Texas*, 153 U. S. 538, 38 L. ed. 813, 14 Sup. Ct. Rep. 874; *Parmelee* v. *Lawrence*, 11 Wall. 39, 20 L. ed. 49.

It cannot be first set up in the argument in the state supreme court.

*Baldwin* v. *Kansas*, 129 U. S. 57, 32 L. ed. 642, 9 Sup. Ct. Rep. 193; *Zadig* v. *Baldwin*, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639; *Sayward* v. *Denny*, 158 U. S. 183, 39 L. ed. 942, 15 Sup. Ct. Rep. 777; *Parmelee* v. *Lawrence*, 11 Wall. 39, 20 L. ed. 49.

The briefs in the state supreme court are not a part of the record.

*Sayward* v. *Denny*, 158 U. S. 183, 39 L. ed. 942, 15 Sup. Ct. Rep. 777; *Loeb* v. *Columbia Twp.* 179 U. S. 485, 45 L. ed. 289, 21 Sup. Ct. Rep. 174.

The same rule applies to the petition for rehearing, unless the state court considers and decides the Federal question raised therein.

*Capital Nat. Bank* v. *First Nat. Bank*, 172 U. S. 431, 43 L. ed. 504, 19 Sup. Ct. Rep. 202; *Mallett* v. *North Carolina*, 181 U. S. 592, 45 L. ed. 1017, 21 Sup. Ct. Rep. 730.

By analogy we may refer to the decisions under § 5 of the judiciary act of March 3, 1891, providing for writs of error from the district or circuit courts in any case involving the construction or application of any law of the United States.

*Western U. Teleg. Co.* v. *Ann Arbor R. Co.* 178 U. S. 243, 44 L. ed. 1054, 20 Sup. Ct. Rep. 867; *Ansbro* v. *United States*, 159 U. S. 697, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Muse* v. *Arlington Hotel Co.* 168 U. S. 435, 42 L. ed. 532, 18 Sup. Ct. Rep. 109.

This court has repeatedly held that it will take jurisdiction only when a Federal question was actually raised and decided, not when it simply might have been raised.

*Maxwell* v. *Newbold*, 18 How. 511, 15 L. ed. 506; *Crowell* v. *Randell*, 10 Pet. 368, 9 L. ed. 458; *Brown* v. *Colorado*, 106 U. S. 95, 27 L. ed. 132, 1 Sup. Ct. Rep. 175; *Hagar* v. *California*, 154 U. S. 639, and 24 L. ed. 1044, 14 Sup. Ct. Rep. 1186; *Chouteau* v. *Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340.

The mere pleading of a judgment of another state, without specially setting up the right claimed under article 4 of the Constitution, is not sufficient.

*Jacobs* v. *Marks*, 182 U. S. 583, 45 L. ed. 1241, 21 Sup. Ct. Rep. 865.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Appellate jurisdiction was conferred on this court by the 25th section of the judiciary act of 1789, over final judgments and decrees in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, in three classes of cases: The first class was where the validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question, and the decision was against their validity; the second was where the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, was drawn in question, and the decision was in favor of their validity; and the third was "or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party under such clause of the said Constitution, treaty, statute, or commission." 1 Stat. at L. 73, 85, chap. 20, § 25.

By the 2d section of the act of February 5, 1867 (14 Stat. at L. 385, 386, chap. 28), the original 25th section was re-enacted with certain changes, and, among others, the words just quoted were made to read: "Or where any title, right, privilege, *or immu- [308] nity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority." And this was reproduced in § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). The change from the drawing in question of the construction of a clause of the Constitution, or of a treaty, statute, or commission, to the claim of a right under the Constitution, treaty, statute, commission, or authority, emphasized the necessity that the right must be specially set up and denied.

In *Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503, the distinction between the denial of validity and the denial of a title, right, privilege, or immunity specially set up or claimed, is pointed out, as well as the distinction, between the construction of a statute or the extent of an authority and the validity of a statute or of an authority.

Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in § 709 (U. S. Comp. Stat. 1901, p. 575), and it is thoroughly settled that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised. *Spies* v. *Illinois*, 123 U. S. 131, *sub nom. Ex parte Spies*, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Jacobi* v. *Alabama*, 187 U. S. 133, *ante*, 106, 23 Sup. Ct. Rep. 48; *Layton* v. *Missouri*, 187 U. S. 356, *ante*, 214, 23 Sup. Ct. Rep. 137; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605.

The proper way is by pleading, motion, exception, or other action, part, or being

made part, of the record, showing that the claim was presented to the court. *Loeb* v. *Columbia Twp.* 179 U. S. 472, 481, 45 L. ed. 280, 21 Sup. Ct. Rep. 174. It is not properly made when made for the first time in a petition for rehearing after judgment; or in the petition for writ of error; or in the briefs of counsel not made part of the record. *Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Zadig* v. *Baldwin*, 166 U. S. 488, 41 L. ed. 1088, 17 Sup. Ct. Rep. 639. The assertion of the right must be made unmistakably, and not left to mere inference. *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

If the highest court of a state entertains a petition for rehearing, which raises Federal questions, and decides them, that will be sufficient (*Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. [309] 730); or *if the court decides a Federal question which it assumes is distinctly presented to it in some way. *Home for Incurables* v. *New York*, 187 U. S. 155, *ante*, 117, 23 Sup. Ct. Rep. 84; *Sweringen* v. *St. Louis*, 185 U. S. 46, 46 L. ed. 799, 22 Sup. Ct. Rep. 569.

Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this cannot be made out by resort to judicial knowledge. *Powell* v. *Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Mountain View Min. & Mill. Co.* v. *McFadden*, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488; *Arkansas* v. *Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47.

Counsel by their specification of errors, under rule 21, assert the Federal questions to be that the decision of the supreme court of California was against a title, right, privilege, or immunity claimed by plaintiff in error under the treaty between the United States and Hawaii. And that the decision was in contravention of § 1 of article 4 of the Constitution.

1. We do not find that any claim under the treaty was made in the trial court, and the rule of practice of the supreme court of California is that it will not pass on questions raised for the first time in that court, and which might and should have been raised in the trial court. *Stoddard* v. *Treadwell*, 29 Cal. 281; *King* v. *Meyer*, 35 Cal. 646; *Deady* v. *Townsend*, 57 Cal. 298; *Williams* v. *McDonald*, 58 Cal. 527; *Anderson* v. *Black*, 70 Cal. 226, 231, 11 Pac. 700.

Neither the pleading of the decree of divorce nor of the statute of Hawaii providing for the forfeiture of Mrs. McGrew's rights in the policy of insurance, as construed by the supreme court of Hawaii, nor of both together, amounted to specially asserting any right under the treaty. Those averments did not assert that claim in the trial court in such manner as to bring it to the attention of that court, nor, indeed, to show that any right under the treaty was present in the mind of counsel.

To give them that effect would be in the teeth of our decision in *F. G. Oxley Stave Co.* v. *Butler County*, and numerous other decisions. That case involved a decree, in respect of which there was a general allegation that it was *rendered against dead per- [310] sons, as well as in the absence of necessary parties who had no notice of the suit; and we held that such general allegations did not meet the statutory requirement that the final judgment of a state court may be reexamined here if it denies some title, right, privilege, or immunity "specially set up or claimed" under the Constitution or authority of the United States. Mr. Justice Harlan said: "This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the circuit courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. . . . Upon like grounds, the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right."

This also disposes of the suggestion that the offering in evidence of the judgment in the suit by the administrator, and of evidence of its payment, raised a Federal question under the treaty, for no such ground was taken in relation to that evidence, to say nothing of the fact that Mrs. McGrew was not a party to that suit.

In the bill of exceptions there is an enumeration of certain objections to the entry of judgment and certain errors of law alleged to have occurred during the trial, and to have been excepted to by defendant, which embraces the objection that the decision of the trial court was against law, because, among other things, the findings of fact did not determine the issues raised by the allegation in the answer quoted in the statement preceding this opinion, and that the court erred in sustaining the objection of plaintiff to the introduction of evidence of payment by the company to the administrator of the amount due on the policy. But there is no reference to the treaty, and all this no more set up the claim than the answer itself.

In fact, the question was not even raised in the supreme *court, though, if so, the [311] court was not then bound to regard it. Reference was made in the briefs in the supreme court to the treaty, but those references did not specially set up or claim any right as secured by the treaty, nor were the briefs made part of the record by any certificate or entry duly made, and our attention has not been called to any statute or rule of court in California making them such.

In the petition for rehearing it was said

that the treaty made the decision in *Carter v. Mutual L. Ins. Co.* controlling, and if that could be considered as a compliance with § 709 (U. S. Comp. Stat. 1901, p. 575), which we do not think it could, it came too late, and the petition was denied without an opinion. In doing so that court adhered to the usual course of its judgments, and its action cannot be revised by us. If the supreme court of California had seen fit on that petition to entertain the contention of plaintiff in error as asserting a Federal right, and had then decided it adversely, the case would have occupied a different position.

Where a state court refuses to give effect to the judgment of a court of the United States, rendered upon a point in dispute, and with jurisdiction of the case and the parties, it denies the validity of an authority exercised under the United States; and where a state court refuses to give effect to the judgment of a court of another state it refuses to give full faith and credit to that judgment. The one case falls within the first class of cases named in § 709 (U. S. Comp. Stat. 1901, p. 575), and the other within the third class.

Where a judgment of another state is pleaded in defense, and issue is made upon it, it may well be ruled that that sets up a right under the 3d subdivision, because the effect of the judgment is the only question in the case; but here the plea of the decree of divorce and the statute did not necessarily suggest or amount to a claim under the treaty. They were properly admitted in evidence under the state law for what they might be worth as a defense, but that did not involve the assertion of an absolute right under the treaty.

The supreme court of Hawaii in its second opinion in the administrator's case said that the company, not having brought Mrs. McGrew in by interplea, must rely on the [312] courts of California taking the same view that the courts of Hawaii did, but did not intimate that the courts of California were compelled by treaty to take that view.

Nor can this failure to claim under the treaty be supplied by judicial knowledge. We so held in *Mountain View Min. & Mill. Co. v. McFadden*, 180 U. S. 533, 45 L. ed. 656, 21 Sup. Ct. Rep. 488, where we ruled that judicial knowledge could not be resorted to to raise controversies not presented by the record; and Professor Thayer's Treatise on Evidence was cited, in which, referring to certain cases relating to the pleadings and matters of record, it was said "that the right of a court to act upon what is, in point of fact, known to it must be subordinate to those requirements of form and orderly communication which regulate the mode of bringing controversies into court, and of stating and conducting them." *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 190, 46 L. ed. 147, 22 Sup. Ct. Rep. 49.

That rule must necessarily govern us in passing on the question of our appellate jurisdiction under § 709 (U. S. Comp. Stat. 1901, p. 575).

The supreme court of California held that the Hawaiian statute had no force in California "except by comity;" accorded full effect to the decree of divorce as dissolving the bond of matrimony, but decided that Mrs. McGrew was not affected by the statute because she was not domiciled in Hawaii, and was domiciled in California, when that decree was rendered, and when the statute could have operated if she had been domiciled in Hawaii, and that the statute "had no operation upon her or her personal property here; for the law which governs personal property is the law of the domicil." As to whether a Federal question was involved at all, see *Roth v. Ehman*, 107 U. S. 319, 27 L. ed. 499, 2 Sup. Ct. Rep. 312; *Roth v. Roth*, 104 Ill. 35, 44 Am. Rep. 81; Württemburg Treaty, 1844 (8 Stat. at L. 588), Comp. Treaties (1899) 656.

It is argued that by the judgment against the company in favor of McGrew's administrator, the Hawaiian courts had adjudicated that Mrs. McGrew's title passed to the administrator. But Mrs. McGrew was not a party to that action, and was not bound by it, so that it could be pleaded against her. The insurance company did not litigate the question of ownership on her behalf, and was in no way authorized to represent her. [313] In any point of view we return to the contention that it was in virtue of the treaty that the California courts were obliged to accept the Hawaiian decisions, and the record fails to show that a right or title was set up thereunder.

2. The second question indicated by plaintiff in error is that the decision was in conflict with § 1 of article 4 of the Constitution, providing that full faith and credit in each state shall be given to the public acts, records, and public proceedings of every other state, as carried out by § 905 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 677), because it is insisted that prior to the decision this constitutional provision applied to Hawaii, and should be regarded as an enlargement of and connected with the alleged claim of right under the treaty. But an alleged right under a treaty between two foreign nations is inconsistent with an alleged right arising under the Federal Constitution, and as a right under the Constitution it was not at any time or in any way brought to the attention of the state courts. The judgment of the trial court was rendered October 11, 1897. The resolutions of annexation were passed July 7, 1898. The act to provide a government for Hawaii was passed April 30, 1900 [31 Stat. at L. 142, chap. 339]. By this act it was provided that the laws of Hawaii, not inconsistent with the Constitution and laws of the United States, or the provisions of the act, should remain in force, subject to repeal or amendment, but the act forfeiting the wife's property was repealed May 12, 1896. Hawaii Laws 1896, p. 70.

The judgment of the supreme court of California was rendered February 28, 1901, and we cannot retain jurisdiction on the ground of the assertion of a Federal right which did not exist when the judgment was rendered in the trial court, and which was

not brought to the attention of the highest court of the state in any way whatever.

*Writ of error dismissed.*

Mr. Justice **Peckham** took no part in the consideration and disposition of this case.

Mr. Justice **White** dissented.

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314]*JOHN D. HOOKER and A. E. Pomeroy, *Plffs. in Err.*,

*v.*

CITY OF LOS ANGELES.

(See S. C. Reporter's ed. 314-321.)

*Error to state court—Federal question—claims under Spanish and Mexican grants—construction of state statute—Federal rights specially set up or claimed.*

1. A decision of a state court adverse to the claim that, under Mexican and Spanish grants confirmed and patented under the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), the owners of the land were entitled to riparian rights and subterranean waters, involves no Federal question reviewable in the Supreme Court of the United States, where the validity of such act was not drawn in question.
2. The construction by a state court of a law of the state as authorizing the court to try and determine in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court of the United States on writ of error to that court.
3. A decision of a state court in condemnation proceedings is not reviewable in the Supreme Court of the United States on the theory that due process of law was denied thereby, or property taken without just compensation, where there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument.

[No. 149.]

*Argued January 23, 1903. Decided February 23, 1903.*

IN ERROR to the Supreme Court of the State of California to review a judgment affirming a judgment of the Superior Court of the County of Los Angeles in favor of the City of Los Angeles in a condemnation proceeding. *Dismissed.*

See same case below, 124 Cal. 597, 57 Pac. 585.

Statement by Mr. Chief Justice **Fuller**:

This is a writ of error to the supreme court of the state of California to review a judgment of that court affirming the judgment of the superior court of the county of Los Angeles, California, in favor of the city of Los Angeles, and against Hooker and Pomeroy. The city brought suit against Hooker and Pomeroy, to condemn all their "estate, right, title, and interest" in and to certain tracts of land, described in the complaint, for the purpose of enabling the city "to construct and maintain thereon the 'headworks' of its projected system for supplying water to its inhabitants for private and municipal purposes." All questions except the amount of compensation to be awarded were by stipulation tried by the court. The jury returned a verdict awarding $23,000 as the value "of an estate in fee simple in the lands described in the complaint, including all their elements of value, subject to the paramount right of the city of Los Angeles to take from the Los Angeles river, from time to time, all the water that may be needed at such time for the use of the inhabitants of said city, and for all municipal and public uses and purposes therein," and $2,000 as damages to the remaining *portion of the tract of which that[315] land formed a part. Judgment was rendered thereon for the amount so found, and costs. The case was carried to the supreme court, and the judgment affirmed. 124 Cal. 597, 57 Pac. 585.

*Mr.* **J. S. Chapman** argued the cause, and, with *Messrs. John Garber, R. H. F. Variel*, and *J. G. North*, filed a brief for plaintiffs in error:

The claim set up in the answer, of the rights of a riparian owner, and the ownership of the percolating waters in these lands, derived from the patent of the United States, as well as from the confirmed Mexican grants, presented a Federal question, and, the decision being against that right, this court has jurisdiction.

*Packer* v. *Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 46 L. ed. 800, 22 Sup. Ct. Rep. 563; *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Washougal & L. Transp. Co.* v. *Dalles, P. & A. Nav. Co.* 27 Wash. 490, 68 Pac. 74.

Whether the proceedings in this case did result in taking the property of the plaintiffs in error without just compensation is a Federal question. This court has established the proposition that taking private property for a public use without just compensation does deprive the party of his property without due process of law.

*Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

It is quite sufficient if it appear that the Federal question arose and was necessarily decided.

*Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Harris* v. *Den-*

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*sie*, 3 Pet. 292, 7 L. ed. 683; *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379.

No one can make a specific claim to the protection of the Constitution of the United States, or any act of Congress, or any treaty made by or under the authority of the United States, in the pleadings, under the law of California.

*Green* v. *Palmer*, 15 Cal. 411, 76 Am. Dec. 492; *Druex* v. *Domec*, 18 Cal. 88; *Smith* v. *Richmond*, 19 Cal. 483; *Bowen* v. *Aubrey*, 22 Cal. 566; *Guy* v. *Washburn*, 23 Cal. 112; *Willson* v. *Cleaveland*, 30 Cal. 200; *Bruck* v. *Tucker*, 42 Cal. 351.

The prohibition of the 14th Amendment of the Constitution of the United States against depriving one of his property without due process of law is not limited to the action of the state through its legislature.

*Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

*Messrs.* **John F. Dillon** and **J. R. Scott** argued the cause, and, with *Messrs. Henry T. Lee, Harry Hubbard*, and *John M. Dillon*, filed a brief for defendant in error:

Inasmuch as the question whether the condemnation statute of California is in conflict with the Federal Constitution was not raised in either the trial court or the state supreme court, and was not passed upon by either of those courts, there is no jurisdiction in this court to review the judgment of the supreme court of California.

*Chicago & N. W. R. Co.* v. *Chicago*, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; *Eastern Bldg. & L. Asso.* v. *Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Hamilton Mfg. Co.* v. *Massachusetts*, 6 Wall. 632, 18 L. ed. 904; *Scudder* v. *Coler*, 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120; *Erie R. Co.* v. *Purdy*, 185 U. S. 148. 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Michigan Sugar Co.* v. *Dix*, 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Parmelee* v. *Lawrence*, 11 Wall. 36, 20 L. ed. 48; *Chapin* v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Lawler* v. *Walker*, 14 How. 149, 14 L. ed. 364; *Miller* v. *Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Caldwell* v. *Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Chemical Nat. Bank* v. *City Bank*, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; *Morrison* v. *Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *O'Neil* v. *Vermont*, 144 U. S. 358, 36 L. ed. 465, 12 Sup. Ct. Rep. 693; *Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Levy* v. *San Francisco City & County Super. Ct.* 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; *Louisville & N. R. Co.* v. *Louisville*, 166 U. S. 709, 41 L. ed. 1173, 17 Sup. Ct. Rep. 725; *Powell* v. *Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Connecticut ex rel. New York & N. E. R. Co.* v. *Woodruff*, 153 U. S. 689, 38 L. ed. 869, 14 Sup. Ct. Rep. 976.

The claim of a Federal question was not even raised in the petition for rehearing in the state supreme court, although had it there been made, it would have been too late.

Foster, Fed. Pr. 3d ed. 1187, Notes 44, 47; *Turner* v. *Richardson*, 180 U. S. 87, 45 L. ed. 438, 21 Sup. Ct. Rep. 295; *Caldwell* v. *Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Miller* v. *Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570.

A Federal question cannot be raised for the first time in the assignment of errors in the United States Supreme Court.

*Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Chapin* v. *Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Ansbro* v. *United States*, 159 U. S. 695, 40 L. ed. 310, 16 Sup. Ct. Rep. 187; *Claassen* v. *United States*, 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169.

The petition for a writ of error forms no part of the record.

*Clark* v. *Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 2, 113; *Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577.

The findings of fact and the verdict of the jury as to the amount of compensation for property taken, and as to the amount of damages to property not taken, are conclusive, provided no erroneous rule was laid down by the court or adopted by the jury in arriving at such amounts; and no Federal question is raised thereby, or is presented to or decided by the state courts.

*Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Jenkins* v. *Neff*, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905.

If plaintiffs in error, having the opportunity, did not comply with the state practice in making objections and taking exceptions in such manner as to authorize the state supreme court to reverse the judgment, the United States Supreme Court will not take jurisdiction to consider alleged errors in the trial court which could not have been passed upon by the state supreme court under the practice prevailing there.

*Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Miller* v. *Texas*, 153 U. S. 535, 38 L. ed. 812, 14 Sup. Ct. Rep. 874; *Duncan* v. *Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Chemical Nat. Bank* v. *City Bank*, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; *Morrison* v. *Watson*, 154 U. S. 111, 38 L. ed. 927, 14 Sup. Ct. Rep. 995; *O'Neil* v. *Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693; *Northern P. R. Co.* v. *Ellis*, 144 U. S. 458, 36 L. ed. 504, 12 Sup. Ct. Rep. 724;

*Brown* v. *Massachusetts*, 144 U. S. 573, 36 L. ed. 546, 12 Sup. Ct. Rep. 757; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Baldwin* v. *Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193; *Chappell* v. *Bradshaw*, 128 U. S. 132, 32 L. ed. 309, 9 Sup. Ct. Rep. 40; *Backus* v. *Ft. Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

An appeal to the jurisdiction of this court must not be a mere afterthought.

*Scudder* v. *Coler*, 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Bolln* v. *Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287.

It has always been held necessary that the record, taken in conjunction with the opinion of the state supreme court or the certificate of that court or of its chief justice, should show clearly and distinctly that a Federal question was raised in the state court, and was, either expressly or impliedly, decided by that tribunal.

*Eastern Bldg. & L. Asso* v. *Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *Lawler* v. *Walker*, 14 How. 149, 14 L. ed. 364; *Hamilton Mfg. Co.* v. *Massachusetts*, 6 Wall. 632, 18 L. ed. 904; *Chicago & N. W. R. Co.* v. *Chicago*, 164 U. S. 454, 41 L. ed. 511, 17 Sup. Ct. Rep. 129; *Proprietors of Bridges* v. *Hoboken Land & Improv. Co.* 1 Wall. 143, 17 L. ed. 576; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Michigan Sugar Co.* v. *Dix*, 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581; *Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 46 L. ed. 171, 22 Sup. Ct. Rep. 120.

The right claimed by the plaintiffs in error, derived through Spanish and Mexican grants confirmed and patented by the United States, is not a Federal question.

*Chrystal Springs Land & Water Co.* v. *Los Angeles*, 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; *Kennedy* v. *Hunt*, 7 How. 590, 12 L. ed. 831; *Eldridge* v. *Trezevant*, 160 U. S. 452, 40 L. ed. 490, 16 Sup. Ct. Rep. 345; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Williams* v. *Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Packer* v. *Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; *St. Louis* v. *Myers*, 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; *St. Louis* v. *Ruts*, 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; *Barney* v. *Keokuk*, 94 U. S. 324, 24 L. ed. 224.

*Messrs. W. B. Mathews, John F. Dillon, Harry Hubbard*, and *John M. Dillon* filed a separate brief for defendant in error on the question of jurisdiction:

The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time such authority is disputed.

*Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 653, 34 L. ed. 1116, 11 Sup. Ct. Rep. 435; *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *De Lamar's Nevada Gold Min. Co.* v. *Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

The controversy in the state court did not involve the construction of the treaty, but the validity of claims of title under Spanish and Mexican grants made prior to the treaty, and the decision of such controversy was not against the validity of the treaty.

*New Orleans* v. *De Armas*, 9 Pet. 224, 9 L. ed. 109; *United States* v. *Arredondo*, 6 Pet. 738, 8 L. ed. 564; *Crystal Springs Land & Water Co.* v. *Los Angeles*, 82 Fed. 114, Affirmed in 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350.

To bring any case within the reach of U. S. Rev. Stat. § 709, "it must appear upon the face of the record of the state court, either by express terms or by clear and necessary intendment, that the question did actually arise in the state court,—not that it might have arisen or have been applicable to the case,—and that the question was actually decided—not that it might have been decided by the state court—against the title, right or privilege, or exemption set up by the party."

*Ocean Ins. Co.* v. *Polleys*, 13 Pet. 157, 10 L. ed. 105; *Proprietors of Bridges* v. *Hoboken Land & Improv. Co.* 1 Wall. 116, 17 L. ed. 571.

There is nothing in the record to show that the state courts were led to suppose that any claim under the Constitution of the United States was made by plaintiffs in error, or that any ruling involved a decision against a right set up by them under that instrument.

*Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Harris* v. *Dennie*, 3 Pet. 292, 7 L. ed. 683; *Dewey* v. *Des Moines*, 173 U. S. 193, 43 L. ed. 665, 19 Sup. Ct. Rep. 379; *Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record, before the state court can be held to have disposed of such a Federal question by its decision.

*Powell* v. *Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166.

The state court disposed of no Federal question in admitting in evidence statutes of the state showing the succession of the present city of Los Angeles to the former pueblo, over the objection of counsel for plaintiffs in error that they were "incompetent, irrelevant, immaterial, and unconstitutional." The last-named objection is presumed to refer to the Constitution of the state.

*Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

We cannot find in the pleadings or other proceedings in the trial court, or in the supreme court, that any statute of California was asserted to be in conflict with the Constitution, or any law or treaty of the United States, or that any right was claimed by plaintiffs in error under the Constitution, or any treaty or statute of the United States.

The city alleged in its complaint that the Los Angeles river was a non-navigable stream, rising a few miles to the north and northwest of the city, and fed by streams rising to the surface in or near the bed of the river; that that bed was composed of sandy soil, into which the water sank and formed subterranean streams flowing beneath the bed and then rising to the surface; that the river flowed through the land sought to be condemned before reaching the city; that the city was the owner of the exclusive right to the use of all the water of the river in trust for the public purposes of supplying the inhabitants of the city with water for domestic use, supplying water for the irrigation of land embraced within the pueblo lands of the city, and other municipal uses; that plaintiffs in error were owners of the fee simple of the lands described, subject to the rights of the city to the water of the river; and the prayer was for the condemnation in fee simple of all the estate, right, title, and interest of plaintiffs in error in the land.

[316] *The answer of plaintiffs in error denied that the river was fed by springs rising to the surface in or adjoining the bed of the river; admitted that the bed was composed of sandy soil, but denied that the waters of the river formed well-defined subterranean streams flowing in channels beneath the bed, or that such subterranean waters rose before reaching the city, or became a part of the surface water of the river; and denied that the city was the owner of any right to the use of all the water of the river, in trust, or otherwise; denied that the city had any right in the water or to the use thereof, other than as a riparian owner of lands through which the river flowed, and rights acquired by appropriation; and denied that the city owned the right to the water of the river to the exclusion of plaintiffs in error. On the contrary, the answer alleged that the lands of plaintiffs in error were riparian lands situated far above the north boundary of the city, and that, as riparian owners, plaintiffs in error were entitled to the use of the waters of the river for all lawful purposes, and, to a reasonable extent, for irrigating those lands, and for domestic and other uses. And it set up grants of part of the land to the predecessors of plaintiffs in error in 1843 by the governor of both Californias, and of the remainder of the land by grant in 1784; that confirmation was petitioned for before the board of land commissioners appointed under the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), the grants confirmed, and the decrees of the board affirmed by the district court of the United States for the southern district of California, and patents duly issued; and averred that plaintiffs in error claimed title "under and through the aforesaid Mexican and Spanish grants, and the proceedings for the confirmation thereof, and the said patents issued by the United States founded thereon;" and that as owners of the land plaintiffs in error were also owners of the waters percolating in the soil thereof, and riparian owners, having the rights of riparian proprietors in the waters of the river.

The trial court decided that the city was, and had been since its organization, owner in fee simple of the paramount use of the waters of the Los Angeles river, so far as might be needed from time to time, for the public purposes of supplying the *inhabi- [317] tants of the city with water for public and domestic purposes, as described in the complaint; that plaintiffs in error were the owners of the particular land, and had, subject to the rights of the city, the rights of riparian proprietors thereof, and the right to use the water of the river for all purposes for which riparian owners are entitled to use such waters.

The contentions seem to be that the state courts decided against the claim of plaintiffs in error to the rights of a riparian owner, and to the ownership of alleged percolating waters, as derived from patents of the United States as well as from Mexican grants, or under the treaty of Guadeloupe Hidalgo; that the statutes of California in authorizing the trial of title in condemnation proceedings, and the determination of compensation before the determination of title, amounted to providing for the taking of private property for public use without just compensation; that certain statutes declaring the city to be vested with a paramount right to the surface and subterranean waters deprived plaintiffs in error of their property without due process of law; and that the statute of the state in providing that compensation and damages should be deemed to have accrued at the date of the summons, as construed by the state courts, resulted in taking the property of plaintiffs in error without just compensation.

Obviously, the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, was one of state law and of general public law, on which the decision of the state court was final. *San Francisco* v. *Scott*, 111 U. S. 768, 28 L. ed. 593, 4 Sup. Ct. Rep. 688; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350. And the question of the existence of percolating water was merely a question of fact.

The patents were in the nature of a quitclaim, and under the act of March 3, 1851 [§ 15], were "conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." The validity of that act was not drawn in question in the state court, and as the right or title asserted by plaintiffs in

error was derived under Mexican and Spanish grants, the decision of the state court on the claims asserted by plaintiffs in error to [318] the waters of the river was not *against any title or right claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised, under the Constitution. If the title of plaintiffs in error were protected by the treaty, still the suit did not arise thereunder, because the controversy in the state court did not involve the construction of the treaty, but the validity of the title of Mexican and Spanish grants prior to the treaty. *New Orleans* v. *De Armas*, 9 Pet. 224, 9 L. ed. 109; *Iowa* v. *Rood*, 187 U. S. 87, *ante*, 86, 23 Sup. Ct. Rep. 49; *Phillips* v. *Mound City Land & Water Asso.* 124 U. S. 605, 31 L. ed. 588, 8 Sup. Ct. Rep. 651.

In *Crystal Springs Land & Water Co.* v. *Los Angeles*, 82 Fed. 114, the circuit court ruled that where both parties claimed under Mexican grants, confirmed and patented by the United States in accordance with the provisions of the treaty of Guadeloupe Hidalgo, and the controversy was only as to what were the rights thus granted and confirmed, the suit was not one arising under a treaty so as to confer jurisdiction on a Federal court, and that where the only ground of Federal jurisdiction was the allegation in a bill that defendant's claim of title was based in part on certain acts of the legislature of the state, which attempted to transfer to it, as alleged, the title held by complainant's grantors at the time of their passage, the court would not retain jurisdiction when an answer was filed by defendant denying the allegations, and disclaiming any title or claim of title not held by it before the passage of the acts. The bill was dismissed, and we affirmed the judgment. 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573.

The trial court determined for itself, among other questions, the nature and extent of the city's interest in the waters of the river, but while it instructed the jury in relation thereto it did not file its written findings until after the return of the verdict. And it is argued that the respective rights of the parties were not in fact adjudicated until after the amount of compensation had been found, and that in this way plaintiffs in error were deprived of their property without due process of law. The 14th Amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be heard. [319] *Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.

The construction of a law of a state, that it was competent for the court to try and determine, in a condemnation proceeding, an adverse claim of the plaintiff therein to an interest in property sought to be condemned, is conclusive on this court, and we cannot understand how the entry of the verdict of a jury as to the amount of compensation prior to the filing of written findings on the other issues could have the effect of depriving plaintiffs in error of their property without due process of law. The chief justice of California well said that it was of no importance in what order the other issues in the case were decided, except in so far as the determination of one point was necessary as a basis for the determination of another, and that if the instructions to the jury actually given were correct, the fact that these findings had not been previously filed was of no consequence.

And so as to certain statutes of the state of California, which declared that the city of Los Angeles is vested with the paramount right to the surface and subterranean water of the Los Angeles river. Those statutes were admitted in evidence merely to show that the city was the successor of the ancient pueblo. The court held that the right of the city of Los Angeles to take from the Los Angeles river all of the waters of the river to the extent of its reasonable domestic and municipal needs was based on the Spanish and Mexican law, and not on the charters of the city of Los Angeles. The validity of the statutes, on account of repugnancy to the Federal Constitution, was not drawn in question in the trial court nor in the supreme court of the state, and both courts held that they neither granted to the city nor took away from plaintiffs in error any rights or property.

Section 1249 of the Code of Civil Procedure of California provided that for the purpose of assessing compensation and damages the right thereto should be taken to have accrued at the time of the summons, "and its actual value at that date shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken, but injuriously affected."

*The validity of the statute under the state [320] Constitution had been repeatedly sustained by the state courts, and those courts held that the value referred to in the statute was the actual value at that date.

Plaintiffs in error asked the court to charge the jury that the date of estimating the value of the property was the date of the summons, and the supreme court held that in these circumstances they could not be permitted to attack the condemnation statute as unconstitutional so far as related to the appraising the value of the land as provided.

Moreover, this court cannot reverse the decisions of state courts in regard to questions of general justice and equitable considerations in the taking of property. *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

The truth is there is nothing in this record adequately showing that the state courts were led to suppose that any claim under the Constitution of the United States was made by plaintiffs in error, or that any ruling involved a decision against a right set up by them under that instrument.

In *Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777, after stat-

ing the contention of plaintiff in error that the effect of the judgment of the state court was "to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege, or immunity of plaintiff in error under the Constitution, of being protected from such deprivation or denial," we said: "But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the supreme court in disposing of the rulings below. . . . We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that plaintiff in error claimed protection under the Constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instru-
[321] ment. And *we may add that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error."

This case comes within the rule there laid down, and *the writ of error must be dismissed.*

Mr. Justice **McKenna** took no part in the decision of this case.

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CHARLES F. CHAMPION, *Appt.*,
*v.*
JOHN C. AMES, United States Marshal.†

(See S. C. Reporter's ed. 321–375.)

*Interstate commerce—regulation by Congress—prohibition of traffic in lottery tickets.*

The carriage of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state is interstate commerce, which Congress, under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets so to be carried.

[No. 2.]

*Argued February 27, 28, 1901. Ordered for reargument April 29, 1901. Reargued October 16, 17, 1901. Ordered for reargument before full bench November 10, 1902. Reargued December 15, 16, 1902. Decided February 23, 1903.*

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review an order dismissing a writ of habeas corpus to inquire into a detention under a warrant charging a conspiracy to cause lottery tickets to be carried from one state to another. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **Moritz Rosenthal** argued the cause, and, with *Mr. Joseph B. David*, filed a brief for appellant:

The test of the validity of a statute is its real, and not its apparent, object; and its real object must be ascertained by determining whether the legitimate end sought is within the scope of the legislative power.

*Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *United States* v. *Fox*, 95 U. S. 670, 24 L. ed. 538; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Henderson* v. *New York*, 92 U. S. 259, *sub nom. Henderson* v. *Wickham*, 23 L. ed. 543; *New York* v. *Miln*, 11 Pet. 103, 9 L. ed. 648; *The Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374.

Commerce, as used in the Constitution, is restricted to commercial intercourse.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Trade-Mark Cases*, 100 U. S. 95, *sub nom. United States* v. *Steffens*, 25 L. ed. 550.

There are tangible objects that are not articles of commerce.

*Austin* v. *State*, 101 Tenn. 563, 50 L. R. A. 478, 48 S. W. 305.

A railroad ticket is not an article of commerce. A railroad ticket is not merchandise; it is only a receipt or voucher for the payment of the passenger's fare, and is but evidence of the contract of carriage between the railroad company and the passenger.

Ray, Negligence of Imposed Duties, Pass. Carr. 198, 199, 494, 495; 2 Beach, Railways, § 869; *Com.* v. *Wilson*, 14 Phila. 384.

An insurance policy is not an article of commerce.

*Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

The business of an interstate mercantile agency is not commerce.

*State* v. *Morgan*, 2 S. D. 32, 48 N. W. 314.

The loaning of money by foreign corporations engaged in that business is not a matter of interstate commerce.

*Nelms* v. *Edinburg American Land Mortg. Co.* 92 Ala. 157, 9 So. 141.

The protection of the Constitution does not extend to lotteries, games of chance, or

†This case is reported by the Official Reporter under the title "Lottery Case."

NOTE.—*On the power of Congress to regulate commerce*—see notes to State *ex rel.* Corwin v. Indiana & O. Oil, Gas, & Min. Co. (Ind.) 6 L. R. A. 579; Bullard v. Northern P. R. Co. (Mont.) 11 L. R. A. 246; *Re* Wilson (D. C.) 12 L. R. A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

speculation. These may be interstate gambling, but are not commerce.

Prentice & Egan, Commerce Clause of Fed. Const. p. 55.

*Mr.* **William D. Guthrie** also argued the cause and filed a brief for appellant:

The suppression of lotteries or of any other harmful business is essentially an exercise of the police power, exclusively within the domain of, and expressly reserved to, the several states.

*Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson* v. *Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *United States* v. *E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

There is no such thing as a Federal police power, except in respect of those specific subjects delegated to Congress.

*M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *License Cases*, 5 How. 504, 12 L. ed. 256; *Trade-Mark Cases*, 100 U. S. 82, *sub nom. United States* v. *Steffens*, 25 L. ed. 550.

Congress cannot conclusively determine what is or what is not an article of commerce. That inquiry is essentially judicial.

*License Cases*, 5 How. 504, 12 L. ed. 256.

Congress does not possess the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails.

*Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877; *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374.

A conviction under a statute of Virginia for selling lottery tickets for the national lottery authorized by the act of Congress of May 4, 1812, has been sustained.

*Cohen* v. *Virginia*, 6 Wheat. 264, 5 L. ed. 257.

If the lottery tickets had been deemed articles of commerce, obviously the Virginia act would have been invalid as a regulation of commerce.

*Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *Webber* v. *Virginia*, 103 U. S. 344, 26 L. ed. 565.

Insurance policies are essentially wagers, and constitute aleatory contracts substantially the same as the contract of lottery. Both forms of contract depend upon chance and uncertain events, and in principle cannot be distinguished in their nature.

1 Pothier, Obligations, Evans's Transl. pp. 9–10; Louisiana Civil Code, act 1776; Spain Civil Code 1889, Tit. 12, U. S. Govt. Transl. 1899, pp. 230–232; 1 May, Ins. 4th ed. p. 5; Clark, Contr. pp. 405–406; Lawson Contr. §§ 284–287; Hollingsworth, Contr. pp. 229–232; Anson, Contr. 2d Am. ed. pp. 232, 233; Angell, Fire & Life Ins. pp. 12, 14; 1 Joyce, Ins. §§ 2, 7; Emerigon, Ins. Meredith's Transl. p. 13; Richards, Ins. § 20.

The issuing of insurance policies in New York and sending them to Virginia, to be there delivered to the insured on payment of premium, is not interstate commerce.

*Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states, and would exclude state control over many contracts purely domestic in their nature.

*Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

"Commerce" is not the equivalent or synonym of "intercourse,' but is synonymous with "commercial intercourse."

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23.

The Constitution "neither changes with time, nor does it in theory bend to the force of circumstances."

*Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

We are not at liberty to give the provisions of the Constitution new meanings because of considerations of expediency. If we could, then "there is no power which may not, by this mode of construction, be conferred on the general government and denied to the states."

*Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Ex parte Wells*, 18 How. 307, 15 L. ed. 421.

The power of Congress over commerce with foreign nations and the Indian tribes is conclusive and absolute.

*United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, *sub nom. United States* v. *Lariviere*, 23 L. ed. 846.

While commercial reprisals may be necessary as national expedients, such considerations can never be permitted to govern the action of Congress in regulating commerce among the several states.

2 Tucker, Const. 528–533; *Groves* v. *Slaughter*, 15 Pet. 449, 10 L. ed. 800; *Passenger Cases*, 7 How. 283, 12 L. ed. 702.

Indeed, the clause guarantying the privileges and immunities of citizens would probably be held to nullify any such attempt of Congress.

*Passenger Cases*, 7 How. 492, 12 L. ed. 789; *Crandall* v. *Nevada*, 6 Wall. 35, 18 L. ed. 745; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

The insurance cases present a striking example of the difference in the nature of the power to regulate interstate commerce and foreign commerce.

*Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

The whole power to regulate every form of relations and intercourse with foreign countries resides in the sovereign national

power created by the Constitution of the United States.

*Head Money Cases*, 112 U. S. 580, *sub nom. Edye* v. *Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; The Federalist, 9 Hamilton's Works, Lodge's ed. pp. 250, 258, 262.

In the case of internal or interstate commerce, the only power Congress exercises is that expressly delegated; and that power is hedged in and circumscribed by the local police and municipal powers expressly reserved to the states. It may, therefore, be conceded that Congress, under the plenary power to regulate our relations with foreign countries, may well exclude persons, commodities, or printed matter of any nature whatsoever, whether or not relating to or connected with commerce. But no one would seriously suggest that any class of American citizens could be excluded or deported under the same power which enables Congress to exclude or deport aliens.

*United States* v. *Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

*Assistant Attorney General* **Beck** argued the cause and filed a brief for appellee:

The purpose of the framers of the Federal Constitution clearly was to empower Congress "to legislate in all cases to which the separate states are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation."

2 Madison Papers, 859.

It seems to be the clear meaning of the Constitution that the words "to regulate commerce" include the regulation of migration of persons, irrespective of their relations to things in commerce.

Tucker, Const. p. 525.

The transit of individuals from state to state is interstate commerce.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Passenger Cases*, 7 How. 282, 12 L. ed. 702; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

Indeed, neither the transit of individuals nor the transportation of goods is essential to commerce. The mere transmission of intelligence is also commerce.

*Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Rattcrman* v. *Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

The mere transit of persons arriving at our ports of entry is, without reference to traffic, the subject of congressional regulation, because it is commerce.

*New York* v. *Compagnie Generale Transatlantique*, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87; *Head Money Cases*, 112 U. S. 580, *sub nom. Edye* v. *Robertson*, 28 L. ed. 798, 5 Sup. Ct. Rep. 247; *Henderson* v. *New York*, 92 U. S. 259, *sub nom. Henderson* v. *Wickham*, 23 L. ed. 543; *Nishimura Ekin* v. *United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336.

The same must be true of the transit of persons from state to state, assuming that foreign commerce is the same as interstate commerce, with the exception of the *locus in quo*.

*Gibbons* v. *Ogden*, 9 Wheat. 228, 6 L. ed. 77.

The power to regulate commerce among the several states is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations.

*Brown* v. *Houston*, 114 U. S. 630, 29 L. ed. 260, 5 Sup. Ct. Rep. 1091; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 482, 31 L. ed. 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 587, 39 L. ed. 544, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415.

The carriage of things for hire from state to state by any means of transportation is commerce.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23.

The judicial department of the government should not review the declaration of the legislative branch as to the commercial character of a lottery ticket.

*Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson* v. *Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

The only test as to whether a given article is an article of commerce is whether it is, or has been, customarily the subject of purchase and sale; and this must be determined by considering whether such an article is recognized as a subject of purchase and sale by the commercial world.

*Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

It is a great mistake to suppose that a lottery ticket conveyed no right of action or property interest. Whatever is the present effect of restrictive legislation upon such commercial commodities, they formerly conveyed unquestioned property rights which could be enforced in courts of law.

*Clark* v. *Washington*, 12 Wheat. 40, 6 L. ed. 544.

The commercial power of the Union can extend to written instruments, where they affect or are instruments of the purchase and sale of property interests.

*Almy* v. *California*, 24 How. 169, 16 L. ed. 644; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. ed. 382; *Fairbank* v. *United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.

In reading the court's opinion upon the insurance cases, the question actually presented to the court must be kept in mind.

*Woodruff* v. *Parham*, 8 Wall. 123, 19 L. ed. 382.

A careful examination of all of these cases will disclose the fact that each of them was predicated upon the fact that the method of transacting the business made the transactions intrastate, and not interstate.

*Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

The power to prohibit, as a regulation of trade, is absolute except where expressly limited by other sections of the Constitution.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson* v. *Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

Congress under its power to regulate commerce with the Indian tribes may exclude any selected article from such commerce as deleterious.

*United States* v. *Holliday*, 3 Wall. 407, 18 L. ed. 182; *United States* v. *43 Gallons of Whiskey*, 108 U. S. 491, 27 L. ed. 803, 2 Sup. Ct. Rep. 906; *United States* v. *Le Bris*, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; *Sarlls* v. *United States*, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; *United States* v. *Mayrand*, 154 U. S. 552, and 18 L. ed. 699, 14 Sup. Ct. Rep. 1212.

States have undertaken in the interests of the public health to exclude importations of a certain kind from other states, and their legislation has been held by this court to be unconstitutional.

*Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight* v. *Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855.

These laws were not held to be void because they in effect levied taxes upon imports; for it is well settled that the word "imports" in the Constitution refers only to articles brought in from foreign countries.

*License Cases*, 5 How. 504, 12 L. ed. 256; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Pittsburg & S. Coal Co.* v. *Louisiana*, 156 U. S. 590, 39 L. ed. 544, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459.

The Sherman anti-trust law is in itself a prohibition, *pro tanto*, of commerce, but its constitutionality has been affirmed.

*United States* v. *Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25.

The power to regulate interstate commerce being an express power, with no express restrictions on the prohibition of interstate traffic in a given article, the purposes for which Congress may prohibit are not reviewable by the courts.

*M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579.

Congress, having an express and unlimited power to regulate interstate commerce, may do so without having its reasons questioned.

*Doyle* v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148.

Mr. Justice **Harlan** delivered the opinion of the court:

The general question arising upon this appeal involves the constitutionality of the 1st section of the act of Congress of March 2d, 1895, chap. 191, entitled "An Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States." 28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3168.

The appeal was from an order of the circuit court of the United States for the northern district of Illinois dismissing a writ of habeas corpus sued out by the appellant Champion, who in his application complained that he was restrained of his liberty by the Marshal of the United States in violation of the Constitution and laws of the United States.

*It appears that the accused was under indictment in the district court of the United States for the northern district of Texas for a conspiracy under § 5440 of the Revised Statues (U. S. Comp. Stat. 1901, p. 3676), providing that "if two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." [322]

He was arrested at Chicago under a warrant based upon a complaint in writing, under oath, charging him with conspiring with others, at Dallas, in the northern district of Texas, to commit the offense denounced in the above act of 1895; and the object of the arrest was to compel his appearance in the Federal court in Texas to answer the indictment against him.

The 1st section of the act of 1895, upon which the indictment was based, is as follows: "§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert, or similar

enterprise, offering prizes dependent upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in [for] the first offense by imprisonment for not more than two years. or by a fine of not more than $1,000, or both, and in the second and after offenses by such imprisonment only." 28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178.

The indictment charged, in its first count, that on or about the 1st day of February A. D. 1899, in Dallas county, Texas, "C. F. Champion, alias W. W. Ogden, W. F. Cham-[323]pion, and *Charles B. Park did then and there unlawfully, knowingly, and feloniously conspire together to commit an offense against the United States, to wit, for the purpose of disposing of the same, to cause to be carried from one state to another in the United States, to wit, from Dallas, in the state of Texas, to Fresno, in the state of California, certain papers, certificates, and instruments purporting to be and representing tickets, as they then and there well knew, chances, shares, and interests in and dependent upon the event of a lottery, offering prizes dependent upon lot and chance, that is to say, caused to be carried, as aforesaid, for the purpose of disposing of the same, papers, certificates, or instruments purporting to be tickets to represent the chances, shares, and interests in the prizes which by lot and chance might be awarded to persons, to these grand jurors unknown, who might purchase said papers, certificates, and instruments representing and purporting to be tickets, as aforesaid, with the numbers thereon shown and indicated and printed, which by lot and chance should, on a certain day, draw a prize or prizes at the purported lottery or chance company, to wit, at the purported monthly drawing of the so-called Pan-American Lottery Company, which purported to draw monthly at Asuncion. Paraguay, which said Pan-American Lottery Company purported to be an enterprise offering prizes dependent upon lot and chance, the specific method of such drawing being unknown to the grand jurors, but which said papers, certificates, and instruments purporting to be and representing tickets upon their face purporting to be entitled to participation in the drawing for a certain capital prize amounting to the sum of $32,000, and which said drawings for said capital prize, or the part or parts thereof allotted or to be allotted in conformity with the scheme of lot and chance, were to take place monthly, the manner and form of which is to the grand jurors unknown, but that said drawing and lot and chance by which said prize or prizes were to be drawn was purported to be under the supervision and direction of Enrigue Montes de Leon, manager, and Bernardo Lopez, intervener, and which said papers, certificates, and instruments purporting to be tickets of the said Pan-American Lottery Company [324]were so divided as *to be called whole, half, quarter, and eighth tickets, the whole tickets to be sold for the sum of $2, the half tickets for the sum of $1, the quarter tickets for the sum of 50 cents and the eighth tickets for the sum of 25 cents."

The indictment further charged that "in pursuance to said conspiracy, and to effect the object thereof, to wit, for the purpose of causing to be carried from one state to another in the United States, to wit, from the state of Texas to the state of California aforesaid, for the purpose of disposing of the same, papers, certificates, and instruments purporting to be and representing tickets, chances, and shares and interests in and dependent upon lot and chance, as aforesaid, as they then and there well knew, said W. F. Champion and Charles B. Park did then and there, to wit, on or about the day last aforesaid, in the year 1899, in the county aforesaid, in the Dallas division of the northern district of Texas aforesaid, unlawfully, knowingly, and feloniously, for the purpose of being carried from one state to another in the United States, to wit, from Dallas, in the state of Texas, to Fresno, in the state of California, for the purpose of disposing of the same, deposit and cause to be deposited and shipped and carried with and by the Wells-Fargo Express Company, a corporation engaged in carrying freight and packages from station to station along and over lines of railway, and from Dallas, Texas, to Fresno, California, for hire, one certain box or package containing, among other things, two whole tickets or papers or certificates of said purported Pan-American Lottery Company, one of which said whole tickets is hereto annexed by the grand jury to this indictment and made a part hereof."

It thus appears that the carrying in this case was by an incorporated express company, engaged in transporting freight and packages from one state to another.

The commissioner who issued the warrant of arrest, having found that there was probable cause to believe that Champion was guilty of the offense charged, ordered that he give bond for his appearance for trial in the district court of the United States for the northern district of Texas, or in default thereof to be committed to jail. Having declined to give the required bond the accused was taken into custody. Rev. Stat. § 1014 (U. S. Comp. Stat. 1901, p. 716). *Thereupon he sued out the present writ of[325] habeas corpus upon the theory that the act of 1895, under which it was proposed to try him, was void, under the Constitution of the United States.

The appellant insists that the carrying of lottery tickets from one state to another state by an express company engaged in carrying freight and packages from state to state, although such tickets may be contained in a box or package, does not constitute, and cannot by any act of Congress be legally made to constitute, *commerce* among the states within the meaning of the clause of the Constitution of the United States providing that Congress shall have power "to regulate commerce with *foreign nations.[345] and among the several states, and with the

Indian tribes;" consequently, that Congress cannot make it an offense to cause such tickets to be carried from one state to another.

The government insists that express companies, when engaged, for hire, in the business of transportation from one state to another, are instrumentalities of commerce among the states; that the carrying of lottery tickets from one state to another is commerce which Congress may regulate; and that as a means of executing the power to regulate interstate commerce Congress may make it an offense against the United States to cause lottery tickets to be carried from one state to another.

The questions presented by these opposing contentions are of great moment, and are entitled to receive, as they have received, the most careful consideration.

What is the import of the word "commerce" as used in the Constitution? It is not defined by that instrument. Undoubtedly, the carrying from one state to another by independent carriers of things or commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. But does not commerce among the several states include something more? Does not the carrying from one state to another, by independent carriers, of lottery tickets that entitle the holder to the payment of a certain amount of money therein specified also constitute commerce among the states?

It is contended by the parties that these questions are answered in the former decisions of this court, the government insisting that the principles heretofore announced support its position, while the contrary is confidently asserted by the appellant. This makes it necessary to ascertain the import of such decisions. Upon that inquiry we now enter, premising that some propositions were advanced in argument that need not be considered. In the examination of former judgments it will be best to look at them somewhat in the order in which they were rendered. When prior adjudications have been thus collated the particular grounds upon which the judgment in the present case must necessarily rest can be readily de-[346]termined. We may *here remark that some of the cases referred to may not bear directly upon the questions necessary to be decided, but attention will be directed to them as throwing light upon the general inquiry as to the meaning and scope of the commerce clause of the Constitution.

The leading case under the commerce clause of the Constitution is *Gibbons* v. *Ogden*, 9 Wheat. 1, 189, 194, 6 L. ed. 23, 68, 69. Referring to that clause, Chief Justice Marshall said: "The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. . . . It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term. If this be the admitted meaning of the word, in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it. The subject to which the power is next applied is to commerce 'among the several states.' The word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the states cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more states than one. . . . *The genius and character of the[347] whole government seem to be that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. . . ."

Again: "We are now arrived at the inquiry,—What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is *complete in itself*, may be exercised *to its utmost extent*, and acknowledges *no limitations, other than are prescribed in the Constitution*. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in Congress *as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States.*"

Mr. Justice Johnson, in the same case, expressed his entire approbation of the judg-

ment rendered by the court, but delivered a separate opinion indicating the precise grounds upon which his conclusion rested. Referring to the grant of power over commerce, he said: "My opinion is founded on the application of the words of the grant to the subject of it. The 'power to regulate commerce' here meant to be granted was that power to regulate commerce which previously existed in the states. But what was that power? The states were, unquestionably, supreme; and each possessed that power over commerce which is acknowledged to reside in every sovereign state. . . . The law of nations, regarding man as a social animal, pronounces all commerce legitimate in a state of peace, until prohibited by positive law. The power of a sovereign state over commerce, therefore, amounts to nothing more than a power to limit and restrain it at pleasure. And since the power [348] to prescribe *the limits to its freedom necessarily implies the power to determine what shall remain unrestrained, it follows that the power must be exclusive; it can reside but in one potentate; and hence the grant of this power carries with it the whole subject, leaving nothing for the state to act upon."

The principles announced in *Gibbons* v. *Ogden* were reaffirmed in *Brown* v. *Maryland*, 12 Wheat. 419, 446, 6 L. ed. 678, 688. After expressing doubt whether any of the evils proceeding from the feebleness of the Federal government contributed more to the establishing of the present constitutional system than the deep and general conviction that commerce ought to be regulated by Congress, Chief Justice Marshall, speaking for the court, said: "It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the states." Considering the question as to the just extent of the power to regulate commerce with foreign nations and among the several states, the court reaffirmed the doctrine that the power was "complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. . . . Commerce is intercourse; one of its most ordinary ingredients is traffic."

In the *Passenger Cases*, 7 How. 283, 12 L. ed. 702, the court adjudged certain statutes of New York and Massachusetts, imposing taxes upon alien passengers arriving in the ports of those states, to be in violation of the Constitution and laws of the United States. In the separate opinions delivered by the justices there will not be found any expression of doubt as to the doctrines announced in *Gibbons* v. *Ogden*. Mr. Justice McLean said: "Commerce is defined to be 'an exchange of commodities.' But this definition does not convey the full meaning of the term. It includes 'navigation and intercourse. That the transportation of passengers is a part of commerce is not now an open question." Mr. Justice Grier said: "Commerce, as defined by this court, means something more than traffic,—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse." The same views were expressed by Mr. Justice Wayne, in his separate opinion. He regarded the question then before the *court as covered by the de- [349] cision in *Gibbons* v. *Ogden*, and in respect to that case he said: "It [the case] will always be a high and honorable proof of the eminence of the American bar of that day, and of the talents and distinguished ability of the judges who were then in the places which we now occupy." Mr. Justice Catron and Mr. Justice McKinley announced substantially the same views.

In *Almy* v. *California*, 24 How. 169, 16 L. ed. 644, a statute of California imposing a stamp duty upon bills of lading for gold or silver transported from that state to any port or place out of the state was held to be a tax on exports, in violation of the provision of the Constitution declaring that "no tax or duty shall be laid on articles exported from any state." But in *Woodruff* v. *Parham*, 8 Wall. 123, 138, 19 L. ed. 382, 386, this court, referring to the *Almy Case*, said it was well decided upon a ground not mentioned in the opinion of the court, namely, that, although the tax there in question was only on bills of lading, "such a tax was a regulation of commerce, a tax imposed upon the transportation of goods from one state to another, over the high seas, in conflict with that freedom of transit of goods and persons between one state and another, which is within the rule laid down in *Crandall* v. *Nevada* [6 Wall. 35, 18 L. ed. 744], and with the authority of Congress to regulate commerce among the states."

In *Henderson* v. *New York*, 92 U. S. 259, 270, *sub nom. Henderson* v. *Wickham*, 23 L. ed. 543, 548, which involved the constitutional validity of a statute of New York relating to vessels bringing passengers to that port, this court, speaking by Mr. Justice Miller, said: "As already indicated, the provisions of the Constitution of the United States, on which the principal reliance is placed to make void the statute of New York, is that which gives to Congress the power 'to regulate commerce with foreign nations.' As was said in *United States* v. *Holliday*, 3 Wall. 417, 18 L. ed. 185, 'commerce with foreign nations means commerce between citizens of the United States and citizens or subjects of foreign governments.' It means trade, and it means intercourse. It means commercial intercourse between nations, and parts of nations, in all its branches. It includes navigation, as the principal means by which foreign intercourse is effected. To regulate this trade and intercourse is *to prescribe the rules by [350] which it shall be conducted. 'The mind,' says the great Chief Justice, 'can scarcely conceive a system for regulating commerce between nations which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of one nation into the ports of another;' and he might have added, with equal force, which

prescribed no terms for the admission of their cargo or their passengers. *Gibbons* v. *Ogden*, 9 Wheat. 190, 6 L. ed. 68."

The question of the scope of the commerce clause was again considered in *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 9, 12, 24 L. ed. 708, 710, 712, involving the validity of a statute of Florida, which assumed to confer upon a local telegraph company the exclusive right to establish and maintain lines of electric telegraph in certain counties of Florida. This court held the act to be unconstitutional. Chief Justice Waite, delivering its judgment, said: "Since the case of *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23, it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Postoffices and post roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government. The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation it is not only the right, but the duty, of Congress to see to it that intercourse among the states and the transmission of [351] intelligence are not *obstructed or unnecessarily encumbered by state legislation. The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of intercommunication, but especially is it so in commercial transactions." In his dissenting opinion in that case Mr. Justice Field speaks of the importance of the telegraph "as a means of intercourse," and of its constant use in commercial transactions.

In *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238, Mr. Justice Field, delivering the judgment of the court, said: "Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." This principle was expressly reaffirmed in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 203, 29 L. ed. 158, 161, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

Applying the doctrine announced in *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.*, it was held in *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067, that the law of a state imposing a tax on private telegraph messages sent out of the state was unconstitutional, as being, in effect, a regulation of interstate commerce.

In *Brown* v. *Houston*, 114 U. S. 630, 29 L. ed. 260, 5 Sup. Ct. Rep. 1095, it was declared by the court, speaking by Mr. Justice Bradley, that "the power to regulate commerce among the several states is granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations." The same thought was expressed in *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 482, 31 L. ed. 706, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851, and *Pittsburg & S. Coal Co.* v. *Bates*, 156 U. S. 587, 39 L. ed. 543, 5 Inters. Com. Rep. 30, 15 Sup. Ct. Rep. 415.

In *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635, it was said to be settled by the adjudged cases that to tax "the transit of passengers from foreign countries or between the states is to regulate commerce."

In *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347, 356, 30 L. ed. 1187, 1188, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126, the court recognized the commerce with foreign countries and among the states which Congress could regulate as including not only the exchange and transportation of commodities, or *visible, tangible things, but [352] the carriage of persons, and the transmission by telegraph of ideas, wishes, orders, and intelligence. See also *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127, and *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

In *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 218, 38 L. ed. 962, 968, 4 Inters. Com. Rep. 649, 656, 14 Sup. Ct. Rep. 1087, 1092, the question was as to the validity, under the commerce clause of the Constitution, of an act of the Kentucky legislature relating to tolls to be charged or received for passing over the bridge of the Covington & Cincinnati Bridge Company, a corporation of both Kentucky and Ohio, erected between Covington and Cincinnati. A state enactment prescribing a rate of toll on the bridge was held to be unconstitutional, as an unauthorized regulation of interstate commerce. The court, reaffirming the principles announced in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826, and in *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4, said, among other things: "Commerce was defined in *Gibbons* v. *Ogden*, 9 Wheat. 1, 189,

6 L. ed. 23, 68, to be 'intercourse,' and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river."

At the present term of the court we said that "transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." *Hanley* v. *Kansas City Southern R. Co.* 187 U. S. 617, *ante*, 333, 23 Sup. Ct. Rep. 214.

This reference to prior adjudications could be extended if it were necessary to do so. The cases cited, however, sufficiently indicate the grounds upon which this court has proceeded when determining the meaning and scope of the commerce clause. They show that commerce among the states embraces navigation, intercourse, communica-[353]tion, traffic, the transit of persons, *and the transmission of messages by telegraph. They also show that the power to regulate commerce among the several states is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States; that such power is plenary, complete in itself, and may be exerted by Congress to its utmost extent, subject *only* to such limitations as the Constitution imposes upon the exercise of the powers granted by it; and that in determining the character of the regulations to be adopted Congress has a large discretion which is not to be controlled by the courts, simply because, in their opinion, such regulations may not be the best or most effective that could be employed.

We come, then, to inquire whether there is any solid foundation upon which to rest the contention that Congress may not regulate the carrying of lottery tickets from one state to another, at least by corporations or companies whose business it is, for hire, to carry tangible property from one state to another.

It was said in argument that lottery tickets are not of any real or substantial value in themselves, and therefore are not subjects of commerce. If that were conceded to be the only legal test as to what are to be deemed subjects of the commerce that may be regulated by Congress, we cannot accept as accurate the broad statement that such tickets are of no value. Upon their face they showed that the lottery company offered a large capital prize, to be paid to the holder of the ticket winning the prize at the drawing advertised to be held at Asuncion, Paraguay. Money was placed on deposit in different banks in the United States to be applied by the agents representing the lottery company to the prompt payment of prizes. These tickets were the subject of traffic; they could have been sold; and the holder was assured that the company would pay to him the amount of the prize drawn. That the holder might not have been able to enforce his claim in the courts of any country making the drawing of lotteries illegal, and forbidding the circulation of lottery tickets, did not change the fact that *the tickets issued by the foreign[354] company represented so much money payable to the person holding them and who might draw the prizes affixed to them. Even if a holder did not draw a prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets. In short, a lottery ticket is a subject of traffic, and is so designated in the act of 1895. 28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178. That fact is not without significance in view of what this court has said. That act, counsel for the accused well remarks, was intended to supplement the provisions of prior acts, excluding lottery tickets from the mails, and prohibiting the importation of lottery matter from abroad, and to prohibit the act of causing lottery tickets to be carried, and lottery tickets and lottery advertisements to be transferred from one state to another by any means or method. 15 Stat. at L. 196, chap. 246; 17 Stat. at L. 302, chap. 335; 19 Stat. at L. 90, chap. 186; Rev. Stat. § 3894, U. S. Comp. Stat. 1901, p. 2659; 26 Stat. at L. 465, chap. 908; 28 Stat. at L. 963, chap. 191, U. S. Comp. Stat. 1901, p. 3178.

We are of opinion that lottery tickets are subjects of traffic, and therefore are subjects of commerce, and the regulation of the carriage of such tickets from state to state, at least by independent carriers, is a regulation of commerce among the several states.

But it is said that the statute in question does not regulate the carrying of lottery tickets from state to state, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect of the carrying from one state to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit*, but only to *regulate*. This view was earnestly pressed at the bar by learned counsel, and must be examined.

It is to be remarked that the Constitution does not define what is to be deemed a legitimate regulation of interstate commerce. In *Gibbons* v. *Ogden* it was said that the power to regulate such commerce is the power to prescribe the rule by which it is to be governed. But this general observation leaves it to be determined, when the question comes before the court, whether Congress, in prescribing a particular rule, has exceeded its power under the Constitution. While our government *must be ac-[355] knowledged by all to be one of enumerated powers (*M'Cullough* v. *Maryland*, 4 Wheat.

316, 405, 407, 4 L. ed. 579, 601), the Constitution does not attempt to set forth all the means by which such powers may be carried into execution. It leaves to Congress a large discretion as to the means that may be employed in executing a given power. The sound construction of the Constitution, this court has said, "must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." 4 Wheat. 421, 4 L. ed. 605.

We have said that the carrying from state to state of lottery tickets constitutes interstate commerce, and that the regulation of such commerce is within the power of Congress under the Constitution. Are we prepared to say that a provision which is, in effect, a *prohibition* of the carriage of such articles from state to state is not a fit or appropriate mode for the *regulation* of that particular kind of commerce? If lottery traffic, *carried on through interstate commerce*, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the states, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the states?

In determining whether regulation may not under some circumstances properly take the form or have the effect of prohibition, the nature of the interstate traffic which it was sought by the act of May 2d, 1895, to suppress cannot be overlooked. When enacting that statute Congress no doubt shared the views upon the subject of lotter-
[356] ies heretofore expressed by this court. *In *Phalen* v. *Virginia*, 8 How. 163, 168, 12 L. ed. 1030, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: "Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple." In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the Constitution; this, for the reason that no state may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. *Stone* v. *Mississippi*, 101 U. S. 814, 25 L. ed. 1079; *Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

If a state, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several states, provide that such commerce shall not be polluted by the carrying of lottery tickets from one state to another? In this connection it must not be forgotten that the power of Congress to regulate commerce among the states is plenary, is complete in itself, and is subject to no limitations except such as may be found in the Constitution. What provision in that instrument can be regarded as limiting the exercise of the power granted? What clause can be cited which, in any degree, countenances the suggestion that one may, of right, carry or cause to be carried from one state to another that which will harm the public morals? We cannot think of any clause of that instrument that could possibly be invoked by those who assert their right to send lottery tickets from state to state except the one providing that no person shall be deprived of his liberty without due process of law. We have said that the liberty protected by the Constitution
*embraces the right to be free in the enjoy- [357]
ment of one's faculties; "to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper." *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, 431. But surely it will not be said to be a part of anyone's liberty, as recognized by the supreme law of the land, that he shall be allowed to introduce into commerce among the states an element that will be confessedly injurious to the public morals.

If it be said that the act of 1895 is inconsistent with the 10th Amendment, reserving to the states respectively, or to the people, the powers not delegated to the United States, the answer is that the power to regulate commerce among the states has been expressly delegated to Congress.

Besides, Congress, by that act, does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of any state, but has in view only commerce of that kind among the several states. It has not assumed to interfere with the completely internal affairs of any state, and has only legislated in respect of a matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of lottery tickets within its limits, so Congress, for the pur-

pose of guarding the people of the United States against the "widespread pestilence of lotteries" and to protect the commerce which concerns all the states, may prohibit the carrying of lottery tickets from one state to another. In legislating upon the subject of the traffic in lottery tickets, as carried on through interstate commerce, Congress only supplemented the action of those states—perhaps all of them—which, for the protection of the public morals, prohibit the drawing of lotteries, as well as the sale or circulation of lottery tickets, within their respective limits. It said, in effect, that it would not permit the declared policy of the states, which sought to protect their people against the mischiefs of the lottery business, to be overthrown or disregarded by the agency of interstate commerce. We should hesitate long before [358] adjudging that an evil of such *appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. What was said by this court upon a former occasion may well be here repeated: "The framers of the Constitution never intended that the legislative power of the nation should find itself incapable of disposing of a subject-matter specifically committed to its charge." *Re Rahrer*, 140 U. S. 545, 563, *sub nom. Wilkerson* v. *Rahrer*, 35 L. ed. 572, 577, 11 Sup. Ct. Rep. 865, 869. If the carrying of lottery tickets from one state to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one state to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute, and has become offensive to the entire people of the nation. It is a kind of traffic which no one can be entitled to pursue as of right.

That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one state to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it cannot be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins, or, in its discretion, may prohibit their being transported from one state to another. Indeed, by the act of May 29th, 1884, chap. 60 [23 Stat. at L. 32, § 6, U. S. Comp. Stat. 1901, p. 3184], Congress has provided: "That no railroad company within the United States, or the owners or masters of any steam or sailing, or other vessel or boat, shall receive for transportation or transport, from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock affected with any contagious, infectious, or communicable disease, and especially the disease known as *pleuro-pneu- [359] monia; nor shall any person, company, or corporation deliver for such transportation to any railroad company or master or owner of any boat or vessel, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease; nor shall any person, company, or corporation drive on foot or transport in private conveyance from one state or territory to another, or from any state into the District of Columbia, or from the District into any state, any live stock, knowing them to be affected with any contagious, infectious, or communicable disease, and especially the disease known as pleuro-pneumonia." *Reid* v. *Colorado*, 187 U. S. 137, *ante*, 108, 23 Sup. Ct. Rep. 92.

The act of July 2d, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), known as the Sherman anti-trust act, and which is based upon the power of Congress to regulate commerce among the states, is an illustration of the proposition that regulation may take the form of prohibition. The object of that act was to protect trade and commerce against unlawful restraints and monopolies. To accomplish that object Congress declared certain contracts to be illegal. That act, in effect, prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of Congress to regulate interstate commerce. *United States* v. *Trans-Mission Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States* v. *Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96. In the case last named the court, referring to the power of Congress to regulate commerce among the states, said: "In *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23, the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. Under this grant of power to Congress that body, in our judgment, may enact such legislation as shall declare void and *prohibit* the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness *of the proposition that the consti- [360] tutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned. The power to regulate

interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution, which provides that no person shall be deprived of life, liberty, or property without due process of law." Again: "The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law *prohibiting* the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the states."

That regulation may sometimes take the form or have the effect of prohibition is also illustrated in the case of *Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson* v. *Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865. In *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273, it was adjudged that state legislation prohibiting the manufacture of spirituous, malt, vinous, fermented, or other intoxicating liquors within the limits of the state, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege, or immunity secured by the Constitution of the United States or by the amendments thereto. Subsequently in *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062, this court held that ardent spirits, distilled liquors, ale, and beer were subjects of exchange, barter, and traffic, and were so recognized by the usages of the commercial world, as well as by the laws of Congress and the decisions of the courts. In *Leisy* v. *Hardin*, 135 U. S. 100, 110, 125, 34 L. ed. 128, 132, 138, 3 Inters. Com. Rep. 36, 41, [361] 47, 10 Sup. Ct. Rep. 681, 684, 690, the *court again held that spirituous liquors were recognized articles of commerce, and declared a statute of Iowa prohibiting the sale within its limits of any intoxicating liquors, except for pharmaceutical, medicinal, chemical, or sacramental purposes, under a state license, to be repugnant to the commerce clause of the Constitution, if applied to the sale, within the state, by the importer, in the original, unbroken packages, of such liquors manufactured in and brought from another state. And in determining whether a state could prohibit the sale within its limits, in original, unbroken packages, of ardent spirits, distilled liquors, ale, and beer, imported from another state, this court said that they were recognized by the laws of Congress as well as by the commercial world as "subjects of exchange, barter, and traffic," and that "whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognized as subjects of commerce are not such."

Then followed the passage by Congress of the act of August 8th, 1890 (26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177), providing "that all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory, be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." That act was sustained in the *Rahrer Case* as a valid exercise of the power of Congress to regulate commerce among the states.

In *Rhodes* v. *Iowa*, 170 U. S. 412, 426, 42 L. ed. 1088, 1096, 18 Sup. Ct. Rep. 664, 669, that statute—all of its provisions being regarded—was held as not causing the power of the state to attach to an interstate commerce shipment of intoxicating liquors "whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination and delivery there to the consignee."

Thus, under its power to regulate interstate commerce, as involved in the transportation, in original packages, of ardent spirits [362] from one state to another. Congress, by the necessary effect of the act of 1890 made it impossible to transport such packages to places within a prohibitory state and there dispose of their contents by sale; although it had been previously held that ardent spirits were recognized articles of commerce and, until Congress otherwise provided, could be imported into a state, and sold in the original packages, despite the will of the state. If at the time of the passage of the act of 1890 all the states had enacted liquor laws prohibiting the sale of intoxicating liquors within their respective limits, then the act would have had the necessary effect to exclude ardent spirits altogether from commerce among the states; for no one would ship, for purposes of sale, packages containing such spirits to points within any state that forbade their sale at any time or place, even in unbroken packages, and, in addition, provided for the seizure and forfeiture of such packages. So that we have in the *Rahrer Case* a recognition of the principle that the power of Congress to regulate interstate commerce may sometimes be exerted with the effect of excluding particular articles from such commerce.

It is said, however, that in order to suppress lotteries carried on through interstate commerce, Congress may exclude lottery tickets from such commerce. That principle

leads necessarily to the conclusion that Congress may arbitrarily exclude from commerce among the states any article, commodity, or thing, of whatever kind or nature, or however useful or valuable, which it may choose, no matter with what motive, to declare shall not be carried from one state to another. It will be time enough to consider the constitutionality of such legislation when we must do so. The present case does not require the court to declare the full extent of the power that Congress may exercise in the regulation of commerce among the states. We may, however, repeat, in this connection, what the court has heretofore said, that the power of Congress to regulate commerce among the states, although plenary, cannot be deemed arbitrary, since it is subject to such limitations or restrictions as [363] are *prescribed by the Constitution. This power, therefore, may not be exercised so as to infringe rights secured or protected by that instrument. It would not be difficult to imagine legislation that would be justly liable to such an objection as that stated, and be hostile to the objects for the accomplishment of which Congress was invested with the general power to regulate commerce among the several states. But, as often said, the possible abuse of a power is not an argument against its existence. There is probably no governmental power that may not be exerted to the injury of the public. If what is done by Congress is manifestly in excess of the powers granted to it, then upon the courts will rest the duty of adjudging that its action is neither legal nor binding upon the people. But if what Congress does is within the limits of its power, and is simply unwise or injurious, the remedy is that suggested by Chief Justice Marshall in *Gibbons* v. *Ogden*, when he said: "The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments."

The whole subject is too important, and the questions suggested by its consideration are too difficult of solution, to justify any attempt to lay down a rule for determining in advance the validity of every statute that may be enacted under the commerce clause. We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another is therefore interstate commerce; that under its power to regulate commerce among the several states Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end, and of that character, is not inconsistent *with any limitation [364] or restriction imposed upon the exercise of the powers granted to Congress.

*The judgment is affirmed.*

Mr. Chief Justice **Fuller**, with whom concur Mr. Justice **Brewer**, Mr. Justice **Shiras**, and Mr. Justice **Peckham**, dissenting:

Although the 1st section of the act of March 2, 1895 (28 Stat. at L. 963, chap. 191, U. S. Comp. Stat. 1901, p. 3178), is inartificially drawn, I accept the contention of the government that it makes it an offense (1) to bring lottery matter from abroad into the United States; (2) to cause such matter to be deposited in or carried by the mails of the United States; (3) to cause such matter to be carried from one state to another in the United States; and further, to cause any advertisement of a lottery or similar enterprise to be brought into the United States, or be deposited or carried by the mails, or transferred from one state to another.

The case before us does not involve in fact the circulation of advertisements and the question of the abridgment of the freedom of the press; nor does it involve the importation of lottery matter, or its transmission by the mails. It is conceded that the lottery tickets in question, though purporting to be issued by a lottery company of Paraguay, were printed in the United States, and were not imported into the United States from any foreign country.

The naked question is whether the prohibition by Congress of the carriage of lottery tickets from one state to another by means other than the mails is within the powers vested in that body by the Constitution of the United States. That the purpose of Congress in this enactment was the suppression of lotteries cannot reasonably be denied. That purpose is avowed in the title of the act, and is its natural and reasonable effect, and by that its validity must be tested. *Henderson* v. *New York*, 92 U. S. 268, *sub nom. Henderson* v. *Wickham*, 23 L. ed. 548; *Minnesota* v. *Barber*, 136 U. S. 320, 34 L. ed. 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862.

The power of the state to impose restraints and burdens on persons and property in conservation and promotion of the public *health, good order, and prosperity is [365] a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive, and the suppression of lotteries as a harmful business falls within this power, commonly called of police. *Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

It is urged, however, that because Congress is empowered to regulate commerce between the several states, it, therefore, may suppress lotteries by prohibiting the carriage of lottery matter. Congress may, indeed, make all laws necessary and proper for carrying the powers granted to it into

execution, and doubtless an act prohibiting the carriage of lottery matter would be necessary and proper to the execution of a power to suppress lotteries; but that power belongs to the states, and not to Congress. To hold that Congress has general police power would be to hold that it may accomplish objects not intrusted to the general government, and to defeat the operation of the 10th Amendment, declaring that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

The ground on which prior acts forbidding the transmission of lottery matter by the mails was sustained, was that the power vested in Congress to establish postoffices and post roads embraced the regulation of the entire postal system of the country, and that under that power Congress might designate what might be carried in the mails and what excluded. *Re Rapier*, 143 U. S. 110, 36 L. ed. 93, 12 Sup. Ct. Rep. 374; *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877.

In the latter case, Mr. Justice Field, delivering the unanimous opinion of the court, said: "But we do not think that Congress possesses the power to prevent the transportation in other ways, as merchandise, of matter which it excludes from the mails. To give efficiency to its regulations and prevent rival postal systems, it may, perhaps, prohibit the carriage by others for hire, over postal routes, of articles which legitimately constitute mail matter, in the sense in which those terms were used when the Constitution was adopted, consisting of [366] letters, and of newspapers *and pamphlets, when not sent as merchandise; but further than this its power of prohibition cannot extend." And this was repeated in the *Case of Rapier*.

Certainly the act before us cannot stand the test of the rule laid down by Mr. Justice Miller in the *Trade-Mark Cases*, 100 U. S. 96, *sub nom. United States* v. *Steffens*, 25 L. ed. 552, when he said: "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several states, or with the Indian tribes. If not so limited, it is in excess of the power of Congress."

But apart from the question of bona fides, this act cannot be brought within the power to regulate commerce among the several states, unless lottery tickets are articles of commerce, and, therefore, when carried across state lines, of interstate commerce; or unless the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody from one state to another.

Mr. Justice Catron remarked in the *License Cases* [5 How. 504, 600, 12 L. ed. 256, 299] that "that which does not belong to commerce is within the jurisdiction of the police power of the state; and that which does belong to commerce is within the jurisdiction of the United States;" and the observation has since been repeatedly quoted by this court with approval.

In *United States* v. *E. C. Knight Co.* 156 U. S. 13, 39 L. ed. 329, 15 Sup. Ct. Rep. 254, we said: "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality. It will be perceived how far reaching the proposition is that the power of dealing with a monopoly directly may be exercised by the *general government [367] whenever interstate or international commerce may be ultimately affected. The regulation of commerce applies to the subjects of commerce, and not to matters of internal police." This case was adhered to in *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96, where it was decided that Congress could prohibit the performance of contracts, whose natural effect, when carried out, would be to directly regulate interstate and foreign commerce.

It cannot be successfully contended that either Congress or the states can, by their own legislation, enlarge their powers, and the question of the extent and limit of the powers of either is a judicial question under the fundamental law.

If a particular article is not the subject of commerce, the determination of Congress that it is, cannot be so conclusive as to exclude judicial inquiry.

When Chief Justice Marshall said that commerce embraced intercourse, he added, commercial intercourse, and this was necessarily so since, as Chief Justice Taney pointed out, if intercourse were a word of larger meaning than the word "commerce," it could not be substituted for the word of more limited meaning contained in the Constitution.

Is the carriage of lottery tickets from one state to another commercial intercourse?

The lottery ticket purports to create contractual relations, and to furnish the means of enforcing a contract right.

This is true of insurance policies, and both are contingent in their nature. Yet this court has held that the issuing of fire, marine, and life insurance policies, in one state, and sending them to another, to be there delivered to the insured on payment of premium, is not interstate commerce. *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *New York L. Ins. Co.* v. *Cravens*,

178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962.

In *Paul* v. *Virginia*, Mr. Justice Field, in delivering the unanimous opinion of the court, said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured, for a consideration paid by the latter. These contracts [368] are not articles of commerce *in any proper meaning of the word. They are not subjects of trade and barter offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one state to another, and then put up for sale. They are like other personal contracts between parties which are completed by their signature and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different states. The policies do not take effect—are not executed contracts—until delivered by the agent in Virginia. They are, then, local transactions, and are governed by the local law. They do not constitute a part of the commerce between the states any more than a contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

This language was quoted with approval in *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207, and it was further said: "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise, and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature. The business of insurance is not commerce. A contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against 'the perils of the sea.'" Or, as remarked in *New York L. Ins. Co.* v. *Cravens*, "against the uncertainty of man's mortality."

The fact that the agent of the foreign insurance company negotiated the contract of insurance in the state where the contract was to be finally completed and the policy delivered, did not affect the result. As Mr. Justice Bradley said in the leading case of *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592: "The negotiation of [369] sales of goods which are in another *state, for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce." And see *Collins* v. *New Hampshire*, 171 U. S. 30, 43 L. ed. 60, 18 Sup. Ct. Rep. 768, and other cases.

Tested by the same reasoning, negotiable instruments are not instruments of commerce; bills of lading are, because they stand for the articles included therein; hence it has been held that a state cannot tax interstate bills of lading because that would be a regulation of interstate commerce, and that Congress cannot tax foreign bills of lading, because that would be to tax the articles exported, and in conflict with article 1, § 9, cl. 5, of the Constitution of the United States, that "no tax or duty shall be laid on any articles exported from any state." *Fairbank* v. *United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.

In *Nathan* v. *Louisiana*, 8 How. 73, 12 L. ed. 993, it was held that a broker dealing in foreign bills of exchange was not engaged in commerce, but in supplying an instrumentality of commerce, and that a state tax on all money or exchange brokers was not void as to him as a regulation of commerce.

And in *Williams* v. *Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 128, that the levy of a tax by the state of Georgia on the occupation of a person engaged in hiring laborers to be employed beyond the limits of the state was not a regulation of interstate commerce, and that the tax fell within the distinction between interstate commerce or an instrumentality thereof, and the mere incidents that might attend the carrying on of such commerce.

In *Cohen* v. *Virginia*, 6 Wheat. 264, 440, 5 L. ed. 257, 299, Congress had empowered the corporation of the city of Washington to "authorize the drawing of lotteries for any improvement of the city, which the ordinary funds or revenue thereof will not accomplish." The corporation had duly provided for such lottery, and this case was a conviction under a statute of Virginia for selling tickets issued by that lottery. That statute forbade the sale within the state of any ticket in a lottery not authorized by the laws of Virginia.

The court held, by Chief Justice Marshall, that the lottery was merely the emanation of a corporate power, and "that the *mind of [370] Congress was not directed to any provision for the sale of the tickets beyond the limits of the corporation."

The constitutionality of the act of Congress, as forcing the sale of tickets in Virginia, was therefore not passed on, but if lottery tickets had been deemed articles of commerce, the Virginia statute would have been invalid as a regulation of commerce, and the conviction could hardly have been affirmed, as it was.

In *Nutting* v. *Massachusetts*, 183 U. S. 553, 556, 46 L. ed. 324, 325, 22 Sup. Ct. Rep. 238, 239, Mr. Justice Gray said: "A state has the undoubted power to prohibit foreign insurance companies from making contracts of insurance, marine or other, within its limits, except upon such conditions as the state may prescribe, not interfering with interstate commerce. A contract of marine insurance is not an instrumentality of commerce, but a mere incident of commercial intercourse. The state, having the power

to impose conditions on the transaction of business by foreign insurance companies within its limits, has the equal right to prohibit the transaction of such business by agents of such companies, or by insurance brokers, who are to some extent the representatives of both parties."

If a state should create a corporation to engage in the business of lotteries, could it enter another state, which prohibited lotteries, on the ground that lottery tickets were the subjects of commerce?

On the other hand, could Congress compel a state to admit lottery matter within it, contrary to its own laws?

In *Alexander* v. *State*, 86 Ga. 246, 10 L. R. A. 859, 12 S. E. 408, it was held that a state statute prohibiting the business of buying and selling what are commonly known as "futures," was not protected by the commerce clause of the Constitution, as the business was gambling, and that clause protected interstate commerce, but did not protect interstate gambling. The same view was expressed in *State* v. *Stripling*, 113 Ala. 120, 36 L. R. A. 81, 21 So. 409, in respect of an act forbidding the sale of pools on horse races conducted without the state.

In *Ballock* v. *State*, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184, it was held that when the bonds of a foreign government are coupled with conditions and stipulations that change [371] their character from an *obligation for the payment of a certain sum of money to a species of lottery tickets condemned by the police regulations of the state, the prohibition of their sale did not violate treaty stipulation or constitutional provision. Such bonds with such conditions and stipulations ceased to be vendible under the law.

So lottery tickets forbidden to be issued or dealt in by the laws of Texas, the *terminus a quo*, and by the laws of California or Utah, the *terminus ad quem*, were not vendible; and for this reason, also, not articles of commerce.

If a lottery ticket is not an article of commerce, how can it become so when placed in an envelope or box or other covering, and transported by an express company? To say that the mere carrying of an article which is not an article of commerce in and of itself nevertheless becomes such the moment it is to be transported from one state to another, is to transform a non-commercial article into a commercial one simply because it is transported. I cannot conceive that any such result can properly follow.

It would be to say that everything is an article of commerce the moment it is taken to be transported from place to place, and of interstate commerce if from state to state.

An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation. This in effect breaks down all the differences between that which is, and that which is not, an article of commerce, and the necessary consequence is to take from the states all jurisdiction over the subject so far as interstate communication is concerned. It is a long step in the direction of wiping out all traces of state lines, and the creation of a centralized government.

Does the grant to Congress of the power to regulate interstate commerce impart the absolute power to prohibit it?

It was said in *Gibbons* v. *Ogden* that the right of intercourse between state and state was derived from "those laws whose authority is acknowledged by civilized man throughout the world;" but under the Articles of Confederation the states might have interdicted interstate trade, yet *when they [372] surrendered the power to deal with commerce as between themselves to the general government it was undoubtedly in order to form a more perfect union by freeing such commerce from state discrimination, and not to transfer the power of restriction.

"But if that power of regulation is absolutely unrestricted as respects interstate commerce, then the very unity the Constitution was framed to secure can be set at naught by a legislative body created by that instrument." 183 U. S. 171, 46 L. ed. 136, 22 Sup. Ct. Rep. 70.

It will not do to say—a suggestion which has heretofore been made in this case—that state laws have been found to be ineffective for the suppression of lotteries, and therefore Congress should interfere. The scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest.

In countries whose fundamental law is flexible it may be that the homely maxim, "to ease the shoe where it pinches," may be applied, but under the Constitution of the United States it cannot be availed of to justify action by Congress or by the courts.

The Constitution gives no countenance to the theory that Congress is vested with the full powers of the British Parliament, and that, although subject to constitutional limitations, it is the sole judge of their extent and application; and the decisions of this court from the beginning have been to the contrary.

"To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" asked Marshall, in *Marbury* v. *Madison* [1 Cranch, 176, 2 L. ed. 73].

"Should Congress," said the same great magistrate in *M'Culloch* v. *Maryland*, "under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

*And so Chief Justice Taney, referring to [373] the extent and limits of the powers of Congress: "As the Constitution itself does not draw the line, the question is necessarily one for judicial decision, and depending altogether upon the words of the Constitution." [*License Cases*, 5 How. 574, 12 L. ed. 288.]

It is argued that the power to regulate

commerce among the several states is the same as the power to regulate commerce with foreign nations, and with the Indian tribes. But is its scope the same?

As in effect before observed, the power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the states, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the states. The laws which would be necessary and proper in the one case would not be necessary or proper in the other.

Congress is forbidden to lay any tax or duty on articles exported from any state, and while that has been applied to exports to a foreign country, it seems to me that it was plainly intended to apply to interstate exportation as well; Congress is forbidden to give preference by any regulation of commerce or revenue to the ports of one state over those of another; and duties, imposts, and excises must be uniform throughout the United States.

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." This clause of the 2d section of article 4 was taken from the 4th article of Confederation which provided that "the free inhabitant of each of these states . . . shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and com-[374]merce;" while other parts of the *same article were also brought forward in article 4 of the Constitution.

Mr. Justice Miller, in the *Slaughter-House Cases*, 16 Wall. 36, 75, 21 L. ed. 394, 408, says that there can be but little question that the purpose of the 4th article of the Confederation, and of this particular clause of the Constitution, "is the same, and that the privileges and immunities intended are the same in each."

Thus it is seen that the right of passage of persons and property from one state to another cannot be prohibited by Congress. But that does not challenge the legislative power of a sovereign nation to exclude foreign persons or commodities, or place an embargo, perhaps not permanent, upon foreign ships or manufactures.

The power to prohibit the transportation of diseased animals and infected goods over railroads or on steamboats is an entirely different thing, for they would be in themselves injurious to the transaction of interstate commerce, and, moreover, are essentially commercial in their nature. And the exclusion of diseased persons rests on different ground, for nobody would pretend that persons could be kept off the trains because they were going from one state to another to engage in the lottery business. However enticing that business may be, we do not understand these pieces of paper themselves can communicate bad principles by contact.

The same view must be taken as to commerce with Indian tribes. There is no reservation of police powers or any other to a foreign nation or to an Indian tribe, and the scope of the power is not the same as that over interstate commerce.

In *United States* v. *43 Gallons of Whiskey*, 93 U. S. 188, 194, *sub nom. United States* v. *Lariviere*, 23 L. ed. 846, 847, Mr. Justice Davis said: "Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes,—a power as broad and free from restrictions as that to regulate commerce with foreign nations. The only efficient way of dealing with the Indian tribes was to place them under the protection of the general government. Their peculiar habits and character required this; and the history of the country shows the necessity of keeping them 'separate, subordinate, and dependent.' Accordingly, treaties have been made and laws passed *separating Indian territory from that of[375] the states, and providing that intercourse and trade with the Indians should be carried on solely under the authority of the United States."

I regard this decision as inconsistent with the views of the framers of the Constitution, and of Marshall, its great expounder. Our form of government may remain notwithstanding legislation or decision, but, as long ago observed, it is with governments, as with religions: the form may survive the substance of the faith.

In my opinion the act in question in the particular under consideration is invalid, and the judgments below ought to be reversed, and my brothers **Brewer, Shiras,** and **Peckham** concur in this dissent.

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JOHN FRANCIS, Anthony Hoff, and John Edgar, alias Peter Edgar, *Petitioners*,

*v.*

UNITED STATES.

(See S. C. Reporter's ed. 375-385.)

*Interstate commerce—traffic in lottery tickets—policy slips.*

Policy slips written by a customer to indicate his choice of numbers, and delivered by him to an agent of the policy game, to be forwarded by him to headquarters in another state, are not within the provisions of the act of Congress of March 2, 1895, chap. 191 (28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178), making it an offense against the United States to cause to be carried from one state to another any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in a lottery.

[No. 80.]

*Argued October 16, 17, 1901. Ordered for reargument before full bench November 10, 1902. Reargued December 15, 16, 1902. Decided February 23, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the District Court for the Southern District of Ohio entered upon a conviction for the offense of causing lottery tickets or papers representing an interest in a lottery to be carried from one state to another. *Reversed* and remanded to the District Court, with directions to set aside the verdict and grant a new trial.

See same case below, 46 C. C. A. 25, 106 Fed. 896.

The facts are stated in the opinion.

*Mr.* **Miller Outcalt**, argued the cause, and, with *Mr. Thomas F. Shay*, filed a brief for petitioners:

Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *United States* v. *E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect; and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is or is not repugnant to the Constitution of the United States.

*Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 5 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *New York* v. *Miln*, 11 Pet. 103, 9 L. ed. 648; *Passenger Cases*, 7 How. 283, 12 L. ed. 702; *Henderson* v. *New York*, 92 U. S. 259, 23 L. ed. 543; *United States* v. *Fox*, 95 U. S. 670, 24 L. ed. 538; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

The protection of the Constitution does not extend to lotteries, games of chance, or speculation. These may be interstate gambling, but are not commerce.

Prentice & Egan, Commerce Clause of Fed. Const. p. 55.

A state may prohibit buying or selling what are commonly known as futures.

*Fortenbury* v. *State*, 47 Ark. 188, 1 S. W. 58; *Alexander* v. *State*, 86 Ga. 246, 10 L. R. A. 859, 12 S. E. 408.

A state may prohibit the sale of lottery tickets or of bonds containing conditions which make their value dependent upon chance.

*Ballock* v. *State*, 73 Md. 1, 8 L. R. A. 671, 20 Atl. 184; *Roselle* v. *Farmers' Bank*, 141 Mo. 36, 39 S. W. 274.

A state may prohibit the sale of pools on horse races conducted without the state, although not forbidden as to races conducted within the state.

*State* v. *Stripling*, 113 Ala. 130, 38 L. R. A. 81, 21 So. 409.

And may forbid the sending of money without the state for gambling purposes.

*Lacey* v. *Palmer*, 93 Va. 159, 31 L. R. A. 822, 24 S. E. 930; *State* v. *Harbourne*, 70 Conn. 484, 40 L. R. A. 607, 40 Atl. 179.

The power conferred upon Congress by the commerce clause of the Constitution is exclusive so far as it relates to matters within its purview which are national in their character and admit or require uniformity of regulation affecting all the states. That clause was adopted in order to secure such uniformity against discriminating state legislation.

*Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238.

A lottery grant is not in any sense a contract within the meaning of the Constitution, but simply a gratuity, a license, which the state, under its police power and for the protection of the public morals, can at any time revoke.

*Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

*Mr.* **George F. Edmunds** also argued the cause and filed a brief for petitioners:

If the clear principles declared and implied in *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862, are to be followed, it is demonstrated that the act cannot stand as a lawful exercise of the power "to regulate commerce among the several states."

The contention that the language of the commerce clause must have the same meaning and application as to commerce among the states as that with foreign nations is entirely untenable.

Even if the sovereign and exclusive power in Congress and the President in dealing with foreign relations were left out of view, it is submitted that the word "regulate" may have one meaning as applied to one class of subjects, and a different or limited one as applied to another class of subjects. The same word is in all such cases construed according to the general intent.

*Maryland* v. *Baltimore & O. R. Co.* 22 Wall. 105, 22 L. ed. 713.

*Mr.* **John G. Carlisle** also argued the cause for petitioners.

*Assistant Attorney General* **Beck** argued the cause and filed a brief for respondent.

For his contentions see his brief as reported in *Champion* v. *Ames*, *ante*, 492.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an indictment under Rev. Stat. § 5440 (U. S. Comp. Stat. 1901, p. 3676), for conspiring *to commit an offense against the [376] United States. The offense which the defendants are alleged to have conspired to commit and to have committed is that of causing to be carried from one state to another, *viz.*, from Kentucky to Ohio, five papers, certificates, and instruments, purporting to be and to represent chances, shares, and interests in the prizes thereafter to be awarded by lot in the drawings of a lottery,

commonly known as the game of policy. Act of March 2, 1895, chap. 191 (28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178). It appears that the lottery in question had its headquarters in Ohio and agencies in different states. A purchaser, or person wishing to take a chance, went to one of these agencies, in this case in Kentucky, selected three or more numbers, wrote them on a slip, and handed the slip to the agent, in this case to the defendant Hoff, paying the price of the chance at the same time, and keeping a duplicate, which was the purchaser's voucher for his selection. The slip in this case was taken by the defendant Edgar to be carried to the principal office, where afterwards, in the regular course, there would be a drawing by the defendant Francis. If the purchaser's number should win, the prize would be sent to the agency and paid over. The carriage from one state to another, relied upon as the object of the conspiracy, and as the overt act in pursuance of the conspiracy, was the carriage by Edgar of slips delivered to Hoff, as above described. The case was sent to the jury by the district court, the defendants were found guilty, and the judgment against them was affirmed by the circuit court of appeals. *Reilley* v. *United States*, 46 C. C. A. 25, 106 Fed. 896. The case then was brought here on certiorari.

An exception was taken at every step of the trial in the hope that some shot might hit the mark. We entirely agree with the circuit court of appeals in its unfavorable comments on the practice. But, little attention as most of the objections made deserve, they at least succeeded in raising the broad questions whether the act of 1895 is constitutional, and whether the offense proved is within it. The former is disposed of by the case of *Champion* v. *Ames*, 188 U. S. 321, *ante*, 492, 23 Sup. Ct. Rep. 321. The latter remains, and thus far seems to us not to have received quite sufficient notice.

[377] *The game was played by mixing seventy-eight consecutive numbers and drawing out twelve after all the purchases for the game had been reported. If the three on any slip corresponded in number and order with three drawn out, the purchaser won. The purpose of bringing in the slips to headquarters was that all purchases should be known there before the drawing, and thus swindling by agents of the lottery made impossible. It is said by the circuit court of appeals that the successful slips were returned with the prizes. If this is correct we do not perceive that it materially affects the case. The arrangement, whatever it was, was for the convenience and safety of those who managed this lottery, and was in no way essential to the interests of the person making the purchase or bet. The daily report of the result of the drawings to Hoff, with whom he dealt, and the forwarding of the prize, if drawn, filled all his needs. It would seem from the evidence, as the government contended,—certainly the contrary does not appear and was not argued.—that Hoff and Edgar, the carrier, were agents of the lottery company. Thus the slips were at home, as between the purchaser and the lottery, when put into Hoff's hands. They had reached their final destination in point of law, and their later movements were internal circulation within the sphere of the lottery company's possession. Therefore the question is suggested whether the carriage of a paper of any sort by its owner or the owner's servant, properly so called, with no view of a later change of possession, can be commerce, even when the carriage is in aid of some business or traffic. The case is different from one where, the carriage being done by an independent carrier, it is commerce merely by reason of the business of carriage.

The question just put need not be answered in this case. For on another ground we are of opinion that there was no evidence of an offense within the meaning of the act of 1895. The assumption has been that the slips carried from Kentucky to Ohio were papers purporting to be or represent a ticket or interest in a lottery. But in our opinion these papers did not purport to be or do either. A ticket, of course, is a thing which is the holder's means of making good his rights. The essence of *it is that it is in the [378] hands of the other party to the contract with the lottery as a document of title. It seems to us quite plain that the alternative instrument mentioned by the statute, *viz.*, a paper representing an interest in a lottery, equally is a document of title to the purchaser and holder,—the thing by holding which he makes good his right to a chance in the game. But the slips transported, as we have pointed out, were not the purchasers' documents. It is true that they corresponded in contents, and so in one sense represented or depicted the purchasers' interests. But "represent" in the statute means, as we already have said in other words, represent to the purchaser. It means stand as the representative of title to the indicated thing, and that these slips did not do. The function of the slips might have been performed by descriptions in a book, or by memory, if the whole lottery business had been done by one man. They as little represented the purchaser's chances as the stubs in a check book represent the sums coming to the payees of the checks.

We assume, for purposes of decision, that the papers kept by the purchasers were tickets, or did represent an interest in a lottery. But those papers did not leave Kentucky. There was no conspiracy that they should. We need not consider whether, if it had been necessary to take them to Ohio in order to secure the purchaser's rights, the lottery keepers could be said to conspire to cause them to be carried there, when the carriage would be in an interest adverse to theirs, and they would be better off and presumably glad if the papers never were presented. See *Com.* v. *Peaslee*, 177 Mass. 267, 271, 59 N. E. 55; *Graves* v. *Johnson*, 179 Mass. 53, 58, 60 N. E. 383.

*The judgment of the Circuit Court of Appeals is reversed; the judgment of the Dis-*

*trict Court is also reversed*, and the cause remanded to that court, with directions to set aside the verdict and grant a new trial.

Mr. Justice **Harlan** dissenting:

This is a criminal prosecution based upon the 1st section of the act of Congress of March 2d, 1895, chap. 191, entitled "An Act [379] *for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, Subject to the Jurisdiction and Laws of the United States."

That section reads: "§ 1. That any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same *or* deposited in or carried by the mails of the United States, *or* carried from one state to another in the United States, any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise offering prizes dependent upon lot or chance, *or* shall cause any advertisement of such lottery, so-called gift concert, or similar enterprises offering prizes dependent upon lot or chance, to be brought into the United States, *or* deposited in or carried by the mails of the United States, *or* transferred from one state to another in the same, shall be punishable in the first offense by imprisonment for not more than two years or by a fine of not more than $1,000, or both, and in the second and after offenses by such imprisonment only." 28 Stat. at L. 963, U. S. Comp. Stat. 1901, p. 3178.

The indictment charges a conspiracy to commit the offense denounced by that section.

Judge Severens, delivering the judgment of the circuit court of appeals, thus stated, and I think accurately, the result of certain evidence on the part of the government: "Upon the trial the government offered evidence tending to prove that the respondents adopted a scheme of lottery business called by them 'policy,' which they subsequently carried into operation, of the character following: The principal office for the transaction of the business was located in a building in Cincinnati, Ohio. The place where the drawings of numbers from a wheel were made was located in another building or room adjoining the principal office and connected with it by a private way. In various places in that city and elsewhere, in Ohio and other states, one, at least, being in Newport, Kentucky, they had offices or stations at which the patrons purchased tickets or chances in the drawings to be thereafter made in Cincinnati, at the place mentioned. Successive numbers from one to seventy- [380] eight, inclusive, were each day *put into the wheel, and at each drawing twelve numbers were taken out. A list of these twelve numbers was taken into the principal office and there recorded. Several hours in the day before these drawings respectively took place the patrons purchased chances at the sub-offices or stations from an agent of the respondents, or from one of the latter, in charge at that place. In this instance the purchase was made of the respondent Hoff at the Newport office. The purchaser (Harrison, in this instance) chose three of the numbers from one to seventy-eight, inclusive, and wrote them upon a slip of paper, of which, according to the method of doing business, he kept a duplicate. He handed his list of numbers, with figures to denote the sum paid, upon a slip of paper, and the money to pay for his chance, to the person in charge, to be transmitted to the principal office in Cincinnati by the 'carrier,' who would call to take them up. When these slips and the moneys were all brought into the principal office, the drawing above mentioned took place. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win the prize, $200, when the game (of which there were several forms) was played on the basis above stated. If not, he lost. A report of the drawings was sent back to the station from which the slip came, and if any purchaser had made a 'hit' his slip would be returned with the prize, to be there delivered to him. Of the respondents, Reilley was in charge of the principal office, Francis of the drawings, Hoff of the station in Newport, as already stated, and Edgar was the carrier. The slip of paper taken by the carrier represented the interest of the purchaser of the chance, and, although containing figures only, it had a definite meaning and was understood by all the parties concerned. It was the transportation of some of such lists, one being that of Harrison, from Newport, Kentucky, to Cincinnati, Ohio, with knowledge of their character that constituted the overt act done in pursuance of the conspiracy." That the counsel for the accused held the same view of the evidence is shown in an extract from their brief printed in the margin.†

†"In the *Francis Case*, now before the court, it was shown that the principal office of the 'policy' concern was located in Cincinnati, Ohio, that the drawings took place in an adjoining building or room, and that sub-offices or agencies were maintained in various places in that city and in other cities in Ohio and other states, at which patrons or players would select numbers in the drawings to be made in Cincinnati. One desiring to play such a game would choose three of the numbers from 1 to 78 inclusive, and write them upon a slip of paper, of which he kept a duplicate. He would hand his list of numbers, with figures to denote the sum paid, together with the money to pay for his chance, to the person in charge of the sub-office or agency, to be transmitted to the principal office in Cincinnati. When these slips and the moneys were brought to the principal office, the drawing took place. Successive numbers, from 1 to 78 inclusive, were put into a wheel and at each drawing twelve numbers were taken out. If the three numbers on the slip were of the twelve drawn from the wheel, the purchaser would win a prize. If not, he lost. A report of the drawings was sent back to the agency from which the slip came, and, if any purchaser had won a prize, or, as it is termed, made a 'hit,' his slip was returned with the prize, to be there delivered to him. In the instance shown

[381] *I. The act of March 2d, 1895, chap. 191, was under examination by this court in *France* v. *United States*, 164 U. S. 676, 41 L. ed. 595, 17 Sup. Ct. Rep. 219. That was an indictment for a conspiracy to violate its 1st section. The judgment of conviction in that case was reversed upon the ground that the evidence showed that the papers and instruments which the defendants caused to be carried from Kentucky to Ohio did not relate to a lottery to be thereafter drawn, but to one that had previously been drawn. The court said: "There is no contradiction in the testimony, and the government admits and assumes that the drawing in regard to which these papers contained any information had already taken place in Kentucky, and it was the result of that drawing only that was on its way in the hands of messengers to the agents of the lottery in Cincinnati. The statute does not cover the transaction, and, however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, [382] rendering its violator liable to fine *and imprisonment, we are compelled to construe it strictly. Full effect is given to the statute by holding that the language applies only to that kind of a paper which depends upon a lottery the drawing of which has not yet taken place, and which paper purports to be a certificate, etc., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate, and not to construe legislation."

No such point can be made in this case, because the indictment presents a case within the provisions of the statute as interpreted in *France* v. *United States*; for it refers to papers and instruments relating to a lottery thereafter to be drawn. Besides, there was evidence tending to show that the papers and instruments which the defendants were charged to have caused to be carried from Kentucky to Ohio had reference to a future drawing, and not to one that had already occurred. And the trial judge, after stating the facts, said to the jury: "Did these papers, or so-called lottery tickets, which it is alleged defendants conspired to carry from Kentucky to Ohio, purport to represent interests of players in a drawing afterwards to take place? It is not necessary, gentlemen, that they should purport or show upon their face that they were tickets in a lottery giving an interest to the holder in a drawing afterwards to take place, but their purport may be shown outside of the papers. Now, as to the evidence offered by the government upon that point, you will recall the evidence of France, who was introduced as an expert, to tell what they were, and the evidence of Harrison, that he wrote out his ticket and delivered one half of it to the agent, paid his money and held the duplicate,—one of the duplicates, his evidence of the interest he had in the drawing that was to come off that day, —and the evidence to which I have before referred as to the fact that the duplicate left with Hoff was afterwards found in possession of Edgar at the end of the bridge, shortly after the play was made. If, from these facts, you are satisfied that it represented an interest in the drawings afterwards to take place, then, within the meaning of the law, it purported to represent the interest of the *player in the drawing, although it [383] did not so state upon its face."

II. In *Champion* v. *Ames*, 188 U. S. 321, *ante*, 492, 23 Sup. Ct. Rep. 321, it has been held that lottery tickets were subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one state to another was therefore interstate commerce; that under its power to regulate commerce among the several states, Congress—subject to the limitations imposed by the Constitution upon the powers granted by it—has plenary authority over such commerce, and may prohibit the carriage of such tickets from state to state; and that legislation to that end and of that character is not inconsistent with any limitation or restriction imposed by the Constitution upon the exercise of the powers granted to Congress.

Here, there was no carrying of lottery tickets from Kentucky to Ohio by an independent carrier engaged in the transportation, for hire, of freight and packages from one state to another. But the carrying was by an individual acting in pursuance of a conspiracy between himself and others that had for its object the carrying from Kentucky to Ohio of certain papers or instruments representing a chance, share, or interest in or dependent upon the event of a lottery, thereafter to be drawn, which offered prizes dependent upon lot or chance. Those who were parties to the conspiracy were, in effect, partners in committing the crime denounced by the above act of Congress; and the act of one of the parties in execution of the objects of such conspiracy was the act of all the conspirators.

The judgment therefore should be affirmed, unless it be that the carrying of lottery tickets from one state to another by an individual, acting in co-operation with his co-conspirators, is not interstate "commerce." But is it true that the "commerce among the several states," which Congress has the power to regulate, cannot be carried on by an individual, or by a combination of individuals? We think not. In *Paul* v. *Virginia*, 8 Wall. 168, 183, 19 L. ed. 357, 361, the court, referring to the grant to Congress of power to regulate commerce among the

by the testimony, the selection was made by the witness Harrison at the Newport office. The defendant Reilley was claimed to be in charge of the principal office in Cincinnati, Francis in charge of the drawings, and Hoff in charge of the station in Newport. Edgar carried the slips from Newport to Cincinnati, and this carriage of the slips constituted the alleged overt act done in pursuance of a conspiracy in violation of the act of Congress."

several states, said: "The language of the grant makes no reference to the instrumen-
[384]talities *by which commerce may be carried on; it is general and includes alike commerce by individuals, partnerships, associations, and corporations." In *Welton* v. *Missouri*, 91 U. S. 275, 280, 23 L. ed. 347, 349, it was said that the power to regulate commerce embraces "all the instruments by which such commerce may be conducted." That the commerce clause of the Constitution embraces alike commerce by individuals, partnerships, associations, and corporations was recognized in *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 21, 24 L. ed. 708, 715. And in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 205, 29 L. ed. 158, 162, 1 Inters. Com. Rep. 382, 386, 5 Sup. Ct. Rep. 826, 828, the court said that commerce among the states "includes commerce by whomsoever conducted, whether by individuals or by corporations."

In *Champion* v. *Ames* the carrying of lottery tickets happened to be by an incorporated express company. But if it had been by an express company organized as a partnership or joint-stock company the result of the decision could not have been different. In this case, if the carrying had been by an ordinary express wagon, owned by a private person, but employed by the accused and other conspirators to carry the lottery papers in question from Kentucky to Ohio, surely the carrying in that mode would be commerce within the meaning of the Constitution. It cannot be any less commerce because the carrying was by an individual who, in conspiracy or co-operation with others, caused the carrying to be done in violation of the act of Congress. The learned counsel for the accused, referring to the legislation enacted prior to 1895, which had for its object to exclude lottery matter from the mails, and to prohibit the importation of lottery matter from abroad, says: "In 1895 the act now in question was passed, supplementing the provisions of the prior acts so as to prohibit the act of causing lottery tickets to be carried and lottery advertisements to be transferred from one state to another by *any means or methods*."

It seems to me that the evidence made a case within the act of Congress, and that no error of law was committed by the trial court. The papers carried from Kentucky to Ohio were of the class described in the act, "any paper, certificate, or instrument
[385]*purporting to be or represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, so-called gift concert, or similar enterprise, offering prizes dependent upon lot or chance." The paper or instrument carried from Kentucky to Ohio, of which the purchaser had a duplicate, certainly represented to all the parties concerned, a chance, or interest dependent upon an event of a lottery or "similar enterprise," offering prizes dependent upon a lot or chance. To hold otherwise is to stick in the bark. It informed the policy gambler, if a prize was drawn, that the person who held the duplicate was entitled to the prize, and it was therefore a paper the carrying of which from one state to another made the conspirators causing it to be so carried guilty of an offense under the act of Congress. The reasoning by which the case is held not to be embraced by the act of Congress is too astute and technical to commend itself to my judgment. It excludes from the operation of the act a case which, as I think, is clearly within its provisions.

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## LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, *Plff. in Err.*, *v.* COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 385-399.)

*Taxation—of corporate franchise—including value of franchise derived from other state—due process of law.*

A Kentucky corporation operating a ferry across the Ohio river is deprived of its property without due process of law by the action of that state in including, for purposes of taxation, in the valuation of the franchise derived by the corporation from Kentucky, the value of an Indiana franchise for a ferry from the Indiana to the Kentucky shore, which such corporation had acquired.

[No. 17.]

*Argued January 17, 1902. Ordered for reargument before full bench March 10, 1902. Reargued December 8, 9, 1902. Decided February 23, 1903.*

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Franklin County in favor of the Commonwealth in an action to recover a tax on the value of the franchise of a corporation. *Reversed.*

See same case below, 22 Ky. L. Rep. 446, 57 S. W. 624.

The facts are stated in the opinion.

*Mr.* **Alexander Pope Humphrey** argued the cause and filed a brief for plaintiff in error:

Kentucky has never attempted to provide for the granting of a ferry franchise across the Ohio river, except from Kentucky to a landing in the state upon the other side of the river, and never for a ferry franchise from such state to Kentucky.

*Newport* v. *Taylor*, 16 B. Mon. 700; *Reeves* v. *Little*, 7 Bush, 470; *Conway* v. *Taylor*, 1 Black, 603, 17 L. ed. 191.

A ferry franchise is property.

2 Washb. Real. Prop. pp. 291, 292; *Stevens* v. *Stevens*, 3 Dana, 371; *Lippencott* v. *Allander*, 27 Iowa, 460, 1 Am. Rep. 299; 1 Scribner, Dower, 189; 2 Scribner, Dower (74) 599; *Conway* v. *Taylor*, 1 Black, 632,

NOTE.—*On taxation of corporate franchises*—see note to Louisville Tobacco Warehouse Co. v. Com. (Ky.) 57 L. R. A. 33.

17 L. ed. 202; 3 Kent, Com. 459; *Mabury* v. *Louisville & J. Ferry Co.* 9 C. C. A. 174, 18 U. S. App. 542, 60 Fed. 649; *Bowman* v. *Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740; *Bowman* v. *Wathen*, 1 How. 189, 11 L. ed. 97.

One state cannot tax real property situated in another state.

Cooley, Taxn. 2d ed. p. 55; 25 Am. & Eng. Enc. Law, p. 130.

The board of valuation and assessment was bound to value the Indiana franchise, and deduct it from the value of the capital stock.

*Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 151, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Adams Exp. Co.* v. *Kentucky*, 166 U. S. 172, 41 L. ed. 961, 17 Sup. Ct. Rep. 527.

The tax is void as a regulation of interstate commerce.

*Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Adams Exp. Co.* v. *Ohio*, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604.

The privilege here attempted to be taxed is one derived from the United States, and hence is not taxable by the state.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Hall* v. *De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Moran* v. *New Orleans*, 112 U. S. 69, 28 L. ed. 653, 5 Sup. Ct. Rep. 38; *Harman* v. *Chicago*, 147 U. S. 396, 37 L. ed. 216, 13 Sup. Ct. Rep. 306; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 701, 40 L. ed. 859, 16 Sup. Ct. Rep. 714.

*Mr.* **D. W. Sanders** argued the cause and filed a brief for defendant in error:

The power to acquire the ownership of the ferry privileges in Indiana is a valuable franchise granted this corporation, and it is this franchise which the state undertakes to tax, and not the franchise to be a corporation. This the state may do.

*Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 153, 41 L. ed. 954, 17 Sup. Ct. Rep. 532; *New York & L. E. R. Co.* v. *Pennsylvania*, 158 U. S. 437, 39 L. ed. 1045, 15 Sup. Ct. Rep. 896; *Adams Exp. Co.* v. *Ohio*, 166 U. S. 221, 41 L. ed. 977, 17 Sup. Ct. Rep. 604.

The levy of this tax upon the franchises of the corporation does not conflict with the 14th Amendment to the Constitution of the United States.

*Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 710, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; *Horn Silver Min. Co.* v. *New York*, 143 U. S. 312, 36 L. ed. 167, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403.

Mr. Justice **Harlan** delivered the opinion of the court:

This action was brought against the Louisville & Jeffersonville Ferry Company, a corporation of Kentucky, to recover certain taxes alleged to be due that commonwealth in virtue of the valuation and assessment by the state board of valuation and assessment of the corporate franchise of the defendant company for the year 1894.

Some of the provisions of the Revised Statutes of Kentucky under which that board proceeded are given in the margin.†

†"§4077. Every railway company, . . . and every other like company, corporation, or association, also every other corporation, company, or association having or exercising any special or exclusive privilege or franchise not allowed by law to natural persons, or performing any public service, shall, in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the state, and a local tax thereon to the county, incorporated city, town, and taxing district, where its franchise may be exercised. The auditor, treasurer and secretary of state are hereby constituted a board of valuation and assessment for fixing the value of said franchise, except as to turnpike companies, which are provided for in § 4095 of this article, the place or places where such local taxes are to be paid by other corporations on their franchise, and how apportioned, where more than one jurisdiction is entitled to a share of such tax, shall be determined by the board of valuation and assessment, and for the discharge of such other duties as may be imposed on them by this act. The auditor shall be chairman of said board, and shall convene the same from time to time, as the business of the board may require.

"§4078. In order to determine the value of the franchises mentioned in the next preceding section, the corporations, companies, and associations mentioned in the next preceding section, except banks and trust companies whose statements shall be filed as hereinafter required by § 4092 of this article, shall annually, between the 15th day of September and the 1st day of October, make and deliver to the auditor of public accounts of this state a statement, verified by its president, cashier, secretary, treasurer, manager, or other chief officer or agent, in such form as the auditor may prescribe, showing following facts, *viz.*: The name and principal place of business of the corporation, company, or association; the kind of business engaged in; the amount of capital stock, preferred and common; the number of shares of each; the amount of stock paid up; the par and real value thereof; the highest price at which such stock was sold at a bona fide sale within twelve months next before the 15th day of September of the year in which the statement is required to be made; the amount of surplus fund and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments and incomes from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in this state, and where situated, assessed, or liable to assessment in this state, and the fair cash value thereof, estimated at

[387] *The company filed an answer, which upon demurrer was adjudged to be insufficient. The defendant declining to answer further, judgment was rendered for the commonwealth. That judgment was affirmed by the court of appeals of Kentucky, and the case is here upon writ of error sued out by the ferry company. The ground of our juris-[388]diction is *that the company claims that, by the judgment of the highest court of Kentucky, affirming the judgment of the court of original jurisdiction, it has been denied rights belonging to it under the Constitution of the United States.

The facts admitted by the demurrer to the answer and therefore, for the purposes of the present hearing, to be taken as true, are substantially as follows:

By an act of the general assembly of Kentucky, approved March the 16th, 1869, the Louisville & Jeffersonville Ferry Company was created a corporation, with power to carry on the business of ferrying freight, passengers, and vehicles over the Ohio river, and to purchase ferryboats, wharves, and ferry franchises for any ferry or ferries between Louisville, Kentucky, and Jeffersonville, Indiana; and upon the purchase of such franchises to have the right to carry on and conduct a ferry or ferries between those cities. It was also authorized to accept boats, franchises, wharves, and other property in payment of stock subscribed and at such prices as might be agreed on.

In the year of 1802, William Henry Harrison, then governor and commander-in-chief of the Indiana territory, granted to Marsden G. Clark a license for a ferry at Jeffersonville, Indiana, for the transportation of passengers, carriages, horses, and cattle across the Ohio river at that place.

In the same year Governor Harrison granted to one Joseph Bowman a license to keep a ferry from the landing near the spring in the town of Jeffersonville across the Ohio river to the public road at the mouth of Bear Grass creek in Kentucky.

In 1820 George White, by an act of the Indiana legislature, was authorized to keep a ferry in the town of Jeffersonville, and to ferry off and from any portion of the public ground or commons in that town lying upon or bordering upon the Ohio river across that river to the opposite shore or mouth of Bear Grass creek,—that creek being then as well as now within the corporate limits of Louisville and near the point at which the defendant company now lands its ferryboats in Kentucky.

These three ferry franchises, about the year 1837, vested in A. Wathen, Charles Strader, John Shallcross, and James *Thompson, and in 1865 came to be owned [389] by John Shallcross, Moses Brown, Hiram Mayberry, James Wathen, A. Wathen, Charles Woolfolk & Co., J. B. Smith, W. C. Hite, E. S. Hoffman, P. Varble, and Daniel Park. During all the intervening years ferries had been maintained.

In 1865 the persons then owning the ferry organized as a partnership for the purpose of operating it, and in that capacity continued to operate it until the Louisville & Jeffersonville Ferry Company was incorporated, as above stated. Under its act of incorporation the company procured to be conveyed to itself the above-mentioned ferry franchises with the boats then owned by the partnership, and issued therefor its fully paid capital stock for $200,000. The boats and personal property so acquired were not of great value,—the principal value being in the franchises acquired as above set forth.

In 1887 the defendant company made a contract with the sinking fund commissioners of the city of Louisville, a corporation having charge of certain fiscal affairs of that city, under which the defendant leased the ferry privileges in Louisville, agreeing to pay therefor $800 a year and a wharfage fee annually of $400. That contract by its terms expired January the 1st, 1902.

The defendant company states in its answer "that the only ferry franchises owned by it are those above mentioned, which were granted by the authorities of the state of Indiana."

All tangible property of the defendant company in Kentucky was assessed in the fall of 1893 for the state tax for the year 1894, and that tax was paid. The property

the price it would bring at a fair voluntary sale; and such other facts as the auditor may require

"§4079. Where the line or lines of any such corporation, company, or association extend beyond the limits of the state or county, the statement shall, in addition to the other facts hereinbefore required, show the length of the entire lines operated, owned, leased, or controlled in this state, and in each county, incorporated city, town, or taxing district, and the entire line operated, controlled, leased, or owned elsewhere. If the corporation, company, or association be organized under the laws of any other state or government, or organized and incorporated in this state, but operating and conducting its business in other states as well as in this state, the statement shall show the following facts, in addition to the facts hereinbefore required: The gross and net income or earnings received in this state and out of this state, on business done in this state, and the entire gross receipts of the corporation, company, or association in this state and elsewhere during the twelve months next before the 15th day of September of the year in which the assessment is required to be made. In cases where any of the facts above required are impossible to be answered correctly, or will not afford any valuable information in determining the value of the franchises to be taxed, the said board may excuse the officer from answering such questions: *Provided*, That said board, from said statement, and from such other evidence as it may have, if such corporation, company, or association be organized under the laws of this state, shall fix the value of the capital stock of the corporation, company, or association, as provided in the next succeeding section, and from the amount thus fixed shall deduct the assessed value of all tangible property assessed in this state, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid."

so assessed consisted of all the company's boats and other personal property, it having no real estate in Kentucky. For the same year all real estate owned by the defendant in Indiana was assessed by the authorities of that state, and the tax thereon paid.

The company had no intangible property except the franchise heretofore described.

"The board of valuation and assessment ascertained what had been the net earnings of the defendant up to September 15th, 1893, for the year preceding that date. It then capitalized said net earnings at 6 per cent,—that is, to have been such an amount [390] *as at 6 per cent would produce the sum of $121,050. From this the board deducted $54,164, being the assessed value of the defendant's property in Kentucky and Indiana, leaving the sum of $66,886 as the value of defendant's franchise."

The boats owned by the defendant company when this action was brought, and also those owned by it in 1893, "were regularly enrolled, under the laws of the United States, at the port of Louisville, and were assessed, as above stated, by the sheriff of Jefferson county, in the fall of that year, and the tax paid upon them in the year 1894."

The defendant brought "before the board of valuation and assessment, before that board had made its assessment final, the fact that its whole capital stock had been issued in consideration of the transfer of the said ferry franchises granted by the state of Indiana and attendant property, and showed that all its property had been assessed as above explained, and protested against any assessment being made upon its franchises as being beyond the jurisdiction of the said board and outside of the territorial jurisdiction of the state of Kentucky, and not taxable in Kentucky; and it protested against the said board making any valuation whatever of its capital stock because all of its property had been once assessed, and any valuation made upon its capital stock would include alone these franchises and profits resulting to the defendant from engaging in interstate commerce; and the defendant further requested the said board, if it should insist upon making a valuation upon its capital stock, to deduct therefrom the value of these franchises. The said board refused to enter into the question of the valuation of the said franchise granted by the state of Indiana, as aforesaid, and owned and operated by this defendant, and refused to regard the fact that the profits which were earned by this defendant came from interstate commerce."

Substantially the whole revenue of the defendant company is derived from interstate commerce, and its net returns, upon which the above capitalization was made, represent its gains from interstate commerce; that is, from the carriage of persons and property between the states of Indiana and Kentucky. Such was the case presented by the answer.

The ferry company insists that the judgment of the court of appeals of Kentucky, affirming the judgment of the court of original jurisdiction (which sustained the action of the state board of valuation and assessment), had the effect to deny rights belonging to it under the Constitution of the United States.

It is appropriate here to state the grounds upon which the court of appeals of Kentucky proceeded. That court said: "The judgments from which the appeals are prosecuted are for the franchise tax for the years of 1894, 1895, 1896, 1897, and 1898. The appellant is a corporation organized under a special act of the legislature passed in 1869. It purchased a ferry franchise, which had been originally granted by the territorial authorities of Indiana, which authorized the original grantee to conduct a ferry business across the Ohio river from Indiana to Kentucky. By regular devolution of title, through descents and conveyances, appellant owns the rights thus granted. The franchise thus acquired authorizes the appellant to transport persons and property from Jeffersonville, Indiana, to Louisville, Kentucky. There was vested in the sinking fund commissioners of the city of Louisville title to the ferry rights along the Ohio river within the boundaries of that city, and by an agreement with them the appellant became the owner of it. The appellant owned certain ferry boats which are enrolled at the port of Louisville. It owned certain real estate in the state of Indiana. It has paid its taxes upon its real property in Indiana and upon its personal property in this state. It has paid its taxes only upon its tangible property. It appears to have no income except the revenue derived from carrying persons and property from one side of the river to the other. The *board of valuation and assessment fixed the [392] value of the franchise for the corporation as if it conducted all of its business in the territorial limits of the state of Kentucky, not deducting anything from that value on account of the fact that it exercised the privilege of conveying passengers from Jeffersonville to Louisville by reason of its acquisition of privileges which were originally granted under the laws of that state. . . . The appellant is a Kentucky corporation. The board of valuation and assessment did not attempt to assess or tax its revenues coming from the exercise of its franchise in the transportation of persons and property over the Ohio river; but under certain sections of the Kentucky statutes it assessed the value of appellant's franchise, which is its intangible property. The board did not assess or attempt to assess the property, either tangible or intangible, which it owned in the state of Indiana."

Again: "By virtue of its corporate authority the appellant acquired ferryboats, the ferry rights, within the city of Louisville, which included the right to transport persons and property from Kentucky to Indiana over the Ohio river, and the necessary use of its wharf to carry on that business. It also by contract (which its charter seems

to have authorized it to do) acquired wharf privileges on the Indiana side, and also the right which had been previously granted by Indiana to transport persons and property from Indiana to Kentucky over the Ohio river. It also owns a park in Indiana. The property thus acquired constituted all of its property, tangible and intangible, in Kentucky and Indiana. Having thus acquired the foregoing property, and having profitably used it, its corporate franchise presumably became of the value fixed by the board of valuation and assessment. If the franchise of the appellant became valuable by the acquisition of tangible or intangible property, or both, the effect is exactly the same, whether it is acquired in Indiana or in Kentucky, or both. It is not the tangible or intangible property in Indiana which the appellant acquired by purchase which is sought to be taxed, but the value of its franchise which has been created in and now ex-[393]ists in Kentucky. . . . *There is no doubt but what the business which the appellant carries on may be properly designated as interstate commerce, and that it is a subject of national character, Congress having the authority and the power under the Constitution to regulate it. The state of Kentucky is not attempting to impose a tax upon receiving and handling persons and property, but is simply attempting to collect a franchise tax on the corporation created by law. As authorized by the laws and Constitution, the state is entitled to impose a tax upon its tangible property. . . . The appellant is domiciled in Kentucky, and the property sought to be taxed has its situs in Kentucky, and, as we have said, there is no attempt to tax the appellant's business income, or revenue, but its income is alone considered in fixing the value of its franchise."

It thus appears from the admitted facts, and from the opinion of the court below, that the state board, in its valuation and assessment of the franchise derived by that company from Kentucky, included the value of the franchise obtained from Indiana for a ferry from its shore to the Kentucky shore. In short, as stated by the court of appeals, the value of the franchise of the ferry company was fixed "as if it conducted all of its business in the territorial limits of the state of Kentucky," making no deduction for the value of the franchise obtained from Indiana.

The boundary of Kentucky extends only to low-water mark on the western and northwestern banks of the Ohio river. *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 609-613, 43 L. ed. 823, 829-831, 19 Sup. Ct. Rep. 553, and authorities there cited. In that case it was said that, although the jurisdiction of that commonwealth for all the purposes for which any state possesses jurisdiction within its territorial limits was coextensive with its established boundaries, that jurisdiction was attended by the fundamental condition that it must not be exerted so as to intrench upon the authority of the national government, or to impair any rights secured or protected by the national Constitution.

So that the authority of the ferry company, derived from *Kentucky, to transport[394] persons, freight, and property across the Ohio river from Kentucky did not invest it with authority to establish and maintain a ferry from the Indiana shore to the Kentucky shore. That is admitted by the counsel for Kentucky. Indeed, in *Newport* v. *Taylor*, 16 B. Mon. 699, 786, the court of appeals of Kentucky said that "Kentucky has never claimed the exclusive right of ferriage across the Ohio river except from this shore, and while she has interdicted the establishment of ferries from this side, within a certain distance of an established ferry on this side, she has constantly recognized the right of the authorities on the other side to establish ferries from that side, without regard to the interdict." The same thought was expressed in *Reeves* v. *Little*, 7 Bush, 470. The case of *Newport* v. *Taylor* was brought to this court, and the judgment of the court of appeals of Kentucky was affirmed. *Conway* v. *Taylor*, 1 Black, 603, 631, 17 L. ed. 191, 202. Referring to the ferry franchise granted by Kentucky, this court there said: "The franchise is confined to the transit from the shore of the state. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the states lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of no complaints, by any of those states. It was shown in the argument at bar that similar laws exist in most, if not all, the states bordering upon those streams. They exist in other states of the Union bounded by navigable waters."

It must therefore be assumed that the franchise granted by Indiana to maintain the ferry from the Indiana shore is wholly distinct from the franchise obtained from Kentucky to maintain the ferry from the Kentucky shore, although the enjoyment of both are essential to a complete ferry right for the transportation of persons and property across the river both ways. And each franchise is property entitled to the protection of the law. Kent says that the privilege of establishing a ferry and taking tolls for the use of the same is a franchise, and that "an estate in such a franchise, and an estate in land, rest upon the same *principle,[395] being equally grants of a right or privilege for an adequate consideration." 3 Kent, Com. 458, 459. In his Treatise on the American Law of Real Property, Washburn says that the right granted by the legislature, as representing the sovereign power, to carry passengers across streams, or bodies of water, or the arms of the sea, from one point to another, for compensation, is to be deemed a franchise, and belongs to the class of estates called incorporeal hereditaments. 2 Washb. 6th ed. §§ 1212, 1215. See also 1 Cooley's Bl. Com. bk. 2, pp. 21, 36. In *Conway* v. *Taylor*, 1 Black, 632, 17

L. ed. 202, this court approved of Kent's view, and said: "A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property." In Kentucky the right of the widow to have dower assigned to her in a ferry has been recognized. *Stevens* v. *Stevens*, 3 Dana, 371.

As, then, the privilege of maintaining the ferry in question from the Indiana shore to the Kentucky shore is a franchise derived from Indiana, and as that franchise is a valuable right of property, is it within the power of Kentucky to tax it directly or indirectly? It is said that the Indiana franchise has not been taxed, but only the franchise derived from Kentucky; that the tax is none the less a tax on the Kentucky franchise, because of the value of that franchise being increased by the acquisition by the Kentucky corporation of the franchise granted by Indiana. This view sacrifices substance to form. If the board of valuation and assessment, for purposes of taxation, had separately valued and assessed at a given sum the franchise derived by the ferry company from Kentucky, and had separately valued and assessed at another given sum the franchise obtained from Indiana, the result would have been the same as if it had assessed, as it did assess, the Kentucky franchise as a unit upon the basis of its value as enlarged or increased by the acquisition of the Indiana franchise.

The learned counsel for Kentucky says that it is the value of the company's franchise contained "in its charter" which is the subject of taxation. But the franchise obtained from Indiana is not in the com-
[396] pany's charter granted by Kentucky. *It is contained only in the act of the legislature of Indiana. The Indiana franchise was not carried into the charter of the Kentucky corporation by reason of that corporation having the authority to purchase it. Its existence and validity depend entirely upon the laws of Indiana.

Counsel further say that Kentucky does not impose a tax upon the company's privilege, *as such*, granted by the state of Indiana. If it had done so the tax so imposed would not have been defended as valid. Yet by her statute, under which the board of valuation and assessment proceeded, Kentucky has accomplished that result by including for purposes of taxation, in the valuation of the franchise granted by it, the value of the franchise granted by Indiana, and then taxing the franchise of the Kentucky corporation upon the basis of the aggregate value of both franchises. Although now owned by one corporation, these are separate franchises.

There is, in our judgment, no escape from the conclusion that Kentucky thus asserts its authority to tax a property right, an incorporeal hereditament, which has its situs in Indiana. While the mode, form, and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by a principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government. Hence, this court, speaking by Chief Justice Marshall, in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 429, 4 L. ed. 579, 607, said that, while all subjects over which the sovereign power of a state extends are objects of taxation, "those over which it does not extend are, upon the soundest principles, exempt from taxation." That proposition, he said, could almost be pronounced self-evident. It was therefore held in *Hays* v. *Pacific Mail S. S. Co.* 17 How. 596, 599, 15 L. ed. 254, 255, that certain steamers engaged in interstate commerce were not subject to taxation in a state where they might be temporarily when prosecuting their business, but were taxable at their home port, which was their situs, and where they belonged, the court saying: "We are satisfied that the state of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, *abiding within its [397] limits, so as to become incorporated with the other personal property of the state; they were there but temporarily, engaged in lawful trade and commerce, with their situs at the home port, where the vessels belonged, and where the owners were liable to be taxed for the capital invested, and where the taxes had been paid;" in *St. Louis* v. *Wiggins Ferry Co.* 11 Wall. 423, 429, 431, 20 L. ed. 192, 194, 195, that certain ferry boats belonging to an Illinois corporation and plying between East St. Louis, Illinois, and St. Louis, Missouri, were not taxable in the latter state, but at their home port in the former state, the court saying that a tax was void when there was no jurisdiction as to the property taxed; in *Morgan* v. *Parham*, 16 Wall. 471, 476, 21 L. ed. 303, 304, that a vessel engaged in interstate commerce, and being from time to time in Mobile while prosecuting its business, was not taxable in Alabama, but was taxable in New York, where it was owned and registered, the court saying that, in its opinion, "the state of Alabama had no jurisdiction over this vessel for the purpose of taxation, for the reason that it had not become incorporated into the personal property of the state, but was there temporarily only, and that it was engaged in lawful commerce between the states, with its situs at the home port of New York, where it belonged, and where its owner was liable to be taxed for its value;" and in *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 206, 29 L. ed. 158, 163, 1 Inters. Com. Rep. 386, 5 Sup. Ct. Rep. 829, that "the property of [foreign] corporations engaged in foreign or interstate commerce, as well as the property of corporations engaged in other business, is subject to state taxation, provided always it be within the jurisdiction of the state." In Cooley on Taxation, the author, while conceding that the legislative power extends over everything, whether it be person, property, possession, franchise, privi-

lege, occupation, or right, says that "persons and property not within the territorial limits of a state cannot be taxed by it;" and that "a state can no more subject to its power a single person or a single article of property whose residence or legal situs is in another state, than it can subject all the citizens or all the property of such other state to its power." 2d ed. pp. 5, 55, 159.

We recognize the difficulty which some-
[398] times exists in particular *cases in determining the situs of personal property for purposes of taxation, and the above cases have been referred to because they have gone into judgment and recognize the general rule that the power of the state to tax is limited to subjects within its jurisdiction or over which it can exercise dominion. No difficulty can exist in applying the general rule in this case; for, beyond all question, the ferry franchise derived from Indiana is an incorporeal hereditament derived from and having its legal situs in that state. It is not within the jurisdiction of Kentucky. The taxation of that franchise or incorporeal hereditament by Kentucky is, in our opinion, a deprivation by that state of the property of the ferry company without due process of law in violation of the 14th Amendment of the Constitution of the United States; as much so as if the state taxed the real estate owned by that company in Indiana.

This view is not met by the suggestion that Kentucky can make it a condition of the exercise of corporate powers under its authority that the tax upon the franchise granted by it shall be measured by the value of all its property, wherever situated, of whatever nature, or from whatever source derived. It is a sufficient answer to this suggestion to say that no such condition was prescribed in the charter of the ferry company when it was granted and accepted. Nor does the taxing statute in question make it a condition of the ferry company's continuing to exercise its corporate powers that it shall pay a tax for its property having a situs in another state. There is no suggestion in the company's charter that the state would ever, in any form, tax its property having a situs in another state. We express no opinion as to the validity of such a condition if it had been inserted in the company's charter, or if it were now, in terms, prescribed by any statute. We decide nothing more than it is not competent for Kentucky, under the charter granted by it, and under the Constitution of the United States, to tax the franchise which its corporation, the ferry company, lawfully acquired from Indiana, and which franchise or incorporeal hereditament has its situs, for purposes of taxation, in Indiana.

As what has been said is sufficient to dispose of the case, we need not consider the question arising upon the record and urged
[399] *by counsel, whether the taxation by Kentucky of the ferry company's Indiana franchise to transport persons and property from Indiana to Kentucky is not, by its necessary effect, a burden on interstate commerce forbidden by the Constitution of the United States.

The judgment of the court of appeals of Kentucky is reversed, and the cause remanded for such further proceedings as may not be inconsistent with this opinion.

*Reversed.*

**The Chief Justice and Mr. Justice Shiras dissent.**

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LOUISVILLE & JEFFERSONVILLE FERRY COMPANY, *Plff. in Err.*,
*v.*
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 399.)

*Taxation—of corporate franchise—including value of franchise derived from other state—due process of law.*

These cases are governed by the decision in *Louisville & Jeffersonville Ferry Co. v. Kentucky, ante,* 513.

[Nos. 18, 19, 20, 21, 22.]

*Decided February 23, 1903.*

IN ERROR to the Court of Appeals of the State of Kentucky to review judgments sustaining a tax on corporate franchises. *Reversed.*

See same case below, 22 Ky. L. Rep. 446, 57 S. W. 624.

Mr. Justice **Harlan** delivered the opinion of the court:

It having been stipulated between the parties that the above cases should abide the decision in No. 17, just decided, 188 U. S. 385, *ante,* 513, 23 Sup. Ct. Rep. 463, the judgment in each case is reversed, and each case is remanded to the state court for such further proceedings as may not be inconsistent with the opinion in No. 17.

*Reversed.*

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*WILLIAM SAMUEL BIGBY, *Plff. in Err.*, [400]
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 400-410.)

*Jurisdiction of Federal courts—suit against the United States—implied contract—case sounding in tort.*

The United States does not, by undertaking to carry a passenger in an elevator in one of its public buildings, impliedly contract that its employees in charge of it will exercise due care, so as to confer jurisdiction on a Federal court, under the Tucker act of March 3, 1887, chap. 359 (24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 752), of an action to recover damages for personal injuries sustained by reason of the negligence of such employees, on the theory that such action is upon a "contract, express or implied, with the gov-

ernment of the United States," within the meaning of that act; but the case is one "sounding in tort," which by that act is excluded from judicial cognizance.

[No. 111.]

*Argued December 4, 5, 1902. Decided February 23, 1903.*

IN ERROR to the Circuit Court of the United States for the Eastern District of New York to review a judgment sustaining a demurrer to a petition in a suit to recover damages from the United States for personal injuries sustained by reason of the negligence of those in charge of an elevator in a public building. *Affirmed.*

See same case below, 103 Fed. 507.

The facts are stated in the opinion.

*Mr.* **Roger Foster** argued the cause and filed a brief for plaintiff in error:

It is well settled that when a carrier, common or special, or any other bailee, injures by his negligence or that of his servants a person or a chattel which has been entrusted to his care, the injured party may waive the tort and sue in contract for damages.

*Pollard* v. *New Jersey R. & Transp. Co.* 101 U. S. 223, 25 L. ed. 840; *Philadelphia & R. R. Co.* v. *Derby*, 14 How. 468, 14 L. ed. 502; *New Jersey S. B. Co.* v. *Brockett*, 121 U. S. 637, 30 L. ed. 1049, 7 Sup. Ct. Rep. 1039; *Boylan* v. *Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. Rep. 50; *Kansas P. R. Co.* v. *Kunkel*, 17 Kan. 145; *Pennsylvania R. Co.* v. *Peoples*, 31 Ohio St. 537; *The Queen of the Pacific*, 61 Fed. 213; *Central Vt. R. Co.* v. *Soper*, 8 C. C. A. 341, 21 U. S. App. 24, 59 Fed. 879; *Cooper* v. *Berry*, 21 Ga. 526, 68 Am. Dec. 468; *Hunt* v. *Norris*, 4 Mart. La. 517; *Orange Bank* v. *Brown*, 3 Wend. 158; Jeremy, Carr. p. 117; 1 Chitty, Pl. 75, 6; 2 Chitty, Pl. 117, 271, 2; Pom. Rem. §§ 568, 570, 571; Addison, Torts, Wood's ed. § 16, p. 17; *Legge* v. *Tucker*, 1 Hurlst & N. 500; *Baylis* v. *Lintott*, L. R. 8 C. P. 345; *Fleming* v. *Manchester, S. & L. R. Co.* L. R. 4 Q. B. Div. 81.

The doctrine applies to all carriers of goods or persons, and to all other bailees, whether or not there has been any undertaking upon their part, and although they do not receive compensation.

*Foulkes* v. *Metropolitan Dist. R. Co.* L. R. 4 C. P. Div. 267; Metcalf, Contr. 2d ed. 5, 6; *Warbrook* v. *Griffin*, 2 Brownl. 254, F. Moore, 876; *Cogge* v. *Bernard*, 2 Ld. Raym. 909; *Beauchamp* v. *Powley*, 1 Moody & R. 38; *Doorman* v. *Jenkins*, 2 Ad. & El. 256; *Dalston* v. *Janson*, 5 Mod. 90, 1 Ld. Raym. 58; *Symons* v. *Darknoll*, Palmer, 523; *Boson* v. *Sandford*, 1 Shower, 29, and 101, 2 Shower, 478, 3 Mod. 321, 2 Salk. 440; *Hunt* v. *Norris*, 4 Mart. La. 517; *Brown* v. *Boorman*, 11 C. & F. 1.

Calling the permission to use the elevator a license does not prevent the transaction from becoming a contract as soon as the licensee has acted upon the license.

*Mumford* v. *Whitney*, 15 Wend. 380, 30 Am. Dec. 60.

The operator of a passenger elevator is a carrier, and is governed by the same principles of law that apply to other carriers.

*Marker* v. *Mitchell*, 54 Fed. 637.

This is not an action "sounding in tort."

*Boylan* v. *Hot Springs R. Co.* 132 U. S. 146, 33 L. ed. 290, 10 Sup. Ct. Rep. 50.

Where the money or property of an innocent person has gone into the coffers of the nation by means of any fraud to which its agent was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.

*United States* v. *State Nat. Bank*, 96 U. S. 30, 24 L. ed. 647; *Swift & C. & B. Co.* v. *United States*, 111 U. S. 22, 28 L. ed. 341, 4 Sup. Ct. Rep. 244.

The United States is liable for salvage services rendered to its ships.

*Bryan* v. *United States*, 6 Ct. Cl. 128; *McGowan* v. *United States*, 20 Ct. Cl. 147.

The United States has often been held liable for the negligence of its officers.

*United States* v. *Bostwick*, 94 U. S. 53, 24 L. ed. 65; *Collins* v. *United States*, 34 Ct. Cl. 294.

The liability of the government to make reparation in cases of this character has been recognized in Belgium.

Passicrisie A. D. 1852, pp. 1–370. See also *Gerveis de Clifton's Case*, Y. B. 22 Edw. III., folio 5, pl. 12.

The state of New York was held liable in damages for the negligence of its employees in leaving unguarded an opening in the railing of a bridge, in consequence of which a person crossing the bridge was injured.

*Gibney* v. *State*, 137 N. Y. 1, 19 L. R. A. 365, 33 N. E. 142.

*Assistant Attorney General* **Pradt** argued the cause and filed a brief for defendant in error:

The true implied contract arises out of certain facts which, when proved, evidence a contract as effectually as though it had been made in express terms. But as to contracts described as implied in law, it cannot be truly said that there is any contract, since there is no evidence of any intention of contract; but, on the contrary, the facts, when established, show that no intention to contract existed.

*Woods* v. *Ayres*, 39 Mich. 350, 33 Am. Rep. 396; *Hertzog* v. *Hertzog*, 29 Pa. 465; Metcalf, Contr. p. 9; Pom. Rem. p. 637; *Milford* v. *Com.* 144 Mass. 65, 10 N. E. 516.

Taking the phrase "implied contract," found in the jurisdictional statute, in connection with the accompanying provision excluding claims "sounding in tort," it is difficult to see how the term can be held to refer to any other than a genuine contract arising with certainty out of proved facts.

Any other construction will render the jurisdiction of the court of claims "as broad as the manifold grievances complained of against the officers and agents of the United States."

*McArthur* v. *United States*, 29 Ct. Cl. 194.

This case is an attempt, under the assumption of an implied contract, to make the gov-

ernment responsible for the unauthorized acts of its officer, those acts being in themselves torts.

*Gibbons* v. *United States*, 8 Wall. 274, 19 L. ed. 454.

The government itself is not responsible for the misfeasances, wrongs, negligences, or omissions of duty of the subordinate officers or agents employed in the public service.

*Robertson* v. *Sichel*, 127 U. S. 515, 32 L. ed. 206, 8 Sup. Ct. Rep. 1286; *German Bank* v. *United States*, 148 U. S. 579, 37 L. ed. 568, 13 Sup. Ct. Rep. 702.

The United States cannot be sued in its own courts without its consent, and has never permitted itself to be sued in any court for torts committed in its name by its officers. Nor can the settled distinction in this respect between contract and tort be evaded by framing the claim as upon an implied contract.

*Hill* v. *United States*, 149 U. S. 598, 37 L. ed. 864, 13 Sup. Ct. Rep. 1011; *Langford* v. *United States*, 101 U. S. 345, 25 L. ed. 1012; *Schillinger* v. *United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85; *Lanman* v. *United States*, 27 Ct. Cl. 265; *McArthur* v. *United States*, 29 Ct. Cl. 194.

The defendant in this case was not in the relation of a common carrier by reason of running its elevator, but simply rested under a duty imposed by law to carry passengers in safety.

*McGrell* v. *Buffalo Office Bldg. Co.* 153 N. Y. 268, 47 N. E. 305; *Allen* v. *Sackrider*, 37 N. Y. 342; 2 Parsons, Contr. 5th ed. 166, note; *Nolton* v. *Western R. Corp.* 15 N. Y. 444, 69 Am. Dec. 623; *Marker* v. *Mitchell*, 54 Fed. 638.

In every case in which one undertakes to carry passengers, there is imposed upon him by law a duty to convey such passengers safely, and this without respect to the manner in which the undertaking is assumed, whether by contract for hire, or gratuitously, or by reason of a mere license extended to the passenger; but such legal liability does not in itself constitute or imply a contract.

*Carroll* v. *Staten Island R. Co.* 58 N. Y. 133, 17 Am. Rep. 221; *Hannibal & St. J. R. Co.* v. *Swift*, 12 Wall. 270, 20 L. ed. 428; *Marshall* v. *York, N. & B. R. Co.* 11 C. B. 663; *Austin* v. *Great Western R. Co.* L. R. 2 Q. B. 445.

Claimant's proper recourse is to Congress.

*Gibbons* v. *United States*, 8 Wall. 274, 19 L. ed. 454; *German Bank* v. *United States*, 148 U. S. 579, 37 L. ed. 568, 13 Sup. Ct. Rep. 702.

Mr. Justice **Harlan** delivered the opinion of the court:

Bigby, the plaintiff in error, claimed in his petition to have been damaged to the extent of $10,000 on account of certain personal injuries received by him while entering an elevator placed by the United States in its courthouse and postoffice building in the city of Brooklyn, and asked judgment for that sum against the government.

The petition was demurred to upon three grounds, namely, that the court had no jurisdiction of the person of the defendant, or of the subject of the action, and did not state facts sufficient to constitute a cause of action against the United States.

The demurrer was sustained by the circuit court on each of the grounds specified, and, so far as it was sustained upon the ground that the petition did not state a cause of action, it was sustained because the action was not authorized by the act of Congress known as the Tucker act, approved March 3d, 1887, chap. 359, and entitled "An Act to Provide for the Bringing of Suits against the Government of the United States." 24 Stat. at L. 505 (U. S. Comp. Stat. 1901, p. 752). The action was accordingly dismissed.

The specific allegations of the petition are—

That the United States is a corporation created by the Constitution, *with its principal office in Washington, and, within the meaning of the New York Code of Civil Procedure, is a foreign corporation; [401]

That on or about November 27th, 1899, the petitioner, while on his way to the office of the marshal of the United States for the eastern district of New York, and at the request of the United States and of its officers, employees, and duly authorized agents, each acting within the scope of his authority, entered into a passenger elevator in the United States courthouse and postoffice building in Brooklyn, which building and elevator was owned and controlled by the United States, and was designed and intended by it for the use of persons on their way to the office of its said marshal;

That the United States "then and there entered into an implied contract" with the petitioner, "wherein and whereby, for a sufficient valuable consideration, it agreed to carry your petitioner safely, to operate said elevator with due care, and to employ for the purposes of the operation of said elevator a competent and experienced person;"

That in "violation of said contract, the United States failed to carry the petitioner safely, or to operate the elevator with due care, or to employ for the operation and to put in charge of such elevator a competent and experienced person, and violated its contract with the petitioner in other ways; and,

That in consequence of said failures, respectively, the petitioner, "while entering the said elevator without negligence on his part was caused to fall and his foot, ankle, and leg were crushed between said elevator and the top of the entrance into the elevator shaft or a projection in the shaft of said elevator or in some other manner, and the back of your petitioner and other parts of the body of your petitioner were also consequently injured, and your petitioner consequently suffered a laceration of the ligaments of his ankle, and he consequently was caused much bodily and mental pain."

The transcript contains a certificate from the circuit court to the effect that in said cause the jurisdiction of that court was in

issue, and that the question was "whether a person who is not, and has not been, an [402] employee of the United States, can *sue the United States, in the circuit court of the United States, in the district where he resides, to recover damages to the amount of $10,000, which damages were caused by personal injury received by said person through the negligence of an employee of the United States, while said person injured as aforesaid was being carried on an elevator in a public building owned and used by the United States as a postoffice and for other governmental uses and purposes, when said person entered said elevator for the purpose of visiting the office of the United States marshal of such district on official business."

This being an action against the United States, the authority of the circuit court to take cognizance of it depends upon the construction of the above act of March 3d, 1887. 24 Stat. at L. 505 (U. S. Comp. Stat. 1901, p. 752).

By that act it is provided that the court of claims shall have jurisdiction to hear and determine "all claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late Civil War, and commonly known as 'war claims,' or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any [403] *court, department, or commission authorized to hear and determine the same." The act further provided that "the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars."

It is clear that the act excludes from judicial cognizance any claim against the United States for damages in a case "sounding in tort." But the contention of the plaintiff is, in substance, that, although the facts constituting the negligence of which he complains made a case of tort, he may waive the tort; that his present claim is founded upon an implied contract with the government, whereby it agreed to carry him safely in its elevator, would operate the elevator with due care, and employ for the purposes of such carriage a competent and experienced person; and, consequently, that his suit is embraced by the words "upon any contract, express or implied, with the government of the United States." The contention of the United States is that no such implied contract with the government arose from the plaintiff's entering or attempting to enter and use the elevator in question, and that the claim is distinctly for damages in a case "sounding in tort," of which the act of Congress did not authorize the circuit court to take cognizance.

Can the plaintiff's cause of action be regarded as founded upon implied contract with the government, within the meaning of the act of 1887?

The precise question thus presented has not been determined by this court. But former decisions may be consulted in order to ascertain whether this suit is embraced by the words, in that act, "upon any contract, express or implied, with the government of the United States." Do those words include an action against the United States to recover damages for personal injuries caused by the negligent management of an elevator erected and maintained by it in one of its courthouse and postoffice buildings?

*In *Gibbons* v. *United States*, 8 Wall. 269, [404] 274, 19 L. ed. 453, 454,—which was an action in the court of claims to recover an amount alleged to have been wrongfully exacted by a quartermaster of the United States in the execution of a contract for the delivery of oats,—this court said: "But it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officer, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents. In the language of Judge Story, 'it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests.' . . . The language of the statutes which confer jurisdiction upon the court of claims excludes by the strongest implication demands against the government founded on torts. The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. . . . These reflections admonish us to be cautious that we do not permit the decisions of this court to become authority for the righting, in the court of claims, of all wrongs done to individuals by the officers of the general government, though they may have been committed while serving that government, and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own

determination. It certainly has not conferred it on the court of claims."

The same general question arose in *Langford* v. *United States*, 101 U. S. 341, 342, 344, 25 L. ed. 1010-1012, which was an action in the court of claims to recover for the use and occupation of lands and buildings, of which certain Indian agents acting for the United States had taken possession without the consent of the American Board of Foreign Missions, which had erected the [405] buildings, and under *which board the plaintiff claimed title. The United States asserted ownership of the property and disputed the title of the claimant. This court held that the action could not be maintained, and said that the reason for limiting suits to cases of express and implied contracts, as distinguished from cases formed on tort, "is very obvious on a moment's reflection. While Congress might be willing to subject the government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the government acting under lawful authority, *with power vested in him to make such contracts*, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of someone. For such acts, however high the position of the officer or agent of the government who did or commanded them, Congress did not intend to subject the government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives."

The subject was again considered in *Hill* v. *United States*, 149 U. S. 593, 598, 599, 37 L. ed. 862, 864, 13 Sup. Ct. Rep. 1011, 1013, which was an action to recover damages for the use and occupation of certain property in the possession of the United States, but of which the plaintiff asserted ownership. This court said: "The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers. Nor can the settled distinction, in this respect, between contract and tort, be evaded by framing the claim as upon an implied contract. *Gibbons* v. *United States*, 8 Wall. 269, 274, 19 L. ed. 453, 454; *Langford* v. *United States*, 101 U. S. 341, 346, 25 L. ed. 1010, 1012; *United States* v. *Jones*, 131 U. S. 1, 16, 18, 33 L. ed. 90, 91, 9 Sup. Ct. Rep. 669. An action in the nature of assumpsit for the use and occupation of real estate will never lie where there has been [406] no relation of contract *between the parties, and where the possession has been acquired and maintained under a different or adverse title, or where it is tortious and makes the defendant a trespasser. *Lloyd* v. *Hough*, 1 How. 153, 159, 11 L. ed. 83, 85; *Carpenter* v. *United States*, 17 Wall. 489, 493, 21 L. ed. 680, 681. In *Langford* v. *United States* it was accordingly adjudged that, when an officer of the United States took and held possession of land of a private citizen, under a claim that it belonged to the government, the United States could not be charged upon an implied obligation to pay for its use and occupation."

In *Robertson* v. *Sichel*, 127 U. S. 507, 515, 32 L. ed. 203, 206, 8 Sup. Ct. Rep. 1286, 1290, the court said: "The government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs; since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests." So, in *German Bank* v. *United States*, 148 U. S. 573, 579, 37 L. ed. 564, 568, 13 Sup. Ct. Rep. 702, 705: "It is a well-settled rule of law that the government is not liable for the nonfeasances or misfeasances or negligence of its officers, and that the only remedy to the injured party in such cases is by appeal to Congress."

In *Schillinger* v. *United States*, 155 U. S. 163, 168, 39 L. ed. 108, 110, 15 Sup. Ct. Rep. 85, 86, the question was whether a suit could be maintained against the United States to recover damages for the use of a patent for an improvement in a concrete pavement. It appeared that the patent had been used by a contractor who undertook to construct a pavement for the United States. The pavement was constructed, and at the time the action was brought was in use by the government. It was contended that the United States, having appropriated to public use property that belonged to the plaintiff, came under an implied obligation to compensate him,—such implied obligation arising from the constitutional provision that private property should not be taken for public use except upon payment of just compensation. This view was rejected, and the court said: "Can it be that Congress intended that every wrongful arrest and detention of an individual, or *seiz- [407] ure of his property by an officer of the government, should expose it to an action for damages in the court of claims? If any such breadth of jurisdiction was contemplated, language which had already been given a restrictive meaning would have been carefully avoided. . . . Here the claimants never authorized the use of the patent right by the government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. There was no act of Congress in terms directing, or even by implication suggesting, the use of the patent. No officer of the government directed its use, and the contract which was executed by Cook did not name or describe it. There was no recognition by the gov-

ernment or any of its officers of the fact that in the construction of the pavement there was any use of the patent, or that any appropriation was being made of claimant's property. The government proceeded as though it were acting only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction, from its commencement to its close, where the minds of the parties met, or where there was anything in the semblance of an agreement."

It thus appears that the court has steadily adhered to the general rule that, without its consent given in some act of Congress, the government is not liable to be sued for the torts, misconduct, misfeasances, or laches of its officers or employees. There is no reason to suppose that Congress has intended to change or modify that rule. On the contrary, such liability to suit is expressly excluded by the act of 1887.

Cases of this kind are to be distinguished from those in which private property was taken or used by the officers of the government with the consent of the owner or under circumstances showing that the title or right of the owner was recognized or admitted. As, in *United States* v. *Russell*, 13 Wall. 623, 626, 20 L. ed. 474, which was an action to recover for the use of certain steamers used in the business of the government pursuant to an understanding with the owner that he should be compensated; or, in *United States* v. *Great Falls Mfg. Co.* [408] 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, in which it appeared that certain private property was appropriated by officers of the government for public use, pursuant to an act of Congress, the title of the owner being recognized or not disputed; or, in *United States* v. *Palmer*, 128 U. S. 262, 269, 32 L. ed. 442, 444, 9 Sup. Ct. Rep. 104, which was an action to recover for the use of a patent which the government was invited by the patentee to use. In all such cases the law implies a meeting of the minds of the parties, and an agreement to pay for that which was used for the government, no dispute existing as to the title to the property used. The important fact in each of those cases was that the officers who appropriated and used the property of others were authorized to do so, and hence the implied contract that the government would pay for such use.

But, as we have seen, the plaintiff contends that when he entered, or attempted to enter, the elevator, the government must be deemed to have contracted that its employee in charge of it would use due care so as not to needlessly injure him. In other words, —for it comes to that,—by the mere construction and maintenance of such elevator the government, contrary to its established policy, impliedly agreed to be responsible for the torts of an employee having charge of the elevator, if, by his negligence, injury came to one using it. We find no authority for this position in any act of Congress, and nothing short of an act of Congress can make the United States responsible for a personal injury done to the citizen by one of its employees who, while discharging his duties, fails to exercise such care and diligence as a proper regard to the rights of others required. "Causing harm by negligence is a tort." One of the definitions of a tort is "an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented." Pollock, Torts, 1, 19. The elevator in question was erected in order to facilitate the transaction of the public business, and also, it may be assumed, for the convenience and comfort of those who might choose to use it when going to a room in the courthouse and postoffice building occupied by public officers, and not pursuant to any agreement, express or implied, between the United States and the general public, or *under any agreement between the United States and the individual person who might seek to use it. [409] No one was compelled or required to use it, and no officer in charge of the building had any authority to say that a person using it could sue the government if he was injured by reason of the want of due care on the part of the employee operating it. No officer had authority to make an express contract to that effect, and no contract of that kind could be implied merely from the government's ownership of the elevator and from the negligence of its employee. The facts alleged show a case in which the plaintiff was injured by reason of the negligence of the manager of the elevator. It is therefore a case of pure tort on the part of such manager for which he could be sued. It is a case "sounding in tort," because it had its origin in and is founded on the wrongful and negligent act of the elevator manager. There is in it no element of contract as between the plaintiff and the government; for, as we have said, no one was authorized to put upon the government a liability for damages arising from the wrongful, tortious act of its employee. The plaintiff therefore cannot by the device of waiving the tort committed by the elevator operator make a case against the government of implied contract. A party may in some cases waive a tort; that is, he may forbear to sue in tort, and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that "a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them upon which assumpsit can be maintained." *Cooper* v. *Cooper*, 147 Mass. 370, 373, 17 N. E. 892, 894. If the plaintiff could sue the elevator employee upon an implied contract that due care should be observed by him in managing the elevator, it does not follow that he could sue the government upon implied contract. For under existing legislation no relation of contract could arise between the government and those who chose to use its elevator. It is easy to perceive how disastrous to the operations of the government would be a

rule under which it could be sued for torts committed by its agents and employees in the management of its property. It is for Congress to determine in all such cases [410]*what justice requires upon the part of the government. If any exceptions ought to be made to the general rule it is for Congress to make them.

We have not overlooked the allegation in the petition that the plaintiff entered the elevator "at the request of the United States, and of its officers, employees, and duly authorized agents, each acting within the scope of his authority." This, we assume, means at most only that the plaintiff entered, or attempted to enter, the elevator with the assent of those who had control of it and of the building in which it was erected. But if more than this was meant to be alleged; if the plaintiff intended to allege an express or affirmative request by officers or agents of the United States,—the case would not, in our view, be changed; for the court knows that, without the authority of an act of Congress, no officer or agent of the United States could, in writing or verbally, make the government liable to suit by reason of the want of due care on the part of those having charge of an elevator in a public building.

We are of opinion that this case is one sounding in tort, within the meaning of the act of 1887, and therefore not maintainable in any court.

*The judgment of the Circuit Court dismissing the action for want of jurisdiction is affirmed.*

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DAVID MARK CUMMINGS and Grace Dunlap Kennedy, *Appts.*,
*v.*
CITY OF CHICAGO.

(See S. C. Reporter's ed. 410–431.)

*Jurisdiction of circuit court—suit arising under Federal Constitution and laws—direct appeal to Supreme Court—navigable waters—state authority over—when not superseded by Congress.*

1. A suit which involves the question of the right to construct a dock in a navigable river under certain acts of Congress and a permit from the Secretary of War, which are alleged to be in execution of the power of Congress, under the Constitution, over the navigable waters of the United States, is one arising under the Constitution and laws of the United States, of which, under the act of March 3, 1887, chap. 373 (24 Stat. at L. 552), as corrected by the act of August 13, 1888, chap. 866 (25 Stat. at L. 433, U. S. Comp. Stat. 1901, p. 508), a circuit court of the United States has jurisdiction without diversity of citizenship.
2. A suit which involves the consideration of questions relating to the power of Congress, under the Constitution, over the navigable waters of the United States, is one which involves the construction or application of the Federal Constitution, within the meaning of the act of March 3, 1891 (26 Stat. at L. 830, chap. 517, U. S. Comp. Stat. 1901, p. 549), authorizing direct appeals from a circuit court to the Supreme Court of the United States.
3. The authority of a state to prohibit the erection, without its permission, of a structure in a navigable river wholly within its limits, was not superseded by the provision of the river and harbor act of March 3, 1899, chap. 425, § 10 (30 Stat. at L. 1121, 1151, U. S. Comp. Stat. 1901, p. 3541), that it shall not be lawful to erect any structure in a navigable river except on plans recommended by the chief of engineers and authorized by the Secretary of War.

[No. 136.]

*Submitted December 19, 1902. Decided February 23, 1903.*

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a judgment sustaining a demurrer to, and dismissing for want of equity, a bill to enjoin the city of Chicago from interfering with the construction of a dock in the Calumet river. *Affirmed.*

The facts are stated in the opinion.

*Messrs.* **Warren B. Wilson** and **S. A. Lynde** submitted the cause for appellants:

As riparian owners the appellants had the right to build their dock, subject only to the public easement for the purpose of navigation.

*Yates* v. *Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Chicago* v. *Laflin*, 49 Ill. 172; *Chicago* v. *McGinn*, 51 Ill. 266, 2 Am. Rep. 295; *Chicago* v. *Van Ingen*, 152 Ill. 624, 38 N. E. 894.

Neither the state of Illinois nor the city of Chicago, its agent, has any power to interfere with or prevent the erection of any dock or structure which Congress has authorized to be built in this river.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Pennsylvania* v. *Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249, 18 How. 421, 15 L. ed. 435; *Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Pound* v. *Turck*, 95 U. S. 459, 24 L. ed. 525; *Wisconsin* v. *Duluth*, 96 U. S. 379, 24 L. ed. 668; *Newport & C. Bridge Co.* v. *United States*, 105 U. S. 470, 26 L. ed. 1143; *Cardwell* v. *American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811.

Congress has the power to determine what shall or shall not be deemed in law an obstruction to navigation.

NOTE.—*As to Federal question as conferring jurisdiction on United States courts*—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7; Bailey v. Mosher, 11 C. C. A. 308; and *Re* Buchanan, 39 L. ed. U. S. 884.

*On direct review by the United States Supreme Court of circuit or district court judgments*—see note to Gwin v. United States, 46 L. ed. U. S. 741.

*On the power of states over navigable rivers*—see notes to Swanson v. Mississippi & R. River Boom Co. (Minn.) 7 L. R. A. 673; Eisenbach v. Hatfield (Wash.) 12 L. R. A. 632; and Mills v. United States (C. C. S. D. Ga.) 12 L. R. A. 673.

*Pennsylvania* v. *Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435; *The Clinton Bridge sub nom. Gray* v. *Chicago, I. & N. R. Co.* 10 Wall. 454, 19 L. ed. 969; *South Carolina* v. *Georgia*, 93 U. S. 4, 23 L. ed. 782; *North Bloomfield Gravel Min. Co.* v. *United States*, 32 C. C. A. 84, 59 U. S. App. 377, 88 Fed. 675.

A state has no power to interfere with the erection of any structure in navigable waters authorized by Congress.

*Decker* v. *Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 434, 30 Fed. 723; *Stockton* v. *Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9; *Pennsylvania R. Co.* v. *Baltimore & N. Y. R. Co.* 37 Fed. 129. See also *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. Ct. Rep. 185; *Sands* v. *Manistee River Imp. Co.* 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113.

Authority from the Secretary of War to construct the dock was given by and under the act of March 3, 1899, and is paramount and excludes any state or municipal control of this same matter.

*South Carolina* v. *Georgia*, 93 U. S. 4, 23 L. ed. 782; *Wisconsin* v. *Duluth*, 96 U. S. 379, 24 L. ed. 668; *United States* v. *Milwaukee & St. P. R. Co.* 5 Biss. 410, 420, Fed. Cas. Nos. 15,778, 15,779; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *United States* v. *Bellingham Bay Boom Co.* 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343; *United States* v. *Ormsbee*, 74 Fed. 207; *United States* v. *Moline*, 82 Fed. 592.

The delegation of power to the Secretary of War, by the act of 1899, to issue this permit, is valid.

*Luther* v. *Borden*, 7 How. 1, 12 L. ed. 581; *Miller* v. *New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357.

A case arises under the Constitution of the United States when the right of either party depends upon the validity of an act of Congress.

*Patton* v. *Brady*, 184 U. S. 611, 46 L. ed. 715, 22 Sup. Ct. Rep. 493; *Cohen* v. *Virginia*, 6 Wheat. 264, 5 L. ed. 257.

The appeal was properly taken to this court.

*Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Wiley* v. *Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17.

The obstruction of the exercise of a license issued by the United States is in violation of the commerce clause.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23.

Where the identical thing which is attempted to be forbidden is expressly authorized by act of Congress, and a conflict arises between the two, the local regulation must give way.

*Henderson* v. *Wickham*, 92 U. S. 259, 23 L. ed. 543.

No state law can hinder or obstruct the free use of a license granted under an act of Congress.

*Pennsylvania* v. *Wheeling & B. Bridge Co.* 13 How. 518, 14 L. ed. 249.

This ordinance of the city of Chicago, upon which appellee relies, and under which it is acting in preventing the building of these docks, is unreasonable and void and in violation of the commerce clause of the United States Constitution, for the same reasons that the police regulations and ordinances were held void in the cases of—

*Chy Lung* v. *Freeman*, 92 U. S. 275, 23 L. ed. 550; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Henderson* v. *Wickham*, 92 U. S. 259, 23 L. ed. 543; *Welton* v. *Missouri*, 91 U.S.275,23 L.ed. 347.

*Mr.* **Charles M. Walker** submitted the cause for appellee. *Mr. Henry Schofield* was with him on the brief:

If the statement of the claim or demand in a bill does not, in and of itself, show that the claim or demand arises under the Constitution or laws of the United States, the fact that the defendant filed a demurrer cannot aid the statement to that end.

*Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; *New Orleans* v. *Benjamin*, 153 U. S. 411, 38 L. ed. 764; 14 Sup. Ct. Rep. 905.

The circuit court had no jurisdiction under U. S. Rev. Stat. § 629, subd. 16 (U. S. Comp. Stat. 1901, p. 506), because no civil right secured by the Constitution or laws of the United States is involved.

*Holt* v. *Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272.

A municipal ordinance is not a state act, unless passed under legislative authority.

*Hamilton Gaslight & Coke Co.* v. *Hamilton*, 146 U. S. 258, 36 L. ed. 963, 13 Sup. Ct. Rep. 90.

When a state parts with its title to the bed of navigable water, and thereby gives an implied license to build wharves in the bed in aid of commerce, it nevertheless retains its power to control and prohibit, in the interest of the public, the building of wharves and other structures in such bed, and does not, and cannot thereby, in any way impair or diminish the power of Congress, under the commerce clause, to regulate and prohibit, in the interest of interstate and foreign commerce, the use of such bed, or the police power of the state.

*Prosser* v. *Northern P. R. Co.* 152 U. S. 59, 38 L. ed. 352, 14 Sup. Ct. Rep. 528; *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Walker* v. *Marks*, 17 Wall. 648, 21 L. ed. 744; *Weber* v. *State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *Com.* v. *Alger*, 7 Cush. 53; *People* v. *New York & S. I. Ferry Co.* 68 N. Y. 71; *State* v. *Sargent & Co.* 45 Conn. 358; *Hawkins Point Light-House Case*, 39 Fed. 77; Gould, Waters, 3d ed. §§ 138, 179, p. 349.

In the case of navigable streams, the cases

in Illinois all recognize that the license of a riparian owner on a navigable stream in Illinois, by virtue of his ownership of the bed in front of his land, may be regulated and prohibited by the legislature in the interest of the public easements of navigation, etc.

*Middleton* v. *Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *People* v. *St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Illinois & M. Canal* v. *Haven*, 10 Ill. 548; *Illinois River Packet Co.* v. *Peoria Bridge Asso.* 38 Ill. 467; *Ensminger* v. *People*, 47 Ill. 384, 95 Am. Dec. 495; *Chicago* v. *Laflin*, 49 Ill. 172; *Chicago* v. *McGinn*, 51 Ill. 266, 2 Am. Rep. 295; *Rockwell* v. *Baldwin*, 53 Ill. 19; *Hubbard* v. *Bell*, 54 Ill. 110, 5 Am. Rep. 98; *Braxon* v. *Bressler*, 64 Ill. 488; *Washington Ice Co.* v. *Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Piper* v. *Connelly*, 108 Ill. 646.

The river and harbor act is preventive legislation, and is not legislation designed to grant authority.

*Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; *Lane* v. *Smith*, 71 Conn. 65, 41 Atl. 18; 20 Ops Atty. Gen. 102.

The states have power over local matters, such as bridges, quarantine, pilots, wharves, etc., in the absence of any legislation on the same subject by Congress, although the exercise of such power by the states may, and often does, incidentally affect, impede, and embarrass interstate commerce.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Cooley* v. *Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996.

In the application of the principles of the supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together, and the act of Congress should have been passed in the exercise of a clear power under the Constitution.

*Sinnot* v. *Davenport*, 22 How. 227, 16 L. ed. 307. See also *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717.

The construction which counsel seek to put upon the power vested in the Secretary of War by the act of Congress of 1899 makes the constitutionality of that act as applied to the facts in this case very doubtful.

*Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

Mr. Justice **Harlan** delivered the opinion of the court:

The appellants, citizens of Illinois, brought this suit against the city of Chicago for the purpose of obtaining a decree restraining the defendant, its officers and agents, from interfering with the construction of a dock in front of certain lands owned by the plaintiffs and situated on Calumet river, within the limits of that city.

The city demurred to the bill upon the ground that it did not state facts entitling the plaintiffs to the relief asked. The demurrer was sustained, and the bill was dismissed for want of equity.

The controlling question in the case is whether the plaintiffs have the right, in virtue of certain legislation of Congress and of certain action of the Secretary of War, to which reference will be presently made, to proceed with the proposed work in disregard of an ordinance of the city of Chicago requiring the permission of its department of public works as a condition precedent to the construction of any dock within the limits of *the city. The plaintiffs had not ob- [412] tained any permit from that department.

The legislation of Congress and the action of the Secretary of War upon which the plaintiffs rely are very fully set forth in the bill, and are as follows:

In the river and harbor appropriation act of August 2d, 1882, chap. 375, will be found this provision: "Improving harbor at Calumet, Illinois: Continuing improvement, thirty-five thousand dollars: *Provided*, That with a view to the improvement of the Calumet river, in the state of Illinois, from its mouth to the Fork at Calumet lake, the Secretary of War shall appoint a board of engineers who shall examine said river and report upon the practicability and the best method of perfecting and maintaining a channel for through navigation to said Fork at Lake Calumet, adapted to the passage of the largest vessels navigating the Northern and Northwestern Lakes, limiting and locating the lines of channel to be improved by the United States, and of docks that may be constructed by private individuals, corporations, or other parties, and clearly defining the same under the direction of the chief of engineers, United States Army; and the Secretary of War shall report to Congress the result of said examination, and the estimated cost of the proposed improvement; also what legislation, if any, is necessary to prevent encroachments being made or maintained within the limits of the channel designated as above provided for." 22 Stat. at L. 194.

Thereafter, the bill alleges, the Secretary of War appointed a board of engineers, who surveyed the river and defined the lines of its channel and of docks to be constructed, under the direction of said chief of engineers; and the Secretary of War thereafter reported to Congress the estimated cost of the proposed improvement.

In the river and harbor appropriation act of July 5th, 1884, chap. 229, this provision was inserted: "Improving Calumet River, Illinois: Continuing improvement, fifty thousand dollars: *Provided, however*, That no part of said sum shall be expended until the right of way shall have been conveyed to the United States, free from expense, and the United States shall be fully *released from all liability for damages [413] to adjacent property owners, to the satisfaction of the Secretary of War." 23 Stat. at L. 133, 143.

Under these enactments, the bill alleged, the United States caused a plat to be made establishing the channel of the river and its lines, and fixing the dock lines thereof. That plat was approved by the chief of engineers of the Army and was duly recorded in the recorder's office of Cook county.

The above legislation was followed by this provision in the river and harbor act of August 5th, 1886, chap. 929: "Improving Calumet River, Illinois: Continuing improvement, thirty thousand dollars; of which eleven thousand two hundred and fifty dollars are to be used between the Forks and one-half mile east of Hammond, Indiana; . . . *Provided, however*, That no part of said sum, nor any sum heretofore appropriated, except the said eleven thousand two hundred and fifty dollars, for the river above the Forks, shall be expended until the entire right of way, as set forth in Senate Executive Document Number Nine, second session Forty-seventh Congress, shall have been conveyed to the United States free of expense, and the United States shall be fully released from all liability for damages to adjacent property owners, to the satisfaction of the Secretary of War; . . ." 24 Stat. at L. 310, 325.

Without going into all the details set forth in the bill, it may be assumed that the deeds of conveyance which the above acts of 1884 and 1886 required to be made to the United States were in fact made and accepted.

The bill alleges that the United States by its duly authorized officials thereafter entered upon the improvement of Calumet river in accordance with the surveys and plans adopted by the chief of engineers of the United States Army, and "thereby established said dock or channel line on the west line of said river in the manner and form shown by said plat approved by the said chief of engineers, and filed for record as aforesaid."

By the 7th section of the river and harbor act of Congress approved September 19th, 1890, chap. 907, it was provided: "That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulk-[414]head, jetty, or structure of *any kind outside established harbor lines, or in any navigable waters of the United States, where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters, and it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers, and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works, under an act of the legislature of any state, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such state." 26 Stat. at L. 426, 454.

Then, by the 10th section of the river and harbor act of March 3d, 1899, chap. 425, it was provided: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited; and it shall not be lawful to build, or commence the building of, any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, *or capacity of, any port, roadstead,[415] haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the Secretary of War prior to beginning the same." 30 Stat. at L. 1121, 1151 ( U. S. Comp. Stat. 1901, p. 3541).

Subsequently, the plaintiffs and the Calumet Grain & Elevator Company—the latter also owning land on the Calumet river in front of which the proposed new dock would be built—caused plans of the dock to be prepared and submitted to the Secretary of War and the chief of engineers of the Army, and application was made to the former for permission to rebuild the dock along the front of their lands on Calumet river as shown by those plans.

Those plans were approved by the United states engineer stationed at Chicago, and were subsequently recommended by the chief of engineers of the Army. The Secretary thereupon issued and delivered to the plaintiffs and the Grain & Elevator Company the following instrument:

Whereas, by § 10 of an act of Congress, approved March 3d, 1899, entitled "An Act Making Appropriations for the Construction, Repair, and Preservation of Certain Public Works on Rivers and Harbors, and for Other Purposes," it is provided that it shall not be lawful to build, or commence the building of, any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the Secretary of War: and *

shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the Secretary of War prior to beginning the same; and whereas, D. M. Cummings, as ex-[416]ecutor of the estate of C. R. *Cummings, and the Calumet Grain & Elevator Company have applied to the Secretary of War for permission to rebuild the dock in front of that part of block 108, in sections 5 and 6, T. 37, R. 15, E., fronting on Calumet river, south of 95th street, Chicago, Illinois, along the lines shown on the attached plans, which have been recommended by the chief of engineers; now, therefore, this is to certify that the Secretary of War hereby gives unto said D. M. Cummings, as executor of the estate of C. R. Cummings, and the Calumet Grain & Elevator Company permission to rebuild the dock, at said place, along the lines shown on said plans, subject to the following condition: That the work herein permitted to be done shall be subject to the supervision and approval of the engineer officer of the United States Army in charge of the locality.

Witness my hand this 12th day of May, 1900. Elihu Root,
Secretary of War.

The bill then alleged—

That after the granting of permission by the Secretary of War the plaintiffs became entitled, in virtue of that permission and the provision of the act of March 3d, 1899, to build the proposed dock in front of their premises, subject only to the condition that the work should be under the supervision and be approved by the engineer officer of the Army in charge of the locality;

That after the action of the Secretary of War they entered into a contract for the building of the dock, and were engaged in the prosecution of the work when, about the 15th of October, 1900, the city of Chicago, by its officers and agents, put a stop to the work by force and threats, asserting that it could not be prosecuted unless a permit therefor be issued by its department of public works;

That this action of the city was taken pursuant to certain ordinances theretofore passed by the city council, and which made it the duty of the city's harbor master to require all parties engaged in repairing, renewing, altering, or constructing any dock within the city to produce such permit, and in default thereof to cause the arrest of any parties engaged in the work and the removal of the dock;

[417] *That the engineer officer in the department of public works of the city, having agreed that the city had no power to interfere with the plaintiffs or prevent the building of said dock by them, agreed that the work should not be interfered with by the city or its agents;

That the plaintiffs thereupon resumed the construction of the dock, but they were again stopped by the city through its police, and plaintiffs' contractors, agents, and servants were forced to discontinue the work, being threatened with arrest and violence if they should attempt to continue it further;

That the city by its officers and agents has notified the plaintiffs that they will not be permitted to continue the work or to build the dock in front of their premises, notwithstanding the permission or authority given to them by the Secretary of War, and that, by its police, it would forcibly prevent the building thereof, arrest those engaged in doing the work, and remove any dock built; and,

That the city wholly refuses to recognize the permission and authority given the plaintiffs by the Secretary of War to build said dock, and their right "under the Constitution and laws of the United States, and more particularly under the said act of Congress of March 3d, 1899, to build it by virtue of the said authority and permission granted by the Secretary of War and the approval and recommendation of the plans therefor by the chief of engineers of the United States Army;"

That, in view of the action taken by the city and its police, they fear that attempts to continue their work will necessarily be futile and lead to breaches of the peace and conflicts between the men engaged in the work and the police of the city of Chicago; and that the right to build said dock in front of their premises in accordance with the permission and authority given them by the Secretary of War and on the lines recommended by the chief of engineers and within the dock line established by said survey and by the deed to the United States is a property right, which the plaintiffs have as the owners of the premises and of the land upon which the dock is to be built, and that the action of the city in thus preventing the building of the dock is a taking of the property of the plaintiffs "without due *process of law, and a taking thereof for[418] public use without just compensation, in violation of the 5th Amendment of the Constitution of the United States."

The relief asked was a decree enjoining the city, its agents and officers, from interfering with the building of the dock, and that upon the final hearing of the cause it be adjudged and decreed that under the acts of Congress the plaintiffs have the right, by virtue of the permission granted by the Secretary of War, to build the dock on the lines shown by the plans recommended by the chief of engineers, and that the city of Chicago has no right, power, or authority to interfere therewith.

1. We hold that the circuit court had jurisdiction in this case. That the parties, plaintiffs and defendant, are citizens of the same state is not sufficient to defeat the jurisdiction; for by the act of March 3d, 1887, chap. 373, as corrected by the act of *August[426] 13th, 1888, chap. 866, the circuit courts have jurisdiction, without reference to the citizenship of the parties, of suits at com-

mon law or in equity arising under the Constitution or laws of the United States. 24 Stat. at L. 552, 25 Stat. at L. 433 (U. S. Comp. Stat. 1901, p. 508). The present suit does arise under the Constitution and laws of the United States, because the plaintiffs base their right to construct the dock in question upon the Constitution of the United States, as well as upon certain acts of Congress and the permit (so called) of the Secretary of War,—which legislative enactments and action of the Secretary of War were, it is alleged, in execution of the power of Congress, under the Constitution, over the navigable waters of the United States. Clearly, such a suit is one arising under the Constitution and laws of the United States. That it is a suit of that character appears from the bill itself. The allegations which set forth a Federal right were necessary in order to set forth the plaintiffs' cause of action.

2. The appeal was properly taken directly to this court, since by the act of March 3d, 1891, chap. 517, this court has jurisdiction to review the judgment of the circuit court in any case involving the construction or application of the Constitution of the United States. 26 Stat. at L. 830 (U. S. Comp. Stat. 1901, p. 554). The present case belongs to that class; for it involves the consideration of questions relating to the power of Congress, under the Constitution, over the navigable waters of the United States.

3. We come now to the merits of the suit as disclosed by the bill. The general proposition upon which the plaintiffs base their right to relief is that the United States, by the acts of Congress referred to, and by what has been done under those acts, has taken "possession" of Calumet river, and, so far as the erection in that river of structures such as bridges, docks, piers, and the like is concerned, no jurisdiction or authority whatever remains with the local authorities. In a sense, but only in a limited sense, the United States has taken possession of Calumet river, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the Secretary [427] of War, to whom has been *committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the Secretary, may erect structures in Calumet river without reference to the wishes of the state of Illinois on the subject. We say the state of Illinois, because it must be assumed, under the allegations of the bill, that the ordinances of the city of Chicago making the approval of its department of public works a condition precedent to the right of anyone to erect structures in navigable waters within its limits are consistent with the Constitution and laws of that state, and were passed under authority conferred on the city by the state.

Calumet river, it must be remembered, is entirely within the limits of Illinois, and the authority of the state over it is plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several states. That authority has been exercised by the state ever since it was admitted into the Union upon an equal footing with the original states.

In *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 683, 27 L. ed. 442, 445, 2 Sup. Ct. Rep. 185, 188, the question was as to the validity of regulations made by the city of Chicago in reference to the closing, between certain hours of each day, of bridges across the Chicago river. Those regulations were alleged to be inconsistent with the power of Congress over interstate commerce. This court said: "The Chicago river and its branches must, therefore, be deemed navigable waters of the United States, over which Congress under its commercial power may exercise control to the extent necessary to protect, preserve, and improve their free navigation. But the states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago *river [428] and its branches than any other state, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and comfort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the state, or the authorities of the city upon whom it has devolved that duty. When its power is exercised so as to unnecessarily obstruct the navigation of the river or its branches, Congress may interfere and remove the obstruction. If the power of the state and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary. This doctrine has been recognized from the earliest period, and approved in repeated cases, the most notable of which are *Willson* v. *Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412, decided in 1829, and *Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. ed. 96, decided in 1865."

To the same effect is the recent decision in *Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S. 365, 366, 368, 41 L. ed. 747, 748, 17 Sup. Ct. Rep. 357. See also *Cardwell* v.

*American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423, and *Huse* v. *Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313.

Did Congress, in the execution of its power under the Constitution to regulate interstate commerce, intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits? Did it intend to declare that the wishes of Illinois in respect of structures to be erected in such waters need not be regarded, and that the assent of the Secretary of War, proceeding under the above acts of Congress, was alone sufficient to authorize such structures?

These questions were substantially answered by this court in *Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S. 366, 368, 41 L. ed. 748, 17 Sup. Ct. Rep. 357, 358, decided in 1897. That case required a construction of the 5th and 7th sections of the river and [429] harbor act of September 19th, 1890, *upon which sections the plaintiffs in this case partly rely. In that case this court said: "The contention is that the statute in question manifests the purpose of Congress to deprive the several states of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the states as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined. . . . The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end. . . . The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built." Referring to the 7th section of the act of 1890, the court said: "The language of the 7th section makes clearer the error of the interpretation relied on. The provision that it shall not be lawful to thereafter erect any bridge 'in any navigable river or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge . . . have been submitted to and approved by the Secretary of War,' contemplated that the function of the Secretary should extend only to the form of future structures, since the act would not have provided for the future erection of bridges under state authority if its very purpose was to deny for the future all power in the states on the subject. . . . The construction claimed for the statute is that its purpose was to deprive the states of all power as to every stream, even those wholly within their borders, whilst the very words of the statute, saying that its terms should not be construed as conferring on the states power to give authority to build bridges on streams not wholly within their limits, *by a negative [430] pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several states of the authority to consent to the erection of bridges over navigable waters wholly within their territory."

The decision in *Lake Shore & M. S. R. Co.* v. *Ohio* was rendered before the passage of the river and harbor act of 1899. But the 10th section of that act, upon which the permit of the Secretary of War was based, is not so worded as to compel the conclusion that Congress intended, by that section, to ignore altogether the wishes of Illinois in respect of structures in navigable waters that are wholly within its limits. We may assume that Congress was not unaware of the decision of the above case in 1897 and of the interpretation placed upon existing legislative enactments. If it had intended by the act of 1899 to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective states, and to supersede entirely the authority which the states, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the government would have been manifested by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended.

We do not overlook the long-settled principle that the power of Congress to regulate commerce among the states "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *Brown* v. *Maryland*, 12 Wheat. 419, 446, 6 L. ed. 678, 688; *Brown* v. *Houston*, 114 U. S. 630, 29 L. ed. 260, 5 Sup. Ct. Rep. 1091. But we will not at this time make any declaration of opinion as to the full scope of this power, or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several states. Whether Congress may, against or without the expressed will of a state, give affirmative authority to private parties to erect structures in such waters, it is not necessary in *this case to [431] decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the states. The effect

of that act, reasonaly interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies.

For the reasons stated, *the judgment of the Circuit Court is affirmed.*

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CALUMET GRAIN & ELEVATOR COMPANY, *Appt.*,
*v.*
CITY OF CHICAGO.

(See S. C. Reporter's ed. 431.)

*Jurisdiction of circuit court—suit arising under Federal Constitution and laws—direct appeal to Supreme Court—navigable waters—state authority over—when not superseded by Congress.*

This case is governed by the decision in *Cummings* v. *Chicago, ante,* 525.

[No. 135.]

*Submitted December 19, 1902. Decided February 23, 1903.*

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a judgment sustaining a demurrer to, and dismissing for want of equity, a bill to enjoin the city of Chicago from interfering with the construction of a dock in the Calumet river. *Affirmed.*

*Messrs.* **Warren B. Wilson** and **S. A. Lynde** submitted the cause for appellants.

*Mr.* **Charles M. Walker** submitted the cause for appellee. *Mr. Henry Schofield* was with him on the brief.

For contentions of counsel see their briefs as reported in *Cummings* v. *Chicago, ante,* 525.

Mr. Justice **Harlan** delivered the opinion of the court:

This case relates to the construction of a dock in Calumet river, on or in front of land belonging to the appellant. The facts upon which that company principally bases its claims for relief are those upon which the plaintiffs relied in *Cummings* v. *Chicago,* just decided. 188 U. S. 410, *ante,* 525, 23 Sup. Ct. Rep. 472. Upon the authority of the decision in that case, *the judgment in this case is affirmed.*

*UNITED STATES, *Appt.*, [4
*v.*
JAMES A. RICKERT, as County Treasurer in and for Roberts County, South Dakota.

(See S. C. Reporter's ed. 432–445.)

*Indian allottees—state taxation of—equitable relief against.*

1. A state may not tax lands allotted to Indians in severalty, under the act of February 8, 1887 (24 Stat. at L. 389, chap. 119), the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, when, unless the time shall be extended by the President, they shall be conveyed free from any charge or encumbrance, and declares that any conveyance thereof, or any contract touching the same, before the expiration of such period, shall be absolutely null and void.
2. Permanent improvements on lands allotted to Indians in severalty, under the act of February 8, 1887 (24 Stat. at L. 389, chap. 119), the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, and then, unless the time shall be extended by the President, convey the fee free from any charge or encumbrance, cannot be taxed by a state as personal property.
3. Cattle, horses, and other property of like character furnished by the United States to Indian allottees, under the act of February 8, 1887 (24 Stat. at L. 389, chap. 119), in order to enable them to maintain themselves while the land should, under § 5 of that act, be held in trust by the United States for their sole use and benefit, are not subject to state taxation.
4. The United States has such an interest in preventing the taxation by a state of permanent improvements on, and personal property used in the cultivation of, lands allotted to Indians in severalty, under the act of February 8, 1887 (24 Stat. at L. 389, chap. 119), the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, and then convey the fee free of all encumbrance, as entitles it to maintain a suit in equity to restrain the collection of such tax.
5. The United States has no such prompt and efficacious remedy at law as will deprive it of the right to equitable relief against the unlawful taxation by a state of permanent improvements upon, and personal property used in the cultivation of, lands allotted to Indians in severalty, under the act of February 8, 1887 (24 Stat. at L. 389, chap. 119), the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, and then convey the fee free of all encumbrance.

NOTE.—*On injunction to restrain the collection of illegal taxes*—see notes to Odlin v. Woodruff (Fla.) 22 L. R. A. 699; Dows v. Chicago, 20 L. ed. U. S. 65; and Ogden City v. Armstrong, 42 L. ed. U. S. 445.

*On the jurisdiction of equity where remedy at law exists*—see notes to Meldrum v. Meldrum (Colo.) 11 L. R. A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. (N. J. Eq.) 6 L. R. A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

[No. 216.]

*Argued January 28, 29, 1903. Decided February 23, 1903.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit presenting questions as to the right of a state to tax Indian allottees, and the right of the Federal government to equitable relief against such taxation. The fourth question answered in the affirmative, and the first, second, third, and fifth questions in the negative.

The facts are stated in the opinion.

*Assistant Attorney General* **Van Devanter** argued the cause, and, with *Mr. Joseph R. Webster*, filed a brief for appellant:

The political status of tribal Indians is that of pupilage under wardship of the general government.

*United States* v. *Kagama*, 118 U. S. 375, 383, 30 L. ed. 228, 6 Sup. Ct. Rep. 1109.

The duty and jurisdiction to exercise such control and wardship being so vested in the general government, the manner of its exercise is purely a political question for determination by the political departments, and not within judicial cognizance.

*Thomas* v. *Gay*, 169 U. S. 264, 271, 42 L. ed. 740, 743, 18 Sup. Ct. Rep. 340; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 483–485, 43 L. ed. 1041, 1055, 19 Sup. Ct. Rep. 722; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, *ante*, p. 183, 23 Sup. Ct. Rep. 115; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, *ante*, 299, 23 Sup. Ct. Rep. 216.

The legal title of the United States is not devested by the instrument which has come to be known as a first or trust patent. That instrument amounts simply to a covenant to stand seised to the use of the allottee, with a promise to convey at the expiration of the fixed trust period, or of such extended period as the President, in his discretion, may prescribe.

*Lizzie Bergen*, 30 Land Dec. 258.

As long as the United States recognizes the national character of the Indians, they are under the protection of treaties and the laws of Congress, and their property is withdrawn from the operation of state laws.

*The Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket* v. *Johnson County*, 18 L. ed. 667; *The New York Indians*, 5 Wall. 761, 769, *sub nom. Fellows* v. *Denniston*, 18 L. ed. 708, 712.

The states have no power, by taxation or otherwise, in any manner to burden or control the governmental agencies of the United States acting in one of its appropriate and exclusive spheres of action.

19 Ops. Atty. Gen. 161, 511.

The act making the Indian citizens does not of itself take them from the condition of pupilage, or remove them from the control of the government, but is only a step looking to that end; it rests with the United States to declare when its guardianship is terminated and the work it has undertaken is accomplished.

*Eells* v. *Ross*, 12 C. C. A. 205, 29 U. S. App. 59, 64 Fed. 417; *Beck* v. *Flournoy Live-Stock & Real-Estate Co.* 12 C. C. A. 497, 27 U. S. App. 618, 65 Fed. 30; *United States* v. *Flournoy Live-Stock & Real-Estate Co.* 69 Fed. 886; *Farrell* v. *United States*, 49 C. C. A. 183, 110 Fed. 942; *State* v. *Columbia George*, 39 Or. 127, 65 Pac. 604; *Auditor General* v. *Williams*, 94 Mich. 180, 53 N. W. 1097; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, *ante*, 183, 23 Sup. Ct. Rep. 115.

The language used in treaties with the Indians should never be construed to their prejudice.

*Worcester* v. *Georgia*, 6 Pet. 515, 582, 8 L. ed. 483, 508; *Choctaw Nation* v. *United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75; *The Kansas Indians*, 5 Wall. 737, *sub nom. Blue Jacket* v. *Johnson County*, 18 L. ed. 667; *In the Case of the Miamis*, 5 Wall. 760, *sub nom. Wan-Zop-E-Ah* v. *Miami County*, 18 L. ed. 674; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 396, 46 L. ed. 954, 966, 22 Sup. Ct. Rep. 650.

Necessity exists for extended Federal jurisdiction and control over Indian lands.

*State ex rel. Tompton* v. *Denoyer*, 6 N. D. 586, 693, 72 N. W. 1014.

Until the government consents to the taxation of its property and agencies, the state cannot make them subject to taxation.

*Van Brocklin* v. *Anderson*, 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670.

If the United States or the Indians own the land, they are not taxable, and an injunction against their being taxed will be allowed.

*Union P. R. Co.* v. *McShane*, 22 Wall. 444, 462, 464, 22 L. ed. 747, 751, 752; *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 511, 33 L. ed. 687, 694.

If taxation is void because levied, in violation of laws of the United States, upon property employed in the sphere of the governmental powers of the United States, the enforcement of such tax may be enjoined, though the property does not belong to the government.

*Whitbeck* v. *Mercantile Nat. Bank*, 127 U. S. 193, 32 L. ed. 118, 8 Sup. Ct. Rep. 1121.

Jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances.

*Kilbourn* v. *Sunderland*, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594.

*Messrs.* **A. B. Kittredge** and **W. D. Lane** argued the cause and filed a brief for appellee:

By the acts of Congress under which these patents were granted, it is plain that Congress intended the Indians to receive the full protection of the local laws, and to become citizens of the states which they inhabit.

*State ex rel. Tompton* v. *Denoyer*, 6 N. D. 586, 72 N. W. 1014; *Keokuk* v. *Ulam*, 4 Okla. 5, 38 Pac. 1080.

All property is subject to taxation unless exempted by the express provision of some

constitution, statute, or treaty, and all such exemptions are strictly construed. Immunity from taxation by the state will not be recognized unless granted in terms too plain to be mistaken.

*Chicago, B. & K. C. R. Co.* v. *Guffey*, 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; Cooley, Taxn. pp. 204, 205; 25 Am. & Eng. Enc. Law, p. 157; *Waller* v. *Hughes* (Ariz.) 11 Pac. 122.

The improvements upon these lands are analogous to those upon public lands entered as homesteads. Such improvements are clearly taxable; they are not the property of the United States.

*Crocker* v. *Donovan*, 1 Okla. 165, 30 Pac. 374; *State ex rel. Sioux County* v. *Tucker*, 38 Neb. 56, 56 N. W. 718.

And not only such improvements but those on other public lands as well.

*People* v. *Shearer*, 30 Cal. 656; *Territory ex rel. Sampson* v. *Clark*, 2 Okla. 82, 35 Pac. 882; *Forbes* v. *Gracey*, 94 U. S. 762, 24 L. ed. 313.

The mere fact that the legal title to lands is in the United States does not exempt them from taxation.

*Northern P. R. Co.* v. *Walker*, 47 Fed. 681; Cooley, Taxn. 2d ed. pp. 87, 366, and cases there cited.

The interest of a lessee of government lands is taxable.

*Ex parte Gaines*, 56 Ark. 227, 19 S. W. 602.

Improvements are not an interest in real estate under the statute of frauds.

*Pierson* v. *David*, 1 Iowa, 23.

Improvements on public lands are property, and a sufficient consideration to sustain a promise to pay for the same.

*Brooks* v. *Hiatt*, 13 Neb. 503, 14 N. W. 480.

The United States has not such an interest in this controversy, or in its subject, as entitles it to maintain this suit.

*Kansas P. R. Co.* v. *Prescott*, 16 Wall. 608, 21 L. ed. 374; *Missouri River, Ft. S. & G. R. Co.* v. *Morris*, 13 Kan. 302; *Kansas P. R. Co.* v. *Culp*, 9 Kan. 38.

If the United States is the owner of the personal property in question, it has an adequate remedy at law. If the "improvements" assessed as a personal tax are a part of the realty of which the appellant is the legal owner, then the suit will not lie, because property of the United States cannot be taxed by the state, and a court of equity will not enjoin the attempted enforcement of an illegal tax.

*Hannewinkle* v. *Georgetown*, 15 Wall. 547, 21 L. ed. 231; *McHenry* v. *Brett*, 9 N. D. 68, 81 N. W. 65.

It is a well-established principle of equity jurisprudence that mere illegality of a tax is not sufficient ground for equitable interference.

Cooley, Taxn. §§ 760, 772, 774; High, Inj. § 505.

Until the taxes have been paid, no wrong has been suffered. When they have been paid, they can be recovered back in an action at law, which furnishes an adequate remedy.

*Brewer* v. *Springfield*, 97 Mass. 152; *Loud* v. *Charleston*, 99 Mass. 208; *Susquehanna Bank* v. *Broome County*, 25 N. Y. 314.

The unlawful collection of a tax by distress of seizure and sale of chattels is no more than an ordinary trespass; for which there is an ample remedy at law.

*Odlin* v. *Woodruff*, 31 Fla. 160, 22 L. R. A. 699, 12 So. 227; *Ritter* v. *Patch*, 12 Cal. 298.

The principle that illegality of tax alone is not sufficient to justify equitable interference, but that there must be other grounds bringing the case clearly under equitable jurisdiction, is not less firmly established by decisions of the United States Supreme Court.

*Dows* v. *Chicago*, 11 Wall. 108, 20 L. ed. 65; *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 21 L. ed. 231; *State Railroad Tax Cases*, 92 U. S. 575, *sub nom. Taylor* v. *Secor*, 23 L. ed. 663.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was instituted under the direction of the Attorney General of the United States, for the purpose of restraining the collection of taxes alleged to be due the county of Roberts, South Dakota, in respect of certain permanent improvements on, and personal property used in the cultivation of, lands in that county occupied by members of the Sisseton band of Sioux Indians in the state of South Dakota.

*The case is here upon questions certified [433] by the judges of the United States circuit court of appeals for the eighth circuit.

According to the certificate the bill alleged that Charles R. Crawford, Adam Little Thunder, Solomon Two Stars, and Victor Renville are Indians and members of the Sisseton band of Sioux Indians in the state of South Dakota, wards of the United States and under its guardianship and supervision, and residents of that portion of the Sisseton agency situated in the county of Roberts; that the said Indians are holding, and for several years last past have held, allotted lands in that county, and within the former Sisseton Indian Reservation, which lands were allotted to those Indians under the provisions of the agreement of December the 12th, 1889, as ratified by the act of March 3d, 1891 (26 Stat. at L. 1035, 1036, chap. 543), and more particularly under § 5 of the general allotment act of Congress approved February the 8th, 1887 (24 Stat. at L. 389, chap. 119), and that the lands so allotted by the United States are held in trust by the United States under the provisions of the last-named act.

The bill then alleged that during the year 1900 the duly authorized officers of Roberts county listed certain improvements on the allotted lands of Crawford, and returned the assessment thereon at the sum of $630, such improvements consisting of a large frame house and barn attached thereto (a fixture and permanent improvement upon the allotted lands), and other improvements of a permanent character attached to these

lands; that the amount of taxes extended on the tax roll of such improvements for state and county taxes for the year 1900 was the sum of $21.42; that for that year the officers of Roberts county listed, assessed, and returned upon the tax rolls of the county certain personal property against Crawford, consisting of horses, one cow, and two wagons, at the aggregate valuation of $129, upon which was assessed and levied a tax of $4.90; and that said personal property was issued to the allottee by the United States pursuant to the acts of Congress and the treaties between the United States and the band of Indians to which Crawford belongs, was branded "I. D.," and was then and there in the possession of the allottee, being kept and used by him upon his allotment

[434] *Similar allegations were made in reference to the other Indians named in the bill, covering the years 1899 and 1900.

It was also alleged that the defendant was county treasurer and collector of taxes for the county, and threatened to sell, and was about to sell, the property just described as that of the Indians named in the bill and assessed for the years above stated, and would sell the same unless restrained, whereby the United States would be subjected to and compelled to defend a multitude of actions, suits, and proceedings which would greatly embarrass it; that the assessments of said property and the amount of taxes so assessed and returned upon the tax roll of the county are upon the books of the county and of record in the office of the county auditor and treasurer, and constitute a cloud upon the title of the lands of the United States above referred to.

It was further alleged that the United States was without any plain, adequate, and speedy remedy at law, and could only have relief in a court of equity, and that irreparable injury would be inflicted upon it in case the enforcement, assessment, and collection of such taxes were not enjoined.

The defendant demurred to the bill upon the following grounds: That it did not disclose any equity nor entitle the United States to the relief prayed; that the United States had no interest in the subject-matter of the suit; that the property assessed by Roberts county was personal property, and the injunction would not lie to restrain the collection of the tax; and that the United States had an adequate remedy at law.

The demurrer to the bill was sustained, and the government failing to amend, the bill was dismissed upon the merits. Subsequently, the case was carried to the circuit court of appeals.

Thereupon, that court made a certificate of certain questions in respect to which it desired the instructions of this court. These questions will be referred to in the course of this opinion.

[435] *I. *Were the lands held by the allottees, Charles R. Crawford and the other Indians named in the bill, subject to assessment and taxation by the taxing authorities of Roberts county, South Dakota?*

This is the first of the questions certified by the judges of the circuit court of appeals. It is not, in our opinion, difficult of solution.

By the act of Congress of February 8th, 1887, chap. 119, referred to in the certificate and known as the general allotment act, provision was made for the allotment of lands in severalty to Indians on the various reservations, and for extending the protection of the laws of the United States and the territories over the Indians. To that end the President was authorized, whenever, in his opinion, a reservation or any part thereof was advantageous for agricultural and grazing purposes, to cause it, or any part thereof, to be surveyed or resurveyed if necessary, and to allot the lands in the reservation in severalty to any Indian located thereon, in certain quantities specified in the statute,—the allotments to be made by special agents appointed for that purpose, and by the agents in charge of the special reservations on which the allotments were made. 24 Stat. at L. 388, 389, 390, § 1.

What interest, if any, did the Indian allottee acquire in the land allotted to him? That question is answered by the 5th section of the allotment act, which provides: "That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare, that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where *such [436] land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: *Provided*, That the President of the United States may in any case, in his discretion, extend the period. And if any conveyance shall be made of the lands set apart and allotted, as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the state or territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; . . ." 24 Stat. at L. 389, chap. 119, § 5.

The word "patents," where it is first used in this section, was not happily chosen to express the thought which, it is clear, all parts of the section being considered, Congress intended to express. The "patents" here referred to (although that word has various meanings) were, as the statute

plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period,—unless the time was extended by the President,—convey the fee, discharged of the trust and free of all charge or encumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee. This interpretation of the statute is in harmony with the explicit declaration that any conveyance of the land, or any contract touching the same, while the United States held the title in trust, should be absolutely null and void. So that the United States retained its hold on the land allotted for the period of twenty-five years after the allotment, and as much longer as the President, in his discretion, should determine.

The bill, as appears from the certificate [437] of the judges, shows *that the lands in question were allotted "under provisions of the agreement of December 12th, 1889, as ratified by the act of March 3d, 1891, and more particularly under § 5 of the general allotment act approved February 8th, 1887." Upon inspection of that agreement, we find nothing that indicates any different relation of the United States to the allotted lands from that created or recognized by the act of 1887. On the contrary, the agreement contemplates that patents shall issue for the lands allotted under it "upon the same terms and conditions and limitations as is provided in § 5 of the act of Congress approved February 8th, 1887." 26 Stat. at L. 1035, 1038, art. 4.

If, as is undoubtedly the case, these lands were held by the United States in execution of its plans relating to the Indians,—without any right in the Indians to make contracts in reference to them, or to do more than to occupy and cultivate them,—until a regular patent conveying the fee was issued to the several allottees, it would follow that there was no power in the state of South Dakota, for state or municipal purposes, to assess and tax the lands in question until at least the fee was conveyed to the Indians. These Indians are yet wards of the nation, in a condition of pupilage or dependency, and have not been discharged from that condition. They occupy these lands with the consent and authority of the United States; and the holding of them by the United States under the act of 1887, and the agreement of 1889, ratified by the act of 1891, is part of the national policy by which the Indians are to be maintained as well as prepared for assuming the habits of civilized life, and ultimately the privileges of citizenship. To tax these lands is to tax an instrumentality employed by the United States for the benefit and control of this dependent race, and to accomplish beneficent objects with reference to a race of which this court has said that "from their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever the *question has arisen." *United* [438] *States* v. *Kagama*, 118 U. S. 375, 384, 30 L. ed. 228, 231, 6 Sup. Ct. Rep. 1109, 1114. So that if they may be taxed, then the obligations which the government has assumed in reference to these Indians may be entirely defeated; for by the act of 1887 the government has agreed at a named time to convey the land to the allottee in fee, discharged of the trust, "and free of all charge or encumbrance whatsoever." To say that these lands may be assessed and taxed by the county of Roberts under the authority of the state is to say they may be sold for the taxes, and thus become so burdened that the United States could not discharge its obligations to the Indians without itself paying the taxes imposed from year to year, and thereby keeping the lands free from encumbrances.

In *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 155, *sub nom. Van Brocklin* v. *Anderson*, 29 L. ed. 845, 846, 6 Sup. Ct. Rep. 670, 672, the court held that property of the United States was exempt by the Constitution of the United States from taxation under the authority of any state. Giving the outlines of the grounds of the judgment delivered by Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579, the court said: "That Constitution and the laws made in pursuance thereof are supreme; they control the Constitutions and laws of the respective states, and cannot be controlled by them. The people of a state give to their government a right of taxing themselves and their property at its discretion. But the means employed by the government of the Union are not given by the people of a particular state, but by the people of all the states; and being given by all, for the benefit of all, should be subjected to that government only which belongs to all. All subjects over which the sovereign power of a state extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does not extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the taxing power of a state on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is *the usurpa- [439] tion of a power which the people of a single state cannot give. The power to tax involves the power to destroy; the power to

destroy may defeat and render useless the power to create; and there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control. The states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."

These principles were recognized and applied in *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 504, 33 L. ed. 687, 690, 10 Sup. Ct. Rep. 341, 344, in which the court said: "The Constitution vests in Congress the power to 'dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.' And this implies an exclusion of all other authority over the property, which could interfere with this right or obstruct its exercise."

It was therefore well said by the Attorney General of the United States, in an opinion delivered in 1888, "that the allotment lands provided for in the act of 1887 are exempt from state or territorial taxation upon the ground above stated, . . . namely, that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power, and therefore outside the province of state or territorial authority." 19 Ops. Atty. Gen. 161, 169.

In support of these general views, reference may be made to the following cases: *Weston* v. *Charleston*, 2 Pet. 467, 7 L. ed. 487; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *United States* v. *Rogers*, 4 How. 567, 11 L. ed. 1105; *New York Indians*, 5 Wall. 761, *sub nom. Fellows* v. *Denniston*, 18 L. ed. 708; *Choctaw Nation* v. *United States*, 119 U. S. 1, 27, 30 L. ed. 306, 314, 7 Sup. Ct. Rep. 75; *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 483, 43 L. ed. 1041, 1054, 19 Sup. Ct. Rep. 722; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 653, 34 L. ed. 295, 301, 10 Sup. Ct. Rep. 965; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, *ante*, 183, 23 Sup. Ct. Rep. 115; *Lone Wolf*, v. *Hitchcock*, 187 U. S. 553, *ante*, 299, 23 Sup. Ct. Rep. 216.

Another suggestion by the defendant de-
[440] serves to be noticed. *It is that there is a "compact" between the United States and the state of South Dakota which, if regarded, determines this case for the state. Let us see what there is of substance in this view.

By the act of February 22d, 1889, chap. 180, providing, among other things, for the division of the territory of Dakota into two states, it was declared that the conventions called to frame Constitutions for them should provide, "by ordinances irrevocable without the consent of the United States and the people of said states," as follows:

"Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; . . . that no taxes shall be imposed by the states on lands or property therein belonging to, or which may hereafter be purchased by, the United States, or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribe." 25 Stat. at L. 677.

That provision was embodied in the Constitution of South Dakota,—for the purpose, no doubt, of meeting the views of Congress expressed in the enabling act of 1889,—and was declared by that instrument to be irrevocable without the consent of the United States and the people of the state expressed by *their legislative assembly; and [441] this action of the United States and of the state constitutes the "compact" referred to, and upon which the appellee relies in support of the taxation in question.

We pass by, as unnecessary to be considered, whether the above provision in the act of Congress of 1889 had any legal efficacy in itself, after the admission of South Dakota into the Union upon an equal footing with the other states; for the same provision, in the state Constitution, deliberately adopted by the state, is, without reference to the act of Congress, the law for its legislature and people, until abrogated by the state. Looking at that provision, we find nothing in it sustaining the contention that the county of Roberts has any authority to tax these lands. On the contrary, it is declared in the state Constitution that lands within the limits of the state, owned or held by any Indian or Indian tribe, shall, until the title has been extinguished by the United States, remain under the absolute jurisdiction and control of the Congress of the United States. And when the state comes to declare, in its Constitution, what taxes it shall not be precluded from imposing, the provision is that it shall not be precluded from taxing, as other lands, "any

lands owned or held by any Indian who has severed his tribal relation, *and* has obtained from the United States, or from any person, a title thereto *by patent or other grant.*" [S. D. Const. art. 22, subd. 2.] The patent or grant here referred to is the final patent or grant which invests the patentee or grantee with the title in fee, that is, with absolute ownership. No such patent or grant has been issued to these Indians. So that the appellee cannot sustain the taxation in question under the clause of the state Constitution to which he refers, and the right to tax these lands must rest upon the general authority of the legislature to impose taxes. But, as already said, no authority exists for the state to tax lands which are held in trust by the United States for the purpose of carrying out its policy in reference to these Indians.

II. *Were the permanent improvements, such as houses and other structures upon the lands held by allotment by Charles R. Crawford and the other Indians named in* [442] *the bill, subject to *assessment and taxation by the taxing officers of Roberts county as personal property in 1899 and 1900?* This is the second of the questions certified by the judges of the circuit court of appeals.

Looking at the object to be accomplished by allotting Indian lands in severalty, it is evident that Congress expected that the lands so allotted would be improved and cultivated by the allottee. But that object would be defeated if the improvements could be assessed and sold for taxes. The improvements to which the question refers were of a permanent kind. While the title to the land remained in the United States, the permanent improvements could no more be sold for local taxes than could the land to which they belonged. Every reason that can be urged to show that the land was not subject to local taxation applies to the assessment and taxation of the permanent improvements.

It is true that the statutes of South Dakota, for the purposes of taxation, classify "all improvements made by persons upon lands held by them under the laws of the United States" as personal property. But that classification cannot apply to permanent improvements upon lands allotted to and occupied by Indians, the title to which remains with the United States, the occupants still being wards of the nation, and as such under its complete authority and protection. The fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States.

Counsel for the appellee suggests that the only interest of the United States is to be able at the end of twenty-five years from the date of allotment to convey the *land* free from any charge or encumbrance; that if a house upon Indian land were seized and sold for taxes, that would not prevent the United States from conveying the *land* free from any charge or encumbrance; and that, in such case, the Indians could not claim any breach of contract on the part of the United States. These suggestions entirely ignore the relation existing between the United States and the Indians. It is not a relation simply of contract, each party to which is capable of guarding his own interests, but the *Indians are in a state [443] of dependency and pupilage, entitled to the care and protection of the government. When they shall be let out of that state is for the United States to determine without interference by the courts or by any state. The government would not adequately discharge its duty to these people if it placed its engagements with them upon the basis merely of contract, and failed to exercise any power it possessed to protect them in the possession of such improvements and personal property as were necessary to the enjoyment of the land held in trust for them. In *Choctaw Nation* v. *United States*, 119 U. S. 1, 28, 30 L. ed. 306, 315, 7 Sup. Ct. Rep. 75, 90, this court said: "The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons equally subject to the same laws." See also *Minnesota* v. *Hitchcock*, 185 U. S. 373, 396, 46 L. ed. 954, 966, 22 Sup. Ct. Rep. 650.

III. *Was the personal property, consisting of cattle, horses, and other property of like character, which had been issued to these Indians by the United States, and which they were using upon their allotments, liable to assessments and taxation by the officers of Roberts county in 1899 and 1900?* This is the third one of the certified questions.

The answer to this question is indicated by what has been said in reference to the assessment and taxation of the land and the permanent improvements thereon. The personal property in question was purchased with the money of the government, and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to *in- [444] duce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be used in execution of the purpose of the government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose.

IV. *Has the United States such an interest in this controversy or in its subjects as entitles it to maintain this suit?* This is the fourth one of the certified questions.

In view of the relation of the United States to the real and personal property in question, as well as to these dependent Indians still under national control, and in view of the injurious effect of the assessment and taxation complained of upon the plans of the government with reference to the Indians, it is clear that the United States is entitled to maintain this suit. No argument to establish that proposition is necessary.

V. *Has the United States a remedy at law so prompt and efficacious that it is deprived of all relief in equity?* This is the last of the certified questions.

We do not perceive that the government has any remedy at law that could be at all efficacious for the protection of its rights in the property in question and for the attainment of its purposes in reference to these Indians. If the personal property and the structures on the land were sold for taxes and possession taken by the purchaser, then the Indians could not be maintained on the allotted lands, and the government, unless it abandoned its policy to maintain these Indians on the allotted lands, would be compelled to appropriate more money and apply it in the erection of other necessary structures on the land and in the purchase of other stock required for purposes of cultivation. And so on, every year. It is manifest that no proceedings at law can be prompt and efficacious for the protection of the rights of the government, and that adequate relief can only be had in a court of equity, which, by a comprehensive decree, can finally determine once for all the question of the validity of the assessment and taxation in question, and thus give security against any action upon the part of the local authorities tending to interfere with the complete control, not [445] only of the Indians *by the government, but of the property supplied to them by the government and in use on the allotted lands. *Union P. R. Co.* v. *McShane*, 22 Wall. 444, 22 L. ed. 747; *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550, 564-566, 36 L. ed. 537, 543, 12 Sup. Ct. Rep. 689.

Some observations may be made that are applicable to the whole case. It is said that the state has conferred upon these Indians the right of suffrage and other rights that ordinarily belong only to citizens, and that they ought, therefore, to share the burdens of government like other people who enjoy such rights. These are considerations to be addressed to Congress. It is for the legislative branch of the government to say when these Indians shall cease to be dependent and assume the responsibilities attaching to citizenship. That is a political question, which the courts may not determine. We can only deal with the case as it exists under the legislation of Congress.

We answer the fourth question in the affirmative, and the first, second, third, and fifth questions in the negative. It will be so certified to the circuit court of appeals.

*Answers certified.*

Mr. Justice **Brewer** took no part in the decision of this case.

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UNITED STATES, *Plff. in Err.*,

*v.*

ARTHUR LYNAH *et al.*

(See S. C. Reporter's ed. 445-485.)

*Courts—jurisdiction of circuit court—suit against United States—compensation for property taken for public use—destruction of value in improving navigation.*

1. A circuit court of the United States has jurisdiction of a suit against the United States to recover compensation for the alleged total destruction of the value of real property as a necessary result of the acts of its officers and agents in improving navigation, where the government does not deny plaintiff's title, and admits that the work done was authorized by Congress, but denies that such work produced the alleged injury and destruction.
2. The turning of a valuable rice plantation into an irreclaimable and valueless bog, as the necessary result of an improvement in navigation undertaken by the United States government, is a taking of the land, within the meaning of the 5th Amendment to the Federal Constitution.
3. The liability of the United States, under the 5th Amendment to the Federal Constitution, to make just compensation for an appropriation of land for public use, is not defeated because such land was taken by the government in the exercise of its power to improve navigation.

[No. 45.]

*Argued October 30, 31, 1902. Ordered for reargument December 22, 1902. Reargued January 9, 1903. Decided February 23, 1903.*

IN ERROR to the Circuit Court of the United States for the District of South Carolina to review a judgment for plaintiff in a suit to recover from the United States compensation for the destruction of real property by an improvement in navigation. *Affirmed.*

See same case below, 106 Fed. 121, on motion for new trial or for an amendment of the findings of fact.

Statement by Mr. Justice **Brewer**:

On February 4, 1897, defendants in error commenced their action in the circuit court

NOTE.—*As to what constitutes a taking of property by eminent domain*—see note to Memphis & C. R. Co. v. Birmingham, S. & T. R. Co. (Ala.) 18 L. R. A. 166.

*As to right of riparian owner to compensation for injuries in improving navigation*—see note to Gibson v. United States, 41 L. ed. U. S. 997.

of the United States for the district of South Carolina to recover of the United States the sum of $10,000 as compensation for certain real estate (being a part of a plantation known as Verzenobre) taken and appropriated by the defendant.

The petition alleged in the 1st paragraph the citizenship and residence of the petitioners; in the 2d, that they had a claim against the United States under an implied contract for compensation for the value of property taken by the United States for public use; 3d, that they were the owners as tenants in common of the plantation; and in the 4th and 7th paragraphs:

"Fourth. That for several years continuously, and now continuously, the said government of the United States of America, [447] in *the exercise of its power of eminent domain under the Constitution of the United States and by authority of the acts of Congress, duly empowering its officers and agents thereto, in that case made and provided, did erect, build, and maintain, and continuously since have been erecting, building and maintaining, and are now building, erecting, and maintaining in and across the said Savannah river, in the bed of the said Savannah river, certain dams, training walls, and other obstructions, obstructing and hindering the natural flow of the said Savannah river through, in, and along the natural bed thereof and raising the said Savannah river feet at the point of and above the said obstructions and dams in the bed of the said Savannah river, and causing the said waters of the Savannah river aforesaid to be kept back and to flow back and to be raised and elevated above the natural height of the Savannah river along its natural bed at the points of the said dams, training walls, and obstructions, and at points above the said dams, training walls, and obstructions in said river."

"Seventh. And your petitioners further show that the said acts of the government of the United States, as aforesaid, have been done and are being done lawfully by the officers and agents of the United States under the authority of the United States in the exercise of its powers of eminent domain and regulation of commerce under the Constitution of the United States and the laws of Congress for the public purpose of the improvement of the harbor of Savannah and deepening the waters of the Savannah river at the port of Savannah, a port of entry of the United States and seaport of the United States of America, situated within the state of Georgia, on the Savannah river, and with the purpose of deepening and enlarging the navigable channel and highway for commerce of the said Savannah river for the public use, purpose, and benefit of interstate and foreign and international trade and commerce, and for other public purposes, uses, and benefits."

The remaining paragraphs set forth the effect of the placing by the government of the dams, restraining walls, and other obstructions in the river, together with the value of the property appropriated by the overflow. The answer of the government averred:

*"First. That this defendant has no knowl- [448] edge or information sufficient to form a belief as to the truth of the allegations contained in the 1st and 3d paragraphs of the said petition and complaint.

"Second. That this defendant denies all of the allegations contained in the 2d, 4th, 5th, 6th, 7th, and 8th paragraphs of the said petition and complaint except so much of the 4th paragraph as alleges that the said United States heretofore erected certain dams in the Savannah river pursuant to power vested in it by law, and except so much of the 7th paragraph as alleges that the said dams heretofore erected by the United States were lawfully erected by its officers and agents."

For a further defense the statute of limitations was pleaded. The case came on for trial before the court without a jury, which made findings of fact, and from them deduced conclusions of law and entered a judgment against the defendant for the sum of $10,000. The findings were to the effect that the plaintiffs were the owners of the plantation, deriving title by proper mesne conveyances from "a grant by the lord's proprietors of South Carolina," made in 1736. Other findings pertinent to the questions which must be considered in deciding this case were as follows:

"IV. A certain parcel of these plantations, measuring about 420 acres, had been reclaimed by drainage, and had been in actual continued use for seventy years and upwards as a rice plantation, used solely for this purpose. This rice plantation was dependent for its irrigation upon the waters of the Savannah river and its ditches, drains, and canals, through and by which the waters of the river were flowed in and upon the lands, and were then drained therefrom, were adapted to the natural level of the said Savannah river, and dependent for their proper drainage and cultivation upon the maintenance of the natural flow of the said river in, through, and over its natural channel along its natural bed to the waters of the ocean.

"V. This portion of the plantation fronting on the river and dedicated to the culture of rice, extended almost up to, if not quite to, low-water mark, and a large part of it was between *mean high-water and low-water [449] mark, protected from the river by an embankment. Through this embankment trunks or water ways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low-water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands, the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlets of the trunks or water ways should always be above the mean low-water mark.

. . . . . .

"VII. For several years last past and at the present time the government of the United States, under its proper officers, authorized thereto by the act of Congress, have been engaged in the improvement of the navigation of the Savannah river, a navigable water of the United States, this improvement being carried on by virtue of the provisions of § 8, art. I. of the Constitution, giving to the Congress the power to regulate commerce.

"VIII. In thus improving navigation of this navigable water the United States has built and maintained, and is now building and maintaining, in and across the Savannah river, in the bed thereof, certain dams, training walls, and other obstructions, obstructing the natural flow of said river in and along its natural bed, and so raising the level of the said river above said obstructions, and causing its waters to be kept back and to flow back and to be elevated above its natural height in its natural bed.

"IX. This rice plantation Verzenobre is above these obstructions. The direct effect thereof is to raise the level of the Savannah river at this plantation, and to keep the point of mean low water above its natural point, so that the outlet of the trunks and water ways above spoken of in the bank of said plantation, instead of being above this point of low-water mark, is now below this point. Another direct result was that by seepage and percolation the water rose in the plantation until the water level in the [450] land gradually rose to the height *of the increased water level in the river, and the superinduced addition of water in the plantation was about 18 inches thereby. By reason of this it gradually became difficult, and has now become impossible, to let off the water on this plantation or to drain the same, so that these acres dedicated to the culture of rice have become boggy, unfit for cultivation, and impossible to be cultivated in rice.

"X. By the raising of the level of the Savannah river by these dams and obstructions, the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation above the obstruction, and has actually invaded said plantation, directly raising the water in said plantation about 18 inches, which it is impossible to remove from said plantation. This flooding is the permanent condition now, and the rice plantation is thereby practically destroyed for the purpose of rice culture or any other known agriculture, and is an irreclaimable bog and has no value.

"XI. By reason of this superinduced addition of water actually invading the said rice plantation, and its destruction thereby for all purposes of agriculture, plaintiffs have been compelled to abandon the cultivation of said rice plantation and have been forced to pursue their calling of planting rice on other plantations below the dams. The direct result to plaintiffs is an actual and practical ouster of possession from this rice plantation, cultivated by themselves and family for many years.

"XII. Beyond the backing up of the water on and in the plantation by reason of the dams and obstruction, and the invasion of these lands by this superinduced addition of water at and in the plantation as above described, rendered necessary by the execution of the government's plans, the United States is not in actual possession of these lands.

"XIII. Up to this time no other use has been discovered for these lands than for rice culture, and the direct results above stated have totally destroyed the market value of the lands. They now have no value.

"XIV. The value of these rice lands before the obstructions *aforesaid were put in- [451] to the river was about $30 per acre; between $25 and $30 per acre. The value of the rice plantation, 420 acres, thus destroyed, is $10,000."

Upon these findings of fact the important conclusions of law were thus stated:

"V. The crucial question in this case is, Was there a taking of this land in the sense of the Constitution?

"The facts found show that by reason of the obstruction in the Savannah river the water has been directly backed up against the embankment on the river and the banks on and in this plantation, the superinduced addition of water actually invading it and destroying its drainage and leaving it useless for all practical purposes. The government does not in a sense take this land for the purposes of putting its obstructions on it. But it forces back the water of the river on the land as a result necessary to its purpose, without which its purpose could not be accomplished. For the purpose of the government, that water in the river must be raised. The banks of this plantation materially assist this operation, for by their resistance the water is kept in the channel. The backing up of the water against the banks to create this resistance raises the water in the plantation and destroys the drainage of the plantation. This is a taking. 'It would,' says Mr. Justice Miller, 'be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which had received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject to total destruction without making any compensation, because in the narrowest sense of that word it has not been taken for the public use.' *Pumpelly* v. *Green Bay & M. Canal* *Co. 13 [452] Wall. 177, 178, 20 L. ed. 560. In that case the backing up of water on land was held to be a taking.

"VI. The plantation of plaintiffs being actually invaded by superinduced addition of water directly caused by the government dams and obstructions backing up the water of the Savannah river, and raising the water level at and in the rice plantation, and making it unfit for rice cultivation or for any other known agriculture, and plaintiffs having been compelled thereby to abandon the plantation, and this actual and practical ouster of possession being continued and permanent by reason of the permanent condition of the flooding of the plantation, and the plantation being thereby now an irreclaimable bog of no value,—makes the action of the government a taking of lands for public purposes within the meaning of the 5th Amendment, for which compensation is due to the plaintiffs. *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 182. 20 L. ed. 561; *Mugler* v. *Kansas*, 123 U. S. 668. 31 L. ed. 212, 8 Sup. Ct. Rep. 273.

"VII. The government has not gone into actual occupancy of this land, but by reason of these dams and obstructions made necessary by this public work and fulfilling its purpose the water in the Savannah river has been raised at the plaintiffs' plantation and has been backed up on it and remains on it so that the drainage has been destroyed and ditches filled up and superadded water permanently kept on the land and forced up into it, making it wholly unfit for cultivation. and the plaintiffs have thereby been practically and actually ousted of their possession. This is taking of the land for public purposes. for which compensation must be provided. *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 181, 20 L. ed. 561."

The case involving the application of the Constitution of the United States was brought by writ of error directly to this court.

*Mr.* **Robert A. Howard** argued the cause, and, with *Solicitor General Richards*, filed a brief for plaintiff in error:

There can be no doubt that, in England, a subject may be the owner of a portion or tract of shore by ancient charter or grant.

Hall, Sea Shores, 15; Hale, De Jure Maris, Hargrave's Law Tracts, chap. 5; *Constable's Case*, 5 Coke, 107.

And so, in this country, the individual may be owner of a portion of shore by grant from the state.

*Shively* v. *Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *Morris* v. *United States*, 174 U. S. 196, 43 L. ed. 946, 19 Sup. Ct. Rep. 649.

But the subject or individual takes this ownership, whether from the Crown or the state, subject to the trust devolving upon the state for the public, which cannot be destroyed or diminished.

*Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *State* v. *Pacific Guano Co.* 22 S. C. 58; *Atty. Gen.* v. *Parmeter*, 10 Price, 378; Hale, De Jure Maris, Hargrave's Law Tracts, chap. 6, p. 36.

The lands are held by the state, as they were by the King, in trust for the public use of navigation and fishery; and the erection thereon of wharves, piers, lighthouses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris;* in other words, they are held for the use of the people at large.

*Stockton* v. *Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9.

The power granted to Congress by the Constitution to regulate commerce is without limitation.

*Gibbons* v. *Ogden*, 9 Wheat, 196, 6 L. ed. 70; *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 656, 31 L. ed. 543, 8 Sup. Ct. Rep. 643; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *South Carolina* v. *Georgia*, 93 U. S. 4, 23 L. ed. 782; *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

The improvement of harbors, bays, and navigable rivers, the building of piers, wharves, etc., and the erection of dams, come within the regulation of commerce.

*Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Stockton* v. *Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 9.

Congress has power to order obstructions to be placed in the navigable waters of the United States. It may build lighthouses in the bed of the stream. It may construct jetties.

*Gilman* v. *Philadelphia*, 3 Wall. 724, 18 L. ed. 99; *South Carolina* v. *Georgia*, 93 U. S. 4, 23 L. ed. 782; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708.

All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal government by the Constitution.

*Gibson* v. *United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578.

The circuit court had no jurisdiction.

*Hill* v. *United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011; *Schillinger* v. *United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85.

Whatever excludes all idea of a contract excludes at the same time a remedy which can spring from contract only, which affirms it, and seeks its enforcement.

*Lloyd* v. *Hough*, 1 How. 153, 11 L. ed. 83.

The doctrine of waiver of tort is simply a question of the election of remedies.

Keener, Quasi Contracts, pp. 159–161; *National Trust Co.* v. *Gleason*, 77 N. Y. 400; *United States* v. *Great Falls Mfg. Co.* 112 U. S. 657, 28 L. ed. 850, 5 Sup. Ct. Rep. 306; *Great Falls Mfg. Co.* v. *Garland*, 124 U. S. 597, 31 L. ed. 532, 8 Sup. Ct. Rep. 631.

The title and rights of riparian or littoral proprietors in the soil below high-water mark of navigable waters are governed by the local laws of the several states, subject to the rights granted to the United States by the Constitution.

*Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 688, 31 L. ed. 551, 8 Sup. Ct. Rep. 643; *People* v. *New York & S. I. Ferry Co.* 68 N. Y. 71; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

The soil under navigable waters being held by the people of the state in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the state.

*Illinois C. R. Co.* v. *Illinois*, 146 U. S. 459, 36 L. ed. 1045, 13 Sup. Ct. Rep. 110. See also *McCready* v. *Virginia*, 94 U. S. 391, 24 L. ed. 248; *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565; *Boston* v. *Lecraw*, 17 How. 426, 15 L. ed. 118; *Com.* v. *Charlestown*, 1 Pick. 180, 11 Am. Dec. 161; *Com.* v. *Alger*, 7 Cush. 53; *Rundle* v. *Delaware & R. Canal Co.* 14 How. 80, 14 L. ed. 335; *Fisher* v. *Haldeman*, 20 How. 186, 15 L. ed. 879; Phear, Rights of Water, 52, 53.

*Mr.* **J. P. Kennedy Bryan** argued the cause and filed a brief for defendants in error:

The backing up of water, destroying land, is a taking.

*Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336; *Mugler* v. *Kansas*, 123 U. S. 667, 31 L. ed. 212, 8 Sup. Ct. Rep. 273; *Gibson* v. *United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *King* v. *United States*, 59 Fed. 9.

Power to regulate commerce, exercised by Congress in the improvement of a navigable river, is subject to the limitations of the 5th Amendment to the Constitution; and when private property is taken for, and in the course of, such improvements, just compensation must be provided.

*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Scranton* v. *Wheeler*, 179 U. S. 153, 45 L. ed. 133, 21 Sup. Ct. Rep. 48.

Whether there was any actual intention on the part of the government to take the land is immaterial. This question is determined, as matter of law, upon the legal effect of the ultimate facts found, and not by any arbitrary standard of intention or nonintention on the part of the government, its agents or officers.

*Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

In the state of South Carolina the public trust for navigation is only in the beds of rivers below low water; the shore of a tidal river is grantable to the individual absolutely.

*Chisolm* v. *Caines*, 67 Fed. 290; *State* v. *Pacific Guano Co.* 22 S. C. 83.

The public trust for navigation does not attach to reclaimed lands on the shore.

*Com.* v. *Alger*, 7 Cush. 68; *Shively* v. *Bowlby*, 152 U. S. 19, 38 L. ed. 338, 14 Sup. Ct. Rep. 548; *Boston* v. *Lecraw*, 17 How. 426, 15 L. ed. 118; *Richardson* v. *Boston*, 19 How. 269, 15 L. ed. 642; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Hoboken* v. *Pennsylvania R. Co.* 124 U. S. 691, 31 L. ed. 552, 8 Sup. Ct. Rep. 643; *Hanford* v. *St. Paul & D. R. Co.* 43 Minn. 110, 7 L. R. A. 722, 44 N. W. 1144; *Miller* v. *Mendenhall*, 43 Minn. 95, 8 L. R. A. 89, 44 N. W. 1141.

The United States has recognized a vested right, by use and occupancy of the citizen, upon improvements in a navigable river.

*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; *United States* v. *Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770.

*Mr. J. P. Kennedy Bryan*, with *Mr. Julian Mitchell, Jr.*, of counsel for defendants in error in *United States* v. *Williams*, filed a joint brief for defendants in error:

There is an implied contract on the part of the government to pay compensation where it takes private property.

*Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557; *Mugler* v. *Kansas*, 123 U. S. 667, 31 L. ed. 212, 8 Sup. Ct. Rep. 273; *Scranton* v. *Wheeler*, 179 U. S. 153, 45 L. ed. 133, 21 Sup. Ct. Rep. 48; *United States* v. *Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Great Falls Mfg. Co.* v. *Garland*, 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631.

The obligation that the law imposes raises an implied contract.

*Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450, 17 L. ed. 805.

Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform.

1 Parsons, Contr. p. 5.

Contracts implied in law are legal fictions adopted for the purpose of enforcing legal duties by actions *ex contractu*, where no actual contract exists, either express or implied. In the case of a contract implied in law, the intention is disregarded.

15 Am. & Eng. Enc. Law, p. 1078.

Wherever the defendant has converted the property of the owner to his own use, the owner may either disaffirm his act and treat him as a wrongdoer, or sue for trespass, etc., or affirm his acts and sue in assumpsit.

Cooley, Torts, p. 109.

*Indebitatus assumpsit* lies where the duty is to pay money.

2 Harvard Law Review, "The History of Assumpsit," pp. 64–66.

An implied contract arises, by operation of

the law, out of the lawful taking by the government of private property in the exercise of the power to regulate commerce and eminent domain, and the limitation thereof. *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Great Falls Mfg. Co.* v. *Garland*, 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631; *United States* v. *Jones*, 109 U. S. 513, 27 L. ed. 1015, 3 Sup. Ct. Rep. 346.

The position of the counsel for the government is in direct contradiction to the decision of this court in the *Chicago Lake Front Cases*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110, in which this court held that, after the reclamation and occupation of lands out to the point of navigability in the lake, there was thereafter no trust in the state, and that the same was private property, and that its absolute alienation was consistent with the law of the trust in navigable waters held by the state and the United States.

Mr. Justice **Brewer** delivered the opinion of the court:

There are three principal questions in this case? First, Did the circuit court have jurisdiction? second, Was there a taking of the land within the meaning of the 5th Amendment? and, third, If there was a taking, was the government subject to the obligation of making compensation therefor?

Did the circuit court have jurisdiction? It may be premised that this question was not raised in the circuit court, nor was it presented to this court on the first argument, but only upon the reargument. This omission on the part of the learned counsel for the government is certainly suggestive. Nevertheless, as the question, now for the first time presented, is one of jurisdiction, it must be considered and determined. To sustain the challenge of jurisdiction it is insisted by the government that there was no implied contract, but simply tortious acts on the part of its officers; and *Hill* v. *United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011, and *Schillinger* v. *United States*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85, are relied upon. Let us see what those cases were and what they decided. In the former the plaintiff sued to recover from the United States for the use and occupation of land for a lighthouse. The land upon which the lighthouse was built was submerged land in Chesapeake [459] bay. *The government pleaded that it had a paramount right to the use of the land, and that plea was demurred to. It was held that the circuit court had no jurisdiction, and in the opinion delivered by Mr. Justice Gray it was said, after referring to several cases (pp. 598, 599, L. ed. p. 864, Sup. Ct. Rep. p. 1013):

"In *Langford* v. *United States* [101 U. S. 341. 25 L. ed. 1010], it was accordingly adjudged that, when an officer of the United States took and held possession of land of a private citizen, under a claim that it belonged to the government, the United States could not be charged upon an implied obligation to pay for its use and occupation.

"It has since been held that if the United States appropriates to a public use land which they admit to be private property, they may be held, as upon an implied contract, to pay its value to the owner. *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, and 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631. It has likewise been held that the United States may be sued in the court of claims for the use of a patent for an invention, the plaintiff's right in which they have acknowledged. *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717; *United States* v. *Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104. But in each of these cases the title of the plaintiff was admitted, and in none of them was any doubt thrown upon the correctness of the decision in *Langford's Case*. See *Schillinger* v. *United States*, 24 Ct. Cl. 278.

"The case at bar is governed by *Langford's Case*. It was not alleged in this petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title in the land in question, with the exclusive right of building thereon, and claimed damages of the United States for the use and occupation of the land for a lighthouse. The United States positively and precisely pleaded that the land was submerged under the waters of Chesapeake bay, one of the navigable waters of the United States, and that the United States, 'under the law, for the purpose of a lighthouse, has a paramount right to its use as against the plaintiff or any other person;' and the plaintiff demurred to this plea."

In the other case it appeared that the architect of the capitol contracted with G. W. Cook for the laying of pavement in the *cap- [460] itol grounds. The contractor in laying the pavement infringed, as petitioners claimed, upon rights granted to them by patent. Thereafter this suit was brought, not against the party guilty of the alleged infringement, but against the United States, which had accepted the pavement in the construction of which, as petitioners claimed, the contractor had infringed upon their rights. In the opinion it was said (p. 170, L. ed. p. 111, Sup. Ct. Rep. p. 87):

"Here the claimants never authorized the use of the patent right by the government; never consented to, but always protested against it, threatening to interfere by injunction or other proceedings to restrain such use. There was no act of Congress in terms directing, or even by implication suggesting, the use of the patent. No officer of the government directed its use, and the contract which was executed by Cook did not name or describe it. There was no recognition by the government or any of its officers of the fact that in the construction of the pavement there was any use of the patent, or that any appropriation was being made of claimant's property. The government proceeded as though it were acting

only in the management of its own property and the exercise of its own rights, and without any trespass upon the rights of the claimants. There was no point in the whole transaction, from its commencement to its close, where the minds of the parties met or where there was anything in the semblance of an agreement. So, not only does the petition count upon a tort, but also the findings show a tort. That is the essential fact underlying the transaction and upon which rests every pretense of a right to recover. There was no suggestion of a waiver of the tort or a pretense of any implied contract until after the decision of the court of claims that it had no jurisdiction over an action to recover for the tort."

How different is the case at bar! The government did not deny the title of the plaintiffs. It averred in the answer simply that it had "no knowledge or information sufficient to form a belief," but did not couple such averment with any denial, nor did it pretend that it owned the property or had a paramount proprietary right to its possession. It did not put in issue the question of title, but rested upon a denial [461] that the acts its officers *had done by its direction had overflowed the land and wrought the injury as alleged, or that such overflow and injury created an implied contract, and also upon the bar of the statute of limitations. Nowhere in the record did it set up any title to the property antagonistic to that claimed by the plaintiffs. It simply denied responsibility for what it had caused to be done, and pleaded that if it had ever been liable, the statute of limitations had worked a bar. No officer of the government, as in the *Langford Case*, claimed that the property found by the court to be the property of the plaintiffs belonged to the government. While there was no formal admission of record that the land belonged to the plaintiffs, the case was tried alone upon the theory that the government could not be held responsible for what it had done. It did not repudiate the actions of its officers and agents, but on the contrary in terms admitted that they acted by authority of Congress, and that all that they did was lawfully done. So that if the overflow and destruction of this property was, as we shall presently inquire, a taking and appropriation within the scope of the 5th Amendment to the Constitution, the jurisdictional question now presented is whether such appropriation, directed by Congress, created an implied contract on the part of the government to pay for the value of the property so appropriated. Let us see what this court has decided. In *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846. 5 Sup. Ct. Rep. 306, Congress having made an appropriation therefor, a dam was constructed across the Potomac with the view of supplying the city of Washington with water. In the construction of such dam certain lands belonging to the plaintiff were taken, although such lands were not by the act of Congress specifically ordered to be taken. The property so taken not having been paid for, plaintiff brought this action in the court of claims to recover the value thereof, and it was held that the action might be maintained, and in the opinion it was said (p. 656, L. ed. p. 850, Sup. Ct. Rep. p. 310):

"It seems clear that these property rights have been held and used by the agents of the United States, under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the *Maryland [462] shore to Conn's island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. *Kohl* v. *United States*, 91 U. S. 367, 374, 23 L. ed. 449, 452. In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims of actions founded 'upon any contract, express or implied, with the government of the United States.'"

In *Great Falls Mfg. Co.* v. *Atty. Gen.* 124 U. S. 581, *sub nom. Great Falls Mfg. Co.* v. *Garland*, 31 L. ed. 527, 8 Sup. Ct. Rep. 631, an action, which, like the preceding, grew out of provisions made by Congress to supply water to the city of Washington, and in which the relief sought was the removal of all structures on the premises, or if it should appear that the property had been legally condemned, the framing of an issue, triable by jury, to ascertain the plaintiff's damages, and a judgment for the amount thereof, it was said, referring to the *con- [463] tention that there were certain defects in the proceedings taken by the government (p. 597, L. ed. p. 532, Sup. Ct. Rep. p. 637):

"Even if the Secretary's survey and map,

and the publication of the Attorney General's notice did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded."

In *Hollister* v. *Benedict & B. Mfg. Co.* 113 U. S. 59, 28 L. ed. 901, 5 Sup. Ct. Rep. 717, an action by the assignees of a patent against a United States collector for infringement, the law is thus stated (p. 67, L. ed. p. 904, Sup. Ct. Rep. p. 721):

"If the right of the patentee was acknowledged, and, without his consent, an officer of the government, acting under legislative authority, made use of the invention in the discharge of his official duties, it would seem to be a clear case of the exercise of the right of eminent domain, upon which the law would imply a promise of compensation, an action on which would lie within the jurisdiction of the court of claims, such as was entertained and sanctioned in the case of *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306."

In *United States* v. *Palmer*, 128 U. S. 262, 32 L. ed. 442, 9 Sup. Ct. Rep. 104, an action in the court of claims by a patentee against the government to recover upon an implied contract for the use of the patented invention, it appeared that the petitioner was the patentee of certain improvements in infantry equipments which were adopted by the Secretary of War as a part of the equipment of the infantry soldiers of the United States, and, sustaining the jurisdiction of the court of claims, it was said (p. 269, L. ed. p. 444, Sup. Ct. Rep. p. 105):

"No tort was committed or claimed to have been committed. The government used the claimant's improvements with his consent; and, certainly, with the expectation on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use—two [464] things totally distinct in the law, as *distinct as trespass on lands is from use and occupation under a lease."

In *United States* v. *Berdan Fire-Arms Mfg. Co.* 156 U. S. 552, 39 L. ed. 530, 15 Sup. Ct. Rep. 420, a judgment of the court of claims against the United States on an implied contract for the use of an improvement in breech-loading firearms was sustained, although there was no act of Congress expressly directing the use of such improvement. In the opinion it was said (p. 567, L. ed. p. 535, Sup. Ct. Rep. p. 424):

"While the findings are not so specific and emphatic as to the assent of the government to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the government that the patent was wrongfully issued; no claim of a right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use, in spite of protest or remonstrance. Negatively, at least, the findings are clear. The government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner."

And then, after quoting from several of the findings, it was added (p. 569, L. ed. 536, Sup. Ct. Rep. p. 425):

"The import of these findings is this: That the officers of the government, charged specially with the duty of superintending the manufacture of muskets, regarded Berdan as the inventor of this extractor ejector; that the difference between the spiral and flat spring was an immaterial difference; that, therefore, they were using in the Springfield musket Berdan's invention; that they used it with his permission as well as that of his assignee, the petitioner, and that they used it with the understanding that the government would pay for such use as for other private property which it might take, and this, although they did not believe themselves to have authority to agree upon the price."

The rule deducible from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. It is earnestly contended in argument that the government had a right to appropriate this property. *This may be [465] conceded, but there is a vast difference between a proprietary, and a governmental, right. When the government owns property, or claims to own it, it deals with it as owner and by virtue of its ownership, and if an officer of the government takes possession of property under the claim that it belongs to the government (when in fact it does not), that may well be considered a tortious act on his part, for there can be no implication of an intent on the part of the government to pay for that which it claims to own. Very different from this proprietary right of the government in respect to property which it owns is its governmental right to appropriate the property of individuals. All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property. The government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand. So, the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the 5th Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation.

The government may take real estate for a postoffice, a courthouse, a fortification, or a highway; or in time of war it may take merchant vessels and make them part of its naval force. But can this be done without an obligation to pay for the value of that which is so taken and appropriated? When-

ever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor. Such is the import of the cases cited as well as of many others.

The action which was taken, resulting in the overflow and injury to these plaintiffs, is not to be regarded as the personal act of the officers, but as the act of the government. That which the officers did is admitted by the answer to have been done by authority of the government, and although there may have been no specific act of Congress directing the appropriation of this property of the plaintiffs, yet if that which the officers of the government did, acting under its direction, resulted in an appropria-
[466] tion, *it is to be treated as the act of the government. *South Carolina* v. *Georgia*, 93 U. S. 4, 13, 23 L. ed. 782, 784; *Wisconsin* v. *Duluth*, 96 U. S. 379, 24 L. ed. 668; *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645, 22 L. ed. 846, 5 Sup. Ct. Rep. 306.

Congress for many successive terms appropriated money for the improvement of the Savannah river. 21 Stat. at L. 470, 480, chap. 136; 22 Stat. at L. 194, 200, chap. 375; 23 Stat. at L. 140, chap. 229; 24 Stat. at L. 321, 331, chap. 929; 25 Stat. at L. 413, chap. 860; 26 Stat. at L. 442, chap. 907; 27 Stat. at L. 101, chap. 158; 28 Stat. at L. 351, chap. 299. These appropriations were in the river and harbor bills, and were generally of so much money for improving the river, but some deserve special mention. Thus, in 21 Stat. at L. 470, chap. 136, it was provided that "one thousand dollars may be applied to payment of damages for land taken for widening the channel opposite Savannah." In 24 Stat. at L. 331, chap. 929, the Secretary of War was directed to cause a survey to be made of the "Savannah river from cross tides above Savannah to the bar, with a view to obtaining twenty-eight feet of water in the channel." The appropriation in the 25 Stat. at L. 413, chap. 860, was for the improvement of the river, "completing the present project and commencing the extended project contained in the report of engineer for year ending June 30, 1887." And by the same statute, 431, among the matters referred to the Secretary of War for survey and examination was "whether the damage to the Verzenobie freshet bank in 1887 was caused by the work at cross tides, and whether the maintenance of said bank is essential to the success of the work at cross tides, and what will be the cost of so constructing said bank as to confine the water of said river to its bed." The report of the engineers for the year 1887, referred to in the section above quoted, shows that part of the work which was being done by the government was in the construction of training walls, and wing dams, by which the width of the water way was reduced.

Further, the same year (25 Stat. at L. 94. chap. 194, U. S. Comp. Stat. 1901, p. 3525), an act was passed, entitled "An Act to Facilitate the Prosecution of Works Projected for the Improvement of Rivers and Harbors," which authorized the Secretary of War to commence proceedings "for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision *has been made by law; [467]
. . . provided, however, that when the owner of such land, right of way, or material shall fix a price for the same, which, in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay."

Thus, beyond the effect of the admission in the answer, and beyond the presumption of knowledge which attends the action of all legislative bodies, it affirmatively appears, not only that Congress was making appropriations from year to year for the improvement of the river, but also that it had express notice of damage to the banks along this very plantation; that the works which were being done by the engineers had in view the narrowing of the width of the water way; that land would be damaged as the result of those works, and that it authorized the Secretary of War to take proceedings in eminent domain to acquire the land, right of way, and material which might be necessary for maintaining, operating, or prosecuting works of river improvement, or, if the price could be agreed upon, to purchase the same.

This brings the case directly within the scope of the decision in *United States* v. *Great Falls Mfg. Co.* 112 U. S. 645, 22 L. ed. 846, 5 Sup. Ct. Rep. 306, where, as here, there was no direction to take the particular property, but a direction to do that which resulted in a taking, and it was held that the owner might waive the right to insist on condemnation proceedings, and sue to recover the value.

It does not appear that the plaintiffs took any action to stop the work done by the government, or protested against it. Their inaction and silence amount to an acquiescence—an assent to the appropriation by the government. In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation. is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation. *Roberts* v. *Northern P. R. Co.* 158 U. S. 1, 11, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; *Northern P. R. Co.* v. *Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794, and cases cited in the opinion.

The case, therefore, amounts to this: The plaintiffs alleged *that they were the [468]
owners of certain real estate bordering on the Savannah river; that the government, in the exercise of its powers of eminent domain and regulation of commerce, through officers and agents duly empowered thereto by acts of Congress, placed dams, training walls, and other obstructions in the river in such manner as to hinder its natural flow

and to raise its waters so as to overflow the land of plaintiffs, and overflow it to such an extent as to cause a total destruction of its value. The government, not denying the ownership of plaintiffs, admitted that the work which was done by their officers and agents was done by authority of Congress, but denied that those works had produced the alleged injury and destruction. We are of opinion that under these pleadings and the issues raised thereby the circuit court had jurisdiction to inquire whether the acts done by the officers of the United States under the direction of Congress had resulted in such an overflow and injury of the plaintiff's land as to render it absolutely valueless, and if thereby the property was, in contemplation of law, taken and appropriated by the government, to render judgment against it for the value of the property so taken and appropriated.

Was there a taking? There was no proceeding in condemnation instituted by the government, no attempt in terms to take and appropriate the title. There was no adjudication that the fee had passed from the landowner to the government, and if either of these be an essential element in the taking of lands, within the scope of the 5th Amendment, there was no taking.

Some question is made as to the meaning of the findings. It appears from the 5th finding, as amended, that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. From this it is contended that the only result of the raising of the level of the river by the government works was to take away the possibility of drainage. But findings IX. [469] and X. show that, both by seepage and *percolation through the embankment, and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation about 18 inches; that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the government has undertaken. Does this amount to a taking? The case of *Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557, answers this question in the affirmative. And on the argument it was conceded by the learned counsel for the government (and properly conceded in view of the findings) that so far as respects the mere matter of overflow and injury there was no substantial distinction between the two cases. In that case the Green Bay Company, as authorized by statute, constructed a dam across Fox river, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land. Referring to this it was said (p. 177, L. ed. p. 560):

"The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public, it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to *total destruction without [470] making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

Reference was also made to the case of *Sinnickson* v. *Johnson*, 17 N. J. L. 129, 34 Am. Dec. 184, in respect to which it was said: "The case is mainly valuable here as showing that overflowing land by backing the water on it was considered as 'taking' it within the meaning of the principle." Again, on page 179, L. ed. p. 561, it was said: "But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on Watercourses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." And in a footnote the following authorities were cited: Angell, Watercourses, § 465*a*; *Hooker* v. *New Haven & N. Co.* 14 Conn. 146, 36 Am. Dec. 477; *Rowe* v. *Granite Bridge Corp.* 21 Pick. 344; *Canal Appraisers* v. *People ex rel. Tibbits*, 17 Wend. 604; *Lackland* v. *North Missouri R. Co.* 31 Mo. 180; *Stevens* v. *Middlesex Canal*, 12 Mass. 466.

It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the 5th Amendment.

While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession, and the fee; and when the amount awarded as compensation is paid, the title, the fee, with whatever rights may attach thereto—in this case those at least which [471] belong to a riparian proprietor—*pass to the government and it becomes henceforth the full owner.

Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others, it is an injury which is purely consequential, and for which the government is not liable. But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the 5th Amendment of paying just compensation.

In *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622, 630, it was said:

"But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the 5th Amendment we have heretofore quoted. Congress has supreme control over the regulation of commerce, but if in exercising that supreme control it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this 5th Amendment, and can take only on payment of just compensation."

In that case Congress had passed an act for condemning what was known as "the upper lock and dam of the Monongahela Navigation Company," and provided "that in estimating the sum to be paid by the United States, the franchise of said corporation to collect tolls should not be considered or estimated," but we held that this proviso was beyond the power of Congress; that it could not appropriate the property of the navigation company without paying its full value, and that a part of that value consisted in the franchise to take tolls. So in the recent case of *Scranton* v. *Wheeler*, 179 U. S. 141, 153, 45 L. ed. 126, 133, 21 Sup. Ct. Rep. 48, 53, we repeated the proposition in these words:

"Undoubtedly compensation must be made or secured to the owner when that which is [472] done is to be regarded as a taking *of private property for public use within the meaning of the 5th Amendment of the Constitution, and, of course, in its exercise of the power to regulate commerce, Congress may not override the provision that just compensation must be made when private property is taken for public use."

It is true that a majority of the court held, in that case, that the destruction of access to land abutting on a navigable river by the construction by Congress of a pier on the submerged lands in front of the upland was not a taking of private property for public uses, but only an instance of consequential injury to the property of the riparian owner. But the right of compensation in case of a taking was conceded. There have been many cases in which a distinction has been drawn between the taking of property for public uses and a consequential injury to such property, by reason of some public work. In the one class the law implies a contract, a promise to pay for the property taken, which, if the taking was by the general government, will uphold an action in the court of claims; while in the other class there is simply a tortious act doing injury, over which the court of claims has no jurisdiction. Thus, in *Northern Transp. Co.* v. *Chicago*, 99 U. S. 635, 25 L. ed. 336, the city, duly authorized by statute, constructed a tunnel along the line of LaSalle street and under the Chicago river. The company claimed that it was deprived of access to its premises by and during the construction. This deprivation was not permanent, but continued only during the time necessary to complete the tunnel, and it was held that there was no taking of the property, but only an injury, and that a temporary injury thereto. In the course of the opinion, after referring to the *Pumpelly Case*, 13 Wall. 166, 20 L. ed. 557, and *Eaton* v. *Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147, we said (p. 642, L. ed. p. 338):

"In those cases, it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was physical invasion of real estate of the private owner, and a practical ouster of his possession. But in the present case, there was no such invasion. No entry was made upon the plaintiffs' lot. All that was done was to render for a time its use more inconvenient."

*Chicago* v. *Taylor*, 125 U. S. 161, 31 L. [473] ed. 638, 8 Sup. Ct. Rep. 820, while recognizing and reaffirming the rule there laid down, was decided upon the ground that a new rule was established by the Illinois Constitution of 1870, which provided that "private property shall not be taken or damaged for public use without just compensation." *Montana Co.* v. *St. Louis Min. & Mill. Co.* 152 U. S. 160, 38 L. ed. 398, 14 Sup. Ct. Rep. 506, held that a mere order for inspection of mining property was not a taking thereof, because all that was done was a temporary and limited interruption of the exclusive use. *Gibson* v. *United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, decided that, where by the construction of a dyke by the United States in the improvement of the Ohio river the plaintiff, a riparian owner, was through the greater part of the gardening season deprived of the

use of her landing for the shipment of products from and supplies to her farm, whereby the value of her farm was reduced $150 to $200 per acre, there was no taking of the property, but only a consequential injury. See also *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Meyer* v. *Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106. In this connection *Mills* v. *United States*, 12 L. R. A. 673, 46 Fed. 738, decided in the district court for the southern district of Georgia, is worthy of notice by reason of its similarity in many respects and its clearly marked distinction in an essential matter. It was an action for injuries to a rice plantation on the banks of the Savannah river resulting from works done by the United States in improving the navigability of that river, apparently the very improvement made by the government in the present case. The condition of the claimant's rice plantation prior to the improvement was substantially that of these plaintiffs' property, and the lands were drained by opening the gates when the river was at low-water mark. The complaint was that the erection by the government of what was called the "cross-tides dam," running from the upper end of Hutchinson's island to the lower end of Argyle island, cut off all the flow of water from the stream connecting the front and back rivers, raised both the high and low water levels in the front river, and not only destroyed the facilities for draining these lands into the front river, but rendered it necessary to raise the levees around the rice fields, to prevent flooding the fields at high [474] water. *This, it was alleged, unfitted the lands for rice culture and made it necessary that new drainage into back river be provided where the water levels were suitable. Obviously, there was no taking of the plaintiff's lands, but simply an injury which could be remedied at an expense as alleged of $10,000, and the action was one to recover the amount of this consequential injury. The court rightfully held that it could not be sustained. Here there is no finding, no suggestion, that by any expense the flooding could be averted. We may, of course, know that there is theoretically no limit to that which engineering skill may accomplish. We know that vast tracts have in different parts of the world been reclaimed by levees and other works, and so we may believe that this flooding may be prevented, that some day all these submerged lands may be reclaimed. But as a practical matter, and for the purposes of this case, we must, under the findings, regard the lands in controversy as irreclaimable and their value wholly and finally destroyed.

Therefore, following the settled law of this court, we hold that there has been a taking of the lands for public uses, and that the government is under an implied contract to make just compensation therefor.

*The judgment is affirmed.*

Mr. Justice **Brown** concurring:

I concur in the opinion of the court, both with respect to its jurisdiction and the merits of the case, but I am unable to assent to the ground upon which our jurisdiction is rested. While I think the overflowing of the lands in controversy constitutes a taking within the meaning of the 5th Amendment to the Constitution, I see no reason for holding that there was an implied contract to pay for them within the meaning of the Tucker act. The taking appears to me an ordinary case of trespass to real estate, containing no element whatever of contract. In such case there can be no waiver of the tort. *Jones* v. *Hoar*, 5 Pick. 285; *Smith* v. *Hatch*, 46 N. H. 146.

*But I think our jurisdiction may be sup- [475] ported, irrespective of the question of contract or tort, under that clause of the Tucker act which vests the court of claims with jurisdiction of "all claims founded upon the Constitution of the United States or any law of Congress."

As we had occasion to remark in *Doolcy* v. *United States*, 182 U. S. 222-224, 45 L. ed. 1074, 1078, 21 Sup. Ct. Rep. 762, the 1st section of the Tucker act [24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752], evidently contemplates four distinct classes of cases: (1) Those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an Executive Department; (3) cases of contract, express or implied, with the government; (4) actions for damages, liquidated or unliquidated, in cases *not sounding in tort*. The words "not sounding in tort" are in terms referable only to the fourth class of cases.

In my view, claims founded upon the Constitution may be prosecuted in the court of claims, whether sounding in contract or in tort; and wherever the United States may take proceedings in eminent domain for the condemnation of lands for public use, the owner of such lands may seek relief in the court of claims if his lands be taken without such proceedings, whether such taking be tortious or by virtue of some contract, express or implied, to that effect. That the case under consideration is one of that class is made clear by the act of April 24, 1888 (25 Stat. at L. 94, chap. 194, U. S. Comp. Stat. 1901, p. 3525), which enacts "that the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted."

I fully concur in the opinion of the court that "the government may take real estate for a postoffice, a courthouse, a fortification, or a highway, or in time of war it may take merchant vessels and make them part of its naval force," but this cannot *be "done with- [476]

out an obligation to pay for the value of that which is so taken and appropriated." I am also of opinion that whenever in the exercise of its governmental rights it takes property the ownership of which it concedes to be in an individual, it is bound to pay therefor, but I do not think that there is any distinction between cases where the government impliedly promises to pay by taking property with the assent of the owner, and those where it takes property forcibly and against the will of the owner. It does not seem reasonable to hold that, where the invasion of the owner's right to property is the greater, his remedy for the recovery of its value should be less, and that he should be compelled to resort to the tedious and unsatisfactory method of appealing to the bounty of Congress for relief.

Suppose, for instance, in time of war and under threat of invasion it seizes upon vessels without the consent of the owner and against his protest. There is certainly the same moral obligation to pay for them as if they had been appropriated with his consent, and I see no reason why an action for their value may not be maintained in the court of claims. Yet, as I understand the opinion of the court in this case, it holds indirectly, if not directly, that no such action would lie unless the property were taken with the consent of the owner and under an implied contract to pay for it. The consequences of recognizing such distinctions seem to me so serious that nothing short of clear language in the statute will justify it.

None such is even hinted at in *United States* v. *Russell*, 13 Wall. 623, 20 L. ed. 474, one of the earliest cases, wherein the owner of three steamers seized under "imperative military necessity" sought to recover compensation for their services. These steamers were impressed into the public service and employed as transports for carrying government freight for a certain length of time, when they were returned to the owner. He was held entitled to recover, the court holding that "extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity, in time of war, or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public [477] use, *or may be even destroyed without the consent of the owner." The case followed that of *Mitchell* v. *Harmony*, 13 How. 115, 14 L. ed. 75, and was distinguished from that of *Filor* v. *United States*, 9 Wall. 45, 19 L. ed. 549.

While the cases reported prior to 131 U. S. are based upon the original court of claims act, which limited the jurisdiction of that court to "claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the government of the United States," and are therefore not strictly pertinent under the Tucker act, that of the *Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306, is almost exactly in point, and is strongly corroborative of the position here taken. This was a claim for land taken at the Great Falls of the Potomac in the construction of an aqueduct for bringing water to Washington. Proceedings were taken in Maryland for condemnation, which were discontinued, and the government took possession of the land. Whether such possession was taken with or without the consent of the owner does not appear, although there had been negotiations between the parties. The claimant was held to be entitled to recover upon the ground that the appropriation of the money for the construction of the improvements was equivalent to an express direction by Congress to take this particular property for the objects contemplated by the scheme, and that there was no sound reason why the claimant might not waive any right he might have to an injunction, and elect to regard the action as a taking by the government under its sovereign right of eminent domain, and therefore demand compensation. The case was not put upon the ground that the owner had consented to the taking.

In *Langford's Case*, 101 U. S. 341, 25 L. ed. 1010, the action was brought to recover for the use and occupation of certain lands and buildings to which the claimant asserted title, which were seized for the use of the government under claim that they were public property. It was admitted that if the government takes property for public use, acknowledging its ownership to be private or individual, there arises an implied obligation to pay the owner its value; but that it was a different matter when the government *claimed the property as its own [478] and recognized no superior title. This was also the case in *Hill* v. *United States*, 149 U. S. 593, 37 L. ed. 862, 13 Sup. Ct. Rep. 1011, where the government erected a lighthouse upon submerged land which it claimed as its own. The case was held to be governed by that of Langford.

None of the more recent cases under the Tucker act conflicts with the position here taken: That wherever the United States may proceed to condemn property under its sovereign right of eminent domain, the owner may maintain a petition in the court of claims to recover its value, in case no such proceedings are taken. That act (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), first introduced among the cognizable claims all such as were founded upon the Constitution of the United States, and also introduced, after the words "for damages, liquidated or unliquidated," the words "in cases not sounding in tort." Construing this statute, it was held in the *Jones Case*, 131 U. S. 1, 33 L. ed. 90, 9 Sup. Ct. Rep. 669, that it did not confer jurisdiction in equity to compel the issue and delivery of a patent for public land; and in *Schillinger's Case*, 155 U. S. 163, 39 L. ed. 108, 15 Sup. Ct. Rep. 85, that the owner of a patent which had been infringed by the United States could not recover damages for such infringement in the court of claims, though it would be otherwise if the property had been appropriated with the consent of the patentee and in view of compensation

therefor. Although there was in *Schillinger's Case* an appropriation of the right of a patentee to the monopoly of his invention, the case was nothing more in its essence than the infringement of a patent, and so the action was really one for damages sounding in tort. While it is possible an individual might be able to condemn the patentee's right by proceedings in eminent domain, that remedy would be at least doubtful, when the government sought merely to appropriate so much of it as was necessary for its own use. It would be an unprecedented exercise of the right of eminent domain, and could scarcely be held to be a claim arising under the Constitution. The case was not put upon the ground that it was such a case, but that it was merely an action to recover damages for infringement. Said the court: "It is plainly and solely an action for an infringement" and one sounding in tort. The question whether it was a claim arising under the Consti-
[479] tution was not *considered, except in the dissenting opinion of Mr. Justice Harlan, who said: "The constitutional obligation cannot be evaded by showing that the original appropriation was without the express direction of the government, nor by simply interposing a denial of the title of the claimant to the property, or property rights alleged to have been appropriated." If there were any doubt in that case of the power of the government to condemn the right of the patentee by proceedings in eminent domain, there is certainly none such in this case, where the land was taken by the government with no pretense of consent by the owner.

I think it is going too far to hold that the words of the Tucker act, "not sounding in tort," must be referred back to the first class of cases, namely, "those founded upon the Constitution," and that they should be limited to actions for damages, liquidated or unliquidated, and, hence, the consent of the owner cuts no figure in this case. I freely admit that, if property were seized or taken by officers of the government without authority of law, or subsequent ratification, by taking possession or occupying property for public use, there could be no recovery, since neither the government nor any other principal is bound by the unauthorized acts of its agents. But in endeavoring to raise an implied contract to pay for an ordinary trespass to real estate, I think the opinion of the court misconceives the true source of our jurisdiction.

Mr. Justice **Shiras** and Mr. Justice **Peckham** concurred in the above opinion in so far as it holds that the court had jurisdiction on the ground stated therein, as well as upon the ground stated in the opinion of the court.

Mr. Justice **White**, with whom concurs Mr. Chief Justice **Fuller** and Mr. Justice **Harlan**, dissenting:

The court now holds that it has jurisdic-
[480] tion, because, as a *legal conclusion from the findings of fact, it is held that the property of the appellee has been taken for public use by the United States, and the judgment below is affirmed on the merits for the same reason. As, in my opinion, the findings of fact do not support the conclusion that the property has been taken by the United States, I dissent both on the subject of jurisdiction and on the merits.

The findings of fact are in most respects sufficiently reproduced in the opinion of the court, and need not here be set out in full. It results from the findings that the land is situated on the Savannah river; that it is between high and low water mark, and naturally subject to be overflowed, but that it is protected in some measure from overflow by an embankment, and that through this embankment sluices or water ways were placed, by means of which water was let in on the land for irrigation in the cultivation of rice, and was drawn off when the land was required to be drained in order to carry on the same culture. This was done by gates in the sluices, which were opened to allow the water to flow through the water ways to the inner side of the embankment and thus flood the land when it was requisite to do so, and by opening the gates at low tide to allow the water to flow off when it was required to drain the land. As the exact situation of the water ways through the embankment is important, I reproduce the statement on the subject contained in the findings:

"Through this embankment trunks or water ways were constructed, with flood gates therein. The outer opening of the trunk was about a foot or a little less above the mean low-water mark of the river, in which the tide ebbs and flows. When it is desired to flow the lands the flood gates are opened and the water comes in. When it is desired to draw off this water and to effect the drainage of the lands, the flood gates are opened at low water and the water escapes. It is essential that the outlets of the trunks or water ways should be above the mean low-water mark."

It is now decided that there has been a taking of the property by the United States, because it is thought that the findings establish that the obstructions placed by the government *in the bed of the river at a [481]
point lower down the stream than is, the plantation, for the purpose of improving the navigation of the river, have so raised the water as to cause it to flow over the embankment at the plantation and flood the same, thus destroying its value. On this subject the court says: "Findings IX. and X. show that both by seepage and percolation through the embankment and *the actual flowing upon the plantation* above the obstructions, the water has been raised in the plantation above 18 inches," etc. Whilst it is not disputable that the findings show a percolation through the embankment, I can discover nothing in them supporting the conclusion that the obstructions placed by the government in the bed of the river below the point where the plantation is situated have caused the water in the river to go over the embankment at the plantation

and flood the land. On the contrary, to me it seems that the findings necessitate the conclusion that the permanent damage which the property has suffered arises solely from the fact that the drainage of the plantation into the river has been rendered impossible. And this because the work done by the government has resulted in raising the mean low tide about 12 to 15 inches, so as to cause the water in the river at mean low tide to be above the point of discharge of the water ways, thus rendering drainage through them no longer possible. There may be a wide legal difference arising from damage consequent on an interference with the drainage of property situated, as this is, by work done by the government in the improvement of navigation, and damage caused by the actual flooding of such property resulting from such work. To determine whether the findings show an actual flowing, or a mere injury to drainage, findings VIII., IX., and X. need to be considered. Let us see whether they give support to the claim of actual flooding by an overflow of the embankment at the plantation. Finding VIII. says:

"VIII. In thus improving navigation of this navigable water, the United States has built and maintained and is now building and maintaining in and across the Savannah river, in the bed thereof, certain dams, training walls, and other obstructions, obstructing the natural flow of said river in [482] and along its natural bed, *and so raising the level of said river above said obstructions, and causing its waters to be kept back and to flow back, and to be elevated above its natural height in its natural bed."

Certainly there is nothing in this finding supporting the inference that the government work has caused the river to overflow the plantation embankment. Finding IX. says:

"This rice plantation Verzenobre is above these obstructions. The direct effect thereof is to raise the level of the Savannah river at this plantation, and to keep the point of mean low water above its natural point, so that the outlet of the trunks and water ways above spoken of in the bank of said plantation, instead of being above this point of low-water mark, is now below this point."

Here, then, is the statement that the effect resulting from the government work was simply to raise the mean low-water mark as previously existing, so as to cause it to cover the water ways which were—as declared by the previous finding—a little less than a foot above the former low-water mark. The finding continues:

"Another direct result was that by seepage and percolation the water rose in the plantation until the water level in the land gradually rose to the height of the increased water level in the river, and the superinduced addition of water in the plantation was about 18 inches thereby. By reason of this it gradually became difficult, and has now become impossible, to let off the water on this plantation, or to drain the same, so that these acres, dedicated to the culture of rice, have become boggy, unfit for cultivation, and impossible to be cultivated in rice."

This but declares that because the mean low stage of the water had been raised by the government work so as to cause it to be about 8 inches above the mouth of the water ways and to rest against the embankment about 18 inches, that percolation took place and the drainage was destroyed, the result of the loss of drainage being to render the plantation a bog and no longer suitable for the cultivation of rice. It is submitted nothing in the findings hitherto referred to even intimates *that the effect of the [483] work of the government caused the water to flow over the embankment and flood the plantation. On the contrary, the very opposite is the result of the findings.

Let me next consider the 10th finding. It reads as follows:

"By the raising of the level of the Savannah river by these dams and obstructions, the water thereof has been backed up against the embankment on the river and has been caused to flow back upon and in this plantation above the obstruction, and has actually invaded said plantation, directly raising the water in said plantation about 18 inches, which it is impossible to remove from said plantation."

Now, the flowing described here can only relate to the seepage and percolation referred to in the previous finding. The words "above the obstructions" relate, not to the embankment on the plantation, but to the obstructions put in the bed of the river by the government below the point where the plantation is situated; and, therefore, what the finding means is that above this obstruction the water is caused to flow back against, not over, the embankment, as described in the previous finding. And this finding shows besides that it was the impossibility of removing the water which percolated or was the result of rain fall—in other words, the injury to the drainage—which was the cause of the damage.

Thus, eliminating all question of the flooding of the land by the overflow of the embankment, the question for decision is this: When a plantation or a portion thereof is situated on the bank of a navigable river, below high-water mark, and because of such situation is dependent for its profitable operation upon drainage into the river at mean low tide, does the United States appropriate the property by the simple fact that in improving the navigation of the river it raises the mean low tide slightly above the height where it was wont theretofore to be, and by reason of which the drainage of the land below high-water mark is destroyed? It seems to me to state this question is to answer it in the negative. The owner of the land situated below high-water mark acquired no easement or servitude in the bed of the river by the construction of an embankment along *the margin of [484] his land at the river below high water, by which he could forever exact that the level of the water within the natural banks of the river could never be changed without

his consent, and thus deprive the United States of its control over the improvement of navigable rivers conferred by the Constitution. If damage by the loss of drainage into the river at mean low tide of land so situated was caused by the lawful exercise by the United States of its power to improve navigation it was *damnum absque injuria*, and redress must be sought at the hands of Congress, and cannot be judicially afforded by a ruling that a damage so resulting constitutes a taking of the property by the United States, and creates an implied contract to pay the value of the property. Such a doctrine is directly—as I see it—in conflict with the decisions of this court in *Gibson* v. *United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578, and *Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48. The far-reaching consequence of the doctrine now announced cannot be overestimated.

But even under the hypothesis that the government work caused the land to be overflowed by raising the water above the embankment, I do not conceive that there would be a taking, even in that case, of the property, for a remedy would be easily afforded for any permanent injury to the land by raising the embankment. The quantum of damages would thus not be the value of the property, but the mere cost of increasing the height of the embankment so as to prevent the water from flowing over it. The fact, then, that a taking is now held to exist, and therefore the United States is compelled to pay the value of the entire property, submits the United States, in the exercise of a power conferred upon it by the Constitution, to a rule which no individual would be subjected to in a controversy between private parties. Nor is this answered by the suggestion that there is a taking because the paying by the United States of the sum of money necessary to raise the level of the embankment so as to prevent the overflow would not compensate the owner, as the property would still be worthless because of the want of drainage. To so suggest is but to admit that the damage complained of results from the inability to drain the land, which, for the reasons already pointed out does not, in my opinion, constitute a taking.

[485] *Indeed, the reasoning hitherto indicated as to the assumed overflow of the embankment is equally apposite to the damage by loss of drainage. For injury to the drainage the remedy would be readily afforded by, if possible, draining the plantation elsewhere than into the river, or by resort to the pumping appliances necessary to lift out the water accumulating from rainfall or percolation. The cost of doing these things would then be the measure of damages. That a resort to these simple expedients is unavailing as to this particular property because of its being situated below high-water mark does not, I submit, show that the government has taken the property for public use, but simply establishes that the property is so situated that it is subjected to a loss necessarily arising from the fact that it is below high-water mark and therefore absolutely dependent for its drainage on the right of the owner to exact that the mean low tide of the river should be forever unchanged. As the right to so exact does not exist, the loss of drainage does not constitute an appropriation of the property by the United States, and is but the result of the natural situation of the land. If equities exist, Congress is alone capable of providing for them.

I am authorized to say that the **Chief Justice** and Mr. Justice **Harlan** concur in this dissent.

Mr. Justice **McKenna** took no part in the decision of this case.

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## UNITED STATES
*v.*
## CHARLES A. WILLIAMS *et al.*

(See S. C. Reporter's ed. 485.)

*Courts—jurisdiction of circuit court—suit against United States—compensation for property taken for public use—destruction of value in improving navigation.*

This case is governed by the decision in *United States v. Lynah, ante*, 539.

[No. 59.]

*Argued October 30, 31, 1902. Ordered for reargument December 22, 1902. Reargued January 9, 1903. Decided January 26, 1903.*

IN ERROR to the Circuit Court of the United States for the District of South Carolina to review a judgment for plaintiff in a suit to recover from the United States compensation for the destruction of real property by an improvement in navigation. *Affirmed.*

*Mr.* **Robert A. Howard** argued the cause, and, with *Solicitor General Richards*, filed a brief for plaintiff in error.

For their contentions see their briefs as reported in *United States* v. *Lynah, ante*, 539.

*Mr.* **Julian Mitchell, Jr.**, argued the cause, and, with *Messrs. Julian Mitchell* and *Henry A. M. Smith*, filed a brief for defendants in error:

Under the facts of this case there has been a "taking."

*Pumpelly* v. *Green Bay & M. Canal Co.* 13 Wall. 177, 20 L. ed. 560.

The finding of the court below that the flooding was a direct result of the government works, and not a consequential injury, is conclusive on this court.

*United States* v. *Alexander*, 148 U. S. 192, 37 L. ed. 417, 13 Sup. Ct. Rep. 529; *Saulet* v. *Shepherd*, 4 Wall. 507, 18 L. ed. 446.

The principle of the *Pumpelly Case* has never been modified.

*Mugler* v. *Kansas*, 123 U. S. 667, 31 L. ed. 212, 8 Sup. Ct. Rep. 273; *Gibson* v. *United States*, 166 U. S. 275, 41 L. ed. 1002, 17 Sup. Ct. Rep. 578; *Meyer* v. *Richmond*,

172 U. S. 96, 43 L. ed. 379, 19 Sup. Ct. Rep. 106; *Scranton* v. *Wheeler*, 179 U. S. 154, 45 L. ed. 134, 21 Sup. Ct. Rep. 48; *United States* v. *Alexander*, 148 U. S. 187, 37 L. ed. 416, 13 Sup. Ct. Rep. 529.

The 5th Amendment to the Federal Constitution should be construed liberally.

1 Bl. Com. p. 139; *Sinnickson* v. *Johnson*, 17 N. J. L. 129, 34 Am. Dec. 184; *Eaton* v. *Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147.

Power to regulate commerce is limited by such amendment.

*Monongahela Nav. Co.* v. *United States*, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622; *Scranton* v. *Wheeler*, 179 U. S. 153, 45 L. ed. 133, 21 Sup. Ct. Rep. 48; *Yates* v. *Milwaukee*, 10 Wall. 504, 19 L. ed. 986.

This court has distinctly recognized the right to, and effect of, reclamation of lands between high and low water mark.

*Boston* v. *Lecraw*, 17 How. 433, 15 L. ed. 121; *Richardson* v. *Boston*, 19 How. 269, 15 L. ed. 642; *Hanford* v. *St. Paul & D. R. Co.* 43 Minn. 110, 7 L. R. A. 722, 44 N. W. 1145.

*Mr. Julian Mitchell, Jr.*, with *Mr. J. P. Kennedy Bryan*, counsel for defendants in error in *United States* v. *Lynah*, *ante*, 539, filed a joint brief for defendants in error.

For their contentions see their brief as reported in *United States* v. *Lynah*.

Mr. Justice **Brewer** delivered the opinion of the court:

This case is in all substantial respects similar to the one just decided [*United States* v. *Lynah*, 188 U. S. 445, *ante*, 539, 23 Sup. Ct. Rep. 349], and for the reasons given in the opinion therein *the judgment is affirmed.*

For the reasons stated in their dissenting opinion in the prior case, the **Chief Justice**, Mr. Justice **Harlan** and Mr. Justice **White** dissent also in this case.

Mr. Justice **McKenna** took no part in the decision of this case.

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[486] *EDWARD H. CLARKE, *Petitioner*,

*v.*

WILBUR LARREMORE, Trustee in Bankruptcy of Raymond W. Kenney, Bankrupt.

(See S. C. Reporter's ed. 486-490.)

*Bankruptcy act—four months' clause—lien of execution creditor on proceeds of sale.*

The proceeds in the hands of a sheriff, realized from a sale under an execution, are released from the claim of the execution creditor by the filing of a petition in bankruptcy against the debtor within four months after the judgment is rendered, by virtue of the provisions of the bankruptcy act of 1898, § 67, subd. f (30 Stat. at L. 544, 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450), that all liens obtained against an insolvent through legal proceedings within four months prior to the filing of a petition in bankruptcy against him "shall be deemed null and void in case he is adjudged a bankrupt," and that the property affected thereby shall be deemed wholly discharged and released therefrom.

[No. 51.]

*Argued October 20, 1902. Restored to docket for submission to full bench November 17, 1902. Submitted December 15, 1902. Decided February 23, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed an order of the District Judge for the Southern District of New York restraining a sheriff from paying over the proceeds of an execution sale to the execution creditor, and an order directing the sheriff to pay such proceeds to the trustee in bankruptcy of the judgment debtor. *Affirmed.*

See same case below, 45 C. C. A. 113, 105 Fed. 897.

Statement by Mr. Justice **Brewer:**

On January 23, 1899, the petitioner, the owner of certain notes of Raymond W. Kenney, commenced an action thereon in the supreme court of the state of New York. On March 6, 1899, he recovered judgment for the sum of $20,906.66. An execution, issued thereon, was by the sheriff of the county of New York levied upon a stock of goods and fixtures belonging to Kenney. A sheriff's sale thereof, had on March 15, 1899, realized $12,451.09. Shortly after the levy of the execution Leon Abbett sued out in the same court a writ of attachment against the property of Kenney, and caused it to be levied upon the same stock and fixtures. Immediately thereafter, claiming that the debt in judgment was a fraudulent one, he commenced in aid of his attachment an injunction suit to prevent the further enforcement of the judgment, and obtained a temporary order restraining the sheriff from paying petitioner the money received upon the execution sale. Upon a hearing the supreme court decided that the debt was just and honest, and on April 13, 1899, set aside the restraining order. On the same day, and before the sheriff had returned the execution or paid the money collected on it, a petition in involuntary bankruptcy against Kenney was filed in the United States district court for the southern district of New York, and an order made by *the district judge restraining the sheriff [487] from paying the money to Clarke, the execution creditor. 95 Fed. 427. Kenney was thereafter adjudged a bankrupt, and on November 25, 1899, the plaintiff having been appointed trustee in bankruptcy, the district judge entered a further order directing the sheriff to pay the money to the trustee. 97 Fed. 555. On review, the United States circuit court of appeals for the second circuit affirmed these orders of the district judge (45 C. C. A. 113, 105 Fed. 897), and thereupon a certiorari was granted by this court. 180 U. S. 640, 45 L. ed. 711, 21 Sup. Ct. Rep. 927.

Section 67, subdivision *f*, of the bankrupt act of 1898 (30 Stat. at L. 544, 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450), reads:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien of a bona fide purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

*Mr.* **S. Livingston Samuels** argued the cause and filed a brief for petitioner:

It is the levy which perfects the lien of the execution, and retains such lien until a sale, for the purpose of allowing the title of the purchaser to relate back to it.

*Bond* v. *Willett*, 1 Keyes, 377.

While the personal property continues to rest under the levy, the judgment debtor remains the owner thereof, and he can convey title subject to the lien of the execution.

*Mumper* v. *Rushmore*, 79 N. Y. 19; *Ansonia Brass & Copper Co.* v. *Conner*, 103 N. Y. 502, 9 N. E. 238.

The sheriff, by virtue of his proceedings, becomes a debtor to the execution creditor.

*Turner* v. *Fendall*, 1 Cranch, 117, 2 L. ed. 53.

The specific money collected by the sheriff belongs to him in his official capacity, and if it is lost before payment to the judgment creditor, the loss falls on the officer.

*Phillips* v. *Lamar*, 27 Ga. 228, 73 Am. Dec. 731; *Shaw* v. *Bauman*, 34 Ohio St. 32; *Gilmore* v. *Moore*, 30 Ga. 628; *United States* v. *Dashiel*, 4 Wall. 182, 18 L. ed. 319.

The execution sale satisfies the debt.

*United States* v. *Dashiel*, 3 Wall. 688, 18 L. ed. 268; *Taylor* v. *Ranney*, 4 Hill, 621.

A sheriff collecting money under an execution becomes a debtor to the creditor for the amount collected, and thereby the latter acquires a cause of action against him for money had and received without demand.

*Brewster* v. *Van Ness*, 18 Johns 133; *Dygert* v. *Crane*, 1 Wend. 534; *People* v. *Dunning*, 1 Wend. 16; *Walden* v. *Davison*, 15 Wend. 575; *Denton* v. *Livingston*, 9 Johns. 96, 6 Am. Dec. 264; *Armstrong* v. *Garrow*, 6 Cow. 465; *Townsend* v. *Olin*, 5 Wend. 207.

The creditor recovers in such an action, not only the amount collected by the sheriff, but interest thereon as on any other debt.

*Slingerland* v. *Swart*, 13 Johns. 225; *Crane* v. *Dygert*, 4 Wend. 675.

The sheriff, therefore, is in the same position as a bank to whom a depositor has paid money. The depositor loses his title to the specific moneys which he deposits in the bank, even if they can be identified, and they could not be levied on under an execution against him, even if the bank were to pick them out and set them aside for the purpose of such levy (*Carroll* v. *Cone*, 40 Barb. 220); but he has a cause of action against the bank for the amount of his deposit, and his claim against the bank could be attached as a chose in action.

It has been held that the claim of a judgment creditor against a sheriff for money collected by the latter under the former's execution can be attached as the creditor's chose in action.

*Wehle* v. *Conner*, 83 N. Y. 231.

The sheriff is the agent of the creditor.

*Nelson* v. *Kerr*, 59 N. Y. 224.

So clearly is the money collected by the sheriff on execution the property of the execution creditor, that, if the sheriff has by mistake paid the money over to a third party, the execution creditor, and not the sheriff, can sue the latter for the money as his own.

*Kingston Bank* v. *Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516; *Haebler* v. *Myers*, 132 N. Y. 363, 15 L. R. A. 588, 30 N. E. 963.

The creditor may sue for the money as soon as it is made, even before the return day.

*Rogers* v. *Sumner*, 16 Pick. 387; *Morland* v. *Pellatt*, 8 Barn. & C. 722; *Higgins* v. *M'Adam*, 3 Younge & J. 1.

The act of 1841 vested title as of the date of the adjudication.

*Ex parte Bennet*, 1 Clark (Pa.) 28, Fed. Cas. No. 1,309; *Ex parte Dudley*, 1 Clark (Pa.) 96, Fed. Cas. No. 4,114; *Miller* v. *Black*, 1 Pa. St. 420; *Smith* v. ———, 4 Edw. Ch. 653; *Berthelon* v. *Betts*, 4 Hill, 577; *Buckingham* v. *McLean*, 13 How. 151, 14 L. ed. 90.

Before sale, the execution creditor has no property rights.

*Scott* v. *Morgan*, 94 N. Y. 508.

In case of loss of the property levied on, however, it falls on the creditor, not on the debtor.

*Peck* v. *Tiffany*, 2 N. Y. 451; *United States* v. *Dashiel*, 3 Wall. 688, 18 L. ed. 268; *Re Dawson*, 110 N. Y. 114, 17 N. E. 668.

Collection by the sheriff is payment to the execution creditor.

*Hoover* v. *Wise*, 91 U. S. 308, 23 L. ed. 392; *Re Easley*, 93 Fed. 419.

The doctrine of relation is not favored in its application to bankruptcy law.

*Case* v. *De Goes*, 3 Cai. 261; *Johnston* v. *Jones*, 1 Black, 210, 17 L. ed. 117; *Jackson ex dem. Henderson* v. *Davenport*, 20 Johns. 537.

Where the right of relation has been claimed by construction or implication only, under the bankruptcy acts, the courts have uniformly refused to make any such construction to the injury of third parties.

*Rathbone* v. *Blackford*, 1 Cai. 588; *Higgins* v. *M'Adam*, 3 Younge & J. 1; *Conner* v. *Long*, 104 U. S. 228, 26 L. ed. 723.

The intention of the section in question is to avoid merely the lien of the attachment or judgment.

*Doyle* v. *Heath*, 22 R. I. 213, 47 Atl. 213, 4 Am. Bankr. Rep. 705; *Re Beaver Coal Co.* 6 Am. Bankr. Rep. 404.

Its failure to mention executions shows to a demonstration that it did not intend to interfere with an execution which had already advanced beyond the stage of the "levy" and had been completed by a sale.

*Botts* v. *Hammond*, 40 C. C. A. 179, 99 Fed. 916.

The proviso to § 67, subd. f, applies to a judicial sale occurring after the adjudication, and protects an innocent purchaser, but not the sheriff.

*Jones* v. *Stevens*, 94 Me. 582, 48 Atl. 170, 5 Am. Bankr. Rep. 571.

In the case of an attachment the proceeds of the sale remain in the hands of the sheriff subject to the lien of the attachment, which is conditional and dependent upon the rendition of judgment in favor of the creditor.

*Miller* v. *Bowles*, 58 N. Y. 253 (decided under the act of 1867); *Pratt* v. *Law*, 9 Cranch. 456, 3 L. ed. 791.

The attachment creditor's rights to such proceeds before judgment are exactly the same as they were with reference to the property attached before it was sold. In the case of an execution, however, the sale absolutely at once satisfies the debt, and the right of the creditor to the proceeds in the hands of the sheriff is complete.

The creditor's rights under a prior execution are not opposed to the object of the bankrupt law.

*Clark* v. *Iselin*, 21 Wall. 360, 22 L. ed. 568; *Pirie* v. *Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.

The judgment is valid and unaffected by the bankruptcy proceedings.

*Re Pease*, 4 Am. Bankr. Rep. 547.

The nullification of the lien alone is effected by the adjudication in bankruptcy, and in order that that effect should be produced the lien must be in existence at the time of the adjudication, and must not have become *functus officio* by a previous sale.

*Peck* v. *Connell*, 6 Am. Bankr. Rep. 93.

*Mr. S. Livingston Samuels* also filed a brief for petitioner on submission to full bench:

"Deem," when used in a statute, means to "adjudge."

*Blaufus* v. *People*, 69 N. Y. 107, 25 Am. Rep. 148; *State* v. *Price*, 11 N. J. L. 203.

In the construction of statutes the general words in one clause may be restrained by the particular words in a subsequent clause of the same statute.

*Covington* v. *McNickle*, 18 B. Mon. 262; *Atkins* v. *Fibre Disintegrating Co.* 18 Wall. 272, 21 L. ed. 841.

The inquiry is not as to the abstract force of the words used, but as to the sense in which the legislature intended to use them; and this sense is to be collected from the context; and a narrower or more extended meaning will be given according to the intention thus indicated.

*McIntyre* v. *Ingraham*, 35 Miss. 25.

The word "all" is frequently to be restrained in an act, not only by the context but by the general form and scheme of the statute as demonstrative of the intention of the legislature.

*Phillips* v. *State*, 15 Ga. 518.

In statutes as well as in common parlance, the word "all" is a general, rather than a universal, term, and is to be understood in one sense or the other according to the demands of sound reason.

*Stone* v. *Elliott*, 11 Ohio St. 252; *Kieffer* v. *Ehler*, 18 Pa. 388.

Where a particular construction of a statute will occasion great inconvenience, or produce inequality or injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute.

*Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

*Mr.* **Nelson S. Spencer** argued the cause and filed a brief for respondent:

Petitioner recovered his judgment subject to the operation of the bankrupt act, and the provisions of that act must be read into his judgment contract.

*Mather* v. *Bush*, 16 Johns. 233, 8 Am. Dec. 313; *Walker* v. *Whitehead*, 16 Wall. 314, 21 L. ed. 357; *Barnitz* v. *Beverly*, 163 U. S. 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1042; *Bronson* v. *Kinzie*, 1 How. 311, 11 L. ed. 143.

A void judgment may be such *ab initio*, in which case all acts performed under it, and all claims growing out of it, are also void, and it may be wholly disregarded (Freeman, Judgm. 4th ed. § 117); or it may be such because of a fact subsequent, or of error.

While it is unreversed it is valid and a protection to the sheriff. A bona fide purchaser on a sale made by its authority is protected, but the proceeds must be restored to the judgment debtor, or to anyone who has succeeded to his rights.

*Bank of United States* v. *Bank of Washington*, 6 Pet. 8, 8 L. ed. 299; *Northwestern Fuel Co.* v. *Brock*, 139 U. S. 216, 35 L. ed. 151, 11 Sup. Ct. Rep. 523; *Haebler* v. *Myers*, 132 N. Y. 363, 15 L. R. A. 588, 30 N. E. 963; *Conner* v. *Long*, 104 U. S. 228, 26 L. ed. 723.

Mr. Justice **Brewer** delivered the opinion of the court:

The contention of the petitioner is that—

*"The sheriff having sold the goods levied [488] on before the filing of the petition in bankruptcy, the proceeds of the sale were the property of the plaintiff in execution, and not of the bankrupt, at the time of the adjudication, and the trustee, therefore, has no title to the same."

This contention cannot be sustained. The judgment in favor of petitioner against Kenney was not like that in *Metcalf Bros.* v. *Barker*, 187 U. S. 165, *ante*, 122, 23 Sup. Ct. Rep. 67, one giving effect to a lien theretofore existing, but one which, with the levy of an execution issued thereon, created the lien; and as judgment, execution, and levy were all within four months prior to the filing of the petition in bankruptcy, the lien created thereby became null and void on the adjudication of bankruptcy. This nullity and invalidity relate back to the time of the entry of the judgment, and affect that and all subsequent proceedings. The language of the statute is not "when" but "in case he is adjudged a bankrupt," and the lien obtained through these legal proceedings was by the adjudication rendered null and void from its inception. Further, the statute provides that "the property affected by"—not the property subject to—the lien is wholly discharged and released therefrom. It is true that the stock and fixtures, the property originally belonging to the bankrupt, had been sold, but having, so far as the record shows, passed to a "bona fide purchaser for value," it remained by virtue of the last clause of the section the property of the purchaser, unaffected by the bankruptcy proceedings. But the money received by the sheriff took the place of that property.

It is said that that money was not the property of the bankrupt, but of the creditor in the execution. Doubtless as between the judgment creditor and debtor, and while the execution remained in force, the money could not be considered the property of the debtor, and could not be appropriated to the payment of his debts as against the rights of the judgment creditor, but it had not become the property absolutely of the creditor. The writ of execution had not been fully executed. Its command to the sheriff was to seize the property of the judgment debtor, sell it, and pay the proceeds over to the creditor. The time within which that was to be done had not elapsed, and the ex-[489] ecution *was still in his hands, not fully executed. The rights of the creditor were still subject to interception. Suppose, for instance, there being no bankruptcy proceedings, the judgment had been reversed by an appellate court and the mandate of reversal filed in the trial court; could it for a moment be claimed that, notwithstanding the reversal of the judgment, the money in the hands of the sheriff belonged to the judgment creditor, and could be recovered by him, or that it was the duty of the sheriff to pay it to him? The purchaser at the sheriff's sale might keep possession of the property which he had purchased, but the money received as the proceeds of such sale would undoubtedly belong and be paid over to the judgment debtor. The bankruptcy proceedings operated in the same way. They took away the foundation upon which the rights of the creditor, obtained by judgment, execution, levy, and sale, rested. The duty of the sheriff to pay the money over to the judgment creditor was gone and that money became the property of the bankrupt, and was subject to the control of his representative in bankruptcy.

It was held in *Turner* v. *Fendall*, 1 Cranch, 116, 2 L. ed. 53, that money collected by a sheriff on an execution could not be levied upon under execution placed in his hands against the judgment creditor, and that the latter could maintain an action against the sheriff for a failure to pay the money thus collected. A similar ruling was made in New York (*Baker* v. *Kenworthy*, 41 N. Y. 215), in which it appeared that a sheriff had collected money on an execution in favor of one Brooks; that he returned the execution without paying the money to Brooks, but, on the contrary, levied upon it under an execution against Brooks, and it was held that such levy did not release him from liability to Brooks. It was said in the opinion (p. 216):

"The money paid into the hands of the sheriff on the execution in favor of Brooks did not become the property of Brooks until it had been paid over to him. Until that was done, the sheriff could not levy upon it by virtue of the execution against Brooks then in his hands."

The rule in that state in respect to a levy upon money in the hands of a sheriff may have been changed,—at least, *so far as an[490] attachment is concerned. See *Wehle* v. *Conner*, 83 N. Y. 231.

In *Nelson* v. *Kerr*, 59 N. Y. 224, it is said: "The money collected by the sheriff belongs to the plaintiff." But in that case the execution had been returned, and yet the officer had not paid the money to the execution creditor. See also *Kingston Bank* v. *Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516.

In none of those cases had anything been done to affect the validity or force of the writ of execution. Whatever was done was done under a writ whose validity and potency were unchallenged and undisturbed; while here, before the writ of execution had been fully executed, its power was taken away. Its command had ceased to be obligatory upon the sheriff, and the execution creditor had no right to insist that the sheriff should further execute its commands.

A different question might have arisen if the writ had been fully executed by payment to the execution creditor. Whether the bankruptcy proceedings would then so far affect the judgment and execution, and that which was done under them, as to justify a recovery by the trustee in bankruptcy from the execution creditor, is a question not before us, and may depend on many other considerations. It is enough now to hold that the bankruptcy proceedings seized upon the writ of execution while it was still unexecuted and released the property which was held under it from the claim of the execution creditor.

*The judgment of the Court of Appeals is affirmed.*

Mr. Justice **White** and Mr. Justice **Peckham** dissented.

[491] *HENRY BIGELOW WILLIAMS and Charles F. Ayer, Trustees, *Plffs. in Err.*,
*v.*
HERBERT PARKER, Attorney General of Massachusetts.

(See S. C. Reporter's ed. 491-505.)

*Constitutional law—due process—restriction on height of buildings—compensation.*

Due process of law is not denied the owners of property damaged by the enforcement of a restriction on the height of buildings on certain Boston streets, imposed by Mass. act May 23, 1898, on the theory that the right of action thereby given to recover the damages from the city of Boston "in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway" does not afford adequate provision for compensation because the city, not being a party to the taking, is not technically estopped to deny its liability, since such statutory liability is of a character which, under the decisions of the state courts, the legislature may impose on a municipality.

[No. 116.]

*Argued December 5, 1902. Decided February 23, 1903.*

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review a judgment directing a removal of those parts of a building on a Boston street above the height of 90 feet. *Affirmed.*

See same case below, 174 Mass. 476, 47 L. R. A. 314, 55 N. E. 77, 178 Mass. 330, 59 N. E. 812.

Statement by Mr. Justice **Brewer:**

On May 23, 1898, the legislature of Massachusetts passed the following act:

"Sec. 1. Any building now being built, or hereafter to be built, rebuilt, or altered in the city of Boston, upon any land abutting on St. James avenue, between Clarendon street and Dartmouth street, or upon land at the corner of Dartmouth street and Huntington avenue, now occupied by the Pierce building, so-called, or upon land abutting on Dartmouth street, now occupied by the Boston Public Library building, or upon land at the corner of Dartmouth street and Boylston street, now occupied by the New Old South Church building, may be completed, built, rebuilt, or altered to the height of 90 feet, and no more; and upon any land or lands abutting on Boylston street, between Dartmouth street and Clarendon street, may be completed, built, rebuilt, or altered to the height of 100 feet, and no more: *Provided, however,* That there may be *erect- [492] ed on any such building, above the limits hereinbefore prescribed, such steeples, towers, domes, sculptured ornaments and chimneys as the board of park commissioners of said city may approve.

"Sec. 2. The provisions of chapter 313 of the acts of the year 1896, and of chapter 379 of the acts of the year 1897, so far as they limit the height of buildings, shall not be construed to apply to the territory specified and restricted in § 1 of this act.

"Sec. 3. The owner of, or any person having an interest in, any building upon any land described in § 1 of this act, the construction whereof was begun, but not completed, before the 14th day of January in the current year, who suffers damage under the provisions of this act by reason or in consequence of having planned and begun such construction, or made contracts therefor, for a height exceeding that limited by § 1 of this act for the locality where said construction has been begun, may recover damages from the city of Boston for material bought or actually contracted for, and the use of which is prevented by the provisions of this act, for the excess of cost of material bought or actually contracted for over that which would be necessary for such building if not exceeding in height the limit prescribed for that locality by § 1 of this act, less the value of such materials as are not required on account of the limitations resulting from the provisions of this act, and the actual cost or expense of any rearrangement of the design or construction of such building made necessary by this act, by proceedings begun within two years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city.

"Sec. 4. Any person sustaining damage or loss in his property by reason of the limit of the height of buildings provided for in this act may recover such damage or loss from the city of Boston, by proceedings begun within three years of the passage of this act, and in the manner prescribed by law for obtaining payment for damages sustained by any person whose *land is taken [493] in the laying out of a highway in said city." Acts and Resolves of Massachusetts, 1898, chap. 452.

The building of plaintiff in error comes within the scope of this statute, and on September 17, 1898, the attorney general of Massachusetts filed an information in the supreme judicial court of that state to enjoin the maintenance of that part of the building above the 90-foot line. To this information the defendants pleaded, among other things, that "the statute, . . . in its application to the defendants, . . . is in violation of the 2d clause of § 1 of the 14th Amendment, and of other provisions of the Constitution of the United States." Pending this proceeding, the defendants commenced actions against the city of Bos-

NOTE.—*As to what constitutes due process of law*—see Kuntz v. Sumption (Ind.) 2 L. R. A. 655, and note; *Re* Gannon (R. I.) 5 L. R. A. 359, and note; Ulman v. Baltimore (Md.) 11 L. R. A. 224, and note; and Gilman v. Tucker (N. Y.) 13 L. R. A. 304, and note. And see notes to People v. O'Brien (N. Y.) 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

ton for damages, as provided in §§ 3 and 4 of the statute. The city filed a general denial. The defendants then moved that the attorney general be required to join the city as a party defendant, in order that the question of the city's liability to damages might be conclusively determined in this proceeding, or, in default of such joinder, that it be stayed until the city's liability could be conclusively determined. This motion was denied, and the defendants appealed from the denial thereof. The facts were agreed upon, and the case reserved by the presiding justice for the consideration of the full court. Upon March 13, 1901, a decree was entered, sustaining the contention of the attorney general, and directing a removal of those parts of the building above the height of 90 feet, without prejudice, however, to the right of defendants under the statute to maintain such steeples, towers, etc., as the board of park commissioners of the city of Boston should approve. 174 Mass. 476, 47 L. R. A. 314, 55 N. E. 77. To review such judgment this writ of error was sued out.

*Mr.* **Albert E. Pillsbury** argued the cause, and, with *Mr. Grant M. Palmer*, filed a brief for plaintiffs in error:

Due provision for just compensation for private property taken for public uses is essential to the validity of an act of eminent domain.

*Perry* v. *Wilson*, 7 Mass. 393; *Stevens* v. *Middlesex Canal*, 12 Mass. 466; *Brickett* v. *Haverhill Aqueduct Co.* 142 Mass. 394, 8 N. E. 119; *Atty. Gen.* v. *Old Colony R. Co.* 160 Mass. 62, 22 L. R. A. 112, 35 N. E. 252; *Bent* v. *Emery*, 173 Mass. 495, 53 N. E. 910.

Without such provision the statute is unconstitutional and void, and does not justify an entry upon the land of the owner without his consent.

*Connecticut River R. Co.* v. *Franklin County*, 127 Mass. 50, 34 Am. Rep. 338.

It is not enough that the statute purports to make provision for compensation. The provision must be certain, amounting to assurance of it, without risk of failure in any event. It is beyond legislative power to cast upon the property owner any hazard of loss of his property without compensation.

*Drury* v. *Midland R. Co.* 127 Mass. 571; *Haverhill Bridge* v. *Essex County*, 103 Mass. 120, 4 Am. Rep. 518; *Atty. Gen.* v. *Old Colony R. Co.* 160 Mass. 62, 22 L. R. A. 112, 35 N. E. 252; *Connecticut River R. Co.* v. *Franklin County*, 127 Mass. 50, 34 Am. Rep. 338; *Brewster* v. *J. & J. Rogers Co.* 169 N. Y. 73, 58 L. R. A. 495, 62 N. E. 164; *Bent* v. *Emery*, 173 Mass. 495, 53 N. E. 910; *Kennedy* v. *Indianapolis*, 103 U. S. 599, 26 L. ed. 550; *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965; *Bauman* v. *Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *United States* v. *Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576, 16 Sup. Ct. Rep. 427.

Due provision securing just compensation to the owner of property taken in the exercise of the power of eminent domain by or under the states is required by the due process clause of the 14th Amendment.

*Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Backus* v. *Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Norwood* v. *Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187.

The Federal requirement of due process of law extends to judicial, as well as to legislative, action of the states. The decree of a court may invade the requirement, no less than a statute.

*Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. See also *Virginia* v. *Rives*, 100 U. S. 313, 25 L. ed. 667; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 836, 3 Sup. Ct. Rep. 18; *Logan* v. *United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Scott* v. *McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Gibson* v. *Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Williams* v. *Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 18 Sup. Ct. Rep. 583; *Blake* v. *McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165.

The state cannot be held liable for the acts of its public officers, whether merely tortious or in course of judicial procedure, under a void statute.

*Connecticut River R. Co.* v. *Franklin County*, 127 Mass. 50, 34 Am. Rep. 338; *Murdock Parlor Grate Co.* v. *Com.* 152 Mass. 28, 8 L. R. A. 399, 24 N. E. 854; *Bent* v. *Emery*, 173 Mass. 495, 53 N. E. 910.

The provision for damages cannot be presumed valid or enforceable unless it clearly appears, upon its face, to be so. The existence, at the time of passage of a statute, of facts essential to its validity, may be presumed; but no presumption as to the determination of a future event, so uncertain as the result of contested litigation, can satisfy this imperative constitutional requirement.

*Haverhill Bridge* v. *Essex County*, 103 Mass. 120, 4 Am. Rep. 518; *Connecticut River R. Co.* v. *Franklin County*, 127 Mass. 50, 34 Am. Rep. 338; *Bent* v. *Emery*, 173 Mass. 495, 53 N. E. 910.

Substantial certainty of compensation cannot be predicated of a statute which leaves the right to depend upon the event of litigation with a third party which disputes, has a right to dispute, and has reasonable grounds for disputing, its liability.

Unless the legislature has power to compel a city to establish public parks, it has no power to compel a city to take or pay for property for improving them when established. In the states in which the direct question whether the legislature may com-

pel a city or town to establish public parks has been judicially raised, under constitutional provisions substantially like those of Massachusetts, it has uniformly been determined in the negative.

*People ex rel. Le Roy* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People ex rel. Park Comrs.* v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202, 29 Mich. 343; *Thompson* v. *Moran*, 44 Mich. 602, 7 N. W. 180; *Webb* v. *New York*, 64 How. Pr. 10; Dill. Mun. Corp. 4th ed. §§ 71-74a. See also *Atkins* v. *Randolph*, 31 Vt. 226; *State ex rel. McCurdy* v. *Tappan*, 29 Wis. 664; *Louisville* v. *University of Louisville*, 15 B. Mon. 642; *State ex rel. Geake* v. *Fox* (Ind.) 56 L. R. A. 893, 63 N. E. 19.

Until the present case, the Massachusetts court has never gone so far as to hold that the legislature may compel a city to tax its inhabitants for a system of public parks, nor is there believed to be authority for this proposition in any state. It has gone no farther than to hold that the legislature may authorize taxation for this purpose.

*Holt* v. *Somerville*, 127 Mass. 408; *Foster* v. *Boston Park*, 133 Mass. 321.

And that court seems to regard parks, when established by a city under legislative authority, as held by it in a quasi-private and proprietary character, beyond legislative power to take away.

*Mt. Hope Cemetery* v. *Boston*, 158 Mass. 509, 33 N. E. 695.

It was formerly understood in Massachusetts that the property of the inhabitants was liable to seizure on execution for a debt of a city or town.

*Connecticut River R. Co.* v. *Franklin County*, 127 Mass. 50, 34 Am. Rep. 338.

Apparently this can no longer be regarded as the law.

*Rees* v. *Watertown*, 19 Wall. 107, 22 L. ed. 72; *Merriwether* v. *Garrett*, 102 U. S. 472. 26 L. ed. 197.

Merely to give the owner a right of action is to comply with the constitutional requirement in form, while violating it in substance.

*Haverhill Bridge* v. *Essex County*, 103 Mass. 120, 4 Am. Rep. 518; *Atty. Gen.* v. *Old Colony R. Co.* 160 Mass. 62, 22 L. R. A. 112, 35 N. E. 252.

In the ordinary case the owner of property taken by eminent domain has not only the security of the statutory provision for compensation, but if for any reason that provision fails, equity will exclude the taker and restore the original owner to possession; so solicitous is the law for his protection.

*Atty. Gen.* v. *Old Colony R. Co.* 160 Mass. 62, 22 L. R. A. 112, 35 N. E. 252; *Rockport Water Co.* v. *Rockport*, 161 Mass. 279, 37 N. E. 168; *Sweet* v. *Rechel*, 159 U. S. 389, 40 L. ed. 193, 16 Sup. Ct. Rep. 43.

Here, while the city, which alone is made liable for damages, is refusing to pay, and contesting any obligation to pay, as it has a right to do, the state court proceeds to destroy the property, putting it beyond reach of restoration; and this, notwithstanding it is beyond the power of that court finally to determine the liability of the city, which power belongs to this court alone.

*Mr.* **Edmund A. Whitman** argued the cause, and, with *Mr. Samuel J. Elder*, filed a brief for defendant in error:

Due process means only such process as recognizes the right of the owner to be compensated if his property be taken from him and transferred to the public. All that is essential is that a proper inquiry should be made as to the amount of compensation, and this constitutes "due process."

*Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Sweet* v. *Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43.

The Federal courts ought not to interfere,—especially with a statute which has been declared constitutional by the state supreme court,— unless it clearly appears that there is some abuse of law amounting to confiscation of property or deprivation of personal rights.

*Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644.

It is not necessary that there should be any particular mode of proceeding in the state court for the recovery of compensation.

*Simon* v. *Craft*, 182 U. S. 427, 45 L. ed. 1165, 27 Sup. Ct. Rep. 836.

The 14th Amendment in no way undertakes to control the power of a state, or to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for this purpose gives reasonable notice and affords fair opportunity to be heard before the issues are decided.

*Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344.

A large discretion is necessarily vested in the state legislature to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests.

*Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

It is not necessary that compensation should be determined in advance of the taking. It is sufficient if any adequate provision for compensation is made. Proper inquiry as to the amount of the compensation constitutes due process.

*Backus* v. *Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

Due process of law is process according to the law of the land. This process is regulated by the law of the state.

*French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

If this statute in question can be construed as an exercise of the power of taxation, the rule is still the same.

*Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Fallbrook*

*Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

Nor does it make any difference with the constitutionality of the statute that the legislature of Massachusetts has imposed the entire burden of this public improvement upon the city of Boston.

*Sweet* v. *Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; *Willard* v. *Presbury*, 14 Wall. 676, 20 L. ed. 719; *Bauman* v. *Ross*, 167 U. S. 548, 42 L. ed. 270, 17 Sup. Ct. Rep. 966; *Webster* v. *Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 644; *Williams* v. *Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Freeland* v. *Hastings*, 10 Allen, 570; *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778; *Old Colony R. Co.* v. *Framingham Water Co.* 153 Mass. 561, 13 L. R. A. 332, 27 N. E. 662.

The decision of a supreme court of a state in construing its own Constitution is binding on this court.

*Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Orr* v. *Gilman*, 183 U. S. 278, 46 L. ed. 196, 22 Sup. Ct. Rep. 213.

This court is bound to give the same meaning to a state statute as was given it by the supreme court of the state.

*Stockard* v. *Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130.

The legislature of Massachusetts has imposed at various times a sewerage system, a water system, and a park system upon the city of Boston and the adjoining cities and towns, constituting what the legislature has called a metropolitan district, and the constitutionality of such statutes has been affirmed after careful consideration.

*Kingman, Petitioner*, 153 Mass. 570, 12 L. R. A. 417, 27 N. E. 778; *Adams, Petitioner*, 165 Mass. 497, 43 N. E. 682; *De Las Casas, Petitioner*, 178 Mass. 213, 59 N. E. 664.

Mr. Justice **Brewer** delivered the opinion of the court:

Counsel for plaintiffs in error state in their brief that "the single question in the case is, substantially, whether it is consistent with due process of law for a court to decree the actual destruction of property under a statute of eminent domain by which the state takes certain rights in it, making provision for compensation only by giving the owners a right of action against a city for their damages, while the city, which had no part in the taking, denies the validity of the provision for compensation, upon which the validity of the taking depends, and refuses to pay any damages unless and until it is held liable therefor in another proceeding, which is yet undetermined."

That the statute does not conflict with the Constitution of the state is for this court settled by the decision of the state court. *Merchants' & Mfrs. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 7 Sup. Ct. Rep. 829, and cases cited; *Rasmussen* v. *Idaho*, 181 U. S. 198, 45 L. ed. 820, 21 Sup. Ct. Rep. 594. The constitutional provision of the state, and that found in the 5th Amendment to the Federal Constitution, are substantially alike. The Massachusetts provision reads: "Whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." Declaration of Rights, art. 10. And the 5th Amendment says: "Nor shall private property be taken for public use without just compensation."

So far as the Federal Constitution is concerned, it is settled by repeated decisions that a state may authorize the taking of possession prior to any payment, or even final determination of the amount of compensation. In *Backus* v. *Ft. Street Union Depot Co.* 169 U. S. 557, 568, 42 L. ed. 853, 858, 18 Sup. Ct. Rep. 445, 449, we said:

"Is it beyond the power of a state to authorize in condemnation cases the taking of possession prior to the final determination of the amount of compensation and pay- [503] ment thereof? This question is fully answered by the opinions of this court in *Cherokee Nation* v. *Southern Kansas R. Co.* 135 U. S. 641, 34 L. ed. 295, 10 Sup. Ct. Rep. 965, and *Sweet* v. *Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43. There can be no doubt that if adequate provision for compensation is made authority may be granted for taking possession pending inquiry as to the amount which must be paid and before any final determination thereof."

We pass, therefore, to inquire as to the adequacy of the provision for compensation. No question is made as to the general solvency of the city of Boston. Although in the agreed facts it is stated that the city has no "moneys specially appropriated to any such purpose as that prescribed by the damage clauses of this statute, nor any express statutory power or authority to raise, appropriate, or pay money for such a purpose," yet, as this statute provides that "any person sustaining damage . . . may recover such damage . . . in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway;" and as there is a general statute making suitable provision for such a recovery,—the question of solvency does not seem to be material.

It is true that the city is not a party to the proceedings, and therefore not estopped to deny its liability by reason of having sought and obtained the condemnation. In that respect the statute differs from ordinary statutes giving to corporations, municipal or private, the right to condemn. While there is no technical estoppel by judicial proceeding, yet the state supreme court adjudged the validity of the statute, not merely in respect to the taking, but also in respect to the liability of the city. In its opinion it said (p. 481, L. R. A. p. 317, N. E. p. 78):

"It may be contended that if the legislature could take this right for the use of the public, it could not require the city of Boston to make compensation for it, but should have provided for the payment of damages from the treasury of the commonwealth. This contention would limit too strictly the power of the legislature in the distribution of public burdens. Very wide discretion is left with the lawmaking power in this particular. The legislature may change the [504] political subdivisions *of the commonwealth by creating, changing, or abolishing particular cities, towns, or counties. It may require any of them to bear such share of the public burdens as it deems just and equitable. This right has been exercised in a great variety of ways. *Kingman, Petitioner*, 153 Mass. 566, 12 L. R. A. 417, 27 N. E. 778, and cases and statutes there cited."

And this decision is in harmony with prior adjudications of that court.

It is also true that the proceeding here taken is in many respects novel. Perhaps no case like it has arisen in this country. But as the court of last resort of Massachusetts has treated it as a condemnation, a taking for the public use, it is a taking for the use primarily of the citizens of Boston, and comes within the repeated rulings of the state court in respect to the competency of the legislature to cast the burden thereof upon the city. And while, as stated, there may be no technical estoppel by judgment, yet in view of these rulings it would be going too far to hold that it is essential that there be a judgment establishing the liability of the city before it can be affirmed that adequate provision for compensation has been made.

That there may be novel questions in respect to the measure of damage, the value of the property that is taken, does not avoid the fact that a solvent debtor,—one whose solvency is not liable to go up or down like that of an individual, but is of substantial permanence,—is provided, as well as a direct and appropriate means of ascertaining and enforcing the amount of all such damage. In view, therefore, of the prior decisions of the supreme court of the state as well as that in this case, we are of opinion that it cannot be held that there was a failure to make adequate provision for the payment of the damages sustained by the taking.

We have not considered any question of purely state cognizance, nor have we stopped to comment on the suggestion made by the supreme court of the state, that this statute might be sustained as an exercise of the police power, or, if it could be so sustained, that it could be enforced without any provision for compensation. Consider- [505] ing simply the distinct *proposition so ably presented by the counsel for plaintiffs in error, we are of opinion that the statute in question cannot be adjudged in conflict with the Federal Constitution, and therefore *the judgment of the Supreme Judicial Court of Massachusetts is affirmed.*

AUGUSTUS G. REETZ, *Plff. in Err.*,
*v.*
PEOPLE OF THE STATE OF MICHIGAN.

(See S. C. Reporter's ed. 505-510.)

*Constitutional law—due process of law—validity of state law as to practice of medicine—ex post facto laws.*

1. The grant to a board of registration in medicine, by Mich. Pub. Acts 1899, act No. 237, of the power to decide whether an applicant for registration had been "legally registered" under a prior statute, with no provision in terms for a review of the proceedings of such board, does not render the act obnoxious to the Federal Constitution.
2. Due process of law requires no special provision for granting a hearing to applicants for registration by the board of registration in medicine created by Mich. Pub. Acts 1899, act No. 237, where such act provides for semiannual meetings of the board at specified times at the state capitol.
3. The provision against the practice of medicine by unregistered persons, which is made by Mich. Pub. Acts 1899, act No. 237, creating a board of registration in medicine, does not render such act *ex post facto* as to one licensed under a prior act, where provision is made for registration of persons presenting sufficient proof of legal registration under such prior act.

[No. 143.]

*Argued January 21, 1903. Decided February 23, 1903.*

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which affirmed a conviction in the Circuit Court for the County of Muskegon of a violation of a state statute prohibiting the practice of medicine by unregistered persons. *Affirmed.*

See same case below, 127 Mich. 87, 86 N. W. 396.

NOTE.—*As to the constitutional right to practice a profession*—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 581.

*On judicial power to review actions of boards in respect to licenses of physicians, dentists, etc.*—see note to Iowa Eclectic Medical College Asso. v. Schrader (Iowa) 20 L. R. A. 355.

*As to what constitutes due process of law*—see Kuntz v. Sumption (Ind.) 2 L. R. A. 655, and note; *Re* Gannon (R. I.) 5 L. R. A. 359, and note; Ulman v. Baltimore (Md.) 11 L. R. A. 224, and note; Gilman v. Tucker (N. Y.) 13 L. R. A. 304, and note. And see notes to People v. O'Brien (N. Y.) 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

*On notice and hearing required to constitute due process of law*—see notes to Kuntz v. Sumption (Ind.) 2 L. R. A. 657; Chauvin v. Valiton (Mont.) 8 L. R. A. 194; and Ulman v. Baltimore (Md.) 11 L. R. A. 225.

*As to what laws are ex post facto*—see notes to State v. Cooler (S. C.) 3 L. R. A. 181; Anderson v. O'Donnell (S. C.) 1 L. R. A. 632; Calder v. Bull, 1 L. ed. U. S. 648; Sturges v. Crowninshield, 4 L. ed. U. S. 529; *Re* Medley, 33 L. ed. U. S. 835; Otoe County v. Baldwin, 28 L. ed. U. S. 331; and Barnitz v. Beverly, 41 L. ed. U. S. 94.

Statement by Mr. Justice **Brewer:**

Act No. 237 of the public acts of the state of Michigan (1899) directed the appointment of "a board of registration in medicine," to hold two regular meetings at specified times in each year at the state capitol, and additional meetings at such times and places as it might determine; required all persons engaging in the practice of medicine and surgery to obtain from such board a certificate of registration; prescribed the [506] conditions *upon which such certificate should be granted, and forbade, under penalty, the practice of medicine or surgery without such certificate. The conditions above referred to were either a satisfactory examination, or the possession of "a diploma from any legally incorporated, regularly established, and reputable college of medicine, . . . having at least a three years' course of eight months in each year, or a course of four years of six months in each year, . . . as shall be approved and designated by the board of registration," with a proviso that "the board of registration shall not register any person by reason of a diploma from any college which sells, or advertises to sell, diplomas 'without attendance,' nor from any other than a regularly established and reputable college." Another provision was that an applicant should be given a certificate of registration if he should "present sufficient proof within six months after the passage of this act of his having already been legally registered under act No. 167 of 1883, as amended in 1887, entitled 'An Act to Promote Public Health.'" The plaintiff in error was prosecuted and convicted in the circuit court for the county of Muskegon of a violation of this statute, which conviction was affirmed by the supreme court of the state (127 Mich. 87, 86 N. W. 396), to reverse which ruling this writ of error was sued out.

*Mr.* **William P. Belden** argued the cause, and, with *Messrs. Edwin A. Burlingame* and *Jesse F. Orton*, filed a brief for plaintiff in error:

In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect.

*Henderson* v. *Wickham*, 92 U. S. 259, 23 L. ed. 543.

The confiding of judicial power to a body not a regularly organized court of justice, or at least to a body not possessing the essential powers and attributes of a court, does not constitute due process of law.

*Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

The least that the legislature could do, and keep within the limits of due process of law, would be to provide a tribunal possessing the powers necessary to give persons interested a fair hearing, the right to secure the testimony of witnesses in their own behalf, and the right to have their unlawful acts established affirmatively, without being required to prove their own innocence.

*Schlitz* v. *Roenitz*, 86 Wis. 31, 21 L. R. A. 483, 56 N. W. 194; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *State* v. *Carneall*, 10 Ark. 156.

The duties which the act of 1899 attempts to confide to the state board of registration are, at least, of a quasi-juridical character, and would involve action of the board requiring the exercise of discretion, so that, after such exercise, the decision of the board could not be reviewed by a court in mandamus proceedings.

*State ex rel. Hathaway* v. *State Bd. of Health*, 103 Mo. 22, 15 S. W. 322.

Rights cannot be devested by quasi-juridical bodies without a hearing and orderly procedure.

*Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Hutson* v. *Woodbridge Protection Dist. No. 1*, 79 Cal. 90, 16 Pac. 549, 21 Pac. 435; *Gamble* v. *McCrady*, 75 N. C. 509; *Mercantile Trust Co.* v. *Texas & P. R. Co.* 51 Fed. 529.

It is a maxim of fundamental law that no man shall be condemned without a hearing. A hearing assumes notice of specific grounds of complaint, and a reasonable opportunity for answering them.

*O'Hara* v. *Stack*, 90 Pa. 477.

The deprivation of the plaintiff in error of the right to practise medicine by the board of registration, without any hearing or opportunity for hearing and without the means of producing the necessary evidence, discloses such an interpretation of the law and such a custom of procedure on the part of the board of registration as amount to the plainest violation of the Federal Constitution.

*Yick Wo* v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

The right of a person in his profession is such a right that to deprive him of the privilege of pursuing it, without due process of law, is to deprive him of both his liberty and his property without due process of law.

*Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257. See also *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *O'Hara* v. *Stack*, 90 Pa. 477.

The impropriety of confiding to administrative officers or boards such powers as are by the Michigan statute given to the state board of registration has often been the subject of judicial comment.

*State* v. *Allen*, 2 McCord L. 55; *Huber* v. *Reily*, 53 Pa. 112; *Ex parte McNulty*, 77 Cal. 164, 19 Pac. 237.

The method of exclusion of medical practitioners from the further practice of medicine, adopted by the law of 1899, even though it is only a qualified or conditional exclusion, makes said law, so far as these

persons are concerned, both a bill of attainder and an *ex post facto* law.

*Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366; *Cummings* v. *Missouri*, 4 Wall. 277, 18 L. ed. 356.

*Mr.* **Charles B. Cross** argued the cause, and, with *Messrs. Horace M. Oren* and *George S. Lovelace*, filed a brief for defendant in error:

The act in question is substantially similar to those now in force in nearly all the states, and which, in every case brought before the courts for final adjudication, have been determined not to violate this provision of the Federal Constitution.

*Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *People* v. *Hasbrouck*, 11 Utah, 291, 39 Pac. 918.

A parchment purporting to be a diploma to practise medicine is not evidence *per se* that the college issuing it is a regularly constituted medical institution.

*Hill* v. *Boddie*, 2 Stew. & P. (Ala.) 56.

And the registration of such a diploma is no evidence that the owner thereof is a legally qualified physician. In fact the converse of this proposition may be taken as true, that an institution which grants diplomas under the circumstances shown in this case is not a "legally incorporated, regularly established, and reputable college of medicine," and that the owner thereof was not legally registered.

*Metcalfe* v. *State Bd. of Registration in Medicine*, 123 Mich. 661, 82 N. W. 512.

The state has the power to regulate the practice of any profession requiring special skill and training.

*Allopathic State Bd. of Medical Examiners* v. *Fowler*, 50 La. Ann. 1358, 24 So. 809; *State ex rel. Powell* v. *State Medical Examining Board*, 32 Minn. 324, 50 Am. Rep. 575, 20 N. W. 238; *Hewitt* v. *Charier*, 16 Pick. 353; *Spaulding* v. *Alford*, 1 Pick. 33; *Wright* v. *Lanckton*, 19 Pick. 288; Cooley, Const. Lim. 745.

The power which the legislature has to promote the general welfare is very great, and the discretion which that department of the government has in the employment of means to that end is very large.

*Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257.

The right of contract, like all other rights, is held subject to the necessities of the social state.

*State* v. *Addington*, 12 Mo. App. 214.

The state legislatures have the power, unless there be something in their own constitutions to prohibit it, of entirely abolishing or placing under restriction any trade or profession which they may think expedient.

*Austin* v. *State*, 10 Mo. 593.

The prohibition of the manufacture of beer, etc., though its effect was to destroy the value of brewery property, was held valid in *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273.

This is not an *ex post facto* law.

*Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Hawker* v. *New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Eastman* v. *State*, 109 Ind. 281, 58 Am. Rep. 400, 10 N. E. 97; *State* v. *Creditor*, 44 Kan. 568, 24 Pac. 346; *Craig* v. *State Bd. of Medical Examiners*, 12 Mont. 211, 29 Pac. 532.

Statutes similar in character have been held constitutional as a proper exercise of the police power, in nearly every state of the Union.

*Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79, 40 N. E. 454; *Singer* v. *State*, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044; *State* v. *Randolph*, 23 Or. 74, 17 L. R. A. 470, 31 Pac. 201; *Eastman* v. *State*, 109 Ind. 278, 58 Am. Rep. 400, 10 N. E. 97; *State ex rel. Burroughs* v. *Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750; *Ex parte Frazer*, 54 Cal. 94; *Harding* v. *People*, 10 Colo. 387, 15 Pac. 727; *Williams* v. *People*, 121 Ill. 84, 11 N. E. 881; *People use of State Bd. of Health* v. *Blue Mountain Joe*, 129 Ill. 370, 21 N. E. 923; *State* v. *Mosher*, 78 Iowa, 321, 43 N. W. 202; *Iowa Eclectic Medical College Asso.* v. *Schrader*, 87 Iowa, 659, 20 L. R. A. 355, 55 N. W. 24; *Driscoll* v. *Com.* 93 Ky. 393, 20 S. W. 431; *State* v. *Fleischer*, 41 Minn. 69, 42 N. W. 696; *State ex rel. Kellogg* v. *First Judicial Dist. Ct.* 13 Mont. 370, 34 Pac. 298; *Dogge* v. *State*, 17 Neb. 140, 22 N. W. 348; *Ex parte Spinney*, 10 Nev. 323; *Re Roe Chung*, 9 N. M. 130, 49 Pac. 952; *Re Smith*, 10 Wend. 449; *People* v. *Fulda*, 52 Hun, 65, 4 N. Y. Supp. 945; *State* v. *Van Doran*, 109 N. C. 864, 14 S. E. 32; *Barmore* v. *State Bd. of Medical Examiners*, 21 Or. 301, 28 Pac. 8; *Logan* v. *State*, 5 Tex. App. 306; *Fox* v. *Territory*, 2 Wash. Terr. 297, 5 Pac. 603; *State* v. *Carey*, 4 Wash. 424, 30 Pac. 729; *State* v. *Knowles*, 90 Md. 646, 49 L. R. A. 695, 45 Atl. 877; *France* v. *State*, 57 Ohio St. 1, 47 N. E. 1041; *State Bd. of Health* v. *Roy*, 22 R. I. 538, 48 Atl. 802; *State ex rel. Kellogg* v. *Currens*, 111 Wis. 431, 56 L. R. A. 252, 87 N. W. 561; *State* v. *Call*, 121 N. C. 643, 28 S. E. 517; *State* v. *Hathaway*, 115 Mo. 36, 21 S. W. 1081.

*Mr.* **Charles A. Blair** also argued the cause for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The power of a state to make reasonable provisons for determining the qualifications of those engaging in the practice of medicine, and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question. *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231; *Hawker* v. *New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573, and cases cited in the opinion; *State ex rel. Burroughs* v. *Webster*, 150 Ind. 607, 41 L. R. A. 212, 50 N. E. 750, and cases cited.

*It is objected in the present case that the [507] board of registration is given authority to exercise judicial powers without any appeal from its decision, inasmuch as it may refuse a certificate of registration if it shall find that no sufficient proof is presented that the

applicant had been "legally registered under act No. 167 of 1883." That, it is contended, is the determination of a legal question which no tribunal other than a regularly organized court can be empowered to decide. The decision of the state supreme court is conclusive that the act does not conflict with the state Constitution, and we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process. *Den ex dem. Murray* v. *Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372: *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Ex parte Wall*, 107 U. S. 265, 280, 27 L. ed. 552, 562, 2 Sup. Ct. Rep. 569; *Dreyer* v. *Illinois*, 187 U. S. 71, 83, *ante*, 79, 85, 23 Sup. Ct. Rep. 28, 32; *People* v. *Husbrouck*, 11 Utah, 291, 39 Pac. 918. In the last case this very question was presented, and in the opinion, on page 305, Pac. p. 921, it was said:

"The objection that the statute attempts to confer judicial power on the board is not well founded. Many executive officers, even those who are spoken of as purely ministerial officers, act judicially in the determination of facts in the performance of their official duties; and in so doing they do not exercise 'judicial power,' as that phrase is commonly used, and as it is used in the organic act in conferring judicial power upon specified courts. The powers conferred on the board of medical examiners are nowise different in character in this respect from those exercised by the examiners of candidates to teach in our public schools, or by tax assessors or boards of equalization in determining, for purposes of taxation, the value of property. The ascertainment and determination of qualifications to practise medicine by a board of competent experts, appointed for that purpose, is not the exercise of a power which appropriately belongs to the judicial department of the government."

[508] *In *Hurtado* v. *California*, 110 U. S. 516, 28 L. ed. 232, Mr. Justice Matthews, speaking for the court, discussed at some length and with citation of many authorities the essential elements of due process of law, and summed up the conclusions in these words (p. 537, L. ed. p. 239):

"It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law."

Neither is the right of appeal essential to due process of law. In nearly every state are statutes giving, in criminal cases of a minor nature, a single trial, without any right of review. For nearly a century trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted.

In *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114, upon the question whether the right of appeal was essential to the validity of a taxing statute, we said (p. 427, L. ed. p. 1036, Sup. Ct. Rep. p. 1117):

"Equally fallacious is the contention that, because to the ordinary taxpayer there is allowed, not merely one hearing before the county officials, but also a right of appeal with a second hearing before the state board, while only the one hearing before the latter board is given to railroad companies in respect to their property, therefore the latter are denied the equal protection of the laws. If a single hearing is not due process, doubling it will not make it so."

In *McKane* v. *Durston*, 153 U. S. 684, 687, 38 L. ed. 867, 868, 14 Sup. Ct. Rep. 913, 915, this court declared that "a review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law, and is not now, a necessary element of due process of law." See also *Andrews* v. *Swartz*, 156 U. S. 272, 39 L. ed. 422, 15 Sup. Ct. Rep. 389.

But while the statute makes in terms no provision for a review *of the proceedings of [509] the board, yet it is not true that such proceedings are beyond investigation in the courts. In *Metcalfe* v. *State Bd. of Registration*, 123 Mich. 661, 82 N. W. 512, an application for mandamus to compel this board to register the petitioner was entertained, and, although the application was denied, yet the denial was based, not upon a want of jurisdiction in the court, but upon the merits.

It is further insisted that it is essential to a judicial or quasi-judicial proceeding that it should give a person accused or interested the benefit of a hearing, and that there is in this statute no special provision for notice, or hearing, or authority to summon witnesses or to compel them to testify. The statute provides for semiannual meetings at specified times at the state capitol, but the plaintiff in error did not appear at any of these meetings or there present an application for registration or showing of his right thereto; he simply sent to the secretary of the board a certified copy of his registration under the prior statute, and his diploma from the Independent Medical College of Chicago, Illinois. The latter was returned with a notice from the board that it had denied the application for registration. When a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required. The statute is itself sufficient notice. If plaintiff in error had applied at any meeting for a hearing the board would have been compelled to grant it, and if on such hearing

his offer of or demand for testimony had been refused, the question might have been fairly presented to the state courts to what extent the action of the board had deprived him of his rights.

He seems to assume that the proceedings before the board were in themselves of a criminal nature, and that the state by such proceedings was endeavoring to convict him of an offense in the practice of his profession. But this is a mistake. The state was simply seeking to ascertain who ought to be permitted to practise medicine or surgery, and criminality arises only when one assumes to practise without having his right so to do established by the action of the board. The proceedings of the board to determine his qualifications are no more criminal than examinations of applicants to 10] teach or practise law, and if the *provisions for testing such qualifications are reasonable in their nature, a party must comply with them, and has no right to practise his profession is defiance thereof.

It is further insisted that having once engaged in the practice, and having been licensed so to do, he had a right to continue in such practice, and that this statute was in the nature of an *ex post facto* law. The case of *Hawker* v. *New York*, 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573, is decisive upon this question. The statute does not attempt to punish him for any past offense, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon. As shown in *Dent* v. *West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231, there is no similarity between statutes like this and the proceedings which were adjudged void in *Cummings* v. *Missouri*, 4 Wall. 277, 18 L. ed. 356, and *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366.

We fail to see anything in the statute which brings it within the inhibitions of the Federal Constitution, and therefore *the judgment of the Supreme Court of Michigan is affirmed.*

Mr. Justice **Harlan** concurs in the result.

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GUSTAVUS LEACH, William F. Leach, Chester H. Shaw, *et al.*, *Plffs. in Err.*,

*v.*

CHARLES R. BURR, Executor, and Samuel H. Lucas.

(See S. C. Reporter's ed. 510-516.)

*Publication—meaning of "week"—who may complain of defective publication—wills—mental soundness—when not a question for the jury—burden of proof.*

1. Two publications in each of four consecutive periods of seven days from the date of an order of publication satisfy the requirement of the act of Congress of June 8, 1898 (30 Stat. at L. 434, chap. 394, § 6), requiring such publication in the District of Columbia at least "twice a week for a period of not less than four weeks," although there was but one publication in the last calendar week of such period.
2. Caveators who appear and go to trial in a proceeding to probate a will, without seeking further time for the purpose of securing additional testimony or preparing for the hearing, cannot claim to have been prejudiced by a defect in a notice of publication.
3. The fact that a white testator devised his entire estate to a negro who had been for years his business and household companion, to the exclusion of his cousins, does not require the submission of the issue of his mental soundness to the jury, where the only conclusion that can be drawn from the direct testimony is in favor of his mental soundness when the will was made.
4. The burden of proof on the issue of the mental soundness of a testator is, in the District of Columbia, upon the caveators.

NOTE.—*On presumption and burden of proof as to sanity*—see note to State v. Scott (La.) 36 L. R. A. 721.

[No. 145.]

*Argued January 27, 1903. Decided February 23, 1903.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed an order of the Supreme Court of the District admitting a will to probate. *Affirmed.*

See same case below, 17 App. D. C. 128.

The facts are stated in the opinion.

*Messrs.* **William A. Meloy** and **George F. Hoar** argued the cause and filed a brief for plaintiffs in error:

Where legislation points out specifically how an act is to be done, it must be strictly pursued. Where a statute in granting a new power prescribes how it shall be exercised, it can lawfully be exercised in no other way. The grant is strictly construed; the mode must be strictly pursued.

Sutherland, Stat. Constr. § 454.

The order was to publish "twice a week for four weeks." This means twice in each week, as designating, in universal common parlance, that series of days called the week, "numbered or named, in succession, Sunday (or first day, etc.), Monday, Tuesday, Wednesday, Thursday, Friday, Saturday;" the six working days of the week; the week minus Sunday."

*Ronkendorff* v. *Taylor*, 4 Pet. 349, 7 L. ed. 882; *Thruston* v. *Masterson*, 4 Dana, 126; *Jordan* v. *Giblin*, 12 Cal. 100; *Richardson* v. *Bates*, 23 How. Pr. 516.

Jurisdiction cannot be maintained without the strictest and fullest compliance with the requirements of the statute.

*Settlemier* v. *Sullivan*, 97 U. S. 444, 24 L. ed. 1110; *Hernandez* v. *His Creditors*, 57 Cal. 333; *Koch's Estate*, 19 N. Y. Civ. Proc. Rep. 165; *Guaranty Trust & S. D. Co.* v. *Green Cove Springs & M. R. Co.* 139 U. S. 137, 35 L. ed. 116, 11 Sup. Ct. Rep. 512.

Consent could not cure this omission.

*National Safe Deposit, Sav. & T. Co.* v. *Heiberger*, 19 App. D. C. 506.

It was error in the case at bar for the

court to take the facts from the jury and direct their verdict.

*McCommon* v. *McCommon* (Ill.) 31 N. E. 491; *McCommon* v. *McCommon*, 151 Ill. 428, 38 N. E. 145; *Olmstead* v. *Webb*, 5 App. D. C. 38; *Hardy* v. *Wise*, 5 App. D. C. 108; *United States* v. *Chidester*, 140 U. S. 49, 35 L. ed. 339, 11 Sup. Ct. Rep. 650; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Richmond & D. R. Co.* v. *Powers*, 149 U. S. 43, 37 L. ed. 642, 13 Sup. Ct. Rep. 748; *Gardner* v. *Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; 3 Graham & W. New Trials, 872.

This very disherison of his heirs is in itself strong evidence of a state of mind incapable of making a valid will.

*Delafield* v. *Parish*, 25 N. Y. 9. See also *Phœnix Mut. L. Ins. Co.* v. *Doster*, 106 U. S. 30, 27 L. ed. 65, 1 Sup. Ct. Rep. 18; *Randall* v. *Baltimore & O. R. Co.* 109 U. S. 478, 27 L. ed. 1003, 3 Sup. Ct. Rep. 322; *Humiston* v. *Wood*, 124 U. S. 12, 31 L. ed. 354, 8 Sup. Ct. Rep. 347; *Wilkins* v. *Allen*, 18 How. 385, 15 L. ed. 396; *Philleo* v. *Holliday*, 24 Tex. 38; *Zimmerman* v. *Hafer*, 81 Md. 347, 32 Atl. 316; *Gurley* v. *Park*, 135 Ind. 440, 35 N. E. 279; *Thomas* v. *Carter*, 170 Pa. 272, 33 Atl. 81; *Orchardson* v. *Cofield*, 171 Ill. 14, 40 L. R. A. 256, 49 N. E. 197; Schouler, Wills, 2d ed. 545; Theobald, Wills, 2d ed. 610.

The confidential relations subsisting between the devisor and devisee cast the burden of proof upon the latter to sustain the devise.

*Marx* v. *McGlynn*, 88 N. Y. 357; *Daniel* v. *Hill*, 52 Ala. 431; *Smith's Estate*, 3 Pa. Dist. R. 247; *Good* v. *Zook* (Iowa) 88 N. W. 376; *Moran* v. *Sullivan*, 12 App. D. C. 137; *Slater* v. *Hamacher*, 15 App. D. C. 558; Bailey, Onus Probandi & Preparation for Trial, p. 403.

*Mr.* **J. J. Darlington** argued the cause, and, with *Mr. R. B. Behrend*, filed a brief for defendants in error:

The word "week" in the act is not justly subject to the technical construction sought to be affixed to it.

*Early* v. *Homans*, 16 How. 616, 14 L. ed. 1079.

The sanity of a testator is to be presumed until the contrary is shown, and the burden of proof is upon the caveators.

*Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666; *Tyson* v. *Tyson*, 37 Md. 567; *Dunlop* v. *Peter*, 1 Cranch, C. C. 403, Fed. Cas. No. 4,168.

Mr. Justice **Brewer** delivered the opinion of the court:

Plaintiffs in error, caveators in the trial court, seek a review of the order of the supreme court of the District, holding a special term for orphans' court business, admitting to probate the will of Ezra W. Leach. The order was entered March 17, 1900, and on appeal was sustained by the court of appeals of the District, November 6, 1900. 17 App. D. C. 128. Thereupon this writ of error was sued out.

Whatever may have been the fact theretofore, it is not seriously questioned that by the act of June 8, 1898 (30 Stat. at L. 434, chap. 394), the trial court had jurisdiction to entertain the application for probate, for by § 2 of that act it is provided that "plenary jurisdiction is hereby given to the said court holding the said special term to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and of any and all wills and testaments properly presented for probate therein, and to admit the same to probate and record in said special term." The specific objection to its action is an alleged defect in the publication required in case any party in interest is not found; the statute (§ 6) providing that the court "shall order publication at least twice a week for a period of not less than four weeks of a copy of the issues and notification of trial in some newspaper of general circulation in *the District of Columbia, and [512] may order such other publication as the case may require." The order was made on January 26, 1900, setting the hearing for February 26, 1900, and was "that this order and a copy of said issues heretofore framed shall be published twice a week for four weeks in The Evening Star." Publication was made January 26 and 30, February 2, 6, 9, 13, 16, and 20. There were, therefore, two publications in each successive seven days from the date of the order. January 26 was on Friday. The contention is that the word "week" means that series of days called a week commencing Sunday and ending Saturday, and that under this construction there was only one publication in the last week. *Ronkendorff* v. *Taylor*, 4 Pet. 349, 7 L. ed. 882, is cited as authority. In that case notice of a tax sale was required "by advertising once a week, in some newspaper printed in the city of Washington, for three months," and it was held that this did not require a publication on the same day in each week, the court saying (p. 361, L. ed. p. 886):

"A week is a definite period of time, commencing on Sunday and ending on Saturday. By this construction the notice in this case must be held sufficient. It was published Monday, January the 6th, and omitted until Saturday, January the 18th, leaving an interval of eleven days; still, the publication on Saturday was within the week succeeding the notice of the 6th."

But the language of this statute is not "for four weeks," but "for a period of not less than four weeks," and the words of the order must be construed in the light of the statute. A like difference was called to the attention of the court in *Early* v. *Homans*, 16 How. 610, 14 L. ed. 1079, where the publication was to be "once in each week, for at least twelve successive weeks," and commenting thereon it was said (p. 617, L. ed. p. 1082):

"The preposition 'for' means of itself duration, when it is put in connection with time, and, as all of us use it in that way in our everyday conversation, it cannot be

presumed that the legislator, in making this statute, did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made. When we say that anything may be done in twelve weeks, or that it shall not be done for twelve [513] weeks, after the happening of a *fact which is to precede it, we mean that it may be done in twelve weeks or eighty-four days, or, as the case may be, that it shall not be done before."

Further, the object of a notice is to enable the parties affected thereby to be present and obtain a hearing. The caveators appeared and without seeking further time, for the purpose of securing additional testimony or preparing for the hearing, went to trial on the issues submitted to the jury. They at least cannot claim to be prejudiced by any defect in the notice.

But the substantial question is whether the court erred in taking the case from the jury and directing a verdict sustaining the will. The questions submitted for consideration were whether the testator was at the time of executing the will "of sound mind, capable of executing a valid deed or contract;" whether the will was "procured by the threats, menaces, and duress exercised over him (the testator) by Samuel H. Lucas or any other person or persons," and whether it was "procured by the fraud of Samuel H. Lucas or any other person or persons."

Although jurors are the recognized triers of questions of fact, the power of a court to direct a verdict for one party or the other is undoubted, and when a court has done so and its action has been approved by the unanimous judgment of the direct appellate court, we rightfully pay deference to their concurring opinions. *Patton* v. *Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, and cases cited. An examination of the testimony satisfies us that there was no error in directing the verdict. The testator was seventy-three years old, white, childless, unmarried, his nearest relatives being cousins, the plaintiffs in error. He had lived in this District for at least twenty years. He was a man positive in his opinions, not easily influenced, of strong religious convictions and much attached to his church. His business was that of a florist. He owned two or three parcels of real estate of the value of about $8,000, and also a little personal property worth something like $300. The devisee was Samuel H. Lucas, a young colored man, with whom alone he had kept house for ten or a dozen years, such relation commencing at his invitation and continuing by his wish. For some years Lucas had the general management of the [514] business. Testator's illness *was brief, lasting only eight days. He died on December 21, 1896, between 12 and 1 o'clock. Early in the morning of that day, between 9 and 10 o'clock, the pastor of the church to which he belonged called, and to him he said:

"Pastor, I did not expect to go so early; there are some things which I wanted to perform and have neglected. I wanted to give the church a parsonage. I cannot do it now; it is too late. I will be unable, on account of the laws of Maryland, which apply to the District of Columbia, to do anything of that sort, for they will not allow a man to do anything of that sort within thirty days of the time of his death. I want you to prepare the papers and turn everything over to Sam."

Thereupon the pastor sent for a notary and prepared a deed conveying the real estate to Lucas. After that had been executed the pastor, who had never before prepared a deed, suggested that possibly he had not got everything in just right, and that if the testator wanted to make sure he could make a will. The testator then asked the notary to draw up a will, and it was drawn up and executed. At the time he directed the preparation of the deed he told Lucas what he would like to have done in reference to the parsonage, and Lucas replied that he would carry out his wishes. There was not a syllable of testimony, not a hint, that Lucas, or any other person, requested or suggested any disposition of the property. All that was done was done at the instance and upon the request of the testator. The caveators called four witnesses as to his mental condition, only one of whom was present at any time during his sickness, and that the pastor above referred to. So far from their testimony tending to show mental weakness, it was abundant and emphatic that he was a man of positive convictions, clear-headed, though perhaps eccentric in some views, but at all times fully capable of making his own contracts and attending to his own affairs. The testimony of the pastor, who, as stated, was present on the morning of his death and detailed the circumstances of that interview, shows that his mind was then clear, that he knew what he was doing, and was simply attempting to carry out by the deed and the will that which had been for a long time his intentions. Neither his attending *physician, the notary, the executor, nor Lu- [515] cas were called as witnesses, although all were present that morning. Evidently the caveators were content to rest their case in this respect upon the evidence of the pastor. Seven physicians were called, who, upon a hypothetical question, substantially concurred that it was contrary to their experience and reading that a man seventy-three years of age, dying of acute pneumonia, should have testamentary capacity between three and four hours before death. The only evidence of the cause of his death was the certificate from the health department, which named as such cause broncho-pneumonia. One of these seven physicians testified (and he alone gave evidence in that respect) that the unconsciousness preceding death from acute pneumonia was not characteristic of death from bronchial pneumonia, and that the circumstances disclosed by the pastor would tend to show that there was not mental inability to make a valid deed or contract. That acute pneumonia, especially in one of his age, would ordinarily cloud the intellect for hours before death, would be irrelevant to the question of his mental condition that morning, unless it

was shown that he was suffering from such disease, and that does not appear.

From this direct testimony but one conclusion could be drawn, and that in favor of the mental soundness of the testator at the time he made the will. Nor is the caveators' case strengthened by that which counsel so forcibly presented to our attention, to wit, the right of a jury to take into consideration that which is common knowledge and springs from the ordinary experiences and relations of life. The testator was a white man, the devisee colored, and race prejudice we all know exists. But this testator, eccentric in his views and of positive convictions, is shown to have made this colored man his business and household companion for years. Such continued intimacy, excluding other parties therefrom, is satisfactory evidence that he at least was not moved by such prejudice. The potency of blood relationship is also appealed to, but affection between cousins is often not very strong. The testator lived in this District while the caveators lived in New England, and the testimony fails to show that he vis-
[516] ited them or they him; *that they ever even corresponded, or that the caveators ever manifested any interest in him or his until after his death, when they asserted a right to inherit his property.

Upon questions of this kind submitted to a jury the burden of proof, in this District at least, is on the caveators. *Dunlop* v. *Peter*, 1 Cranch, C. C. 403, Fed. Cas. No. 4,-108. See also *Higgins* v. *Carlton*, 28 Md. 115, 143, 92 Am. Dec. 666; *Tyson* v. *Tyson*, 37 Md. 567. The caveators in the present case failed to sustain this burden, and we are of the opinion that the trial court did not err in directing a verdict against them.

*The judgment is affirmed.*

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HANNAH SCHAEFER, *Plff. in Err.*,
*v.*
JULIUS WERLING, Henry Draper, and Martin B. Schaefer.

(See S. C. Reporter's ed. 516–519.)

*Constitutional law—frontage rule of assessment—error to state court—Federal question.*

1. A state statute under which the cost of a public improvement may be assessed upon the abutting property in proportion to frontage does not violate the Federal Constitution, where, as construed by the state courts, it requires such assessment to conform to the actual special benefits accruing to each of the abutting property owners.
2. The question whether a municipality, by refusing to hear objections to a public improvement, is estopped to collect any portion of the cost thereof from the objector, is not a Federal question which may be reviewed by the Supreme Court of the United States on writ of error to a state court.

[No. 151.]

*Argued January 27, 28, 1903. Decided February 23, 1903.*

IN ERROR to the Supreme Court of the State of Indiana to review a decision of that court affirming the validity of an assessment for a public improvement. *Affirmed.*

See same case below, 156 Ind. 704, 60 N. E. 149.

The facts are stated in the opinion.

*Messrs.* **Samuel M. Sayler** and **W. W. Dudley** argued the cause, and, with *Mr. L. T. Michener*, filed a brief for plaintiff in error:

The avowed purpose of the Barrett law is to formulate a method by which public improvements can be made, regardless of the objections or protests of property owners. It is predicated on the assumption that, as a rule, property along the line of a street improvement will be equally benefited; that, as a rule, property fronting upon a street, foot by foot, will be of equal value, and should therefore be equally assessed.

*Palmer* v. *Stumph*, 29 Ind. 329.

The only warrant for a special assessment against abutting property for the payment of a street improvement is that the benefit must be equal to or exceed the assessment.

Cooley, Taxn. 2d ed. 606; *Illinois C. R. Co.* v. *Decatur*, 147 U. S. 197, 37 L. ed. 134, 13 Sup. Ct. Rep. 293; *Tide-water Co.* v. *Coster*, 18 N. J. Eq. 531, 90 Am. Dec. 634.

Courts of equity are always open to afford a remedy where there is an attempt, under the guise of legal proceedings, to deprive a person of his life, liberty, or property without due process of law.

*French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625.

An unlimited right in the law-making power to concentrate the burden of a tax upon specified property does not exist.

*Hammett* v. *Philadelphia*, 65 Pa. 152, 3 Am. Rep. 615; *State, Agens, Prosecutor*, v. *Newark*, 37 N. J. L. 415, 18 Am. Rep. 729.

The reasoning in cases concerning the police power of the states is apposite to the cause.

*Lawton* v. *Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; *Chicago & N. W. R. Co.* v. *Fuller*, 17 Wall. 560, 21 L. ed. 710; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 331, 29 L. ed. 644, 6 Sup. Ct. Rep. 334, 388, 1191; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

*Mr.* **John C. Chaney** argued the cause, and, with *Messrs. Alphonso Hart, William H. Hart, John G. Cline*, and *Clifford F.*

NOTE.—*On constitutionality of frontage rule of assessment*—see Raleigh v. Peace (N. C.) 17 L. R. A. 330, and note.

*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*Jackman*, filed a brief for defendants in error:

Laws which impose upon property the cost of local improvements do not deprive the owner of his property without due process of law, within the meaning of the 14th Amendment of the Constitution.

*Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Wurtz* v. *Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Walston* v. *Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Spencer* v. *Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Williams* v. *Eggleston*, 170 U. S. 304, 42 L. ed. 1047, 18 Sup. Ct. Rep. 617; *Parsons* v. *District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521.

The power of taxation rests exclusively in the legislature.

*United States* v. *New Orleans*, 98 U. S. 381, 25 L. ed. 225; *Meriwether* v. *Garrett*, 102 U. S. 472, 26 L. ed. 197.

The legislature may designate the common council of a city or the board of trustees of a town to dispose of the details of improvements, such as figuring out the costs, calculating the benefits, etc.

*Ft. Wayne* v. *Cody*, 43 Ind. 197; *Palmer* v. *Stumph*, 29 Ind. 337; *Garvin* v. *Dausman*, 114 Ind. 435, 16 N. E. 826; *Spencer* v. *Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921.

The way of arriving at the amount may be, in some instances, inequitable and unequal, but that is far from rising to the level of a constitutional problem, and far from a case of taking property without due process of law.

*Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *Walston* v. *Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192. See also *Cleveland* v. *Tripp*, 13 R. I. 59; *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Parsons* v. *District of Columbia*, 170 U. S. 45, 42 L. ed. 943, 18 Sup. Ct. Rep. 521; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Webster* v. *Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623.

Frontage may be made the basis of apportionment.

Dill. Mun. Corp. 1890; Cooley, Taxn. 2d ed. 1886, p. 644; *Illinois C. R. Co.* v. *Decatur*, 147 U. S. 190, 37 L. ed. 132, 13 Sup. Ct. Rep. 293; *White* v. *People*, 94 Ill. 604; *Craw* v. *Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *Enos* v. *Springfield*, 113 Ill. 65; *Sterling* v. *Galt*, 117 Ill. 11, 7 N. E. 471; *Springfield* v. *Green*, 120 Ill. 269, 11 N. E. 261; *Sheley* v. *Detroit*, 45 Mich. 431, 8 N. W. 52; Elliott, Roads & Streets, 392, 393; 2 Dill. Mun. Corp. 760*b*; Cooley, Taxn. 451; 2 Beach, Pub. Corp. § 1072; 25 Am. & Eng. Enc. Law, p. 306; *Palmyra* v. *Morton*, 25 Mo. 594; *Fowler* v. *St. Joseph*, 37 Mo. 228; *Powell* v. *St. Joseph*, 31 Mo. 347; *St. Joseph* v. *O'Donoghue*, 31 Mo. 345; *St. Louis use of McGrath* v. *Clemens*, 49 Mo. 554; *Kiley* v. *Cranor*, 51 Mo. 541; *Weber* v. *Schergens*, 59 Mo. 390; *Rutherford* v. *Hamilton*, 97 Mo. 543, 11 S. W. 249; *Farrar* v. *St. Louis*, 80 Mo. 379; *Watson* v. *Chicago*, 115 Ill. 78, 3 N. E. 430; *Bigelow* v. *Chicago*, 90 Ill. 53; *Fagan* v. *Chicago*, 84 Ill. 234; *Galesburg* v. *Searles*, 114 Ill. 217, 29 N. E. 686; *Springfield* v. *Sale*, 127 Ill. 359, 20 N. E. 86; *O'Keilley* v. *Kingston*, 114 N. Y. 439, 21 N. E. 1004; *Whiting* v. *Townsend*, 57 Cal. 515; *Burnett* v. *Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Parker* v. *Challiss*, 9 Kan. 155; *Newman* v. *Emporia*, 41 Kan. 583, 21 Pac. 593; *Ludlow* v. *Cincinnati Southern R. Co.* 78 Ky. 357; *Baltimore* v. *Johns Hopkins Hospital*, 56 Md. 1; *State ex rel. Stateler* v. *Reis*, 38 Minn. 371, 38 N. W. 97; *State, Sigler, Prosecutor*, v. *Fuller*, 34 N. J. L. 227; *Ernst* v. *Kunkle*, 5 Ohio St. 520; *Northern Indiana R. Co.* v. *Connelly*, 10 Ohio St. 159; *Corry* v. *Folz*, 29 Ohio St. 320; *Crawford* v. *Cincinnati*, 26 Ohio L. J. 215; *Magee* v. *Com.* 46 Pa. 358; *McGonigle* v. *Allegheny*, 44 Pa. 118; *Beaumont* v. *Wilkes-Barre*, 142 Pa. 198, 21 Atl. 888; *Davis* v. *Lynchburg*, 84 Va. 861, 6 S. E. 230; *Cleveland* v. *Tripp*, 13 R. I. 59; *Rolph* v. *Fargo*, 7 N. D. 640, 42 L. R. A. 646, 76 N. W. 242; *Roberts* v. *First Nat. Bank*, 8 N. D. 504, 79 N. W. 1049.

Mr. Justice **Brewer** delivered the opinion of the court:

In September, 1892, the plaintiff in error, the owner of five *lots on Williams street, in [517] Schaefer's addition to the city of Huntington, Indiana, with other lot owners, petitioned the city council to have the street graded and graveled. On July 10, 1893, the petition was granted and the street ordered to be so improved. After this improvement had been ordered some of the lot owners petitioned the city council to order the street paved with brick. This petition was presented on August 14, 1893. A remonstrance was at the same time presented, the plaintiff in error being one of the parties thereto. Notwithstanding the remonstrance the city council ordered that the street be paved with brick, and let a contract therefor to the defendants in error. They completed the work according to the contract, and the lots abutting on Williams street were assessed for the cost thereof,—the assessment being made by the front foot,—and a precept to collect the amount due on the lots of the plaintiff in error issued to the city treasurer. Further proceedings were had on appeal, in accordance with the provisions of the statute, which ended in a decision of the supreme court affirming the validity of the assessment, on the authority of *Adams* v. *Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114, and thereupon the case was brought here on writ of error.

The case involves the validity of a statute of Indiana known as the "Barrett law," enacted in 1899. Burns's Rev. Stat. 1894, §§ 4288–4298. We deem it sufficient to refer to the opinion in *Adams* v. *Shelbyville*, 154 Ind. 467, 49 L. R. A. 797, 57 N. E. 114, in which the supreme court of Indiana closed

an elaborate discussion of the various provisions of the law in these words:

"We therefore conclude that § 3, Acts 1889 (Burns's Rev. Stat. 1894, § 4290), must be construed as providing a rule of prima facie assessments in street and alley improvements, which allotments by the city or town engineer, under § 6 of said act of 1889 (Burns's Rev. Stat. 1894, § 4293), are subject to review and alteration by the common council and board of trustees, under § 7 of said act of 1889, as amended (Acts 1891, p. 324; Acts 1899, p. 64; Burns's Rev. Stat. 1894, § 4294), upon the basis of actual special benefits received by the improvement; and that under said § 7, the common [518] council of a city or board of trustees of *an incorporated town have not only the power, but it is their imperative duty, to adjust the assessments for street and alley improvements, under said act, to conform to the actual special benefits accruing to each of the abutting property owners."

Of course, the construction placed by the supreme court of a state upon its statutes is, in a case of this kind, conclusive upon this court. *Forsyth* v. *Hammond*, 166 U. S. 506, 518, 41 L. ed. 1095, 1100, 17 Sup. Ct. Rep. 665, and cases cited. And with that construction the following recently decided cases, in which the matter of street assessment was fully considered, sustain the decision of the state court upholding the validity of the law: *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Wight* v. *Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616; *Tonawanda* v. *Lyon*, 181 U. S. 389, 45 L. ed. 908, 21 Sup. Ct. Rep. 609; *Webster* v. *Fargo*, 181 U. S. 394, 45 L. ed. 912, 21 Sup. Ct. Rep. 623; *Cass Farm Co.* v. *Detroit*, 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644; *Detroit* v. *Parker*, 181 U. S. 399, 45 L. ed. 917, 21 Sup. Ct. Rep. 624; *Wormley* v. *District of Columbia*, 181 U. S. 402, 45 L. ed. 921, 21 Sup. Ct. Rep. 609; *Shumate* v. *Heman*, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; *Farrell* v. *West Chicago Park*, 181 U. S. 404, 45 L. ed. 924, 21 Sup. Ct. Rep. 609; *King* v. *Portland*, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; *Voigt* v. *Detroit*, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337; *Goodrich* v. *Detroit*, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397.

Another question presented is this: The plaintiff in error appeared by counsel before the city council and filed written objections to the brick pavement "because the cost of said improvement will greatly exceed the benefit of said improvement; second, said proposed improvement is not necessary to said real estate, and is not of public utility to said real estate." The record of the city council shows that "after some discussion on the matter Mr. Levy moved to place the communication on file, which motion was concurred in." In her answer filed in the circuit court plaintiff in error alleged that she appeared before the common council, "and offered to present her objections to the necessity of said improvement, but that the said common council refused to hear her objections to the improvement of said street with brick, treating her said objections as a mere communication, and ordering the same placed on file." She further averred that she could and would have shown by witnesses that the improvement was not necessary, and also "that by reason of the refusal of the said action thereon the said city of Huntington, Indiana, is estopped from proceeding to collect any benefits assessed on *the lots herein described." The circuit [519] court sustained a demurrer to this answer. It may be observed that, so far as the question was one of estoppel, it was a purely state, and not a Federal, question. *Gillis* v. *Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Phœnix F. & M. Ins. Co.* v. *Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471; *Beals* v. *Cone*, 188 U. S. 184, *ante*, 435, 23 Sup. Ct. Rep. 275. Further, the matter was not noticed by the supreme court, and its judgment is the one before us for review.

We see no error in the record, and *the judgment is affirmed.*

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JAMES TARRANCE, Will Smith, Amos Clark, *et al.*, *Plffs. in Err.*,

*v.*

STATE OF FLORIDA.

(See S. C. Reporter's ed. 519-525.)

*Constitutional law—equal protection of the laws—negroes as jurors—discrimination against—error to state court—conclusiveness of state decision.*

1. The denial of a motion to quash an indictment, and the overruling of challenges to the array of jurors, which raise the objection that negroes were discriminated against in the selection of grand and petit jurors, is not error, where no evidence is received or offered in support of such charge except defendants' affidavit attached to the motion to quash, stating that the facts set up in such motion are true "to their best knowledge, information, and belief."
2. The settled rule of a state court that objections to the manner of selecting grand jurors on behalf of one who has been indicted by such jurors must be taken by plea in abatement, and not by motion to quash the venire and panel, is binding on the Supreme Court of the United States on writ of error to the state court.

[No. 202.]

*Argued April 17, 1902. Decided February 23, 1903.*

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NOTE.—*As to negroes as grand jurors*—see notes to State v. Russell (Iowa) 28 L. R. A. 204; and Carter v. Texas, 44 L. ed. U. S. 839.

*As to when United States Supreme Court follows decisions of state courts*—see notes to Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508; United States *ex rel.* Butz v. Muscatine, 19 L. ed. U. S. 490; and Elmendorf v. Taylor, 6 L. ed. U. S. 290.

IN ERROR to the Supreme Court of the State of Florida to review a judgment which affirmed a conviction in the Circuit Court of Escambia County of the crime of murder. *Affirmed.*

See same case below, 30 So. 685.

The facts are stated in the opinion.

*Mr.* **Isaac L. Purcell** argued the cause and filed a brief for plaintiffs in error:

Where the discrimination is made by officers of the law, the equal protection of the law is equally denied as though made by the law itself.

*Henderson* v. *Wickham*, 92 U. S. 259, 23 L. ed. 543; *Chy Lung* v. *Freeman*, 92 U. S. 275, 23 L. ed. 550; *Virginia* v. *Rives*, 100 U. S. 329, 25 L. ed. 673; *Neal* v. *Delaware*, 103 U. S. 370, 26 L. ed. 567.

The question could be raised either by plea in abatement or motion to quash.

*Ellis* v. *State*, 25 Fla. 703, 6 So. 768; *Potsdamer* v. *State*, 17 Fla. 895.

The state of facts as set up by defendants' motion, if true, would justify the quashing of the venire.

*Carter* v. *Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687.

The state neither denied nor traversed the motion, and, inasmuch as the allegations therein set forth are not denied, they are admitted to be true; and, if true, the motion ought to have been granted and the indictment quashed.

*Ibid.*; *Williams* v. *Mississippi*, 170 U. S. 213, 42 L. ed. 1012, 19 Sup. Ct. Rep. 583; *Neal* v. *Delaware*, 103 U. S. 370, 26 L. ed. 567.

The question whether a right or privilege claimed under the Constitution or laws of the United States was sufficiently pleaded and brought to the notice of a state court is itself a Federal question, in the decision of which this court on writ of error, is not concluded by the view taken by the highest state court.

*Neal* v. *Delaware*, 103 U. S. 370, 26 L. ed. 567; *Mitchell* v. *Clark*, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312; *Boyd* v. *Nebraska*, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375; *Carter* v. *Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687.

*Mr.* **William B. Lamar** argued the cause and filed a brief for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

Plaintiffs in error were convicted in the [520] circuit court of Escambia *county, Florida, of the crime of murder, and sentenced to fifteen years in prison. The supreme court of the state having affirmed this sentence (30 So. 685), the case was brought here on writ of error.

The contention of plaintiffs in error is that they were denied the equal protection of the laws, by reason of an actual discrimination against their race. The law of the state is not challenged, but its administration is complained of. As said by their counsel:

"We do not contend that the colored men are discriminated against by any law of this state in the selection of names for jury duty, nor do we contend that a negro being tried for a criminal offense is entitled to a jury composed wholly or in part of members of his race; but do claim that when a negro is tried for a criminal offense, he is entitled to a jury selected without any discrimination against his race on account of race, color, or previous condition of servitude; and when this is not the case, he is denied the equal protection of the laws as guaranteed by the 14th Amendment to the Constitution of the United States."

Such an actual discrimination is as potential in creating a denial of equality of rights as a discrimination made by law. But such an actual discrimination is not presumed. It must be proved or admitted. The record discloses these facts: On December 3, 1900, a grand jury was impaneled, and on December 5 returned an indictment charging the defendants with the crime of murder. On December 5 they filed a motion to quash the venire and the panels of the grand and petit jurors. In the motion it was stated that there was in the county as many colored citizens of sound judgment, approved integrity, fair character, and fully qualified for jury duty, as white, and stated as grounds for the motion that "the county commissioners, in selecting the lists of names for jury duty for and during the present year, discriminated against all colored men of African descent, on account of their race, color, and previous condition of servitude, and from said lists were drawn the grand jury which found the indictment against these defendants and the petit jury which is to try them." And that "for many years *all colored men of Af- [521] rican descent have been discriminated against, and none have been selected or drawn or summoned as grand or petit jurors in this or in any of the courts of this county, although there are more than one thousand four hundred colored men in said county, a large number of whom are taxpayers, and of approved integrity, fair character, sound judgment, and intelligence, well known to the county commissioners to be such; and this discrimination is based entirely on race, color, and previous condition of servitude."

On December 6 the state's attorney moved the court to strike out the defendants' motion, on the grounds that it was impertinent, submitted nothing for the court's determination or consideration, was not such a motion as the court could consider, and set up no state of facts which, if true, would justify the quashing of the venire. On the same day this motion of the state's attorney was sustained, and the motion of the defendants to quash was stricken out. On the same day they filed a motion to quash the indictment on substantially the same grounds. This motion was overruled. Special venires were issued before the trial jury was finally impaneled, and as one by one these venires were returned the defendants challenged the array of jurors on the

ground that the sheriff, in the selection of jurors, knowingly discriminated against all colored men, and refused and failed to select any to serve on the jury, although knowing that there were more than five hundred colored men in the county fully qualified to serve. No evidence was received or offered in support of any of these several motions except an affidavit of the defendants attached to the motion to quash the indictment, stating that the facts set up in the motion were true "to their best knowledge, information, and belief."

In respect to all these motions, except the one to quash the venire and panels of the grand and petit jurors, it is sufficient to refer to *Smith* v. *Mississippi*, 162 U. S. 592, 600, 40 L. ed. 1082, 1085, 16 Sup. Ct. Rep. 900; *Carter* v. *Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687. In the first case the motion to quash was supported by an affidavit similar to the one here presented, and it was held no evidence of the facts stated, and that therefore the denial of the motion was not erroneous. In the second case the bill of exceptions showed that the de-[522] fendant asked *leave to introduce witnesses, and offered to introduce witnesses, to prove the allegations in his motion, but that the court refused to hear any evidence in support of the motion, but overruled it without investigating into the truth or falsity of the allegations therein; and this was adjudged error.

We pass, therefore, to a consideration of the ruling on the first motion. No evidence was received or offered in its support, but the motion itself was stricken out, and it is contended that the motion to strike out was equivalent to a demurrer which admitted the truth of the allegations challenged thereby, and in support thereof *Neal* v. *Delaware*, 103 U. S. 370, 26 L. ed. 567, and *Mitchell* v. *Clark*, 110 U. S. 633, 28 L. ed. 279, 4 Sup. Ct. Rep. 170, 312, are cited. But in the former case the court held that an agreement by the attorney general, appearing for the state, was to be regarded as an admission of the truth of the facts stated in the motion and therefore waived the necessity for further evidence; and in the second case there was only a distinct ruling upon a demurrer to a plea.

In reference to the action of the trial court in this matter the supreme court of the state said:

"The first motion filed by defendants was to quash the venire drawn for the term, and the panels of grand and petit jurors. The venire drawn for the term at that time consisted only of the grand and petit jurors then in attendance. In so far as the panel of petit jurors was concerned, the defendants had no right to move to quash that. It was summoned for the first week of the term only, and had and could have no connection whatever with defendants' case, because their case was not to be tried until a subsequent week, when another and different panel of petit jurors would be in attendance. The petit jury objected to had not been called to try defendants' case and would not be, as their term of service would, under the law, expire long before defendants' case would be called for trial. The defendants had no right to challenge the array of petit jurors until their case was called for trial, and it was proposed to impanel upon the jury to try them some member of the objectionable panel.

"As to the grand jury, the defendants had no right at that time to move to quash the panel. If defendants could properly *move[523] to quash the panel or challenge the array of grand jurors for the reasons stated in this motion, it could only be done before the grand jury was impaneled, or at least before the indictment was found. Whether it could be done in that way, we do not now decide. We are clear, however, that a motion to quash the panel of grand jurors by one who has been indicted by such jurors is not proper practice. *Gladden* v. *State*, 13 Fla. 623. As we shall show further on, a plea in abatement of the indictment is the proper remedy. We regard the ruling sustaining the motion to strike, as equivalent to holding that the motion to quash was not the proper method of raising the question sought to be raised; and while we do not approve of the practice of moving to strike a motion, we do not see that the defendants have been injured by the form of the ruling complained of.

. . . . . .

"We are of opinion that the proper method of presenting the question sought to be presented by this motion is by plea in abatement of the indictment, and not by motion to quash, and that the ruling upon the motion can be sustained upon that ground. It has for many years been the practice in this state, sanctioned by repeated rulings of this court, that all objections to the competency of, and to irregularities in selecting, drawing, and impaneling grand jurors, not appearing of record, must be taken advantage of by plea in abatement of the indictment, and not by motion to quash it. *Woodward* v. *State*, 33 Fla. 508, 15 So. 252; *Kitrol* v. *State*, 9 Fla. 9; *Gladden* v. *State*, 13 Fla. 623; *Tervin* v. *State*, 37 Fla. 396, 20 So. 551. See also *State* v. *Foster*, 9 Tex. 65."

The authorities cited in this opinion sustain the propositions laid down. In *Kitrol* v. *State*, 9 Fla. 9, 13, it was said:

"We are, therefore, of the opinion that the incompetency of the grand jurors, by whom indictment is preferred, may be pleaded by the defendant in abatement."

In *Gladden* v. *State*, 13 Fla. 623, 630, the court uses this language:

"In Massachusetts, New York, and other states, it has been held that objections to the legality of the returns of grand *jurors[524] cannot affect an indictment found by them after it has been received by the court and filed; that such objection must be interposed before indictment found, and even before the grand jury is sworn. But it seems to be now settled that such objection may be made by plea in abatement to the indictment at any time before pleading in bar. This is substantially the rule announced by the supreme court of this state in *Kitrol* v.

*State*, 9 Fla. 9. The opinion of the supreme court of Mississippi in *McQuillen* v. *State*, 8 Smedes & M. 587, delivered by Chief Justice Sharkey, announces what we consider the true and correct practice in such a case. Such matters are reached by plea in abatement only (though in some states a challenge to the array is treated, we do not say properly so, as a substitute for a plea in abatement), and matters in abatement in criminal as well as in civil cases must be pleaded before pleading in bar."

In *Burroughs* v. *State*, 17 Fla. 643, 661, where the validity of the composition of the jury was sought to be challenged on a motion in arrest of judgment, the court said:

"Aside from the fact that there is no such bill of exceptions as is required to present any question of that character to this court, if it had been properly raised, we are of the opinion that all objections to the legality of grand jurors must be made by plea in abatement to the indictment before pleading in bar. Such is the rule as announced by this court in *Gladden* v. *State*, 13 Fla. 623."

The force of this decision is not weakened by what was said by the same court in *Potsdamer* v. *State*, 17 Fla. 895, 897:

"The rule is that such objections must be taken by motion or plea in abatement before pleading to the indictment. It is not proper ground of a motion for a new trial;" for *Gladden* v. *State* and *Burroughs* v. *State* are both cited as authority. What kind of a motion the Chief Justice had in mind when he spoke of "motion or plea in abatement" is not disclosed. At any rate, such a general statement cannot be considered as overruling prior decisions.

[525] *In *Tervin* v. *State*, 37 Fla. 396, 20 So. 551, the ruling of the court was expressed in these words (p. 403, So., p. 553):

"On the 25th of October, 1895, the defendant moved to quash the indictment and for his discharge upon the ground that 'there is nothing upon the records of this court to show that the grand jurors who found the indictment were drawn in accordance with chapter 1015 of the acts of the legislature of A. D. 1891.' This motion was overruled, and such ruling constitutes the fourth assignment of error. There is no merit in this assignment. If there was any such irregularity in the drawing or impaneling of the grand jury that found the indictment as would render such indictment void or illegal, the proper way to make it appear was by plea in abatement, instead of by motion to quash."

Neither is there anything in the cases referred to by counsel for plaintiff in error against this ruling. So we have not merely the declaration of the court in this particular case as to the practice to be observed, but a declaration supported by many prior decisions. Obviously, it is the settled rule in the state.

These are all the matters called to our attention by counsel, and in them appearing no error, *the judgment of the Supreme Court of Florida is affirmed.*

Mr Justice **Harlan** did not hear the argument or take part in the decision of this case.

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*NORTHERN PACIFIC RAILWAY COMPANY, *Appt.*, [526]

*v.*

JOHN A. SODERBERG.

(See S. C. Reporter's ed. 526-537.)

*Appeal—from circuit court of appeals—finality of decision—jurisdiction of circuit court—case arising under the laws of the United States—railway land grant—what are mineral lands.*

1. The judgment of the circuit court of appeals is not final under the circuit court of appeals act of 1891, § 6 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), unless the original jurisdiction of the circuit court was dependent "entirely" upon diverse citizenship.
2. A suit over the ownership of real property, in which plaintiff's title rests upon a proper interpretation of the exception of mineral lands in the Northern Pacific Railroad land grant act of July 2, 1864 (13 Stat. at L. 365, chap. 217), is one arising under the laws of the United States, of which a circuit court has jurisdiction wholly independent of citizenship.
3. Lands valuable solely or chiefly for granite quarries are "mineral lands" within the meaning of the exception of such lands, in the act of July 2, 1864 (13 Stat. at L. 365, chap. 217), from the grant made therein to the Northern Pacific Railroad Company.

[No. 61.]

*Argued October 31, 1902. Ordered for reargument November 17, 1902. Leave to United States to intervene December 8, 1902. Reargued December 12, 1902. Decided February 23, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Washington, dismissing a bill to enjoin the removal or disposal of granite from land held under a mineral location, and quieting the title of defendant to such land. *Affirmed.*

See same case below, 43 C. C. A. 620, 104 Fed. 425.

Statement by Mr. Justice **Brown:**

This was a bill filed by the railway company in the circuit court for the district of Washington to enjoin the defendant Soderberg from taking, removing, or disposing of

NOTE.—*As to Federal question as conferring jurisdiction on United States courts*—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7; Bailey v. Mogher, 11 C. C. A. 308; and *Re* Buchanan, 39 L. ed. U. S. 884.

*As to land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

granite from a quarter section of land of which he had taken possession under a mineral location, and for an account of the granite quarried or removed.

The bill alleged the incorporation of the Northern Pacific Railroad Company under an act of Congress of July 2, 1864 (13 Stat. at L. 365, chap. 217), with power to construct a railroad from Lake Superior to Puget sound, with a branch line *via* Columbia river to Portland; the grant of every alternate odd-numbered section of public [527] land, *not mineral, to the amount of twenty alternate sections per mile, on each side of the line when passing through the territories; acceptance of the act by the railroad company; a joint resolution of Congress approved May 31, 1870, authorizing the company to issue bonds for the construction of the road, with a privilege to the company of building its main road by the valley of the Columbia river, with a branch across the Cascade mountains to Puget sound; the definite location on March 26, 1884, of the Cascade branch of the road; the completion and acceptance of the road coterminus with its public lands; the conveyance on August 3, 1896, of all its property to the Northern Pacific Railway Company, which has since continuously operated such road.

The bill further alleged that the quarter section in dispute was rough, mountainous land, the principal value of which consisted in the existence of a ledge of granite of good merchantable quality, and valuable for building stone; that the defendant in 1898 entered upon this quarter section and began to quarry, remove, and dispose of such granite under a mineral location of the land in question, contending that such land is excepted from the general land grant, and that the question whether this land is mineral or nonmineral has not yet been determined by the department. Wherefore an injunction was prayed.

The answer raised no issue of fact, but averred that the lands were mineral in character and as such excepted from the grant, and that defendant having complied with the rules and regulations of the Land Department and made the proper proof, it was assumed and decided that the defendant was entitled to a patent. That he paid the proper fees to the receiver, who forwarded the proofs and records to the Land Department with a recommendation that a patent issue. The patent, however, does not seem to have been actually issued until after the beginning of this suit.

The court heard the case upon a stipulation of facts, and entered a decree dismissing the bill, and quieting the title of the defendant to the lands in question. 99 Fed. 506. On appeal to the circuit court of appeals this decree was affirmed. 43 C. C. A. 620, 104 Fed. 425.

*Mr.* **C. W. Bunn** argued the cause, and, with *Mr. James B. Kerr*, filed a brief for appellant:

The use of the term "mines," in the preemption law, was interpreted by the Interior Department as not excluding stone lands from acquisition under that law.

*Jacob's Case*, 7 Copp's Landowner, 83; *Conlin* v. *Kelly*, 12 Land Dec. 1.

This court has treated the exception of mines, in the pre-emption law, and mineral lands from grants both to states and to railroads, as synonymous.

*Davis* v. *Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628.

The general rule of the Land Department is against granite, or any other ordinary building stone, being capable of acquisition under the mineral laws. Moreover, it is clear that lands containing building stone could be acquired under the pre-emption laws, which, as we have shown, excepted "mines."

*Re Hopper*, 1 Land Dec. 561; *Re Dobbs Placer Mine*, 1 Land Dec. 568; *Re Dunluce Placer Mine*, 6 Land Dec. 761; *Conlin* v. *Kelly*, 12 Land Dec. 1; *Clark* v. *Ervin*, 16 Land Dec. 122; *Hayden* v. *Jamison*, 16 Land Dec. 537; *Gary* v. *Todd*, 18 Land Dec. 58; *Jordan* v. *Idaho Aluminum Min. & Mfg. Co.* 20 Land Dec. 500.

Land simply valuable for its deposit of limestone is not mineral.

*Jacob's Case*, 7 Copp's Landowner, 83.

Phosphate rock is not mineral.

*Tucker* v. *Florida R. & Nav. Co.* 19 Land Dec. 414.

Land producing petroleum is not mineral.

*Re Union Oil Co.* 23 Land Dec. 222.

Magnesia is not considered a mineral.

*Gibson* v. *Tyson*, 5 Watts, 34.

Petroleum is not embraced in the exception of "all minerals."

*Dunham* v. *Kirkpatrick*, 101 Pa. 36, 47 Am. Rep. 696.

Mineral land must contain metals in quantities sufficient to render it available and valuable for mining purposes.

*Alford* v. *Barnum*, 45 Cal. 482; *Merrill* v. *Dixon*, 15 Nev. 407.

A mining claim is a parcel of land containing precious metal in its soil or rock.

*St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 649, 26 L. ed. 875; *McKeon* v. *Bisbee*, 9 Cal. 137, 70 Am. Dec. 642.

No valid location of a mining claim can be made until a vein or deposit of gold, silver, or metalliferous ore or rock in place has been discovered.

*Overman Silver Min. Co.* v. *Corcoran*, 15 Nev. 147.

Minerals mean, ordinarily, metallic fissile bodies.

*Listowell* v. *Gibbings*, 9 Ir. C. L. Rep. 223.

A lead cannot exist without valuable ore.

*Stevens* v. *Gill*, 1 Morrison, Min. Rep. 579.

A lode is "metal-bearing rock."

*Eureka Consol. Min. Co.* v. *Richmond Consol. Min. Co.* 4 Sawy. 302, Fed. Cas. No. 4,548.

"Metal zone" is equivalent to "mineral zone."

*Mount Diablo Mill & Min. Co.* v. *Callison*, 5 Sawy. 439, Fed. Cas. No. 9,886. See also *Reynolds* v. *Iron Silver Min. Co.* 116 U. S. 695, 29 L. ed. 777, 6 Sup. Ct. Rep. 601;

*Richmond Min. Co.* v. *Eureka Min. Co.* 103 U. S. 839, 26 L. ed. 557; *Jupiter Min. Co.* v. *Bodie Consol. Min. Co.* 7 Sawy. 96, 11 Fed. 666.

This court recognizes the distinction between mines and quarries, and between deposits of precious metals and deposits of substances which fall within the strict scientific definition of "mineral."

*Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

If the plaintiff's title arises directly from an act of Congress, and if the question involved depends on the construction of the act, the case is one arising under the laws of the United States.

*Cooke* v. *Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340; *Spokane Falls & N. R. Co.* v. *Ziegler*, 167 U. S. 65, 42 L. ed. 79, 17 Sup. Ct. Rep. 728. See also *Doolan* v. *Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228.

The following cases, decided at the last term, support the jurisdiction of this court in this case:

*Sweringen* v. *St. Louis*, 185 U. S. 38, 46 L. ed. 795, 22 Sup. Ct. Rep. 569; *Huguley Mfg. Co.* v. *Galeton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452; *Patton* v. *Brady*, 184 U. S. 608, 46 L. ed. 713, 22 Sup. Ct. Rep. 493; *Howard* v. *United States*, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543.

*Mr.* **J. T. Ronald** argued the cause and filed a brief for appellee:

The mining laws are to be read in the light of matters of public history relating to the mineral lands of the United States.

*Jennison* v. *Kirk*, 98 U. S. 453, 25 L. ed. 240.

Where the statute operates as a grant of public property to an individual, that construction should be adopted which will support the claim of the government, rather than that of the individual.

*Re Alabama & C. R. Co.* 3 Land Dec. 243; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 9 L. ed. 773; *Dubuque & P. R. Co.* v. *Litchfield*, 23 How. 66, 16 L. ed. 500; *Rice* v. *Minnesota & N. W. R. Co.* 1 Black, 360, 17 L. ed. 147; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634; *Slidell* v. *Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

In case of a doubtful or ambiguous law, the contemporaneous construction of the statute by the executive officers whose duty it is to construe it, or those who have been called upon to carry it into effect, is entitled to great respect, and should ordinarily control the construction of the statute by the courts.

*United States* v. *Moore*, 95 U. S. 760, 24 L. ed. 588; *United States* v. *Burlington & M. River R. Co.* 98 U. S. 336, 25 L. ed. 198; *United States* v. *Graham*, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *Brown* v. *United States*, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; *The Laura*, 114 U. S. 413, *sub nom. Pollock* v. *Bridgeport S. B. Co.* 29 L. ed. 147, 5 Sup. Ct. Rep. 881; *United States* v. *Philbrick*, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; *Robertson* v. *Downing*, 127 U. S. 613, 32 L. ed. 271, 8 Sup. Ct. Rep. 1328; *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 365, 33 L. ed. 367, 10 Sup. Ct. Rep. 112; *Heath* v. *Wallace*, 138 U. S. 578, 34 L. ed. 1066, 11 Sup. Ct. Rep. 380; *Pennoyer* v. *McConnaughy*, 140 U. S. 23, 35 L. ed. 370, 11 Sup. Ct. Rep. 699; *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

The word "mineral," when used in an act of Congress, must be understood in its widest signification, unless there be something in the context or nature of the case to control its meaning; and when the words "mines" and "minerals" are both used in the same statute, the word "mineral" is not on that account to suffer limitation of its meaning.

Lindley, Mines, §§ 90, 91.

Lands valuable only for granite or building stone of a good commercial quality are "mineral lands."

*Pacific Coast Marble Co.* v. *Northern P. R. Co.* 25 Land Dec. 237; Bainbridge, Mines, 4th ed. p. 1; Stewart, Mines, p. 9; Sweet, Law Dict.; *Rosse* v. *Wainman*, 14 Mees. & W. 859; *Micklethwait* v. *Winter*, 6 Exch. 644; *Midland R. Co.* v. *Checkley*, L. R. 4 Eq. 19; *Midland R. Co.* v. *Haunchwood Brick & Tile Co.* L. R. 20 Ch. Div. 552; *Hext* v. *Gill*, L. R. 7 Ch. 699; *Atty. Gen.* v. *Tomline*, L. R. 5 Ch. Div. 750; *Atty. Gen.* v. *Welsh Granite Co.* 35 Week. Rep. 617; *Glasgow* v. *Farie*, L. R. 13 App. Cas. 657; *Bell* v. *Wilson*, 2 Drew. & S. 395; *Jamieson* v. *North British R. Co.* 6 Scot. L. Rep. 188; *Tucker* v. *Linger*, L. R. 8 App. Cas. 508; *Cleveland* v. *Meyrick*, 16 Week. Rep. 104; *Ruabon Brick & Terra Cotta Co.* v. *Great Western R. Co.* L. R. 1 Ch. 427; *Errington* v. *Metropolitan Dist. R. Co.* L. R. 19 Ch. Div. 559; *Atty. Gen.* v. *Mylchreest*, L. R. 4 App. Cas. 294; Lindley, Mines, §§ 90, 98.

The Land Department of the government has universally held stone to be a mineral.

*Hooper's Case*, 1 Land Dec. 560; *Bennet's Case*, 3 Land Dec. 116; *McGlenn* v. *Wienbroeer*, 15 Land Dec. 370; *Van Doren* v. *Plested*, 16 Land Dec. 508; *Gibson's Case*, 21 Land Dec. 329; *Pacific Coast Marble Co.* v. *Northern P. R. Co.* 25 Land Dec. 244.

The mere reservation of lands, with no provision for disposal, does not make the reserved lands nonmineral.

*McFadden* v. *Mountain View Min. & Mill. Co.* 38 C. C. A. 354, 97 Fed. 679.

Stone lands are "mineral lands" within the exception in grants to railroads and to states.

*Re Atlantic & P. R. Co.* 12 Land Dec. 116; *Mineral Lands*, 19 Land Dec. 21; *Pacific Coast Marble Co.* v. *Northern P. R. Co.* 25 Land Dec. 247; *Alldritt* v. *Northern P. R. Co.* 25 Land Dec. 349; *Re Florida C. & P. R. Co.* 26 Land Dec. 600; *Richter* v. *Utah*, 27 Land Dec. 95; *Tulare Oil & Min. Co.* v. *Southern P. R. Co.* 29 Land Dec. 269; *Schrimpf* v. *Northern P. R. Co.* 29 Land Dec. 327; *Beaudette* v. *Northern P. R. Co.*

29 Land Dec. 248; *Morrill* v. *Northern P. R. Co.* 30 Land Dec. 475.

Though a particular mineral may not be mentioned or known to exist at the time of the grant, yet if it is fairly included in the general terms used, it will be excluded.

Barringer & Adams, Mines & Mining, p. 131.

Chromate of iron was included in the reservation of the grant reserving "all minerals."

*Gibson* v. *Tyson*, 5 Watts, 35.

Paintstone is a mineral.

*Hartwell* v. *Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448.

Petroleum oil is a mineral.

*Funk* v. *Haldeman*, 53 Pa. 229; *Gird* v. *California Oil Co.* 60 Fed. 531.

Stone is included in the word "minerals" as used in a lease.

*Griffin* v. *Fellows*, 81* Pa. 114.

Natural gas is included within the meaning of the word "mineral."

*Westmoreland & C. Natural Gas Co.* v. *DeWitt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *State ex rel. Corwin* v. *Indiana & O. Oil, Gas, & Min. Co.* 120 Ind. 575, 6 L. R. A. 579, 2 Inters. Com. Rep. 758, 22 N. E. 778; *Re Buffalo Natural Gas Fuel Co.* 73 Fed. 191.

Granite is included in a purchase of "minerals and ores."

*Armstrong* v. *Lake Champlain Granite Co.* 147 N. Y. 495, 42 N. E. 186.

And see further, as to what are mineral lands,—

Lindley, Mines, §§ 94, 95; *Ah Yew* v. *Choate*, 24 Cal. 562; *Davis* v. *Wiebbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; *Freezer* v. *Sweeney*, 8 Mont. 508, 21 Pac. 20.

The policy of Congress was to exempt all mineral substances from railroad grants.

*Broder* v. *Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790; Barringer & Adams, Mines & Mining, p. 194; *Morton* v. *Nebraska*, 21 Wall. 660, 22 L. ed. 639; *Barden* v. *Northern P. R. Co.* 154 U. S. 317, 38 L. ed. 998, 14 Sup. Ct. Rep. 1030.

Independent of the question whether stone was understood to be a mineral at the time of the passage of the act, Congress has so extended the mining laws as to make minerals include stone, and has otherwise reserved and appropriated stone lands, and consequently, at the date when the railroad became entitled to select these lands, they were otherwise reserved and appropriated, and were not free from other claims or rights, but were mineral lands within the meaning of the laws at that date, and subject to other claims or rights. There can be no doubt of the power of Congress to do this, and especially when the grant was made subject to the reserved power of Congress to add to, alter, or amend the act.

*Menotti* v. *Dillon*, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945; *Northern P. R. Co.* v. *Sanders*, 166 U. S. 620, 41 L. ed. 1139, 17 Sup. Ct. Rep. 671; Lindley, Mines, § 158.

The Land Department has been adhering to this same doctrine.

*Re Northern P. R. Co.* 20 Land Dec. 332, 26 Land Dec. 422.

A reservation for any purpose, within the limits of the withdrawal, made prior to the definite location of the line of the railroad and existing at such time, excepts the land covered thereby from the operation of the grant.

*Re Northern P. R. Co.* 27 Land Dec. 505; *Northern P. R. Co.* v. *Martin*, 6 Land Dec. 657.

It was the policy of the government from the beginning to secure to itself a fair proportion of the minerals, and the control of the same.

*Ivanhoe Min. Co.* v. *Keystone Consol. Min. Co.* 102 U. S. 167, 26 L. ed. 126.

If there is a deposit of any substance belonging to the mineral kingdom, and the land is more valuable for that particular substance than for agriculture, then it is mineral land; and if it is not a vein of quartz or other rock in place, then it is a placer.

Lindley, Mines, § 419.

This court in *Deffeback* v. *Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95, recognizes the criterion to be the value. See also *Davis* v. *Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628.

The test of the character of railroad lands is the same as applied to the question between mineral and agricultural claims, *viz.*, Are they more valuable for mineral than for agricultural purposes?

*Ivanhoe Min. Co.* v. *Keystone Consol. Min. Co.* 102 U. S. 167, 26 L. ed. 126; Barringer & Adams, Mines & Mining, 533, note 2; *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

The burden of proof is upon the railroad company to show the agricultural character of land that is returned as mineral by the Surveyor General.

*Re Central P. R. Co.* 13 Land Dec. 603.

The question whether a given tract of land within the primary or place limits of a railroad grant is mineral, and therefore excepted out of the grant, is to be determined according to the state of the law and the facts as they exist at the time the railroad company applies for its patent.

*Mullan* v. *United States*, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041; Lindley, Mines, §§ 154, 159; *Northern P. R. Co.* v. *Sanders*, 1 C. C. A. 192, 7 U. S. App. 47, 49 Fed. 134; *Northern P. R. Co.* v. *Hinchman*, 53 Fed. 526; *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 330, 38 L. ed. 992, 1002, 14 Sup. Ct. Rep. 1030; *Northern P. R. Co.* v. *Cannon*, 4 C. C. A. 303, 7 U. S. App. 507, 54 Fed. 252.

Land in reservation at the date of definite location is excepted from the terms of the grant.

*Atlantic & P. R. Co.* v. *McCabe*, 4 Land Dec. 94; *St. Paul, M. & M. R. Co.* v. *Northern P. R. Co.* 4 Land Dec. 429; *Southern P. R. Co.* v. *Nimmo*, 4 Land Dec. 100; *Sansom* v. *Southern P. R. Co.* 4 Land Dec. 357;

*Story* v. *Southern P. R. Co.* 4 Land Dec. 397.

If this land was subject to entry under the mineral laws existing at the date of definite location of the road, then it was not "free from other claims or rights," and it did not pass to the road.

*Holmes* v. *Northern P. R. Co.* 5 Land Dec. 336; *Northern P. R. Co.* v. *McLean*, 5 Land Dec. 529; *Northern P. R. Co.* v. *Burt*, 3 Land Dec. 490; *Northern P. R. Co.* v. *Dudden*, 6 Land Dec. 6.

Lands reserved by the President after the grant, the reservation still being in force at date of definite location, are not "free from other claims," and are reserved, and do not pass to the road.

*Re Jackson, L. & S. R. Co.* 5 Land Dec. 432.

The condition of the land at the date of definite location determines whether it will pass under the grant.

*Cayce* v. *St. Louis & I. M. R. Co.* 6 Land Dec. 356; *Neilson* v. *Northern P. R. Co.* 9 Land Dec. 402; *Showell* v. *Central P. R. Co.* 10 Land Dec. 167; *Olney* v. *Hastings & D. R. Co.* 11 Land Dec. 188; *Re Northern P. R. Co.* 12 Land Dec. 572.

The discovery of the mineral character of land at any time prior to the issuance of patent to the railroad effectually excludes such land from the railroad grant.

*Central P. R. Co.* v. *Valentine*, 11 Land Dec. 238; *Atlantic & P. R. Co.* v. *Tiernan*, 17 Land Dec. 587; *Atlantic & P. R. Co.* v. *Willard*, 17 Land Dec. 554; *Northern P. R. Co.* v. *Champion Consol. Min. Co.* 14 Land Dec. 699; *Re Northern P. R. Co.* 13 Land Dec. 691. See also Lindley, Mines, § 162.

When the original jurisdiction of the circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear at the outset, from the declaration of the bill of the party suing, that the suit is of that character.

*Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 143, 37 L. ed. 1032, 14 Sup. Ct. Rep. 35.

In order to maintain that the decision of the circuit court of appeals was not final, it must appear that the jurisdiction of the circuit court was not dependent entirely upon the opposite parties being citizens of different states.

*Borgmeyer* v. *Idler*, 159 U. S. 412, 40 L. ed. 200, 16 Sup. Ct. Rep. 34.

Under this doctrine it appears from the subpœna and bill of complaint herein "that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, and it did not appear therefrom that jurisdiction rested or could be asserted on any other ground."

See also *Press Pub. Co.* v. *Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40.

*Mr.* **R. A. Ballinger** argued the cause for appellee on rearguiment.

*Assistant Attorney General* **Van Devanter** argued the cause, and, with *Mr. Arthur B. Pugh*, filed a brief for the United States:

The term "mineral lands" and terms of like import, wherever used in the acts of Congress making railroad or other land grants, or in the mining laws, either as words of reservation or as authorizing the disposal of lands thus described, have the same meaning and the same breadth of signification.

*Davis* v. *Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; 1 Lindley, Mines, §§ 86, 152, pp. 92, 170.

Coal lands are "mineral lands" within the meaning of that term as used in statutes regulating the disposition of the public domain.

*Mullan* v. *United States*, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041.

Lands valuable for minerals, whether of the metallic or nonmetallic class, are subject to location, entry, and purchase under the provisions of the mining laws, and are also within the exception of "mineral lands" from railroad land grants.

*Montague* v. *Dobbs*, 9 Copp's Landowner, 165; *Hooper's Case*, 1 Land Dec. 560; *Maxwell* v. *Brierly*, 10 Copp's Landowner, 50; 1 Lindley, Mines, §§ 96, 98, 137, 158, 162, pp. 113, 116, 153, 183, 188, 189; *McGlenn* v. *Wienbroeer*, 15 Land Dec. 370; *Van Doren* v. *Plested*, 16 Land Dec. 508; *Hayden* v. *Jamison*, 16 Land Dec. 537; *Shepherd* v. *Bird*, 17 Land Dec. 82; *Gary* v. *Todd*, 18 Land Dec. 58; *Gibson's Case*, 21 Land Dec. 327; *Union Oil Co.'s Case*, 25 Land Dec. 354; *Pacific Coast Marble Co.* v. *Northern P. R. Co.* 25 Land Dec. 233; *Alldritt* v. *Northern P. R. Co.* 25 Land Dec. 349; *Re Florida C. & P. R. Co.* 26 Land Dec. 60; *Richter* v. *Utah*, 27 Land Dec. 95; *McQuiddy* v. *California*, 29 Land Dec. 181; *Tulare Oil & Min. Co.* v. *Southern P. R. Co.* 29 Land Dec. 269; *Beaudette* v. *Northern P. R. Co.* 29 Land Dec. 248; *Schrimpf* v. *Northern P. R. Co.* 29 Land Dec. 327; *Morrill* v. *Northern P. R. Co.* 30 Land Dec. 475.

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.

*United States* v. *Moore*, 95 U. S. 760, 24 L. ed. 588; *Edwards* v. *Darby*, 12 Wheat. 210, 6 L. ed. 604; *United States* v. *State Bank*, 6 Pet. 29, 8 L. ed. 308; *United States* v. *Macdaniel*, 7 Pet. 1, 8 L. ed. 587; *Brown* v. *United States*, 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; *Robertson* v. *Downing*, 127 U. S. 607, 32 L. ed. 269, 8 Sup. Ct. Rep. 1328; 23 Am. & Eng. Enc. Law, p. 342. See also *United States* v. *Graham*, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *United States* v. *Philbrick*, 120 U. S. 52, 30 L. ed. 559, 7 Sup. Ct. Rep. 413; *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

The legislative branch of the government is presumed to be cognizant of the construction given to a statute by public officers whose duty it is to execute it; and after long continuance of such construction with-

out legislative dissent, the courts will adopt it.

Sutherland, Stat. Constr. § 309. See also Black, Constr. & Interpretation of Laws, pp. 215, 216; Endlich, Interpretation of Statutes, § 360.

Nothing passes by implication under grants of a public nature, but in the clear and explicit language of the grant must be found all that is conveyed by it. When doubt arises, the grant must be construed most strictly against the grantee.

*Dubuque & P. R. Co.* v. *Litchfield*, 23 How. 66, 16 L. ed. 500; *Slidell* v. *Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475. See also *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634.

The value of the mineral deposit, rather than its kind, appears to have been the controlling factor in determining whether the lands containing it were subject to entry and patent under the mining law.

*Pacific Coast Marble Co.* v. *Northern P. R. Co.* 25 Land Dec. 233.

The criterion of value has also been recognized by this court as the means of determining whether lands containing mineral deposits are within the meaning of the mining laws.

*Deffeback* v. *Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95. See *Davis* v. *Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628.

Lands containing a valuable stone quarry were subject to location and purchase under the placer mining laws.

*Freezer* v. *Sweeney*, 8 Mont. 508, 21 Pac. 20; *Johnston* v. *Harrington*, 5 Wash. 73, 31 Pac. 316. See also *Montague* v. *Dobbs*, 9 Copp's Landowner, 165; *Gird* v. *California Oil Co.* 60 Fed. 531.

An exception or reservation of "mines and minerals," contained in a lease of lands, includes all substances otherwise falling under the definition of minerals, which have a use and value of their own, either for the purpose of sale or for other purposes, independently of and separably from the use of the rest of the soil.

*Johnstone* v. *Crompton*, 68 L. J. Ch. N. S. 559.

Granite is a mineral within the meaning of a reservation of "minerals and ores," used in a deed of conveyance.

*Armstrong* v. *Lake Champlain Granite Co.* 147 N. Y. 495, 42 N. E. 186.

Limestone or granite ledges were within the meaning of an exception of "all mines and minerals" from a deed of conveyance.

*Brady* v. *Brady*, 31 Misc. 411, 65 N. Y. Supp. 621.

Marble is a mineral within the meaning of an exception of "mines and minerals" from a conveyance of land.

*Phelps* v. *Church of Our Lady*, 53 C. C. A. 407, 115 Fed. 882.

"Paintstone" is a mineral within the meaning of an exception of "mines and minerals," contained in a deed of conveyance.

*Hartwell* v. *Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448.

Petroleum is a mineral.

*Gill* v. *Weston*, 110 Pa. 312, 1 Atl. 921. See also *Westmoreland & C. Natural Gas Co.* v. *De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724; *Hague* v. *Wheeler*, 157 Pa. 324, 22 L. R. A. 141, 27 Atl. 714.

Natural gas is a "crude mineral."

*Re Buffalo Natural Gas Fuel Co.* 73 Fed. 191.

A statute imposing damages upon any person mining or digging out "any coal, iron, or other minerals, knowing them to be upon the land of another," applies to the act of digging and carrying away building stone from an open quarry on the surface of the ground.

*Ruttledge* v. *Kress*, 17 Pa. Super. Ct. 490.

A mineral has been defined to be a fossil, or what is dug out of the earth. The term may, however, in the most enlarged sense, be described as comprising all the substances which now form, or which once formed, part of the solid body of the earth, both external and internal, and which are now destitute of and incapable of supporting animal or vegetable life. In this view, it will embrace as well the bare granite of the high mountain as the deepest hidden diamonds and metalic ores.

Bainbridge, Mines, pp. 1, 2.

"Mineral," in its general legal sense, is any valuable inert or lifeless substance formed or deposited in its present position through natural agencies alone, and which is found either in or upon the soil of the earth or in the rocks beneath the soil.

Barringer & Adams, Mines, p. lxxvi.

The mining laws from their earliest history have been administered by the Land Department as applicable in all their force and effect to the public mineral lands within the limits of the grant.

*Central P. R. Co.* v. *Valentine*, 11 Land Dec. 238.

This practice has been sustained by this court.

*Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

The term "minerals," standing alone and as understood in mining law, generally comprehends and includes all the substances in the earth's crust which are sought for and removed by man for the substance itself.

1 Snyder, Mines & Mining, §§ 134, 140, 143–145, 148; 2 Snyder, Mines & Mining, § 926.

*Mr. Justice **Brown** delivered the opinion [528] of the court:

Motion was made to dismiss this appeal for the reason that, as the jurisdiction of the circuit court was invoked upon the ground of diverse citizenship, the decree of the circuit court of appeals is final, under § 6 of the court of appeals act of 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), as interpreted by the decisions of this court in *Colorado Cent. Consol. Co.* v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Borgmeyer*

v. *Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34; and *Press Pub. Co.* v. *Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40. But, to impress the attribute of finality upon a judgment of the circuit court of appeals, it must appear that the original jurisdiction of the circuit court was dependent "entirely" upon diverse citizenship. That is not the case here. Plaintiff's bill does, indeed, set up a diversity of citizenship as one ground of jurisdiction, but, as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of nonmineral lands, there is another ground wholly independent of citizenship under that clause of § 1 of the act of 1888 (25 Stat. at L. 433, chap. 866) clothing the circuit court with jurisdiction of all civil suits involving over $2,000, "and arising under the Constitution or laws of the United States." If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with the contingency of being sustained by one construction and defeated by another, it is one arising under the laws of the United States. *Doolan* v. *Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Cooke* v. *Avery*, 147 U. S. 375, 37 L. ed. 209, 13 Sup. Ct. Rep. 340. Under the allegations of the bill, the fact that the Land Department had not determined whether the land in question was mineral or nonmineral does not involve a question of fact, as the facts are admitted, but solely a question of law whether land valuable for its granite is mineral or nonmineral under the terms of the grant. *Morton* v. *Nebraska*, 21 Wall. 660, 22 L. ed. 639. The fact that a patent issued pending suit [529] is neither set up in the pleadings nor *noticed in the opinion of either court. The motion to dismiss must therefore be denied.

2. We are thus brought to the main question in the case, *viz.:* Whether lands valuable solely or chiefly for granite quarries are mineral lands within the exception of the grant of 1864? The 3d section of the act containing the granting clause of land "not mineral" also contains the following provisos: "*Provided further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act. . . . *And provided, further*, That the word 'mineral' when it occurs in this act shall not be held to include iron or coal." [13 Stat. at L. 365, chap. 217.] The inference from this proviso is that in the absence of a special provision both iron and coal would be considered as minerals, and thus to repel the idea that only metals were included in the word "mineral." This inference is strengthened by the fact that the day before this act was passed, July 1, 1864 (13 Stat. at L. 343, chap. 205,) another act was approved authorizing the public sale to the highest bidder of "any tracts embracing coal beds or coal fields," and providing that any lands not thus disposed of shall thereafter be liable to private entry. Relying largely upon this act as a "legislative declaration" this court held, in *Mullan* v. *United States*, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041, that coal lands are mineral lands within the meaning of that term as used in the statutes regulating the disposition of the public domain. This effectually disposes of the argument that the word "mineral" must be construed as synonymous with metalliferous.

Upon the other hand, § 2 declares that "the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber, etc., for the construction thereof." There is a possible inference from this that stone was not to be regarded as mineral, although it is more likely that a grant was intended of all material serviceable in the construction of the road, even though it might otherwise be excepted from the grant as a mineral. Taking these two sections together, it would seem that the reason for providing in the 3d section that iron and coal lands should not be deemed mineral was the same as the liberty given by the 2d section to take *ma- [530] terials of earth, stone, and timber; namely, to facilitate the construction and operation of the railroad, in which large quantities of coal and iron would be required.

The word "mineral" is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case. Thus, the scientific division of all matter into the animal, vegetable, or mineral kingdom would be absurd as applied to a grant of lands, since all lands belong to the mineral kingdom, and therefore could not be excepted from the grant without being destructive of it. Upon the other hand, a definition which would confine it to the precious metals—gold and silver—would so limit its application as to destroy at once half the value of the exception. Equally subversive of the grant would be the definition of minerals found in the Century Dictionary; as "any constituent of the earth's crust;" and that of Bainbridge on Mines: "All the substances that now form, or which once formed, a part of the solid body of the earth." Nor do we approximate much more closely to the meaning of the word by treating minerals as substances which are "mined," as distinguished from those which are "quarried," since many valuable deposits of gold, copper, iron, and coal lie upon or near the surface of the earth, and some of the most valuable building stone, such, for instance, as the Caen stone in France, is excavated from mines running far beneath the surface. This distinction between underground mines and open workings was expressly repudiated in *Midland R. Co.* v. *Haunchwood Brick & Tile Co.* L. R. 20 Ch. Div. 552, and in *Hext* v. *Gill*, L. R. 7 Ch. 699.

The ordinance of May 20, 1785, authorizing the sale of lands in the western territory, with a reservation of "one third part of all gold, silver, lead, and copper mines, to be sold or otherwise disposed of, as Congress shall hereafter direct," was evidently

intended as an assertion of the right of the government to a royalty upon the more valuable metals—a prerogative which had belonged to the English Crown for centuries, though there confined to gold and silver, which were only considered as royal metals, and having its origin in the King's prerogative of coinage. 1 Bl. Com. 394. While [531] intrinsically the precious *metals are the more valuable, in the aggregate, the nonprecious metals have probably contributed as much or more to the general wealth of the country.

A division of lands into agricultural and mineral would also be a most uncertain guide to a proper construction of the word "mineral," since most of the lands included in the limits of this grant are neither one nor the other, but desert or rocky land, of no present value for agriculture, and of little value for their mineral deposits. So, too, the general reservations in the earlier acts of Congress of lead mines and saline springs seem to have been dictated by the fact that those were the only valuable minerals known to exist in the states to which the acts were applied, while in Michigan and Wisconsin there was a similar reservation of copper, lead, and other valuable ores, which were just then being discovered and made available. In the earlier grants of Congress in aid of railroads there was generally no reservation of mineral lands, but in the grants subsequent to 1860, to the Lake Superior and Pacific roads, through unsurveyed and almost unknown territories, a reservation was invariably made of lands suspected of being rich in metals. It is quite true that, had it not been for the actual or suspected presence of these metals, Congress might not have deemed it worth while to reserve the nonmetallic mineral lands; but when its attention was called to the fact that valuable mines might exist along the line of these roads, as it appears to have been about 1860, its policy was changed, and not only metalliferous, but all mineral lands were reserved. Subsequent to that, it was only in states which had already received grants without reservation, or in known agricultural states, that such grants continued to be made.

Considerable light is thrown upon the congressional definition of the word "minerals" by the acts subsequent to the Northern Pacific grant of 1864, and prior to the definite location of the line in 1884. The first of these acts, that of July 26, 1866 (14 Stat. at L. 251, chap. 262), declares that the "mineral lands" of the public domain shall be free and open to exploration and occupation, subject to such rules as may be prescribed by law, and subject also to the local customs or rules of miners in the sev- [532] eral *mining districts. The 2d section provides that whenever any person or association of persons claim a vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, or copper, he shall be entitled to enter such tract and receive a patent therefor, upon complying with certain preliminaries, and with a right to follow such vein, etc., into adjoining lands. The argument made in this connection by the railway company would confine the term "mineral lands" to lands bearing gold, silver, cinnabar, or copper, which would exclude all other metalliferous lands, such as contain iron, lead, tin, nickel, platinum, aluminum, etc.,—a limitation wholly inconsistent with the use of the word "mineral" in the 1st section.

This act was amended July 9, 1870 (16 Stat. at L. 217, chap. 235), to allow the entry of "placer" claims, "including all forms of deposits, excepting veins of quartz, or other rock in place," and declaring that they shall be subject to patent under the same provisions as vein or lode claims. As placers are merely superficial deposits, occupying the beds of ancient rivers or valleys, washed down from some vein or lode (*United States* v. *Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195), this act has little bearing upon the present case, though in *Freezer* v. *Sweeney*, 8 Mont. 508, 21 Pac. 20, it was held by the supreme court of Montana to authorize the locating and patenting of a stone quarry.

Another act having a more important bearing is that of May 10, 1872 (17 Stat. at L. 91, chap. 152), "to promote the development of the mining resources of the United States," and providing in the 1st section that "all valuable mineral deposits" in public lands should be open to exploration and purchase, according to the local customs or rules of miners. This section is an obvious extension of § 1 of the act of 1866, above cited, by substituting the words "valuable mineral deposits in lands" for the words "mineral lands," as used in the prior act. The 2d section is also in line with the 2d section of the act of 1866, and provides that "mining claims upon veins or lodes of quartz, or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their *location." [533] This section, like § 2 of the act of 1866, is susceptible of two interpretations: either that the words "valuable mineral deposits" of the 1st section are limited to the particular metals described in the 2d section, or that those metals stood in particular need of regulation as to the length and breadth of vein, and power to pursue such veins downward vertically, and even beyond the vertical side lines of the locations. This appears to us the more reasonable interpretation. The fact that no such limits were imposed on veins of coal or other minerals or metals indicates, not that the act was intended to be confined to the minerals enumerated in § 2, since that would be a clear restriction upon the words "valuable mineral deposits" in the 1st section, but that these particular metals stood in special need of limitation and protection.

Equally pregnant with meaning is the act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), for

the sale of timber lands in California, Oregon, Nevada, and Washington, which provides that lands "valuable chiefly for timber, but unfit for cultivation," as well as lands "valuable chiefly for stone," may be sold in quantities not exceeding 160 acres, with a proviso excluding mining claims, or lands containing gold, silver, cinnabar, or coal. This was followed by another act, August 4, 1892 (27 Stat. at L. 348, chap. 375, U. S. Comp. Stat. 1901, p. 1434), authorizing the entry of lands "chiefly valuable for building stone," under the placer mining laws, and extending the previous act to all public land states. This act was passed after the line of the road had been definitely located, and consequently has no direct bearing upon the case, and can only be regarded as explaining to some extent the previous reservation of all lands valuable for mineral deposits.

Conceding that in 1864 Congress may not have had a definite idea with respect to the scope of the word "mineral," it is clear that in 1884, when the line of this road was definitely located, it had come to be understood as including all lands containing "valuable mineral deposits," as well as lands "chiefly valuable for stone," and that when the grant of 1864 first attached to particular lands by the definite location of the road in 1884, the railway found itself confronted with the fact that the word "mineral" had [534] by successive declarations of Congress *been extended to include all valuable mineral deposits. As no vested rights had been acquired by the railway company, prior to the definite location of its line, it took the lands in question encumbered by such definitions as Congress had seen fit to impose upon the word "mineral," subsequent to 1864.

Indeed, by the very terms of the granting act of July 2, 1864, not only are mineral lands excluded, but the grant is limited to those lands to which "the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, *at the time the line of said road is definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office." It results from this that if, before the definite location of the road, Congress had withdrawn certain of these lands from the grant, the company was bound by such withdrawal and compelled to accept other lands in lieu thereof within the indemnity limits of the grant.

In construing this grant we must not overlook the general principle announced in many cases in this court, that grants from the sovereign should receive a strict construction,—a construction which shall support the claim of the government rather than that of the individual. Nothing passes by implication, and unless the language of the grant be clear and explicit as to the property conveyed, that construction will be adopted which favors the sovereign rather than the grantee.

The rulings of the Land Department, to which we are to look for the contemporaneous construction of these statutes, have been subject to very little fluctuation, and almost uniformly, particularly of late years, have lent strong support to the theory of the patentee, that the words "valuable mineral deposits" should be construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including nonmetallic substances, among which are held to be alum, asphaltum, borax, guano, diamonds, gypsum, resin, marble, mica, slate, amber, petroleum, limestone, building stone, and coal. The cases are far too numerous for citation, and there is practically no conflict in them.

The decisions of the state courts have also favored the same *interpretation. Thus, in [535] *Gibson* v. *Tyson*, 5 Watts. 34, chromate of iron was held to be included in a reservation of all minerals. In *Hartwell* v. *Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448, a grant of "all mines, minerals open or to be opened," was held to include paint stone, on the ground that it was valuable for its mineral properties,—the court distinctly repudiating the idea that the term should be confined to metals or metallic ores. In *Funk* v. *Haldeman*, 53 Pa. 229, and in *Gill* v. *Weston*, 110 Pa. 313, 1 Atl. 921, petroleum was held to be mineral, although the act authorizing the lease of mining lands was passed before petroleum was discovered. See also *Gird* v. *California Oil Co.* 60 Fed. 531. The same principle was extended in *Westmoreland & C. Natural Gas Co.* v. *De Witt*, 130 Pa. 235, 5 L. R. A. 731, 18 Atl. 724, to natural gas, which was said to be a mineral *feræ naturæ*. In *Armstrong* v. *Lake Champlain Granite Co.* 147 N. Y. 495, 42 N. E. 186, a conveyance of "all minerals, and ores," was held to include granite subsequently discovered on the premises, though it would not pass under the name of "mineral ores." In *Johnston* v. *Harrington*, 5 Wash. 78, 31 Pac. 316, the supreme court of that state thought it would hardly be disputed that stone was a mineral, though it seems inconsistent with the subsequent case, in the same volume, of *Wheeler* v. *Smith*, 5 Wash. 704, 32 Pac. 784, holding that the term "mineral" was only intended to embrace deposits of ore.

The rulings of the English courts have, with a possible exception in some earlier cases, adopted the construction that valuable stone passed under the definition of minerals. Said Baron Parke in *Rosse* v. *Wainman*, 14 Mees. & W. 859, 872: "The term 'minerals' [used in an act of Parliament reserving to the lord all mines and minerals], though more frequently applied to substances containing metals, in its proper sense includes all fossil bodies or matters dug out of mines; and Dr. Johnson says that all metals are minerals, but all minerals are not metals; and mines, according to Jacob's Law Dictionary, are quarries or places where anything is digged; and in the

year book, 17 Edw. III., chap. 7, *minerœ de picrre* and *de charbon* are spoken of. Beds of stone, which may be dug by winning or quarrying, are therefore properly minerals, [536] and so *we think they must be held to be in the clause in question, bearing in mind that the object of the act was to give the surface for cultivation to the commoners and to leave in the lord what it did not take away for that purpose." This case was followed in *Micklethwait* v. *Winter*, 6 Exch. 644, in which the same act of Parliament was held to include stone dug from quarries. In *Midland R. Co.* v. *Checkley*, L. R. 4 Eq. 19, stone for road making or paving was held to be a mineral, the Master of the Rolls observing: "Stone is, in my opinion, clearly a mineral, and in fact everything except the mere surface which is used for agricultural purposes. Anything beyond that, which is useful for any purpose whatever, whether it is gravel, marble, fire clay, or the like, comes within the word 'mineral' when there is a reservation of the mines and minerals from a grant of land" In *Midland R. Co.* v. *Haunchwood Brick & Tile Co.* L. R. 20 Ch. Div. 552, brick clay was held to be a mineral; and in *Hext* v. *Gill*, L. R. 7 Ch. 699, the House of Lords held that china clay, and every substance which may be obtained "from underneath the surface of the earth for the purpose of profit," was a mineral, "unless there is something in the context or in the nature of the transaction to induce the court to give it a more limited meaning." The same rule was applied in several analogous cases of granite, sandstone, flintstone, and in other similar circumstances. *Atty. Gen.* v. *Welsh Granite Co.* 35 Week. Rep. 617 (granite); *Bell* v. *Wilson*, 2 Drew. & S. 395 (sandstone); *Tucker* v. *Linger*, L. R. 8 App. Cas. 508 (flintstone), and a dozen other cases to the same effect.

We do not deem it necessary to attempt an exact definition of the words "mineral lands" as used in the act of July 2, 1864. With our present light upon the subject it might be difficult to do so. It is sufficient to say that we see nothing in that act, or in the legislation of Congress up to the time this road was definitely located, which can be construed as putting a different definition upon these words from that generally accepted by the text writers upon the subject. Indeed, we are of opinion that this legislation consists with, rather than opposes, the overwhelming weight of authority to the effect that mineral lands include, not merely metalliferous lands, but all such [537] as are chiefly *valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture.

*The decree of the Court of Appeals is therefore affirmed.*

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

FRANK N. PROUT, Attorney General of the State of Nebraska, *Appt.*,
*v.*
JAMES C. STARR, Samuel W. Allerton, and Chicago, Rock Island, & Pacific Railway Company.

(See S. C. Reporter's ed. 537-545.)

*Stipulation—to abide decree of other suits—jurisdiction of Federal courts—suit against state—conflict of jurisdiction.*

1. The parties to a suit may make a valid agreement to dispense with the taking of evidence, and to accept the evidence taken and abide by the decrees which shall be entered in certain other cases in which the allegations of fact and the contentions of law are identical with those in the suit in question.
2. A suit against the Nebraska board of transportation for the purpose of preventing the enforcement of the Nebraska act of April 12, 1893, fixing maximum railroad rates, on the ground of the invalidity of such statute under the Constitution and laws of the United States, is not a suit against the state within the meaning of the 11th Amendment to the Federal Constitution.
3. A Federal court is not without jurisdiction of a suit to enjoin the attorney general of Nebraska from enforcing, as a member of the Nebraska board of transportation, the provisions of an unconstitutional state statute fixing maximum railroad rates, on the theory that it seeks to restrain him as attorney general from enforcing the criminal laws of the state.
4. A Federal court has jurisdiction to extend to and against the successors in the office of attorney general of a state, duly substituted, the provisions of an order enjoining the enforcement of an unconstitutional state statute fixing maximum railroad fares by a board of which the attorney general is a member.
5. The jurisdiction of a circuit court of the United States over a cause properly before it cannot be defeated by the institution, by one of the parties in a state court, of subsequent proceedings, whether civil or criminal, involving the same legal questions.

[No. 150.]

*Argued January 26, 27, 1903. Decided February 23, 1903.*

APPEAL from the Circuit Court of the United States for the District of Nebraska to review a decree which enjoined the attorney general of that State from enforcing the provisions of a state statute fixing maximum railroad rates. *Affirmed.*

See same case below, 110 Fed. 3.

Statement by Mr. Justice **Shiras**:

On August 3, 1893, James C. Starr and

NOTE.—*As to suits against a state*—see notes to Murdock Parlor Grate Co. v. Com. (Mass.) 8 L. R. A. 399; Carr v. State (Ind.) 11 L. R. A. 370; Tindall v. Wesley, 13 C. C. A. 165; and Hans v. Louisiana, 33 L. ed. U. S. 842.

*As to conflict of jurisdiction between Federal and state courts*—see Louisville Trust Co. v. Cincinnati, 22 C. C. A. 356, and note. And see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 50.

Samuel W. Allerton, citizens of the state of Illinois, on their own behalf and on behalf of others similarly situated, filed a bill of complaint in the circuit court of the United States for the district of Nebraska, against the Chicago, Rock Island, & Pacific Railway Company; George H. Hastings, attor-[538]ney general; John C. Allen, *secretary of state; Eugene Moore, auditor of public accounts; Joseph F. Bartley, state treasurer, and A. R. Humphrey, commissioner of public lands, all of whom were officers of the state of Nebraska, and as such constituted its board of transportation, and William A. Dilworth, J. M. Rountz, and J. W. Johnson, secretaries of said board, and all citizens of Nebraska.

The bill brought into question, under the Constitution and laws of the United States, the validity of a certain act of the legislature of Nebraska, approved April 12, 1893, entitled "An Act to Regulate Railroads, to classify Freights, to Fix Reasonable Maximum Rates to be Charged for the Transportation of Freight upon Each of the Railroads in the State of Nebraska, and to Provide Penalties for the Violation of this Act." It was alleged that if the provisions of the act were put into effect, the earnings of the said railroad company from its business in the state would be materially lessened, and would not pay the operating expenses thereof, nor yield any money from which the railroad property could be maintained, and would, in effect, work a confiscation thereof; that if the penalties imposed in the said act were enforced, the entire property of the company would be taken away; that the plaintiffs were stockholders of the company, and had requested the officers and directors thereof to take proceedings to contest the validity of said act, but they had refused to do so. The principal prayers of the bill were that the company, its officers, agents, and employees, should be restrained by injunction from adopting a schedule of rates to be charged for the transportation of freight on its road, according to the terms and provisions of the said act; and that the said board of transportation, and its members and secretaries, should be enjoined from entertaining or determining any complaint, and from instituting or prosecuting any proceeding or action to enforce the observance of the provisions of said act; and that the attorney general should in like manner be enjoined from bringing any proceedings by way of injunction, or by other process or civil action or indictment against said company for or on account of the nonobservance by it of the provisions of said act.

Thereupon a restraining order of the cir-[539]cuit court was issued, *enjoining the railroad company, the board of transportation and its members, and the said attorney general, as prayed for in the bill; said order was to remain in force until a formal motion for injunction or to set aside the order be made, heard, and decided; and a bond was to be given in the sum of $10,000. This order was duly served upon each and every of the said defendants, together with process of subpœna.

Afterwards, on the 2d day of September, 1893, a joint and several answer was filed by the said board of transportation, its members and secretaries. Therein it was averred that the said defendants were all agents and officers of the state of Nebraska, and had no personal or pecuniary interest whatever in the event of the suit, and were not proper parties thereto, but that said bill of complaint should have been brought against the state of Nebraska; that the said state was the real party in interest, and that the state had not and did not in any way whatever consent to the bringing of the action, and had not and did not submit in any way to the jurisdiction of the said circuit court to hear and determine the matters complained of in said bill; and the defendants submitted that, under the 11th Amendment of the Constitution of the United States, the courts of the United States were wholly without jurisdiction to try, hear, and determine the several matters in difference charged and set forth in the bill of complaint; and that, under the Constitution of the United States and the Constitution and laws of the state of Nebraska, the complainants had a full and adequate remedy at law. The defendants further denied that the state legislation in question violated the provisions of the Constitution of the United States which forbid any state to deprive any person of his property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, or to pass a law impairing the obligation of a contract, or which interferes with commerce between the states.

On October 3, 1893, the complainants filed their replication to the answer.

At and about the same time, and in the same court, certain stockholders of the Chicago, Burlington, & Quincy Railroad *Com-[540]pany, of the Chicago & Northwestern Railway Company, and of the Union Pacific Railway Company, filed three other bills of complaint, in which the said railroad companies and the said persons comprising the board of transportation were defendants, and in which bills the same facts and circumstances were alleged and the same relief was prayed for as in the bill in the present case. All of the state officers appeared and answered by the same counsel, and alleged the same defenses and contentions as were alleged in their answer in this suit. Those cases were put at issue, and after a large amount of evidence was put in, final decrees were rendered against the defendants, and, on March 7, 1898, the decrees of the circuit court were affirmed by this court. *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 814. No testimony was taken by either party in the present case, but it was agreed, while the other cases were pending, that the proofs taken in them should be accepted with the same force and effect as if taken in this case; that the case should not be further particularly proceeded in until the Supreme Court should have rendered its decree in the other cases, when

a decree should be entered conformable to those entered by the Supreme Court in the other three cases.

Meanwhile, Hastings, the attorney general when the bills were filed, was succeeded in his office by Smyth, who by proper order was substituted as defendant and appellant. Overlooking or disregarding the existing preliminary injunction of the circuit court, and the agreement that this case should abide the result in the other cases, Smyth, as attorney general, brought an action in the supreme court of the state of Nebraska against the said Chicago, Rock Island, and Pacific Railway Company, alleging that the company, in violation of the act of April 12, 1893, at divers times had charged for the transportation of freight between points on its road in Nebraska rates in excess of those fixed by the act, and claiming judgment for $310,000, the amount of penalties alleged to have accrued. The attention of Attorney General Smyth was then called to the injunction order of the circuit court, and he thereupon gave the counsel of the company to understand that before the expiration of his term of office he would dismiss said action. Relying upon the under-[541] standing *and agreement aforesaid, the company took no proceedings to enforce the said injunction and agreement.

On or about January 1, 1901, the said defendant, Frank N. Prout, succeeded the said Smyth in his office of attorney general, who declined to dismiss the said action in the supreme court of Nebraska. Whereupon the company filed its answer in the said action in due form, alleging the prior pendency of the action in the circuit court of the United States, and the existence, in full force and effect, of the injunction order of that court. No reply to this answer appears to have ever been filed, and thereupon, on or about February 15, 1901, the company moved the said court for judgment upon the pleadings, but the court denied said motion, upon grounds set out in its opinion. *State* v. *Chicago, R. I. & P. R. Co.* 61 Neb. 545, 85 N. W. 556. No further proceedings have been taken in said action, and the injunction order of the circuit court remains unmodified, and in full force and effect.

On April 6, 1901, Starr and Allerton filed, in the circuit court of the United States, their supplemental bill, alleging the foregoing facts, and praying that the order and injunction previously issued upon their original bill be extended to and against the said Frank N. Prout, as attorney general, and that he be enjoined and restrained from further prosecuting the action brought in the name of the state of Nebraska against the railway company.

To this supplemental bill Frank N. Prout filed a demurrer on the ground that the bill was against the defendant in his official capacity as attorney general of the state, and was against the state, and that therefore the court was, under the 11th Amendment of the Constitution, without jurisdiction.

Upon argument, the demurrer was overruled, and the injunction prayed for was issued. The order directing the injunction provided that if the defendant elected to stand by his demurrer and declined further to plead, a final decree should go, as in the case of *Smyth* v. *Ames*, and, the defendant having elected in open court to stand upon his demurrer, a final decree was entered conformable to that in *Smyth* v. *Ames*. From that decree the defendant, Frank N. Prout, appealed to this court.

*Mr.* **Frank N. Prout** argued the cause and filed a brief for appellant:

The duty of state courts to uphold the fundamental law of the United States is no less imperative than that of the Federal courts.

*Fitts* v. *McGhee*, 172 U. S. 532, 43 L. ed. 543, 19 Sup. Ct. Rep. 269.

A Federal court is without jurisdiction to enjoin an attorney general from prosecuting in the state court a suit brought in the name of the state to recover penalties.

*Fitts* v. *McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; *State* v. *Chicago, R. I. & P. R. Co.* 61 Neb. 545, 85 N. W. 556; *Louisiana* v. *Jumel*, 107 U. S. 723, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; *Hagood* v. *Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Re Ayers*, 123 U. S. 497, 31 L. ed. 226, 8 Sup. Ct. Rep. 164; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

*Mr.* **J. M. Woolworth** argued the cause, and, with *Mr. W. D. McHugh*, filed a brief for appellees:

An agreement in the *Rock Island Case* that it should abide the result here of the three other cases was eminently proper.

*Pacific R. Co.* v. *Ketchum*, 101 U. S. 289, 25 L. ed. 932.

A suit against individuals for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of U. S. Const. 11th Amend.

*Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

If two courts have concurrent jurisdiction of a controversy, the one in which suit is first brought will retain it until final disposition, to the entire exclusion of any process or inquiry in the other.

*Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841; *Chittenden* v. *Brewster*, 2 Wall. 191, 17 L. ed. 839; *Orton* v. *Smith*, 18 How. 263, 15 L. ed. 393; *Sharon* v. *Terry*, 13 Sawy. 387, 1 L. R. A. 572, 36 Fed. 337; *Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119.

*Mr. Justice **Shiras** delivered the opinion [542] of the court:

As the appellant demurred to the supple-

mental bill, and elected to stand on his demurrer when the final decree of the circuit court was entered, we have now only to consider the questions of law presented by the demurrer.

That it was competent for the parties, plaintiffs and defendants, to agree to dispense with taking evidence, to accept the evidence taken in the other cases, and to abide by the decrees therein to be entered, we have no reason to doubt (*Pacific R. Co.* v. *Ketchum*, 101 U. S. 289, 25 L. ed. 932), and that such an agreement was entered into is conceded. The allegations of fact and the contentions of law being the same in all the cases, such an arrangement was convenient and proper. The decrees in the other cases having been affirmed by this court, it was in accordance with that agreement that the circuit court should enter a similar decree in the present case. In so far, then, as the substantial merits of the case are concerned, we are not called upon to consider them. They have been concluded by the reasoning and opinion of this court in the other cases. *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

But by this appeal we are asked to declare that the circuit court had no jurisdiction, because it appears, on the face of the bill, that the complaint is essentially against the state of Nebraska, and is in contravention of the 11th Amendment of the Constitution of the United States.

It is a sufficient answer to this contention that it was made, considered, and determined in *Smyth* v. *Ames*. In the opinion in that case it was said:

"Within the meaning of the 11th Amendment of the Constitution, the suits are not against the state, but against certain individuals charged with the administration of [543] a state *enactment, which, it is alleged, cannot be enforced without violating the constitutional rights of the plaintiffs. It is the settled doctrine of this court that a suit against individuals, for the purpose of preventing them, as officers of a state, from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the state within the meaning of that amendment. *Pennoyer* v. *McConnaughy*, 140 U. S. 10, 35 L. ed. 365, 11 Sup. Ct. Rep. 699; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Scott* v. *Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Tindal* v. *Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770."

The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war,—all of which provisions existed before the adoption of the 11th Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding these constitutional limitations. Much less can the 11th Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the 14th Amendment have been disregarded by state enactments. On the other hand, the judicial power of the United States has not infrequently been exercised in securing to the several states, in proper cases, the immunity intended by the 11th Amendment. *Hans* v. *Louisiana*, 134 U. S. 10, 33 L. ed. 845, 10 Sup. Ct. Rep. 504; *North Carolina* v. *Temple*, 134 U. S. 22, 33 L. ed. 849, 10 Sup. Ct. Rep. 509; *Hawkrader* v. *Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119; *Fitts* v. *McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269.

*It is one of the important functions of [544] this court to so interpret the various provisions and limitations contained in the organic law of the Union that each and all of them shall be respected and observed.

It is further argued by the appellant, as one of the grounds of his demurrer, that he was complained against in his official capacity as attorney general of the state of Nebraska, and not in his individual capacity as a citizen thereof, and that the attorney general of a state cannot be restrained by an injunction of a United States court from enforcing the criminal laws of the state.

This, we think, is only another phase of the same question.

It is true that the defendant was included in the bill as the attorney general of the state, but that was because he was one of the board of transportation, which was directed to enforce the provisions of the act. The bill did not seek to interfere with the acts of the attorney general in prosecuting offenders against the valid criminal laws of the state, but its object was to prevent him from collecting penalties that had accrued under the provisions of a statute judicially determined to be void. The injunction must be so read and understood.

Several changes of incumbents in the office of attorney general took place while the cases were proceeded in, but that did not deprive the court of jurisdiction. The successors in office were duly substituted, and thus became subjected to the preliminary and final decrees of the court. The object of the supplemental bill was to restrain the present appellant, as successor to Smyth, from attempting to transfer the very matters that stood for judgment in the Federal

court to the state court by filing a bill in the latter. Such a course might bring about a conflict between those courts, and create the confusion so often deprecated by this court. *Peck* v. *Jenness*, 7 How. 625, 12 L. ed. 846; *Chittenden* v. *Brewster*, 2 Wall. 191, 17 L. ed. 839; *Orton* v. *Smith*, 18 How. 263, 15 L. ed. 393.

The jurisdiction of the circuit court could not be defeated or impaired by the institution, by one of the parties, of subsequent proceedings, whether civil or criminal, in-[545]volving the *same legal questions, in the state court. *Harkrader* v. *Wadley*, 172 U. S. 148, 166, 43 L. ed. 399, 405, 19 Sup. Ct. Rep. 119, 126.

*The decree of the Circuit Court is affirmed.*

Mr. Justice **Harlan**, concurring:

I am in favor of modifying the judgment in some particulars and then affirming it, but I do not concur in all the reasoning of the opinion.

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TOMAS C. GUTIERRES *et al.*, *Appts.*,

*v.*

ALBUQUERQUE LAND & IRRIGATION COMPANY.

(See S. C. Reporter's ed. 545-557.)

*Public waters—appropriation of—validity of territorial legislation.*

1. Territorial as well as state legislation with respect to the regulation of the use of public waters was authorized by the provisions of the acts of Congress of March 3, 1891 (26 Stat. at L. 1095, chap. 561, U. S. Comp. Stat. 1901, p. 1570), and of July 26, 1866 (14 Stat. at L. 253, chap. 262, § 9, Rev. Stat. § 2339, U. S. Comp. Stat. 1901, p. 1437), recognizing, so far as the United States is concerned, the validity of local customs and decisions in respect to the appropriation of water, and those of the desert land act of March 3, 1877 (19 Stat. at L. 377, chap. 107, U. S. Comp. Stat. 1901, p. 1549), permitting the appropriation of water for irrigation and the reclamation of desert land.
2. Power to authorize irrigation corporations organized under N. M. act February 24, 1887, to take and divert surplus public waters over and above the needs of prior appropriators, was not denied to the legislature of that territory by the proviso in the desert land act of March 3, 1877, 19 Stat. at L. 377, chap. 107, U. S. Comp. Stat. 1901, p. 1549), that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights.

[No. 16.]

*Argued January 9, 1902. Decided February 23, 1903.*

NOTE.—*On the right of prior appropriation of water*—see note to Isaacs v. Barber (Wash.) 30 L. R. A. 665.

APPEAL from the Supreme Court of the Territory of New Mexico to review a judgment which affirmed a judgment of the District Court for the First Judicial District of that Territory within and for the County of Santa Fé, granting a perpetual injunction against interference with a survey by an irrigation corporation. *Affirmed.*

See same case below, 61 Pac. 357.

Statement by Mr. Justice **White**:

*This litigation was begun by the appellee,[546] in the district court for the second judicial district of the territory of New Mexico, within and for the county of Bernalillo. In the bill of complaint, equitable relief was sought against the now appellants. It was alleged, in substance, that plaintiff, on December 31, 1897, became a body corporate, pursuant to the provisions of an act of the general assembly of the territory of New Mexico, approved February 24, 1887, for the purpose of constructing a canal, ditch, and pipe line between named points in the county of Bernalillo, in the territory of New Mexico; that, as preliminary to the construction of such canal, ditch, and pipe line, a survey of lands along the proposed route thereof was necessary, and such survey was authorized by law; and that the defendants, asserting ownership of lands along such proposed route, had forcibly prevented the employees of the plaintiff from entering on said lands to make survey thereof. It was prayed that temporarily, pending the suit, and perpetually by the final decree, the defendants might be enjoined from further interference with the making of the survey, and there was also a prayer for general relief. In their answer the defendants admitted their interferences with the proposed survey, as complained of in the bill, but asserted their right to do so. Reiterating the allegations of the answer, by cross complaint, a perpetual injunction was asked restraining entry by the plaintiff upon the lands. An order was issued temporarily restraining the defendants, as prayed, and thereafter a demurrer to the answer and cross complaint of the defendant was filed and overruled. After replication by the respective parties the cause was transferred to the district court of the first judicial district for the territory of New Mexico, within and for the county of Santa Fé. In that court trial was had and judgment was entered in favor of the plaintiff, perpetuating the preliminary injunction and dismissing the cross complaint of the defendants. *The[547] following findings of fact and conclusions of law were embodied in the judgment:

"Findings of Fact.

"I. That the plaintiff is a corporation and has complied with the provisions of the laws of the territory of New Mexico. It is organized for the purpose of constructing a canal from a point on the Rio Grande about 28 miles above the city of Albuquerque to the railroad bridge across said Rio Grande, at Isleta, the initial and terminal points of said canal being within the county of Bernalillo.

"II. That the headgate of plaintiff's proposed canal is to be at a point on the Rio Grande three eighths (⅜) of a mile below or south of the Indian village of San Felipe, about 28 miles above the city of Albuquerque; that the ultimate terminus or point of discharge into the river is at the railroad bridge near Isleta, the entire length of the canal to be about thirty-five (35) miles. The present proposed terminus is at the city of Albuquerque.

"III. That the engineer of the company was proceeding with a survey of the line between Albuquerque and the headgate when defendants interfered with and obstructed the said engineer in the making of said survey.

"IV. That the capacity of the said proposed canal is two hundred and ten (210) cubic feet of water per second.

"V. That there are at present thirteen ditches taking water from the river between the proposed headgate of plaintiff's canal and Albuquerque, and seven between Albuquerque and the Indian town of Isleta.

"VI. That the aggregate capacity of all the said old ditches is four hundred and ninety-eight (498) cubic feet per second, and the court finds that there has been a valid prior appropriation by the owners of said old ditches of the said four hundred and ninety-eight (498) feet per second of water.

"VII. That during a few months of parts of the summer months of the years 1894, 1895, 1896, and 1897 there was no surplus water flowing in the river at the proposed headgate, but during a large majority of the [548] months of each of these years *there was a large amount of surplus water flowing past that point, and that those years were the only years within ten or twenty years in which the river was dry at or above Albuquerque.

"VIII. That in a majority of the last ten years there has been surplus water flowing in the said river at the proposed headgate at all times.

"IX. That the river became dry at Albuquerque about the last of June, 1894, and remained so for twenty-two days, and also in June, 1896, for a number of days, the court being unable to find the exact number or length of time from the evidence.

"X. That the months of June, July, August, and September are the 'dry season.'

"XI. That the planting and growing season in the Rio Grande valley begins in February and ends with October.

"XII. That very few farmers served by the present ditches sow wheat, oats, barley, or rye in the fall of the year, but do so in the spring, beginning during February or March, and that very little, if any, of the water now appropriated is used for these crops after June 15th, but the water is used for chili, corn, alfalfa, and melons after that time, and for alfalfa as late as October.

"XIII. That for all the months in most years, and for most of the months in every year, there is a surplus of water flowing in the Rio Grande over and above the amount appropriated by said old ditches.

"XIV. The court finds that there is no evidence that plaintiff relies on any source of water supply than the Rio Grande, or that the proposed canal of plaintiff is expected or intended to receive and distribute stored waters.

"XV. That the plaintiff is not the owner of any lands along the line of its proposed canal or elsewhere.

"XVI. That there is no evidence that plaintiff has any contract with or employment by any person who is the owner of lands irrigable from said proposed canal for the conduct of water upon any such lands, or that any owner of lands not now irrigated from existing acequias, desires or intends to irrigate such lands from plaintiff's canal when completed.

*"XVII. That the proposed canal of the [549] plaintiff will cross and recross the existing acequias of Bernalillo nine times within a distance of 1 mile of its length.

"XVIII. That some of the defendants and some of their associates are the owners of lands through which the plaintiff proposes to construct its canal.

"Conclusions of Law.

"I. That the plaintiff corporation is entitled to exercise the power of eminent domain.

"II. That the plaintiff, by the filing of its articles of incorporation with the secretary of the territory of New Mexico, and complying with the provisions of the act under which it is incorporated, has acquired a right to construct its canals and reservoirs to divert through its proposed canal surplus and unappropriated waters flowing in the Rio Grande, and that such a right of eminent domain does not depend upon the ownership of lands by plaintiff or the employment of plaintiff prior to the construction of its canal by owners of lands to carry waters for such owners.

"III. That the defendants, at the time of the filing of the complaint herein, unlawfully obstructed the plaintiff in the exercise of powers lawfully conferred upon it by the act under which it is incorporated.

"IV. That the defendants do not and cannot in this action lawfully represent the rights of such persons claiming a right to the use of the waters of the Rio Grande, by prior appropriation, when the appropriation of such persons was effected at a point below the mouth of the proposed canal of plaintiff.

"V. That the defendants cannot lawfully set up in this action any rights secured to them and their associates or their predecessors in title by the treaty of Guadalupe Hidalgo, and that the allegations of paragraph ten of the answer of defendants with reference to the treaty of defendants are immaterial.

"VI. That the plaintiff is entitled to the relief demanded in the complaint, including a perpetual injunction, as prayed for.

"VII. That defendants are not entitled to any part of the *relief demanded in their [550]

cross complaint, but the same should be dismissed."

A motion to set aside the findings and judgment and for a new trial having been overruled, the cause was taken to the supreme court of the territory. That court affirmed the judgment of the trial court and adopted as its own the findings of fact made by the judge of the district court. Thereupon this appeal was allowed.

*Mr.* **Neill B. Field** argued the cause and filed a brief for appellants:

Neither the state legislature nor the state courts have any independent power to interfere with the primary disposal of the public lands of the United States, or to detract from the estates in such lands granted under the laws of the United States.

*Lux* v. *Haggin*, 69 Cal. 255, 10 Pac. 674.

The power of the territorial legislature to make this grant is utterly inconsistent with the right of the United States to control and dispose of its own property wheresoever the same may be situated.

*Gibson* v. *Chouteau*, 13 Wall. 92, 20 L. ed. 534; *Van Brocklin* v. *Tennessee*, 117 U. S. 151, *sub nom. Van Brocklin* v. *Anderson*, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; *Van Sickle* v. *Haines*, 7 Nev. 262; *Thorp* v. *Freed*, 1 Mont. 680; *Paige* v. *Peters*, 70 Wis. 178, 35 N. W. 328.

The right to the use of water for the purposes of irrigation is incident to the ownership or occupation of lands, without which it does not exist.

*Basey* v. *Gallagher*, 20 Wall. 683, 22 L. ed. 454; *Millheiser* v. *Long* (N. M.) 61 Pac. 111; *Starr* v. *Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; *Turner* v. *Cole*, 31 Or. 154, 49 Pac. 971; *Combs* v. *Agricultural Ditch Co.* 17 Colo. 146, 28 Pac. 966; *Creek* v. *Bozeman Waterworks Co.* 15 Mont. 121, 38 Pac. 459; *Senior* v. *Anderson*, 115 Cal. 496, 47 Pac. 454; *Smith* v. *Hawkins*, 110 Cal. 122, 42 Pac. 453; *Simpson* v. *Williams*, 18 Nev. 432, 4 Pac. 1213; *Barrows* v. *Fox*, 98 Cal. 63, 32 Pac. 811; *Faulkner* v. *Rondoni*, 104 Cal. 140, 37 Pac. 883; *Farmers' High Line Canal & Reservoir Co.* v. *Southworth*, 13 Colo. 111, 4 L. R. A. 767, 21 Pac. 1028; *Rominger* v. *Squires*, 9 Colo. 327, 12 Pac. 213; *Schilling* v. *Rominger*, 4 Colo. 104; *Becker* v. *Marble Creek Irrig. Co.* 15 Utah, 225, 49 Pac. 893, 1119; *St. Luis Water Co.* v. *Estrada*, 117 Cal. 168, 48 Pac. 1076; *Tyler* v. *Wilkinson*, 4 Mason, 397, Fed. Cas. No. 14,312; *Rigney* v. *Tacoma Light & Water Co.* 9 Wash. 576, 26 L. R. A. 425, 38 Pac. 147.

In case of a conflict between a law of the territory of New Mexico, and a treaty stipulation of the United States made in pursuance of law, the treaty is of paramount authority, and must prevail.

*Head Money Cases*, 112 U. S. 598, *sub nom. Edye* v. *Robertson*, 28 L. ed. 803, 5 Sup. Ct. Rep. 247; *Hauenstein* v. *Lynham*, 100 U. S. 488, 25 L. ed. 630; *Ware* v. *Hylton*, 3 Dall. 199, 1 L. ed. 568; *Barker* v. *Harvey*, 181 U. S. 486, 45 L. ed. 965, 21 Sup. Ct. Rep. 690.

The act in question is void because it is not a reasonable exercise of legislative power.

*People* v. *Daniels*, 6 Utah, 288, 5 L. R. A. 444, 22 Pac. 159; *Ellison* v. *Linford*, 7 Utah, 166, 25 Pac. 744; *Baca* v. *Perez*, 8 N. M. 187, 42 Pac. 162.

The right of the appellee to exercise the power of eminent domain depends upon its ability to show affirmatively that it is organized to serve the public, and not merely for private gain.

*Re Niagara Falls & W. R. Co.* 108 N. Y. 384, 15 N. E. 429; *Union River Logging R. Co.* 12 Land. Dec. 581; *Noble* v. *Union River Logging R. Co.* 147 U. S. 172, 37 L. ed. 126, 13 Sup. Ct. Rep. 271.

The conclusion of the courts below that appellee, by the mere filing of its articles of incorporation, became authorized to exercise the power of eminent domain, is in direct conflict with principles established by a very large number of decisions.

*Weidenfeld* v. *Sugar Run R. Co.* 48 Fed. 615; *Bridal Veil Lumbering Co.* v. *Johnson*, 30 Or. 205, 34 L. R. A. 368, 46 Pac. 790; *Re Deansville Cemetery Asso.* 66 N. Y. 569, 23 Am. Rep. 86; *Re Eureka Basin Warehouse & Mfg. Co.* 96 N. Y. 42; *Re Rochester, H. & L. R. Co.* 110 N. Y. 119, 17 N. E. 678; *Re New York, L. & W. R. Co.* 99 N. Y. 12, 1 N. E. 27; *Re Split Rock Cable Road Co.* 128 N. Y. 408, 28 N. E. 506; *Apex Transp. Co.* v. *Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882; *Consolidated Channel Co.* v. *Central P. R. Co.* 51 Cal. 269; *Coster* v. *Tide Water Co.* 18 N. J. Eq. 54; *People ex rel. Robinson* v. *Pittsburgh R. Co.* 53 Cal. 694.

There is nothing in the legislation of Congress which, even impliedly, recognizes the validity of the act in question.

*Bear Lake & River Waterworks & Irrig. Co.* v. *Garland*, 164 U. S. 18, 41 L. ed. 334, 17 Sup. Ct. Rep. 7; *United States* v. *Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770.

The object sought to be accomplished by the territorial legislature is not only not in harmony with the policy of Congress, but is directly opposed to it.

*Ferris* v. *Higley*, 20 Wall. 375, *sub nom. Perris* v. *Higley*, 22 L. ed. 383; *Clayton* v. *Utah*, 132 U. S. 632, 33 L. ed. 455, 10 Sup. Ct. Rep. 190; *Ex parte Lothrop*, 118 U. S. 113, 30 L. ed. 108, 6 Sup. Ct. Rep. 984.

Territorial legislation is invalid when in conflict or inconsistent with the legislation of Congress.

*Ferris* v. *Higley*, 20 Wall. 375, *sub nom. Perris* v. *Higley*, 22 L. ed. 383; *Lewis* v. *Pima County*, 155 U. S. 57, 39 L. ed. 67, 15 Sup. Ct. Rep. 22; *Clayton* v. *Utah*, 132 U. S. 632, 33 L. ed 455, 10 Sup. Ct. Rep. 190; *United States* v. *McMillan*, 165 U. S. 504, 41 L. ed. 805, 17 Sup. Ct. Rep. 395.

The doctrine of prior appropriation, as established in the arid region, does not completely supersede all riparian rights.

*Union Mill & Min. Co.* v. *Dangberg*, 81 Fed. 94; *Barrows* v. *Fox*, 98 Cal. 66, 32 Pac.

811; *Lux* v. *Haggin*, 69 Cal. 255, 10 Pac. 674; Hall's Mexican Law, §§ 1396, 1397.

*Mr.* **William B. Childers** argued the cause and filed a brief for appellee:

Whenever the title has passed, been conveyed by the sovereign, and the land has become private property, "primary disposal of the soil has been made." Thereafter any legislation relating thereto does not "interfere with the primary disposal of the soil."

*Gibson* v. *Chouteau*, 13 Wall. 99, 20 L. ed. 536; *Henshaw* v. *Bissell*, 18 Wall. 255, 21 L. ed. 835; *King* v. *Thomas*, 6 Mont. 409, 12 Pac. 865.

Congress has expressly recognized the power of the legislature to legislate on this subject.

*Basey* v. *Gallagher*, 20 Wall. 681, 22 L. ed. 454. See also *Jennison* v. *Kirk*, 98 U. S. 453, 25 L. ed. 240; *Broder* v. *Natoma Water & Min. Co.* 101 U. S. 274, 25 L. ed. 790; *Atchison* v. *Peterson*, 20 Wall. 513, 22 L. ed. 416.

The validity of such legislation by a territory has never been questioned. It has been expressly recognized.

*Sturr* v. *Beck*, 133 U. S. 545, 33 L. ed. 762, 10 Sup. Ct. Rep. 350.

The act of Congress of 1866, as well as the desert land acts, applies only to the public domain.

Long, Irrigation, § 30; *Cruse* v. *McCauley*, 96 Fed. 369; *Smith* v. *Denniff*, 24 Mont. 20, 50 L. R. A. 741, 60 Pac. 398; *Carson* v. *Gentner*, 33 Or. 512, 43 L. R. A. 130, 52 Pac. 506.

Whether a particular region is a farming neighborhood, and whether the supply of water to that neighborhood constitutes a public use, are questions of fact.

Long, Irrigation, § 5, p. 14; *Lindsay Irrig. Co.* v. *Mehrtens*, 97 Cal. 676, 32 Pac. 802; *Lux* v. *Haggin*, 69 Cal. 255, 10 Pac. 674; *Alisо Water Co.* v. *Baker*, 95 Cal. 268, 30 Pac. 537.

The doctrine of riparian rights has never prevailed in New Mexico, either under Mexico or the United States.

Long, Irrigation, § 10; *Trambley* v. *Luterman*, 6 N. M. 16, 27 Pac. 312; *Millheiser* v. *Long* (N. M.) 61 Pac. 111; *Lux* v. *Haggin*, 69 Cal. 255, 10 Pac. 674.

The Spanish and Mexican law existed in New Mexico, and continues to exist, except so far as changed by statute. That law as to water rights was based on the principle of prior appropriation. This principle was also early recognized by the courts of the Pacific and Rocky Mountain states.

*Barnett* v. *Barnett*, 9 N. M. 205, 50 Pac. 338; *American Ins. Co.* v. *Canter*, 1 Pet. 544, *sub nom. American Ins. Co.* v. *356 Bales of Cotton*, 7 L. ed. 255; *United States* v. *Percheman*, 7 Pet. 82, 8 L. ed. 615; *Mitchel* v. *United States*, 9 Pet. 729, 9 L. ed. 289; *Chicago, R. I. & P. R. Co.* v. *McGlinn*, 114 U. S. 546, 29 L. ed. 271, 5 Sup. Ct. Rep. 1005; *Insular Cases*, 182 U. S. 1–391, 45 L. ed. 1041–1146, 21 Sup. Ct. Rep. 742–826.

New Mexico is a territory, but in it the legislature has all legislative power, except as limited by the Constitution of the United States and the organic act and the laws of Congress appertaining thereto.

*Walker* v. *New Mexico & S. P. R. Co.* 165 U. S. 604, 41 L. ed. 843, 17 Sup. Ct. Rep. 421.

The use of water for irrigation, when distributed by an irrigation company, is a public use.

Long, Irrigation, § 4, p. 12, and authorities there cited; *Oury* v. *Goodwin* (Ariz.) 26 Pac. 376; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56.

In the case of the public domain it is not essential that the appropriator should have acquired, or have the right to acquire, title to the land upon which the water is to be used; and an alien may make a valid appropriation of water on the public land, although he may be incompetent to acquire title to the land itself.

Long, Irrigation, § 35; *Ely* v. *Ferguson*, 91 Cal. 187, 27 Pac. 587; *Santa Paula Waterworks* v. *Peralta*, 113 Cal. 38, 45 Pac. 168; *Toohey* v. *Campbell*, 24 Mont. 13, 60 Pac. 396; *Thorpe* v. *Tenem Ditch Co.* 1 Wash. 566, 20 Pac. 588.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The pertinent portions of the territorial act of February 24, 1887, under which the plaintiff below was incorporated, are noted in the margin.†

*It will be seen that the act authorized the [551] formation of corporations for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, and that two purposes *were to be subserved by [552] the formation of such companies (1) the supplying of water for irrigation, mining, manufacturing, domestic, and other public uses, including cities and towns; and (2) the colonization and the improvement of lands in connection therewith. The articles of association of the appellee set out the second of the aforesaid objects as being the

†Corporation Laws of New Mexico, 1897.

§ 468. Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic, and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith, for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the territory, or some person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged such articles shall be filed with such secretary.

§ 469. Such articles shall set forth: First. The full names of the incorporators and the corporate name of such company.

Second. The purpose or purposes for which such company is formed, and, if the object be to construct reservoirs and canals, or ditches and pipe lines for any of the purposes herein specified, the beginning point and terminus of the main line of such canals and ditches and pipe

purpose for which the company was formed. The organization of the company in conformity to the requirements of the statute is not questioned, and the existence of surplus water over and above the needs of prior appropriators of water at the point where it was proposed to divert the waters of the Rio Grande for the proposed canal is a fact found by the trial court and not disputed either in the supreme court of the territory or in the argument made at bar.

The contentions urged upon our notice substantially resolve themselves into two general propositions: First, that the territorial act was invalid, because it assumed to dispose of property of the United States without its consent; and, second, that said statute, in so far, at least, as it authorized the formation of corporations of the character of the complainant, was inconsistent with the legislation of Congress and therefore void. These propositions naturally admit of consideration together.

The argument in support of the first proposition proceeds upon the hypothesis that the waters affected by the statute are public waters, the property, not of the territory or of private individuals, but of the United States; that by the statute private individuals, or corporations, for their mere pecuniary profit, are permitted to acquire the unappropriated portion of such public waters, in violation of the right of the United States to control and dispose of its own property wheresoever situated. Assuming that the appellants are entitled to urge the objection referred to, we think, in view of the legislation of Congress on the subject of the appropriation of water on the public domain, *particularly referred to in the opinion of [553] this court in *United States* v. *Rio Grande Dam & Irrig. Co.* 174 U. S. 704–706, 43 L. ed. 1142, 1143, 19 Sup. Ct. Rep. 770, the objection is devoid of merit. As stated in the opinion just referred to, by the act of July 26, 1866 (14 Stat. at L. 253, chap. 262, § 9, Rev. Stat. § 2339, U. S. Comp. Stat. 1901, p. 1437), Congress recognized, as respects the public domain, "so far as the United States are concerned, the validity of the local customs, laws, and decisions of courts in respect to the appropriation of water." By the act of March 3, 1877 (19 Stat. at L. 377, chap. 107, U. S. Comp. Stat. 1901, p. 1549), the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted, and it was further provided that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights."

That the purpose of Congress was to recognize as well the legislation of a territory as of a state with respect to the regulation of the use of public waters, is evidenced by the act of March 3, 1891 (26 Stat. at L. 1095, chap. 561, U. S. Comp. Stat. 1901, p. 1570). By the 18th section of the act of

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lines, and the general course, direction, and length thereof shall be stated.

Third. The amount of the capital stock and the number of shares as definitely as practicable.

Fourth. The term of existence of the company, which shall not exceed fifty years.

Fifth. The number of directors, and the names of those who shall manage the business of the company for the first year.

Sixth. The name of the city or town and county in which the principal place of business of the company is to be located.

. . . . . .

§ 484. Corporations formed under this act for the purpose of furnishing and supplying water for any of the purposes mentioned in section four hundred and sixty-eight shall have, in addition to the powers hereinbefore mentioned, rights as follows:

First. To cause such examination and surveys for their proposed reservoirs, canals, pipe lines, and ditches to be made, as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by their officers, agents, and servants, to enter upon the lands or water of any person or of this territory.

Second. To take and hold such voluntary grant of real estate and other property as shall be made to them in furtherance of the purposes of such corporation.

Third. To construct their canals, pipe lines, or ditches upon or along any stream of water.

Fourth. To take and divert from any stream, lake, or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section four hundred and sixty-eight of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of, any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided. *And provided, further,* That no water shall be diverted if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted.

Fifth. To furnish water for the purposes mentioned in section four hundred and sixty-eight, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers.

Sixth. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies.

. . . . . .

§ 492. That no incorporation of any company or companies to supply water for the purposes of irrigation and other purposes shall have any right to divert the usual and natural flow of water of any stream which by law of 1854 has been declared a public acequia for any use whatever, between the fifteenth day of February and the fifteenth day of October of each year, unless it be with the unanimous consent of all and every person holding agricultural and cultivated lands under such stream or public acequia, and to be irrigated by the water furnished by said stream or public acequia, and that no incorporation of any company or companies shall interfere with the water rights of any individual or company acquired prior to the passage of this act.

1891 it was provided as follows (italics not in original):

"Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and 50 feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occu-[554] pation by the government of any *such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective states or territories." It may be observed that the purport of the previous acts is reflexively illustrated by the act of June 17, 1902 (32 Stat. at L. 388). That act appropriated the receipts from the sale and disposal of the public lands in certain states and territories to the construction of irrigation works for the reclamation of arid lands. The 8th section of the act is as follows:

"Sec. 8. That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any state or Federal government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

It would necessarily seem to follow from the legislation referred to that the statute which we have been considering is not inconsistent with the legislation of Congress on the subject of the disposal of waters flowing over the public domain of the United States. Of course, as held in the *Rio Grande Case*, p. 703, L. ed. 1141, Sup. Ct. Rep. 775, even a state, as respects streams within its borders, in the absence of specific authority from Congress, "cannot, by its legislation, destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far, at least, as may be necessary for the beneficial uses of the government property;" and the power of a state over navigable streams and their tributaries is further limited by the *superior power of the general govern-[555] ment to secure the uninterrupted navigability of all navigable streams within the limits of the United States. Necessarily, these limitations are equally applicable in restraint of the legislative branch of a territorial government, controlled, as is such body, by Congress. If we assume that a restriction on the power of a territory similar to that first stated prevails in favor of private owners of lands along a running stream, the act in question clearly is not violative of such rights, for the same does not attempt to authorize an infringement of them. The water which it is provided may be appropriated is "surplus" water, of any stream, lake, or spring, and it is specifically provided in subdivision 4 of § 17 of the act "That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same when so diverted." So, also, in § 25, it is declared "that no incorporation of any company or companies shall interfere with the water rights of any individual or company acquired prior to the passage of this act." The finding of the court below that "surplus" water existed negates the idea that any legitimate appropriation of water which can be made by the appellee can in anywise violate the rights of others.

We perceive no merit in the contention that the proviso in the desert land act of March 3, 1877, declaring that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights, is an expression of the will of Congress that all public waters within its control or the control of a legislative body of its creation, must be *directly* appropriated by the owners of land upon which a beneficial use of water is to be made, and that in consequence a territorial legislature cannot lawfully empower a corporation, such as the appellee, to become an intermediary for furnishing water to irrigate the lands of third parties. As all owners of land within the service capacity of appellee's canal will possess the right to use the water which may be diverted into such canal, the use is clearly public (*Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 163, 41 L. ed. 390, 17 Sup. Ct. Rep. 56), and appellee is therefore a public agency, *whose right to divert water and[556] whose continued existence is dependent upon the application by it within a reasonable time of such diverted water to a beneficial use. Irrigation corporations generally are recognized in the legislation of Congress, and the rights conferred are not limited to such corporations as are mere combinations of owners of irrigable land.

It is conceded on behalf of appellant that, by the laws of Mexico in force when the territory of New Mexico was ceded to the United States, the use of the waters of both

navigable and unnavigable streams was not limited to riparian lands, but extended as well to lands which did not lie upon the banks of the rivers, and that such use was subject to be regulated and controlled by the public authorities. It is, however, contended that the effect of the statute under consideration is to free the waters from public control and to transfer them to private control, a position which is manifestly unsound, in view of the public nature of such corporations and their liability to regulation by the legislative authority which has in effect created them. The concession above referred to and the implication arising from the statement in the answer and cross bill to the purport that the title of the defendants to their lands was derived, mediately or immediately, from those who held title thereto at the time of the acquisition of New Mexico by the United States, coupled with the finding by the trial court that, after making all due allowances for valid appropriations of water within the portion of the Rio Grande directly affected by the canal of the appellee, there yet existed a surplus of unappropriated water, warranted the trial court in treating as immaterial the claim asserted in the tenth paragraph of the answer of the defendants to the effect that, by the treaty of cession of New Mexico to the United States, the defendants and their associates acquired the right of user of all the waters of the Rio Grande adjacent to their lands. Neither do we think that the trial court was called upon, at the instance of the defendants, entire strangers in every aspect to other appropriators, to inquire into and pass upon the question whether appropriators of water below the mouth of the proposed canal of appellee would be injured by the construction of the [557] canal. The rights of such persons *will not, of course, be injuriously affected by the decree in this cause, and *non constat* but that they may yet intervene for their own protection, if they deem that the construction of the canal will be an invasion of their rights, or that they may be willing to forego objection to the construction of the canal.

On the whole, we are of opinion that the decree of the Supreme Court of the Territory of New Mexico was correct, and *it is therefore affirmed.*

Mr. Justice **McKenna** dissents.

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GEORGE C. RANKIN, as Receiver of the Elmira National Bank, *Plff. in Err.*,
*v.*
CHASE NATIONAL BANK.

(See S. C. Reporter's ed. 557-566.)

*Payment — in embezzled currency — bona fides—recovery by owner—banks—cashier's implied authority—inapplicable instruction.*

NOTE.—*On the title to stolen or fraudulently altered negotiable paper*—see note to Baldwin v. Ely, 13 L. ed. U. S. 266.

1. One who has in good faith received currency in payment of an existing debt cannot be compelled to make repayment because it subsequently appears that such currency had been embezzled by the one who made the payment.
2. To charge the jury that the authority of a bank cashier to draw a draft in his official capacity in his individual favor may be implied from the course of previous business is error which requires the reversal of a judgment which sustains the right of a collecting bank to retain the proceeds in payment of his individual debt, where such draft was in fact not drawn to his individual order, but by him as cashier to his order as cashier, and indorsed for deposit to his credit as cashier.

[No. 105.]

*Argued December 3, 4, 1902. Decided February 23, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of a Circuit Court in an action by a receiver of a national bank for a lesser sum than claimed in the complaint. *Reversed*, and remanded to the Circuit Court for a new trial.

See same case below, 46 C. C. A. 683, 108 Fed. 987.

Statement by Mr. Justice **White**:

On the 23d day of May, 1893, the Elmira National Bank of Elmira, New York, failed, and a receiver was shortly thereafter appointed. At the date of the failure, on the face of the ledger of the Chase National Bank of New York city, there was a balance to the credit of the Elmira bank which was paid with interest at 6 per cent, as previously agreed on. The receiver at the time of this payment, asserted that he was entitled to a larger sum. This being disputed by the Chase bank, the present suit was brought. In substance the cause of action was based upon the averment that the Chase bank had wrongfully charged the account of the Elmira bank with a check for $15,012.50. The answer, whilst admitting the charging of the check, asserted its validity. In addition, it was averred that, even although the check had not been legally charged, the Elmira bank was not entitled to recover, because at the time the check was debited to its account, and as a result of such charge, two credit items, one of $8,000 and the other of $7,000, had been put to the account of the Elmira bank, to which it otherwise would not have been entitled, and *hence the check had been counterbal- [559] anced by the credits in question. There was verdict and judgment in favor of the Chase bank, and the case was taken by the Elmira bank to the circuit court of appeals. That court decided that the trial court had correctly instructed the jury that the check for $15,012.50 was void, and therefore had been illegally debited to the Elmira bank. The court, moreover, held that the court below was right in instructing that the two credit items, referred to in the answer, could be retained by the Chase bank if the sum thereof belonged to that bank, which

had given credit to Elmira for the amount solely as a counter entry to the charge of the check for $15,012.50. The judgment was, however, reversed, and a new trial ordered, because it was concluded there was no proof from which the jury could have inferred that the Chase bank had a right to retain the $7,000 item. 43 C. C. A. 496. 104 Fed. 214. On the new trial the case made was as follows:

J. J. Bush, who was the cashier of the Elmira bank, borrowed for his individual account from the Chase bank a sum of money. and his debt, evidenced by his demand note, secured by stock of the Elmira bank as collateral, amounted, on the 4th of May, 1893, in principal and interest, to a sum slightly exceeding $15,000. On that day Porter, the vice president of the Chase bank, through the long-distance telephone, called Bush at Elmira, and requested that he either pay his debt or furnish additional security. Bush replied that he would come to New York city on the next morning and settle the matter. On the morning of the 5th of May he appeared at the office of the Chase bank and offered to Porter, the vice president, $8,000 in cash and a draft for $7,000, signed by Bush as cashier of the Elmira bank, drawn on the Quaker City National Bank of Philadelphia. The vice president stated to Bush that the draft on Philadelphia was not equivalent to cash, because of the disturbed financial condition prevailing in Philadelphia, and hence declined to receive the draft in payment of the note. It was thereupon agreed that Bush would give his individual check on the Elmira bank for the principal and interest of his debt; that this check should be by him certified and [560] made payable at the *Chase bank; that the cash offered should be received, and that the check and cash should be at once put, respectively, to the debit and credit of the account of the Elmira bank. It was also understood that the draft on Philadelphia should be taken, and when collected its proceeds should be credited to the Elmira account. Thereupon a check was drawn by Bush individually on the Elmira bank. Across the face of this check the following was written:

Certified and accepted May 5, 1893. Payable at Chase National Bank, New York. Elmira National Bank.
By J. J. Bush, Cashier.

There was conflict in the testimony as to whether the $7,000 draft on Philadelphia, signed by Bush as cashier, was, when first offered by him, payable to his individual order or to his order as cashier. The officer of the Chase bank testified that when the draft was first offered it was payable to Bush's individual order, and that it was subsequently changed so as to make it payable to the order of Bush as cashier, to carry out the settlement agreed upon. There was no conflict, however, in the proof, showing that the draft on Philadelphia, as actually handed to the Chase bank, was drawn by Bush as cashier of the Elmira bank to his own order as such cashier, and was indorsed by him as cashier for deposit in the Chase bank. The $8,000 in cash, having been received from Bush, was at once credited to the account of the Elmira bank, and also at once the account of that bank was debited with Bush's individual and certified check for the $15,012.50. As the account of the Elmira bank had to its credit a sum more than sufficient to pay the check, it resulted, upon the assumption of the legality and good faith of the Chase bank in charging the check, that it at once received the full amount of the debt due it by Bush. The draft on Philadelphia was forwarded for collection and was thereafter paid, and the proceeds put to the credit of the account of the Elmira bank. It was shown that on the 5th of May, when Bush drew and certified his individual check on the Elmira bank for $15,012.50, his deposit account with that bank *was overdrawn. It was shown [561] that at various times, covering a considerable period, Bush had drawn, as cashier of the Elmira bank, a number of checks for a small amount, each to his individual order, and had used such checks to pay his personal debts, and there was also proof tending to show that the officers and directors of the Elmira bank knew, or had reason to know, that such checks had been drawn by the cashier. Other checks were also offered, from which it was contended the inference of implied authority could be legitimately drawn. It was shown that the Elmira bank had no knowledge of the drawing of the check of $15,012.50, and the fact that such check had been charged by the Chase bank to its account was only learned after the failure of the Elmira bank, when the Chase bank rendered its account to the receiver. It was also shown that Bush, the cashier, had, on the evening of the 4th, or the morning of the 5th of May taken the $8,000 of cash which he paid to the Chase bank from the funds of the Elmira bank.

The court instructed the jury that the check for $15,012.50 was void as to the Elmira bank, "because it was the certification of the cashier's individual check, given and received for his individual benefit, with no authority either to certify or to make it payable elsewhere than at the office of the Elmira National Bank. . . . There is no evidence tending to show that Bush had any real or apparent authority for this certification or to make the check payable at the office of the defendant. . . . The certification by a cashier of his own individual check is void, irrespective of the question whether he had funds in the bank to meet it, for he could not act in regard to the same check in two capacities, both as drawer and as indorser, to bind the bank for its payment."

To this instruction of the court no exception was reserved by the defendant. Having thus eliminated the check of $15,012.50 from the account, the court said:

"The importance of this case turns upon another set of facts, to which I will now call your attention. You will see that

Bush, as cashier, certified his own individual check for $15,012.50, and that he left the currency, $8,000, and the Quaker City draft for $7,000. Consequently, whatever [562] is to be found about the *liability of the defendant to repay $15,000, there is no question that it is liable to repay $12.50 and interest from May 5, 1893, and your verdict will be for the plaintiff for that sum at least."

To this charge also no exception was reserved by the defendant. The court then proceeded:

"The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8,000 in currency and the $7,000 draft. You will see that, with the exception of this $12.50, I put the case as though when Bush came in with his bag containing $8,000 in currency and $7,000 in a draft, those two, the currency and the draft, had been received by Porter and credited upon the note, and this form, this illegal, improper form of taking Bush's individual check and having it certified by himself as cashier, had not been gone into. The questions in the case beyond the $12.50 are in regard to the right of the Chase National Bank to retain the $8,000 in currency and the $7,000 draft. Now, this money, this currency, was without question taken by Bush from the vaults of the Elmira bank without authority, and was its property, but inasmuch as it was currency or money, bank bills, if it was received by the defendant in good faith, in due course of business and for the payment of a valid debt, the defendant is not subjected to the risk of repayment to the person from whom it was illegally obtained."

Coming to consider the draft for $7,000, the court first called the attention of the jury to the fact that there was some dispute in the testimony as to whether this draft, when originally offered by Bush to the Chase bank in part payment of his debt, was drawn to his individual order or to his order as cashier, but expressed an opinion that it was satisfactorily established by the testimony adduced by the Chase bank that the draft, when first offered to that bank, was drawn to Bush's individual order, and that the adding of the word "cashier" after the name of Bush, so as to make it payable to him as cashier, was subsequently done, and that such also was the case as to the indorsement on the draft making it payable for deposit in the Chase National Bank to the credit of Bush, cashier, that is, of the Elmira bank. The court, however, in- [563] structed the jury that in *any event the addition of the word cashier upon the face of the draft and the indorsement put upon it was of no importance except as a mere element of proof on the subject of the good faith of the Chase bank in having received the money and draft from Bush. Thus treating the fact that the draft was signed by Bush as cashier, and was payable to his order as cashier for deposit in the Chase bank to the credit of the Elmira bank, as irrelevant, except on the question of good faith, the court came to consider whether the Chase bank was entitled to retain the proceeds of the draft. The jury were instructed that "in the absence of any authority in the cashier to draw cashier's drafts to his own order in payment of his individual debts, the person who receives such a draft in payment of a cashier's individual debt takes the risk of being obliged to pay the draft to the bank. . . . The general authority of the cashier to draw drafts or checks on the bank in the conduct of its business does not, by itself, permit him to draw such drafts or checks in payment of his personal debts, or to raise money for the transaction of his personal business. When, therefore, he draws a draft or a check on the bank payable to his own order, and for his own individual debt, the party acting thereon takes the risk that he may act without authority to do so."

The jury, however, were instructed that either express or implied authority might have been conferred to draw such drafts, but that, as there was no proof tending to show express authority, it could only be found by implication. The source from which such implication might be derived from the proof before it was stated to the jury is as follows:

"The authority of a cashier may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of a corporation as represented by its board of directors. When during a series of years and in numerous business transactions he has been permitted without objection, and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between his bank and those who in good faith deal with it upon the basis *of his authority to [564] represent the corporation, that he has acted in conformity with instructions received from those who have the right to control its operation. His authority is to be implied from the acquiescence of the directors in permitting an officer, during a series of years, to pursue a particular course of conduct, and this acquiescence is derived from their actual knowledge, or from what should have been their knowledge of the conduct, of the course of business of the officers."

Commenting at length upon the testimony showing the drawing of checks by Bush as cashier to his individual order, and pointing out the fact that the proof on the subject was different and stronger than had been the proof in the case when previously tried, the question of fact as to the existence of the course of business authorizing the inference of authority in Bush was submitted to the jury. Exceptions were reserved by the receiver to the foregoing rulings, as well as to the refusal of the court to give instructions which were asked, embodying asserted principles of law which were directly antagonistic to those charged by the court to the jury. There was verdict and judgment against the Chase bank for $12.50 with interest, and the case was

taken again to the circuit court of appeals. That court, considering that all the legal controversies in the case had been settled by its previous opinion, and that the additional evidence on the subject of course of business was sufficient to support the verdict as to the proceeds of the draft for $7,000, affirmed the judgment, for the reasons just mentioned, which were stated in a *per curiam* opinion.

*Mr.* **Edward B. Whitney** argued the cause and filed a brief for plaintiff in error.

*Mr.* **Thomas Thacher** argued the cause, and, with *Mr. Alfred B. Thacher*, filed a brief for defendant in error.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

1st. The illegality of the check for $15,012.50 and the wrong resulting from charging it to the account of the Elmira bank is not open to controversy. The ruling to [565] that effect on the first *trial seems to have been acquiesced in by the Chase bank, since it prosecuted no writ of error, and this is also true of the case now before us. Besides, no exception was saved by the Chase bank at the trial now under review to the instruction of the court concerning the illegality of the check and its insufficiency as a charge against the funds of the Elmira bank on deposit with the Chase bank. That question may be, therefore, put out of view.

2d. The errors assigned by the receiver of the Elmira bank concerning the right of the Chase bank to retain the $8,000 paid it in cash are also, in substance, not open to inquiry because of the verdict of the jury. Whether the $8,000 in currency was actually received by the Chase bank from Bush in good faith in part payment of his note was left by the court to the jury under adequate instructions, and these issues of fact are therefore foreclosed by the verdict in favor of the Chase bank. It follows that the $8,000 when deposited was the money of the Chase bank, received by it in part payment of a debt. This leaves open only the question whether one, who has in good faith received currency in payment of an existing debt, can be compelled to repay such currency because it subsequently develops that the currency paid had been embezzled by the one who made the payment. That under such conditions repayment cannot be exacted is elementary, and is not disputed. It is equally clear, we think, that the court correctly charged the jury that the burden of showing fraud on the part of the Chase bank was on the receiver.

3d. Conceding, without so deciding, the correctness of the ruling of the court below as to the right to imply authority on the part of the cashier to draw a draft in his official capacity in his individual favor from the course of previous business, we fail to perceive its relevancy to the case before us. The draft for $7,000, which was collected by the Chase bank, was not drawn by the cashier to his individual order, but was drawn by him as cashier to his order as cashier, and was indorsed for deposit to his credit as cashier. It was, therefore, but an order transferring the funds of the Elmira bank, which were on deposit in the Philadelphia bank, to the deposit account of the Elmira *bank with the Chase bank. True it is that [566] Bush, from one view of the testimony, first tendered a draft signed by himself as cashier to his individual order; but such draft was not taken by the Chase bank. It may be, if the principles of authority implied from a course of business as announced by the lower court be sound, and if the facts brought this case within such a rule, if the Chase bank had taken the cashier's draft to his individual order, it could have retained the money. We are not, however, called upon to pass upon the rights of the parties upon the basis of what might have been done, but alone upon what was done. We may not indulge in conjecture, but must dispose of the case as depending upon the real, not the imaginary, transaction. Measuring the rights of the parties by this rule, we see no escape from the conclusion that the money collected by the Chase bank for account of the Elmira bank was obviously the property of the latter. The draft on Philadelphia was refused because of the delay which it was feared would attend its collection. The certified check was taken. It was for the entire debt, principal and interest. It was at once charged. The sum to the credit of the account of the Elmira bank when the check was charged was more than sufficient to pay it. Upon the theory of the good faith of the transaction, on the part of the Chase bank, its debt was paid, and it could have no possible interest in the proceeds of the collection of the draft. Of course, on the theory that the Chase bank was suspicious of the legality of the certified check and of its right to debit the Elmira bank with it, the purpose to retain a right in the proceeds of the draft would be in reason conceivable. But to indulge in this hypothesis would be to assume the existence of bad faith, and hence to defeat the right to the proceeds of the draft and of the money as well.

It follows that there was error committed in the instructions as to the right of the Chase bank to retain the $7,000 collected by it from the proceeds of the draft in favor of the Elmira bank, *and the judgment of the Circuit Court of Appeals is therefore reversed*, and the case remanded to the Circuit Court, with directions to set aside the verdict and grant a new trial.

[567] *COMMERCIAL PUBLISHING COMPANY, *Plff. in Err.*,
*v.*
SAMUEL C. BECKWITH.

(See S. C. Reporter's ed. 567-577.)

*Error to state court—Federal question—construction of contract—judgment—effect in other jurisdiction.*

1. Allegations in a complaint, which set up a right to recover as the result of a judicial sale under the decrees of courts of the United States and of a state, raise Federal questions which confer jurisdiction on the Supreme Court of the United States to review a judgment of a state court denying a recovery.
2. The question whether an advertising agent was entitled, on a proper construction of his contract with a newspaper corporation, to retain a specified sum each month out of the moneys received by him, is not Federal in its nature; and a decision of a state court thereon is therefore not subject to review in the Supreme Court of the United States on writ of error to that court.
3. Due effect cannot be said to have been denied the decrees of courts of another jurisdiction by the construction placed upon them by a state court, where the construction contended for by those claiming that such decrees were not given the proper effect cannot be given without indulging in conjecture and giving to those making such contention the benefit of the doubts which arise as to the precise meaning of such decrees.

[No. 132.]

*Argued December 19, 1902. Decided February 23, 1903.*

IN ERROR to the Supreme Court of the State of New York to review a judgment entered in pursuance of a judgment of the Court of Appeals of that State which reversed a judgment of the Supreme Court in favor of plaintiff in a suit to recover property alleged to have passed under a judicial sale of the property of a corporation in the hands of its receiver, and ordered the complaint to be dismissed. *Affirmed.*

See same case below, 167 N. Y. 329, 60 N. E. 642.

Statement by Mr. Justice **White:**

A Tennessee corporation, styled the Commercial Publishing Company, brought this action in a court of the state of New York to recover from Samuel C. Beckwith a sum of money which, it was averred, belonged to the publishing company. It was alleged in the complaint that the right was derived from one Crawford, who, it was averred, became the owner of certain newspaper advertising accounts, on which payments had been made to Beckwith, the aggregate thereof constituting the amount sued for. The manner in which Crawford was asserted to have acquired the ownership of the accounts will appear in the following statement summarized from the pleadings:

*On September 30, 1893, an action was be- [568] gun in the chancery court of Shelby county, Tennessee, to foreclose a deed of trust which had been made by the Memphis Appeal Company, publishers of a newspaper known as the Memphis Appeal-Avalanche. Samuel C. Beckwith was made a party defendant to the cause. Cotemporaneously with the filing of the bill, a receiver of the assets of the newspaper company was appointed, and he continued the publication of the paper. Although the complaint in the action at bar did not set out the nature of the controversy in the Tennessee suit between the trustees, who were plaintiffs in the action, and Beckwith, it was alleged that a short time after the bill was filed Beckwith procured the removal to a circuit court of the United States of a separate controversy existing between himself and the trustees, in which court, it was averred, such controversy thereafter continued. Subsequently, it was alleged, other actions were filed in the Tennessee court against the Memphis Appeal Company, which actions were ultimately consolidated with the trustee cause. It was charged that in the month of April, 1894, like decrees were simultaneously entered in the consolidated actions in the state court and in the one which had been removed to the United States court, and that, under such decrees, a sale was had on June 16, 1894, of the property vested in the receiver, including the accounts due said receiver, representing moneys earned by the receiver in the operation of the newspaper, of which the accounts upon which Beckwith had collected the money sued for formed a part. At this sale, it was alleged, Crawford became the purchaser of all the property embraced in the order of sale, and he thereafter assigned his purchase to the plaintiff.

In an amended answer Beckwith admitted having collected and retained the moneys sued for, and specially denied the other allegations of the complaint. He also set up as a defense that he had collected the moneys in question rightfully, under the authority of an agreement with the Memphis Appeal Company made prior to the execution of the deed of trust heretofore referred to. He further alleged that the receiver never acquired title to the moneys, and had never offered for sale or *sold any right or title [569] thereto. Subsequently, by supplemental answer, it was alleged that after the execution of the decrees of sale, and on appeal from a final decree which had been entered in the consolidated cause, the supreme court of the state of Tennessee adjudicated that

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*As to full faith and credit to be given to state records and judicial proceedings*—see Lindley v. O'Reilly (N. J.) 1 L. R. A. 79, and note; Cummington v. Belchertown (Mass.) 4 L. R. A. 131, and note; and Rand v. Hanson (Mass.) 12 L. R. A. 574, and note. And see notes to Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; Mills v. Duryee, 3 L. ed. U. S. 411.

the trust deed and all proceedings based thereon were null and void, and that, by reason thereof, the sale in question was a nullity.

The action at bar was tried by a jury, upon an agreed statement of facts. By direction of the court there was a verdict in favor of the plaintiff for the full amount claimed. This judgment was affirmed by the appellate division of the supreme court of the state of New York. An appeal was then taken to the court of appeals of the state, which reversed the judgment, and ordered the complaint to be dismissed with costs. 167 N. Y. 329, 60 N. E. 642. The judgment of the court of appeals having been made that of the trial court, a writ of error from this court was prosecuted.

*Mr.* **A. Walker Otis** argued the cause, and, with *Mr. Thomas B. Turley*, filed a brief for plaintiff in error:

While plaintiff in error claimed title to these accounts under decrees made in the courts of a sister state having jurisdiction of the parties and subject-matter, the New York court refused to give effect to these decrees. This raises a Federal question and gives this court jurisdiction.

*Dupasseur* v. *Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Crapo* v. *Kelly*, 16 Wall. 610, 21 L. ed. 430; *Huntington* v. *Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Dowell* v. *Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611.

Whether due effect has been given by a state court to a judgment or decree of a court of the United States is a Federal question within the jurisdiction of this court on a writ of error to the supreme court of the state.

*Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Central Nat. Bank* v. *Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

If it appear from the record, by clear and necessary intendment, that the Federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient.

*Green Bay & M. Canal Co.* v. *Patten Paper Co.* 172 U. S. 58, 43 L. ed. 364, 19 Sup. Ct. Rep. 97.

It is the settled practice in the chancery court of Tennessee to sell, in advance of the final hearing, property in the hands of a receiver, where the same is depreciating in value.

*Gleaves* v. *Ferguson*, 2 Shannon Cas. 560.

It is the settled law of Tennessee that at a judicial sale made under a decree of the chancery court an innocent purchaser obtains a good title to the property sold, even though the decree of sale is afterwards reversed.

*Anderson* v. *Ammonett*, 9 Lea, 1; *Greenlaw* v. *Greenlaw*, 16 Lea, 435; *Blanz* v. *Bain*, 95 Tenn. 87, 31 S. W. 159.

*Mr.* **Anthony B. Porter** argued the cause, and, with *Mr. Thomas Kilvert*, filed a brief for defendant in error:

No Federal question arises upon the construction by the state court of the agreement of January 3, 1891, as to the rights of the defendant thereunder; and the same is not reviewable under the writ herein.

*Kennard* v. *Nebraska*, 186 U. S. 304, 46 L. ed. 1175, 22 Sup. Ct. Rep. 879.

The defendant's right to collect and devote the money in question to the purposes of the agreement was not affected by the decree of sale in the Tennessee courts, or the sale made thereunder.

*Ray* v. *Norseworthy*, 23 Wall. 128, 23 L. ed. 116.

The rule in *Murdock* v. *Memphis*, 20 Wall. 634, 22 L. ed. 443, governs the case at bar.

Where the state court takes such a view of the case, within the scope of the pleadings, that a decision of a Federal question presented therein would not be necessary, its judgment, in general, will not be reviewed by this court.

*Chapman* v. *Goodnow*, 123 U. S. 540; *Chapman* v. *Crane*, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Avery* v. *Popper*, 179 U. S. 305, 45 L. ed. 203, 21 Sup. Ct. Rep. 94.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

As in the complaint the plaintiff in error unquestionably set up a right to recover as the result of a judicial sale made under decrees, both of courts of the United States and of a state, Federal questions exist in the record, and the motion which has been made to dismiss is therefore denied.

Coming to the merits, the questions for decision are whether due effect was given by the court of appeals of New York to the decrees in question. *Jacobs* v. *Marks*, 182 U. S. 583, 587, 45 L. ed. 1241, 1244, 21 Sup. Ct. Rep. 865.

Two questions were considered by the state court in its opinion, *viz.*: (1) the meaning and effect of the contract entered into between Beckwith and the Memphis Appeal Company; and (2) whether the rights of Beckwith under the contract had been conclusively adjudicated by the prior litigation in Tennessee.

*The agreement referred to was evidenced [570] by two letters and indorsements thereon, and a copy thereof is contained in the margin.†

†Memphis, Tenn., Jan. 3, 1891.

S. C. Beckwith,
48 Tribune Building, New York City.

Dear Sir:—

In consideration of special efforts which you pledge yourself to make in our behalf to the best of your efforts and ability, and furthermore, in consideration of allowing you nothing in the shape of salary, office rents, or traveling expenses, we hereby authorize and appoint you our sole and exclusive agent for a term of five years from September 1st, 1891, and sooner if possible, on a plain commission basis of twenty-five per cent on all business for all that portion of the United States, north of a line running east and west with the southerly boundary of

[571] *In disposing of the first question the court held that "the clause of the agreement giving to the defendant [Beckwith] the right to collect all of the bills was evidently intended to give him the control of the proceeds resulting from the advertisements, so that he could apply the same upon his loan to the amount of 1,000 per month," and that the clause referred to "was in the nature of an equitable pledge of the receipts for that purpose." It was further held that the receiver of the newspaper took possession of the assets and business thereof subject to the liens and obligations of the corporation (in other words, took only the interest which the corporation had in the property which it assumed to possess and own), and as the receiver "accepted and published the advertisements procured by the defendant [Beckwith], he [the receiver] must be deemed to have done so under the contract which the defendant [Beckwith] had with the corporation, and under that contract the defendant had the right to collect the moneys accruing for such advertisements, and to retain out of such collections a sum not to exceed $1,000 per month, to be applied upon the loan." It is manifest that the question of the proper construction of this contract being non-Federal in its nature, is not subject to review, and we consequently assume that the construction was correct.

The second question was treated as involving only the issue of *res judicata*. Considering the final decree entered in the consolidated action, and the decree as subsequently entered by the trial court upon the mandate of the supreme court of Tennessee, it was decided that the Tennessee court "did not adjudicate nor attempt to determine [572]. . . [the] right [of Beckwith] to *the moneys received by him for advertisements inserted in the paper by the receiver after his appointment." The court then said,—evidently assuming that the last decree embodied the direction for sales: "Under the judgment the purchaser became entitled to all the moneys due and owing to the receiver by reason of the publication of the paper, but moneys that did not belong to the receiver, or to which he was not entitled, did not pass to the purchaser, and we find nothing in the prior decree that is an adjudication upon this question." In effect, therefore, the court of appeals of New York construed the decrees of sale and held that the direction to sell merely authorized a sale of the right, title, and interest of the receiver in the accounts in question, and left for future determination, in any controversy which might arise in respect thereto, the question of the extent of the interest, if any, of the receiver in such accounts.

The sole contentions which are open for our consideration are, Did this judgment fail to give full faith and credit to the judicial proceedings in the Tennessee courts as required by § 1 of article 4 of the Constitution? and, Did it deny due efficacy to a title or right claimed under an authority exercised under the United States? It is strenuously argued that, properly interpreted, the decrees directed a sale of the accounts as they stood on the books of the receiver, and that the effect of the decrees and the sale made thereunder was that any right to or lien possessed by Beckwith in the moneys due upon the accounts was transferred to the proceeds of sale of all the property of the Memphis Appeal.

In considering this question it is to be observed that the records of the proceedings in the actions in which the decrees relied upon were rendered were not offered at the trial below, but that the case was disposed of solely upon an agreed statement of facts, to which certain of the decrees made in those actions were annexed as exhibits. To this agreed statement, therefore, and to it alone, we are to look, for the purpose of de-

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Ohio, Missouri, embracing Cincinnati and St. Louis, including these two points.

All applications for rates, space, etc., from aforesaid territory to be referred to you, and in case we should make a deal direct with any parties, agent, or advertisers, from your territory (which, however, is not contemplated), we will allow you the commission named upon same, and refer it to you for collection.

You are to collect all bills and render monthly statements, and to be held responsible for all accounts, except where a concern should fail through no fault of yours, and, in event of that, you are simply to lose your commission, but not to be liable beyond that.

You are not to represent any other morning paper in the state of Tennessee or Arkansas without our consent in writing, but to do all you can in every way, and at all times, within the above territory, to advance the interests of the Appeal-Avalanche.

Memphis Appeal-Avalanche Company,
T. B. Hatchett, Bus. Manager.
Accepted. S. C. Beckwith.

Memphis, Tenn., Jan. 3d, 1891.

The Memphis Appeal Company,
Memphis, Tenn.

Gentlemen:—

In consideration of a contract this day entered into by and between us, I hereby agree to advance to you thirty thousand dollars ($30,000), as follows:

$5,000 in cash on or before January 7th, $5,000 on or before the 12th of January, 1891, then $5,000 on the 26th of January, 1891, to take up your note now in the Nassau Bank of N. Y. for that amount. And $15,000 from time to time as you may advise me and so desire.

The amount named of $30,000 to be loaned you on the Appeal Company's notes, indorsed by W. A. Collier, and I am to be further secured by a deposit as collateral of an equal amount of the capital stock of your company, and which stock shall not be increased without my consent during the term of this loan; neither shall any encumbrance be placed upon same.

Said loan and interest at 6 per cent to be paid me in monthly instalments by moneys coming into my hands from the advertising in your paper, in amounts, say $1,000 per month, until paid. S. C. Beckwith.

O. K.: Memphis Appeal Company.
T. B. Hatchett, Business Manager.

(Indorsed): As the debt is reduced I will surrender stock collateral *pro rata*.
S. C. Beckwith.

termining the question presented for decision. A summary of the statement will be found in the margin.†

*It is to be borne in mind that upon the [573] plaintiff in error rested the burden of establishing that the decrees of sale were not

†On January 3, 1891, the Memphis Appeal Company, then engaged in publishing a newspaper at Memphis, entered into the contract with Beckwith which has heretofore been set out. Beckwith made the advances stipulated and $20,000 thereof was owing to him at the time the action at bar was instituted. While the Memphis Appeal Company was a going concern Beckwith, under the contract aforesaid, procured advertising orders, the indebtedness upon which collected by him was the basis of the recovery sought in this action. After the making of the contract and prior to September 30, 1893, the Memphis Appeal Company executed a deed of trust upon its property to secure certain creditors. On the date named Andrew D. Gwynne and others, the trustees under the deed of trust, brought suit to enforce that instrument. Beckwith was made a party defendant, and a receiver was appointed, who took possession of the property of the Memphis Appeal Company and continued the publication of its newspaper from September 30, 1893, to June 16, 1894. On October 5, 1893, Beckwith procured the removal of the controversy between himself and the trustees into a court of the United States, and that controversy there continued, though it does not appear how it was terminated, if it ever was.

Beckwith served written notice on the receiver that he claimed that his rights under the contract were not affected by the appointment of the receiver, and the receiver replied disputing the right of Beckwith to collect moneys for advertising matter which might be published by the receiver.

After the institution of the trustee suit, sundry actions were filed in the same court by general creditors and others against the Memphis Appeal Company, which were afterwards consolidated with the trustee suit. In April, 1894, in the consolidated action, and in the action pending in the United States court, a decree of sale was entered, "on the motion of the several complainants," directing a sale of the property in the hands of the receiver, because of the asserted fact that the property was deteriorating and was not self-supporting. The property which was ordered to be sold, after due advertisement, was thus described in the order:

"The Memphis Appeal-Avalanche newspaper, with all the rights, privileges, benefits, franchises, etc., belonging to or in any way pertaining to same, together with its good will, subscription list, advertising patronage, income, and profits, and all the machinery, appliances, furniture, material, property, assets, etc., of every kind and description, and the general outfit of the newspaper now in the hands of the receiver in these causes.

"He will sell all and every kind and description of property in his hands, saving and except the uncollected book accounts of the Memphis Appeal Company, accruing prior to his appointment as receiver, and which were placed in his hands for collection. Such of these accounts as remain uncollected will not be sold.

"All accounts which may be or are to become due to the receiver by reason of the operation of the newspaper in his hands will pass to and be acquired by the purchaser at this sale, who will become the full owner of the same. And such purchaser will take the property decreed to be sold herein, subject to all of the contract obligations incurred by the receiver, and will assume the payment of same, including any amount due the receiver on the day of sale for overchecks made by him for personal advances on account of the property in his hands. Excepting only the certificates issued by the receiver for the payment of which the purchaser shall in no way be liable."

After directing that the receiver report his proceedings under the decree to the court, it was further recited as follows:

"The purchaser at the sale herein ordered will acquire the absolute title to all the property decreed to be sold, free from all claims, liens, and encumbrances whatever, save as provided above as to the contract obligations of the receiver; and the proceeds of sale will stand in these causes in lieu and place of the property itself."

Subsequently the decree of sale was modified by directing a sale to be made by the clerks of the respective courts, as commissioners. Respecting the sale and the confirmation thereof, it is recited in the agreed statement as follows (italics not in original):

"13. Thereafter and on the 16th day of June, 1894, said commissioners, acting under the decrees aforesaid, sold at public auction in the city of Memphis, the property aforesaid, *and also all the right, title, and interest of said receiver to the various sums set forth in Exhibit B annexed to the complaint herein, and in and to the claims of said receiver against the parties therein mentioned for said advertisements published by said receiver for their account in said Memphis Appeal-Avalanche between September* 30, 1893, *and June* 16, 1894, *as aforesaid,* when and where same was struck off to one West J. Crawford, he paying therefor to said J. B. Clough and E. B. McHenry as such commissioners the sum of $65,200, and he being the highest, best, and last bidder therefor. That whatever title the receiver had to said sums set forth in Exhibit B was derived from said trust deed and his appointment as such receiver. On the 3d day of July, 1894, decrees were simultaneously entered in said actions thus pending in said chancery court of Shelby county, and said circuit court of the United States, confirming the sale."

On March 26, 1896, a final decree was entered in the consolidated action determining the rights of a large number of persons, one such being Beckwith, whose claim of a lien on the fund under an execution issued in an action brought by a named party other than Beckwith, in which action judgment had been obtained against the Memphis Appeal Company, was overruled, and he was allowed an appeal. A portion of the defendants thereafter prosecuted an appeal to the supreme court of Tennessee, and after the decision of that appeal a decree was entered in the trial court in conformity to the directions of the appellate court, on July 8, 1896. The appeal of Beckwith was disposed of by a general affirmance of the decree below, except as particularly specified in the judgment of the appellate court.

Crawford, the purchaser at the sale, "duly assigned and transferred to the plaintiff all his claims, demands, and right of action against the defendant, which he acquired by virtue of the sale of June 16, 1894, above referred to." As heretofore stated, the collections made by Beckwith sought to be recovered in the action at bar were made on advertising orders procured by Beckwith under the contract and published by the receiver.

given the due effect to which they were enti-
[574] tled, and if it has *failed to sustain such burden this court cannot say that error was committed by the judgment below rendered.

The decrees of sale were made in the con-
[575] solidated action in *the state court and in the action pending in the United States court, and preceded, by nearly two years, the making of the final decree, which, however, was entered only in the consolidated cause, and not in the action pending in the United States court. It is disclosed by the record that in two of the actions which were consolidated—that filed by the trustee and one on behalf of certain employees of the Memphis Appeal Company—liens were asserted upon all the assets which came into the possession of the receiver, *viz.*, those embraced in the deed of trust which was sought to be foreclosed. The deed of trust was made long after the execution of the contract between Beckwith and the Memphis Appeal Company, and vested rights, if any, of Beckwith were not affected by the execution of the deed or by the appointment of a receiver. The agreed statement is silent as to what was the controversy between the trustees and Beckwith, but Beckwith, in the correspondence with the receiver, claimed that his contract right was unaffected by the receivership. Now, in the recital in the decrees of sale of the property to be sold there is first an enumeration of property generally, in language similar to that contained in the deed of trust; there is then an exemption from sale of uncollected book accounts accruing prior to the appointment of the receiver; and next is the following recital: "All accounts which may be or are to become due to the receiver by reason of the operation of the newspaper in his hands will pass to and be acquired by the purchaser at this sale, who will become the full owner of the same." It may be fairly inferred that Beckwith then
[576] was *and prior thereto had been making direct collections from advertisers under the assumed authority of the contract, and he was undoubtedly asserting the right to retain the moneys which he might collect upon advertisements which had been procured by him. The sum due upon such accounts for advertisements published by the receiver was small as compared with the main assets in the custody of the receiver, yet, in that portion of the decree which made the liens and encumbrances operative against the proceeds of sale, the entire proceeds of sale, and not the proceeds of a particular portion of the property sold, were made subject to all liens and encumbrances sought to be enforced in the litigation.

As before stated, the record shows that, in two of the actions which had been consolidated, the complainants were asserting liens against *all* the property which had come into the possession of the receiver, and the decree of sale recites that the sale was ordered upon the motion of the complainants. Beckwith nowhere appears to have been an active participant in obtaining such decree or assenting thereto. It does not even appear that, at the time of the entry of the decrees of sale, he was a party to any of the actions which had been consolidated, for it cannot in reason be so inferred from the mere circumstance that nearly two years after, on the entry of the final decree, he is referred to therein as being a cross complainant in one of the actions seeking to enforce a lien, the nature of which was not disclosed.

The stipulations contained in the agreed statement, particularly the recitals in subdivision numbered 13, lend color to the construction that, as respects the accounts in question, all that was intended to be sold was the right, title, and interest of the receiver therein, the nature and extent of which title was left unadjudicated. The expression, "the property aforesaid," used in the paragraph, it may well be argued, was intended to refer to something distinct from the accounts in question, and the language may properly be interpreted as relating to the property covered by the trust deed, which came into the possession of the receiver. A reasonable construction of the paragraph can be adopted, supporting the claim that, as regards the accounts, *all that [577] was sold was the right, title, and interest of the receiver therein. In the light, therefore, of all the circumstances which have been detailed, we cannot sustain the contention of the plaintiff in error that the guaranty clause of the decrees, transferring liens upon the property to the proceeds of sale, was intended to apply to the accounts in question without indulging in conjecture and giving to the plaintiff in error the benefit of the doubts which arise as to the precise meaning of the decrees.

The parties having chosen to try the case on a statement of facts, which does not afford us the means of saying with that certainty which is required, that the judgment below denied due faith and credit to the decrees in question, we cannot, in view of the burden of proof, reverse the judgment below; and it is therefore *affirmed.*

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## UNITED STATES, *Appt*
*v.*
## ARTHUR B. BARRINGER.

(See S. C. Reporter's ed. 577-594.)

*Government printing office—right of temporary employees to leave of absence.*

1. Mere temporary employees in the government printing office are not entitled to leave of absence with pay, by virtue of the provisions of the sundry civil appropriation bill of June 11, 1896 (29 Stat. at L. 413, chap. 420. U. S. Comp. Stat. 1901, p. 1556) recapitulating the previous statutes regulating this subject, which have from the beginning been construed by the Public Printer as excluding temporary employees from the provisions for leaves of absence.

NOTE.—*As to what claims constitute valid demands against a state*—see note to Northwestern & P. Hypotheek Bank v. State (Wash.) 42 L. R. A. 33.

2. Temporary employees of the government printing office, who have from the beginning been denied leaves of absence by a rule of the Public Printer ratified or approved by the legislation of Congress on this subject, were not affected by the provisions of the act of Congress of July 19, 1897 (30 Stat. at L. 134, chap. 9), authorizing the Public Printer to pay employees, former employees, and the legal representatives of deceased former employees such sums as may be due for accrued and unpaid leaves of absence for the fiscal years 1887 to 1894, both inclusive, and appropriating a sum of money therefor.

[No. 252.]

*Argued January 5, 1903. Decided February 23, 1903.*

APPEAL from the Court of Claims to review a decree making an award to a temporary employee of the government printing office for alleged accrued but unused leaves of absence. *Reversed* and remanded, with directions to dismiss the petition.

Statement by Mr. Justice **White:**

The findings of the court of claims, upon which it predicated the conclusion that the plaintiff was entitled to judgment against the United States, are as follows:

"I. The claimant, Arthur B. Barringer, was from time to time employed as a com-
578 positor in the government printing *office during the following periods: December 31, 1895, to February 26, 1896, inclusive; July 2, 1897, to July 31, 1897, inclusive; December 10, 1897, to July 16, 1898, inclusive; October 24, 1898, to March 4, 1899, inclusive; October 28, 1899, to April 27, 1900, inclusive, aggregating one (1) year, eight (8) months, and twelve (12) days.

"II. During his term of service as such he was paid at the rate of three dollars and twenty cents ($3.20) *per diem* of eight hours for the time served prior to July 1, 1899, amounting to one (1) year, two (2) months, and twelve (12) days, and at the rate of four dollars ($4) a day for such service rendered after July 1, 1899, amounting to six (6) months.

"III. He was not, during any of the times of his employment, allowed leave of absence or *pro rata* pay for leave of absence. If allowed leave of absence of thirty (30) days a year, he would have been entitled to fifty-one (51) days' leave.

"If, instead of taking such leave, he had been paid *pro rata* for the same, he would have been paid three dollars and twenty cents ($3.20) a day for thirty-six (36) days, and four dollars ($4) a day for fifteen (15) days, amounting to one hundred and seventy-five dollars and twenty cents ($175.20).

"IV. The claimant did not, at any time during his several terms of service, set forth in finding I., apply for a leave of absence or for a money equivalent for the same. No leave of absence was granted or allowed to the claimant, for the reason that, under the rules adopted by the Public Printer regarding leaves of absence, persons temporarily employed were not granted leave.

"V. All employees of the government printing office in service from the 1st of July, 1886, to the 30th of June, 1895, whether permanent or temporary, have been paid for all accrued but unused leaves of absence. The last of the appropriations for such unused leaves was that of fifty-seven thousand eight hundred and fifty-nine dollars and sixty cents ($57,859.60), made by the act of July 19, 1897 (30 Stat. at L. 134, chap. 9), and was based on an estimate of the Public Printer, who, in transmitting the same to the Senate, informed that body that it included 'many employees whose terms of service in the office were only for periods of less *than one year,' and that 'the amounts [579] of *pro rata* leave which accrued to such persons are herewith included in the respective years in which they were earned.'"

*Assistant Attorney General* **Pradt** argued the cause, and, with *Mr. George M. Anderson*, filed a brief for appellant.

*Mr.* **George A. King** argued the cause, and, with *Mr. William B. King*, filed a brief for appellee.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

Although the court below found that among the rules for the government of the printing office adopted by the Public Printer, in pursuance of power conferred by law, there was a rule forbidding the allowance of leaves of absence to temporary employees, the court in effect treated the rule in question as void, since it assumed that, by the acts of Congress governing the printing office, temporary employees of the office were entitled to leave of absence with pay. The court deemed that the duration of such leave of absence was such proportion of the yearly annual leave allowed to permanent employees as the period of service of the temporary employee in each year bore to a year's employment. From the premise of law thus assumed, the court held that where a temporary employee had not been allowed his leave of absence because of the enforcement by the Public Printer of the rule denying the right to such leave, the temporary employee was entitled to be paid an extra amount equal to the sum of his regular wages for the period which would have been embraced by the leave had it been granted. In effect, therefore, the conclusion of the court was that, because the statutes were held to allow to a temporary employee leave of absence with regular pay, they must be construed as allowing to such person extra pay without leave, and this upon the theory that the employee who had a right to leave with pay, who had not received it, under the circumstances stated, was entitled, so to speak, to a commutation in money at his regular rate of wages for the period of leave of which he had been deprived.

*The conclusion thus reached was stated [580]

by the court to be exceptional and anomalous, but was deemed to be required by what was conceived to be the unambiguous purport of a provision, held to be mandatory, found in the act of June 11, 1896, making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1897. 29 Stat. at L. 413, chap. 420 (U. S. Comp. Stat. 1901, p. 1556). The provision in question was said to be entirely new in the legislation of Congress with respect to leaves of absence to the employees of the government printing office. Whilst the anomalous result of the conclusion, as observed by the court below, is, we think, apparent, it would seem to us that a yet greater anomaly is involved in the premise which was taken for granted,—that is, that the statutes contemplate the enjoyment by mere temporary employees of the provisions of law relating to an annual leave of absence. We think this is so, because, singular as may be the conclusion that since employees enjoy the right to leave, with pay, they are therefore entitled to extra pay without leave, we think it is far more singular to conceive that one who is engaged for a temporary employment, say for a day or a week or a month or so, comes within the purview of the statutes providing for annual leaves of absence.

If, however, the acts of Congress compel the adoption of the premise assumed or the conclusion drawn from it by the court, however anomalous they may be, our duty is to enforce the result. Whether the acts of Congress do either cannot be ascertained by a mere reference to the particular proviso in the appropriation act which constrained the judgment of the court below, but must be determined by an examination of the acts of Congress concerning leaves of absence to employees in the government printing office from the beginning. The review of the statutes for the purpose of determining whether leave with regular pay involves the right to extra pay without leave will also necessarily require us to examine the same statutes upon which the right, if it exists at all, of temporary employees in the printing office to leave of absence, must rest. In proposing to first investigate such question, we are not unmindful of the fact that the government at bar did not at all dispute the assumption indulged in by the lower [581] court, but rested its *claim to reversal on other grounds. In view of the fact, however, that we must correctly administer the statutes, and that the question as to the right of a temporary employee to leave of absence has been fully presented by the appellee, we shall examine and decide it. The problems, then, for solution in the order stated are: First. Do the acts of Congress which provide for leave of absence to the employees of the government printing office embrace mere temporary employees of such office? and, Second. If such employees are so embraced, do the statutes, whilst providing for leave in favor of the temporary employees, with pay during the term of the leave, provide also for extra pay without leave, where the leave has not been enjoyed because of a rule of the printing office forbidding its allowance?

The original grant of authority to allow leaves of absence, with pay, to employees of the printing office was the act of June 30, 1886. 24 Stat. at L. 91, chap. 572. The statute consisted of two sections, in the second of which it was provided that the act should take effect on and after the first day of July, 1886. The first section is as follows:

"That the employees of the government printing office, whether employed by the piece or otherwise, be allowed a leave of absence, with pay, not exceeding fifteen days in any one fiscal year, after the service of one year, and under such regulations and at such time as the Public Printer may designate. Such employees as are engaged on piece-work shall receive the same rate of pay for the said fifteen days' leave as will be paid to day hands: *Provided*, That those regularly employed on the Congressional Record shall receive leave, with pay, at the close of each session, *pro rata*, for the time of such employment."

We think the employees embraced within this statute were permanent employees, and not those who might be called in for temporary or emergency purposes, since the object of the statute was to provide for annual leave during each fiscal year, and the leave was allowed only after the service of one year. Any doubt as to this construction is removed by the proviso which allows a *pro rata* leave to regular employees of the Congressional Record. As the duration of the work which this class of employees performed was necessarily limited by the sessions of *Congress, it is obvious [582] that they were considered as excluded by the general language in the prior portions of the act, and hence an exceptional provision giving them its advantages was inserted. And the proviso itself adds emphasis to the significance arising from its enactment, since it conferred the benefits only on such employees as were *regularly* employed for such work, and therefore excluded those merely called in to meet an emergency in the employment in question.

It is also obvious that the Public Printer, in administering this act, did not interpret it as embracing temporary employees, since the rules of his office excluded employees of that character from the grant of leaves of absence. And the appropriations made by Congress to execute the act of 1886, one of the acts being enacted by the very Congress which passed the act of 1886, serve to enforce the meaning arising on the face of the act itself. Those appropriations were thus defined: "To enable the Public Printer to comply with the provisions of the law granting fifteen days' annual leave to the employees of the government printing office." Act August 4, 1886, making appropriations for the fiscal year ending June 30, 1887, 24 Stat. at L. 255, chap. 902 (U. S. Comp. Stat. 1901, p. 1489); Act of March 3, 1887, 24 Stat. at L. 509, chap. 362 (U. S. Comp. Stat. 1901, p. 2437); and the urgency deficiency appropriation act of March 30,

1888, 25 Stat. at L. 47, chap. 47, making appropriations for the fiscal year ending June 30, 1888. From the subsequent legislation, to which we shall hereafter refer, we think that it may be inferred that those charged with the administration of the act of 1886 construed it as meaning that a year's service was necessary to give the right to receive leave of absence, and that, if, after earning and enjoying leave by a year's service, before the completion of another full year the employee severed his connection with the service, he was not entitled to any proportional leave. On August 1, 1888, an act was approved, which, with its title, reads as follows (25 Stat. at L. 352, chap. 722):

"An Act to Extend the Leave of Absence of Employees in the Government Printing Office to Thirty Days Per Annum.

"That the act entitled 'An Act Granting Leave of Absence to Employees in the Government Printing Office,' approved June thirtieth, eighteen hundred and eighty-six, [583] be so amended as to *extend the annual leave of absence therein described to thirty days in each fiscal year: *Provided*, That it shall be lawful to allow *pro rata* leave to those serving fractional parts of a year."

Clearly this act was but an amendment of the act of 1886, and did not attempt to repeal that act or to extend its benefits to classes of employees not embraced by the prior act. Its object on its face was simply to extend the period of leave of absence from fifteen to thirty days and to confer upon the permanent employees who were entitled to leave, in accordance with the terms of the previous act, an additional right to enjoy the benefits of a *pro rata* leave, if thereafter they severed their connection with the service before they had completed another entire year's service so as to be entitled to that year's leave.

Undoubtedly the statute was thus construed by the Public Printer in its administration, since he continued in force the rule forbidding leaves of absence to temporary employees, and besides construed the statute as giving the right to proportional leave of absence to only a permanent employee who had served sufficient time to earn at least one annual leave. As the act of 1888 considered and dealt with the prior law, as administered by the Public Printer in pursuance of the authority conferred upon him by the act of 1886, and as the act of 1888 conferred only a new right in one particular —that is, as to fractional leaves to permanent employees—it is not probable that, if it was intended to overthrow the construction which the Public Printer had put upon the previous act, by formulating a rule expressly excluding temporary employees from the right to leave, that some express provision on that subject would not have been incorporated into the amendatory act.

What was intended by the act of August. 1888, is, moreover, shown by an act passed by the very same Congress at the same session. Thus, the appropriation act for the fiscal year ending June 30, 1889, became a law on October 2, 1888. That act contained an appropriation "To enable the Public Printer to comply with the provisions of the law granting thirty days' annual leave to the employees of the government printing office." This was immediately followed by an appropriation "To pay *pro rata* leaves of absence to employees who resign or are discharged *(decision of the [584] First Comptroller)." [25 Stat. at L. 548, chap. 1069]. We have not been referred to the decision of the Comptroller to which the act adverts, nor have we been able to find it. But the appropriation made in furtherance of the act 1888 shows that such act was designed for the benefit solely of the regular employees, and the authority to pay *pro rata* leaves of absence which it granted was such *pro rata* leaves of absence to employees who, from the nature of their previous and permanent service, might expect to earn a full annual leave, but were prevented from doing so by resignation or discharge. Appropriations of like character, couched in substantially identical language, were made for the fiscal year ending June 30, 1890 (25 Stat. at L. 980, chap. 411; 26 Stat. at L. 159, chap. 429); for the fiscal year ending June 30, 1891 (26 Stat. at L. 371, chap. 837); and for the fiscal year ending June 30, 1892 (26 Stat. at L. 948, chap. 542 [U. S. Comp. Stat. 1901, p. 2923]). Indeed, the appropriation act for the last quarter of the fiscal year ending June 30, 1890, makes clear what was the legislative conception of the meaning of the right to *pro rata* leave, granted by the amendatory act of 1888, and the character of the employees embraced by it, for that act, after appropriating a sum to pay employees entitled to annual leave of absence, added the sum necessary to pay for the *pro rata* leaves of "such" employees "who resign or are discharged."

The contention, then, that temporary employees were embraced within the provisions of the act of 1888 not only is in conflict with the text of that act, but is opposed to the administrative construction placed upon the act by the Public Printer charged with its execution. It is, besides, directly repugnant to the legislative interpretation of that act manifested by Congress, during a period of nearly five years, in appropriating the money for its execution.

In the appropriation acts for the fiscal years ending June 30, 1893, 1894, and 1895 (27 Stat. at L. 388, chap. 380; 27 Stat. at L. 572, chap. 208; 28 Stat. at L. 41, chap. 37), whilst appropriations were made for the allowance of annual leaves of absence to the employees of the government printing office, in substance in the same words as found in the previous acts, the clause contained in the previous acts providing for the allowance of *pro rata* leaves to such employees was omitted. It followed, therefore, that, although the act of 1888 provided for *pro rata* leave to the regular employ- [585] ees, the appropriation acts for the years 1893, 1894, and 1895 were susceptible, by their silence on that subject, of the inference that they did not provide a sum to pay such *pro rata* leaves. The attention of Congress

was evidently directed to this omission, since, on June 19, 1894, the deficiency appropriation act for the fiscal year of 1894 (28 Stat. at L. 94, chap. 108) contained the following:

"To enable the Public Printer to pay to the employees heretofore or now employed in the government printing office since July first, eighteen hundred and ninety-three, such sums as may be due them for leaves of absence, notwithstanding the fact that thirty days' leave of absence, with pay, had been granted to such persons in said fiscal year on account of service rendered in the preceding fiscal year, and also to pay all employees of the said office any leave of absence which they may have failed to obtain from the lack of necessary appropriations or other cause, sixty-five thousand dollars, or so much thereof as may be necessary.

"Hereafter the Public Printer is authorized to pay *pro rata* leave of absence out of any appropriation for leaves of absence to employees of the government printing office in any fiscal year, notwithstanding the fact that thirty days' leave of absence, with pay, may have been granted to such employees in that fiscal year on account of service rendered in a previous fiscal year." 28 Stat. at L. 94, chap. 108.

This act also created no new class of beneficiaries of leaves of absence. It recognized the right of permanent employees, who had for annual services in a previous fiscal year earned leave, to be granted in a succeeding year in addition their *pro rata* leave when they were prevented from completing a full year of service, by resignation or discharge, as provided in the previous statute. The act, besides, corrected the omission, if omission resulted, from the silence of the regular appropriation on the subject of *pro rata* leaves for the fiscal year ending June 30, 1894, and, looking to the future, provided a rule for the guidance of the Public Printer, making appropriations for leave of absence without particular specification applicable to *pro rata* leaves in cases where they were allowed by law. [586] All *the reasoning previously adverted to on the subject of the prior acts is applicable to this, and constitutes but another confirmation by Congress of the settled construction excluding temporary employees from the operation of the provisions as to leave of absence. It would seem from a document to which we shall have occasion hereafter to more particularly advert, that the construction of the *pro rata* leave of absence clause was somewhat widened in its practical administration after that, from and including the fiscal year 1893, by allowing a *pro rata* leave to a permanent employee who had not served a year, and therefore had not earned the full leave of thirty days because of the termination of his permanent employment, by resignation or discharge, before the completion of the year. The exact origin of this broadening of the construction of the act has not been made manifest, but it is inferable that it arose from expressions used in an opinion of the acting Comptroller of the Treasury, of date July 3, 1894. Dec. First Comp. 1893-1894, p. 260. Whilst the ruling in question was subsequently somewhat modified, such modification had no relation to the particular expressions in the opinion lending themselves to the construction in question. III. Dec. Comp. Treas. 28.

In 1895 a general act relative to the conduct of the government printing office was passed. 28 Stat. at L. 601, chap. 23 (U. S. Comp. Stat. 1901, p. 2543). The 23d section of that act, in effect, re-enacted and recapitulated the existing laws on the subject of leaves of absence to the employees of the government printing office, as follows:

"The employees of the government printing office, whether employed by the piece or otherwise, shall be allowed leaves of absence, with pay, to the extent of not exceeding thirty days in any one fiscal year, under such regulations and at such times as the Public Printer may designate, at the rate of pay received by them during the time in which said leave was earned; but such leaves of absence shall not be allowed to accumulate from year to year. Such employees as are engaged on piece-work shall receive the same rate of pay for the said thirty days' leave as will be paid to day hands: *Provided*, That those regularly employed on the Congressional Record shall receive leave, with pay, at the close of each session *pro rata* for the time of *such employment: [587] *And provided further*, That it shall be lawful to allow *pro rata* leave to those serving fractional parts of the year."

The text of this section contains nothing which can, we think, be construed as changing the past legislation so as to extend leaves of absence to temporary employees. It cannot, in reason, be argued that Congress, in re-enacting the legislation in question, did not have in mind the class of employees entitled to leaves of absence, since in the act of 1895 it expressly reproduced the exception making a class of temporary employees—those regularly employed on the Congressional Record—beneficiaries of the leave of absence legislation, and excluded from the class of temporary employees so benefited those not regularly employed in such temporary work. When it is considered that the language thus re-enacted had been construed by the Public Printer, the officer charged with the execution of the previous statutes, for nearly ten years, as excluding temporary employees other than the particular class of such employees referred to in the statute, *viz.*, those regularly employed on the Congressional Record, it follows that the re-enactment of the previous laws carried with it the settled administrative construction which had prevailed in their enforcement from the beginning. Here, again, it cannot in reason be said that the mind of the lawmaker did not address itself to the necessity of making a change in the previous laws where one was deemed necessary, since the act as re-enacted not only goes over the ground covered by the progress of the statutes since 1886, and re-enacts the legislative steps manifested in

such progress, but also adds a new provision concerning accumulations of leaves of absence not contained in any prior statute.

When the deficiency appropriation act for the fiscal year ending June 30, 1895, was adopted on March 2, 1895 (28 Stat. at L. 868, chap. 187), the provision found in the appropriation act of June 19, 1894, was substantially reiterated, except in some particulars not necessary to be noticed, with no words contained therein giving rise to the implication that there was any intention to alter the uniform rule which had obtained from the beginning respecting leaves of absence, excluding temporary employees [588] from the benefit of such *leave, except the particular class of such employees enumerated in the previous statutes.

In the appropriation act for the year ending June 30, 1896 (28 Stat. at L. 910, chap. 189 [U. S. Comp. Stat. 1901, p. 3768]), the sum set apart was simply "to enable the Public Printer to comply with the provisions of the law granting thirty days' annual leave to the employees of the government printing office." Doubtless, any specific provision as to payment of *pro rata* leaves of absence to regular employees who had severed their connection with the service was omitted because of the general provision in the prior statute authorizing the use of leave of absence appropriations for the payment of *pro rata* leaves. In the act of June 11, 1896, making appropriations for the fiscal year of 1897 (29 Stat. at L. 413, chap. 420 [U. S. Comp. Stat. 1901, p. 1556]), the same general language was used as contained in the previous act, making an appropriation applicable to payment of leaves of absence of employees in the government printing office, but such provision was followed by a recapitulation of the previous statutes regulating the subject of leaves of absence to such employees, in the following language:

"The employees of the government printing office, whether employed by the piece or otherwise, shall be allowed leaves of absence, with pay, to the extent of not exceeding thirty days in any one fiscal year, under such regulations and at such times as the Public Printer may designate, at the rate of pay received by them during the time in which said leave was earned; but such leaves of absence shall not be allowed to accumulate from year to year. Such employees as are engaged on piece-work shall receive the same rate of pay for the said thirty days' leave as will be paid to day hands: *Provided*, That those regularly employed on the Congressional Record shall receive leave, with pay, at the close of each session, *pro rata* for the time of such employment: *And provided further*, That it shall be lawful to allow pay for *pro rata* leave to those serving fractional parts of a year; also to allow pay for *pro rata* leave of absence to employees of the government printing office in any fiscal year, notwithstanding the fact that thirty days' leave of absence, with pay, may have been granted to such employees in that fiscal year on account of service rendered in a previous fiscal year. *And the Public Printer [589] is hereby authorized to pay to the legal representatives of any employees who have died during the fiscal years of eighteen hundred and ninety-four, eighteen hundred and ninety-five, eighteen hundred and ninety-six, or may hereafter die, who have or hereafter may have any accrued leave of absence due them as such employees, and said claims to be paid out of any unexpended balances of appropriations for the payment of leaves of absence to the employees of the government printing office, for the fiscal years eighteen hundred and ninety-four, eighteen hundred and ninety-five, eighteen hundred and ninety-six, and out of any future appropriations for leaves of absence."

It is language contained in the provision just quoted which the court of claims found to be new, and constrained it to decide that a temporary employee who had not been allowed leave of absence was nevertheless entitled to pay therefor by way of commutation. We do not stop now to consider that question, as we are not presently concerned with it. Now, an analysis of the act of 1896 discloses nothing which lends support to the argument that, in reiterating the previous law in this appropriation act, it was the intention of Congress to depart from the rule applied from the beginning by conferring the right to leave of absence on a mere temporary employee. On the contrary, this statute—like the previous ones—reiterates the exception in favor of a particular class of temporary employees, and by its silence is a further manifestation of the approval by the lawmaking power of the construction of the previous statutes resulting from the rule adopted by the Public Printer from the beginning, excluding temporary employees from the right to leave. And this recapitulation again demonstrates that the mind of Congress was addressed to the necessity of making such changes as it deemed wise, since there is a new provision allowing the legal representatives of deceased employees who were entitled to a leave to recover the amount due therefor.

From the review of the statutes which we have just made, our conclusion is that the assumption that temporary employees of the government printing office were entitled to leave, upon which the decision of the lower court necessarily rests, was *mistakenly [590] made, and therefore the judgment below was erroneous, unless it be that the plain text of the statutes, reiterated time and time again, and settled by years of administrative construction, is to be disregarded, in consequence of what is asserted to be a congressional interpretation to the contrary, arising from an act passed in 1897, and the retroactive effect which it is claimed must necessarily follow as the result of this law and as a consequence of the fifth finding which the court below made.

To the contrary, we think an analysis of the matters relied upon serves but to confirm the construction which we have given to the acts of Congress which we have previously reviewed. In 1896, in the first session of the Fifty-fourth Congress, a resolution was

passed by the Senate calling upon the Public Printer for information concerning the employees in the government printing office who had failed to receive their annual leaves of absence during the fiscal years of 1890, 1891, 1892, 1893, and 1894, and asking a statement of the amount due each person therefor. Temporary employees during the years named could not have been included in the purposes of the resolution, since the general appropriation act passed at that very session contained the provision to which we have heretofore referred, re-enacting the leave of absence laws, containing no repudiation of the rule prevailing from the beginning excluding temporary employees from the right to leave of absence. To conceive that the inquiry concerned leaves not granted to temporary employees would be to assume that inquiry was made as to a class of employees who had been deprived of their right to leave of absence in the past, whilst at the same time such employees, by the re-enactment of the previous laws and the approval of the previous rule governing the printing office, had been declared at that session not to be entitled to such leave. Moreover, the fact that the resolution did not reach other years than 1890 to 1894 shows that it was not the denial of leave of absence to temporary employees which had been complained of, and as to which the resolution made inquiry, because, undoubtedly, temporary employees had not received a leave of absence, not only prior to 1890, but [591] also subsequent to 1894 and *up to the time of the passage of the resolution. If the denial of leave to temporary employees had been the subject of the inquiry, it would have been concerning the past and existing evil, and not to a mere fraction thereof.

The reply of the Public Printer to the resolution was made at the following session of Congress, in 1897, and practically consisted of a transmittal of a report to the Public Printer made by the cashier of the government printing office, which was printed by the Senate as a public document (Sen. Doc. 59, 54th Congress, 2d Sess.), and is largely reproduced in the brief of counsel for the appellee. The report, instead of confining itself to the years from 1890 to 1894, both inclusive, which were inquired about, proceeded to call attention to the subject of unpaid leave of absence claims prior to the year 1890, as follows:

"In view of the anticipated legislation looking forward to the liquidation of the unpaid leave of absence claims of present and former employees of this office, as indicated by Senate resolutions, it would seemingly appear, in the interest of justice and equity, that the scope of such legislation should not be limited or confined simply to the fiscal years of 1890 to 1894, inclusive, but that its provision should also embrace such accrued and unpaid leave of absence claims which were also lost and forfeited during the fiscal years of 1887, 1888, and 1889, and to that end I would respectfully submit for your further consideration a supplemental statement, in detail, covering such leaves of absences as were unpaid in the fiscal years of 1887, 1888, and 1889."

This was followed by a statement of the amount which would be needed to pay such prior claims.

Now, it cannot be that the report had in view the refusal to give leave or pay for leave to merely temporary employees, since such claims, if they existed, would have covered a much longer period than that embraced in the report. It could not, moreover, have covered such claims, inasmuch as at that very time such leaves were not being allowed and could not be allowed under the rules of the office. What the report contemplated was loss of leave in the past sustained by permanent employees of the government printing office, through a construction *of the statute which no longer obtained, [592] or for failure of appropriations in particular fiscal years, or other cause. Acting upon the report, an act was passed by Congress, which became a law on July 19, 1897 (30 Stat. at L. 134, chap. 9), authorizing the Public Printer to pay employees, former employees, and the legal representatives of deceased former employees of the government printing office such sums as may be due said employees and former employees, for accrued and unpaid leaves of absence for the fiscal years 1887 to 1894, both inclusive, and appropriating a sum of money therefor.

Now we think from what has already been said concerning the resolution of inquiry, and the report made in answer thereto, which were the foundations of the act in question, that it is impossible to construe this act as at all affecting temporary employees, without assuming that both Congress and the Public Printer, and indeed everybody concerned, were engaged at one and the same time in rectifying a wrong and in perpetuating the wrong for the future. The act, however, lends itself to no such deduction. Its provisions become clear when the review of the legislation which we have made is considered. From that review it results that the exclusion of temporary employees from the right to leave of absence had prevailed from the beginning, and the rule so excluding had been ratified and approved by Congress over and over again, whenever it considered the subject. But it was also true that, from 1886 to 1894, in which latter year the legislation as to leave of absence in the government printing office crystallized, except as to a minor provision, added by the law of 1896, Congress had been called upon in each successive step when it considered the subject to broaden in favor of the permanent employees entitled to leave, the construction placed upon its prior action on the subject. Thus, permanent employees, at each successive consideration by Congress of the subject, had become entitled thereafter to leaves of absence which had been denied the employees prior thereto. And the purpose of the appropriation act of 1897 was, first, as an act of grace to equalize this condition where it had resulted from a change of legislation, and, second, by an act of jus-

[593] tice to provide for the cases, where, by *lack of appropriations, which the review we have made shows may have sometimes been the case, leaves of absence to permanent employees had not been provided for.

Without going into detail, it suffices to say, we repeat, that the confining of the appropriation in the act of 1897 to the years covered by the act causes the conclusion just stated, we think, to be irresistible, since it conflicts with the conception that the act was intended or did embrace temporary employees who had been denied leave from the beginning, including the period down to the time of the passage of the appropriation act in question.

It remains only to consider the fifth finding made by the court below. When the text of that finding is analyzed, we think it but embodies an inference of law deduced by the court from its consideration of the report of the Public Printer made in answer to the Senate inquiry, and the court's construction of the provisions of the act of 1897. But the matters from which such legal inference was drawn, as we have seen, are in conflict with the import which we have given them. For instance, the language quoted in the finding and taken from the letter of the Public Printer in answering the resolution of inquiry of the Senate heretofore referred to, in full is as follows:

"Your attention is also called to the fact that during the fiscal years of 1890 to 1893, inclusive, many employees whose terms of service in the office were only for periods of less than one year have never received any *pro rata* leave of absence, with pay, which appears to have been the practice of the office during that period."

The construction adopted by the court below, that this clause necessarily referred to temporary employees, is dispelled by the history of the legislation and practice to which we have referred. That clause embraced only the permanent employees during the years in question to whom leave of absence had not been given, owing to the construction prevailing at the time named, which was either departed from by express changes made in subsequent acts of Congress, or by a construction thereafter placed upon the same. This is the result of the concluding words of the passage relied on, [594] *viz.*, "which appears to *have been the practice of the office during that period," excluding, therefore, temporary employees, since not only at that period but at all times from the beginning, and at the time the report was made, temporary employees were excluded from a right to leave of absence by the express rule of the office. If we were to treat the finding as one of fact, in view of the history of the legislation, the absence of any appropriation at any time to pay temporary employees for leaves of absence, the ever presence of the rule forbidding leave to such employees, and the findings as a whole of the court below, and what we deem to be the only implication deducible from the act of 1897 and the communication upon which the court below rested its construction, we should be obliged to say that the ultimate fact which the fifth finding embodies is not consistent with the other findings, and is not entitled to weight.

Our conclusion that temporary employees are not entitled to leaves of absence under the acts of Congress renders it wholly unnecessary to consider the second question which we at the outset proposed, that is, whether, if such employees were entitled to leave with regular pay, they had a claim for pay without leave against the United States because of the rule adopted for the government of the printing office by which no leave was allowed. However, whilst not deciding this question, we deem it our duty to direct attention to the fact that the significance which the court below attached to the language found in the act of 1896, and the statement that that language was new in the legislation on the subject, was, we assume, caused by overlooking the various appropriation acts between 1888 and 1894, which the court did not allude to in its opinion, where the language in question is to be found.

*The decree of the Court of Claims is reversed*, and the cause is remanded to that court, with directions to dismiss the claimant's petition.

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*W. T. WAGGONER, *Plff. in Err.*, [595]

*v.*

J. M. FLACK.

(See S. C. Reporter's ed. 595-605.)

*Contracts — impairment of obligation — change of remedy.*

The obligation of the contract of the state of Texas with a purchaser of public lands was not impaired by Tex. Laws 1897, chap. 37, p. 39, which repealed a statute in force when the contract was made, denying the remedy of forfeiture for nonpayment of interest as agreed upon, and provided such a forfeiture as a remedy, since the prior act did not amount to a contract that the state would not enlarge the remedy, or grant another on account of the purchaser's violation of his contract.

[No. 28.]

*Submitted January 30, 1902. Ordered that Attorney General of Texas be notified of pendency of suit February 24, 1902. Ordered for oral argument before full bench May 19, 1902. Argued December 9, 1902. Decided February 23, 1903.*

IN ERROR to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of a District

NOTE.—*That impairing the remedy impairs the obligation of contract*—see notes to Best v. Baumgardner (Pa.) 1 L. R. A. 356; Louisiana *ex rel.* Ranger v. New Orleans, 26 L. ed. U. S. 132; and Phinney v. Phinney (Me.) 4 L. R. A. 348.

Court of that State in favor of defendant in a suit to recover the possession of land. *Affirmed.*

See same case below, 21 Tex. Civ. App. 449, 52 S. W. 584.

Statement by Mr. Justice **Peckham:**

The plaintiff in error brought his action against the defendant in error in a district court of Texas to recover as owner certain land described in his petition, and of which he alleged the defendant to be in possession. [596] The defendant denied the *averments of the petition, and upon the trial judgment was given in his favor and he was adjudged to be the owner of the land. An appeal was taken to the court of civil appeals of Texas, where the judgment was affirmed, and upon application to the supreme court of the state for a writ of error, the application was denied. The plaintiff then sued out a writ of error from this court to the court of civil appeals, and the record has been brought here for review.

The plaintiff in error alleges the existence of a contract with the state of Texas, the obligations of which he asserts have been impaired by subsequent legislation in that state. The case involves an inquiry into some of the legislation of the state in regard to its public lands, providing for their sale and for the application of the proceeds of such sales for the benefit of its public schools and for other public purposes.

The state has been and is the owner of a large amount of public lands, portions of which it has put upon the market for sale from time to time, under different acts of its legislature, which acts have provided a general system for the sale or leasing of such lands and for the disposition of the proceeds arising therefrom. Among others the legislature passed the act of 1879 (chap. 28, Laws of that year, p. 23). That act provided in detail for the sale of certain public lands, and the terms and conditions upon which the sales were to be made and patents therefor granted. The 12th section provided that, upon a failure of the purchaser to pay the purchase money as agreed upon, it should be the duty of the district attorney to cause a writ to be issued to show cause why the purchaser should not be ejected from the land, and upon his failure to show such cause, a judgment was to be rendered against him and a writ of possession issued in favor of the state. In 1881 the act was amended in immaterial matters.

By chapter 88 of the Laws of 1883, p. 85, another general system for the sale of the public lands for the benefit of the public school system, etc., was enacted, the 9th and 10th sections of which provided for payment of instalments of principal and interest, and [597] in case of failure to pay, the lands were *to be entered as "lands forfeited," without any judicial inquiry. This act provided that the interest on the obligations given by the purchaser of the lands should be payable on the 1st of March in each year. Subsequently by chapter 12 of the Laws of 1885, p. 13, approved February 16, 1885, the 9th and 10th sections of the act of 1883 were amended, the right of forfeiture of the land being still retained, only there was an extension of the time for payment of interest from the 1st of March to the 1st of August in each year before the forfeiture could be asserted. In one week after the passage of the act last named the same legislature passed an act, approved February 23, 1885 (Laws of Texas, 1885, p. 18), by which it was enacted "that the failure of a holder of public free school, university, or asylum land, under contract of purchase from the state, to make the annual payments of principal or interest thereon prior to the 1st day of August after the same becomes due, shall not cause a forfeiture of the rights of such holder in such land." By this act it is claimed that all laws providing for forfeitures of land because of nonpayment of instalments of principal or interest prior to August 1st after the same became due were repealed, and while the law thus stood the plaintiff in error's grantor purchased the land in controversy.

By chapter 99 of the Laws of 1887, page 83, a further provision for the sale or leasing of public lands was made. Section 11, page 86, restored the provisions as to forfeiture without resort to judicial proceedings, and by chapter 47, Laws of 1895, § 11, as well as by chapter 37, Laws of 1897, page 39, approved March 25 and taking effect August 20, 1897, further provision was made in regard to forfeitures without a resort to the courts. It was under the act of 1897 that the forfeiture herein was asserted, and the 1st section, the only material one here, is set forth in the margin.†

*D. B. Phillips, under the act of 1883, as [598] amended by the act of February 16, 1885, and modified by the act of February 23, 1885, made application to purchase the land

†Sec. 1. *Be it enacted by the Legislature of the State of Texas,* That if upon the first day of November of any year any portion of the interest due by any person to the state of Texas for lands heretofore sold by the state of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the public schools, university, or any of the other various state institutions, has not been paid, it shall be the duty of the land commissioner to indorse on the obligation for said lands, "Lands forfeited," and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the state, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of the existing law, or any future law: *Provided,* The purchaser of said land shall have the right, at any time within six months after such indorsement of "Lands forfeited," to institute a suit in district court of Travis county, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist, authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the commissioner of the general land office shall then become fixed

in question on the 30th of October, 1885, and the land was duly awarded him in November of that year. The plaintiff in error, by proper transfers and deeds, has become the vendee, or grantee through others, of Phillips, and represents all the rights that the latter or his grantees had with regard to the premises in controversy.

Phillips, or those claiming under him, paid the interest on the purchase money up to January 1, 1893, and no interest was thereafter paid. The land was forfeited for nonpayment of interest since 1893, by the commissioner of the general land office, without any judicial procedure or suit in court, on August 20, 1897, the day the act of 1897 took effect. In answer to a certified question from the court of civil appeals, the supreme court of the state held in this case that the state had the right to so forfeit the lands by virtue of that act.

Some time after August 20, 1897, namely, [599] on December 16, *in that year, plaintiff through his agent tendered the state treasurer $286.95 to pay up all accrued interest due on the land purchased by Phillips, and on the last-named date through his agent he asked the reinstating of the account of Phillips, and forwarded to the commissioner of the general land office the transfers or deeds, or copies of the same, showing the chain of title from Phillips to himself, and these transfers were filed by the commissioner in his office, but he refused to reinstate as demanded, on the ground that the rights of the defendant Flack had intervened, Flack, prior to this tender and demand, and on November 17, 1897, made his application in due form to purchase the land. His application was on that day accepted, and his obligation to pay the purchase money was received, and thereafter, in March, 1898, the land was awarded him on his application of the previous November. On August 13, 1898, after this suit was brought, the plaintiff in error, through his attorney, again made written application to have the Phillips account for the purchase of the land reinstated, and for this purpose tendered to the state treasurer of Texas, to pay the interest in arrear, the sum of $345.25, which application was rejected on the ground of the intervening rights of the defendant Flack.

*Mr.* **W. W. Flood** for plaintiff in error:

Any deviation from the terms of the contract impairs its obligation and is obnoxious to the Constitution.

*Green* v. *Biddle*, 8 Wheat. 1, 5. L. ed. 547.

Any law which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution.

*McCracken* v. *Hayward*, 2 How. 608, 11 L. ed. 397.

On this question it is beyond doubt that the courts of the United States will not accept as binding the opinions of the state courts.

*Citizens' Sav. Bank* v. *Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530; *Douglas* v. *Kentucky*, 168 U. S. 488, 42 L. ed. 553, 18 Sup. Ct. Rep. 199.

The means of enforcing the contract, in existence when it is made, are so far a part of it that they cannot be changed to the detriment of the rights of either party to the contract.

*Barnitz* v. *Beverly*, 163 U. S. 122, 41 L. ed. 98, 16 Sup. Ct. Rep. 1042.

*Mr.* **C. K. Bell** argued the cause, and, with *Mr. T. S. Reese*, filed a brief for the State of Texas:

The sole question to be decided has been decided by this court.

*Wilson* v. *Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384.

The repeal of a law could not constitute, on the part of the state, an obligation that it should not be restored in the future.

*Fristoe* v. *Blum*, 92 Tex. 84, 45 S. W. 998.

This court will, even where the question is an impairment by legislation of contract rights, follow the decision of the state court when the question is one of doubt and uncertainty.

*Wilson* v. *Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384.

No counsel for defendant in error.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

Referring to the facts in this case, it is seen that the question arising is as to the right of the state to proceed under the act of 1897 to forfeit the lands held by the plaintiff in error for nonpayment of interest.

At the time when the land was purchased by Phillips, in November, 1885, the act of 1883 as amended by the act of February 16, 1885, was in force, excepting, it is said, that the act of February 23, 1885, repealed the provisions in regard to *forfeiture which ex- [600] isted in the prior acts of 1879, 1883, and 1885, so that when Phillips purchased, the state had no right to forfeit the lands, as had theretofore been provided by law.

The attorney general of Texas in his brief filed herein now argues that the act of February 23, 1885, did not unqualifiedly repeal the law in regard to forfeiture as theretofore existing, but simply regulated it so as to place on the same terms those who had purchased lands under the act of 1879 and those purchasing under the act of 1883 as amended by the act of February 16, 1885,

and conclusive: *Provided*, That if any purchaser shall die, or shall have died, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death.

This act is cumulative, and is not intended to deny to the state the right to institute any legal proceedings that may be deemed necessary to secure the purchase money or possession of the land so sold. And this act is intended to be applicable to all purchases heretofore made under any or all of the various acts of the legislature under which land may have been sold by the state.

so that no forfeiture could be claimed under any act until after August 1 in any year. As the act of 1879 made the interest payable on the 1st of March in each year, and the subsequent acts extended the time for the payment of the moneys for lands sold under their authority to the 1st of August, it is contended that the purpose and effect of the act of 1885 were to place the purchasers of lands under all acts upon the same footing as to the time for the payment of interest. This was in substance held by the court of civil appeals of Texas in 1892 in *Berrendo Stock Co.* v. *McCarty*, 20 S. W. 933. The case was, however, reversed in the supreme court in 1893 (85 Tex. 412, 21 S. W. 598), and that court in 1891, in *Culbertson* v. *Blanchard*, 79 Tex. 486, 493, 15 S. W. 700, had also held the same principle it announced in the *Berrendo Case*.

It is true that *Anderson* v. *Waco State Bank*, 86 Tex. 618, 28 S. W. 344, and *Fristoe* v. *Blum*, 92 Tex. 76, 85, 45 S. W. 998, throw some doubt upon the correctness of the former decisions of the supreme court in this respect, but we do not feel here called upon to construe the state statute otherwise than it has been construed up to this time by the court of last resort of the state.

Although this case involves the question of an impairment of an alleged contract by subsequent legislation, and we are not therefore bound by the construction which the state court places upon the statutes of the state which are involved in such an inquiry, yet, as the true construction of the particular statute is not free from doubt, considering the former legislation of the state upon the same subject, we feel that we shall best perform our duty in such case by following the decision of the state court upon the precise question, although doubts as to [601] its correctness *may have been uttered by the same court in some subsequent case. *Wilson* v. *Standefer*, 184 U. S. 399, 412, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384.

We come, then, to the question of what was the contract, and whether it has been impaired by virtue of the enactment of the statute of 1897, under which the forfeiture has been enforced? Although not material, it may yet be observed that the act of 1897 is not the first act which was passed subsequently to the act of 1885, reinstating the provisions for a forfeiture. By § 11 of the act of 1887 (Laws 1887, pp. 83, 86), provision was again made for forfeiting the lands on nonpayment of moneys due, and the same was continued by § 11 of the Laws of Texas of 1895, pp. 63, 67.

We assume that, at the time these lands were purchased by Phillips, no statute existed providing for forfeiture by entry on the books of the state commissioner of the general land office, and it is admitted that only by virtue of the act of 1897 can the state now claim the right to forfeit the lands by an entry to that effect on the account kept with the purchaser, because of the failure to pay the interest since 1893. The plaintiff in error asserts that the statute of 1897, reinstating or providing for the right of the state to thus forfeit the lands for nonpayment of moneys due by the purchaser of land, is an impairment of the contract created between the state and Phillips at the time his application for the land was granted by the state authorities; and the plaintiff in error asserts he has succeeded to all the rights of Phillips, and this is not denied.

We must first decide what were the obligations of the contract which was created by the granting of Phillips' application for the purchase of this land and the taking of his notes therefor. The Laws of Texas of 1883, chapter 58, as amended by chapter 12, page 13, Laws of 1885, furnish the evidence of the obligations of the contract. By those acts it was made the duty of the commissioner of the general land office, after an application for a grant of land had been made and approved, to issue a patent to the purchaser or his assigns, etc., upon payment of all the purchase money and interest upon notes given for the purchase of the land, and provision was made for the giving of the notes or other evidences of the obligation of the purchaser *to pay for the land. His obligation was to [602] pay these notes as they matured. The obligation of the state was to give the patent as mentioned. What particular remedy then existed by which the state might enforce the obligations of the contract made by the purchaser is not material in this aspect of the case. It is true that the remedy for the enforcement of a contract sometimes enters into the contract itself, but that is where an endeavor has been made to so change the existing remedy that there is no effective and enforceable one left, or the remedy is so far impaired that the party desirous of enforcing the contract is left practically without any efficient means of doing so; but in the case of an alteration of a remedy, if one is left or provided which is fairly sufficient, the obligations of a contract are not impaired, although the remedies existing at the time it was entered into are taken away.

It appears in the record that the plaintiff in error, or those he represents, failed for years to comply with the obligations of the contract, and failed to pay the interest as it became due, as they promised, and hence the contract was violated.

The question, then, is, What is the remedy against the party who has broken the contract? The statute of 1897 is turned to for the authority to take possession of the land, the right to keep which the plaintiff in error has ceased to retain because of his failure to do that upon which such right was founded.

The plaintiff in error, however, says to the state: You cannot avail yourself of the remedy provided by the act of 1897, because it did not exist when I purchased the land, and you then contracted not to create any such remedy against me, and the evidence of the contract is to be found in the statute of February 23, 1885, which was in force when I purchased. But the answer is that, although at the time Phillips pur-

chased the land a statute had taken away the remedy by way of forfeiture, as therein stated, yet the act taking away the remedy did not constitute a contract on the part of the state with all who purchased lands from it at that time, that it would never pass any other act by which the state might be empowered through its agents to forfeit the lands and take possession thereof by virtue of such forfeiture. The act of February 23, [603] 1885, was a mere *enactment, declaring the law to be as therein stated, upon the subject of a remedy for a violation by a purchaser of the obligations of his contract, and it did not assume to bind the hands of any future legislature that might think proper to deal with the subject. There was no promise or contract expressed in the statute that the state would not enlarge the remedy or grant another on account of the purchaser's violation of his contract, and we think no such contract is to be implied.

A purchaser of lands at the time Phillips purchased had no right to assume that the state would not alter the law in the future so far as to give it another and better or a quicker remedy for a violation of his contract by the purchaser than existed at the time the purchase was made. To enact laws providing remedies for a violation of contracts, to alter or enlarge those remedies from time to time as to the legislature may seem appropriate, is an exercise of sovereignty, and it cannot be supposed that the state, in a case like this, contracts, in a public act of its legislature, to limit its power in the future, even if it could do so, with or without consideration, unless the language of the act is so absolutely plain and unambiguous as to leave no room for doubt that its true meaning amounts to a contract by it to part with its power to increase the effectiveness of existing remedies as against those who purchase lands while the act remains alive. No such language is to be found in the act in question, and none ought to be implied.

We cannot discern the difference in principle between this case and that of *Wilson* v. *Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384, which involved a portion of this same legislation. In that case the lands were purchased under the act of 1879, which provided (§ 12) for a forfeiture after judicial inquiry determining the failure of the purchaser to pay the annual instalments of interest as they became due. Subsequently the act of 1897, already mentioned, was passed and that act, it is seen, authorized the commissioner, when any portion of the interest due by the purchaser had not been paid, to declare a forfeiture of the purchase without judicial aid, and it gave to his action the effect of putting an end to the contract. It was under the act of 1897 that the forfeiture was declared in that case. There, as here, it was contended [604] *that the act of 1897 violated the contract between the parties. It was urged that as the act of 1879 provided a remedy by a resort to judicial proceedings for the purpose of enforcing a forfeiture, that such remedy was a part of the contract, and that the act of 1897, which provided for a forfeiture of the lands without judicial action, was a violation of the contract, and therefore void. This court held that the stipulation in the 12th section of the act of 1879, providing for a judicial forfeiture, did not amount in legal contemplation to a promise by the state that the only remedy which might thereafter be resorted to by it was the one therein provided for. The court recognized the plain distinction between the obligation of a contract and a remedy given by the legislature to enforce that obligation, and it held that the remedy might be modified and enlarged without impairing such obligation.

It is to be noted that the act of 1897 does not take away from the purchaser the right to be heard in a court of justice upon the question whether he, in fact, is in default in his payments of the obligations given by him for the land which he purchased. The act of 1897 grants the purchaser six months after the land commissioner has indorsed on the purchaser's obligation for payment for the land, the words "Lands forfeited," within which the purchaser may institute suit in the district court of Travis county, Texas, against the commissioner for the purpose of contesting the forfeiture and setting aside the same, upon the ground that the facts do not exist authorizing such forfeiture.

Neither Phillips nor any of the successors to his title availed themselves of the opportunity to be judicially heard afforded by the law of 1897, and, as stated by the court in *Wilson* v. *Standefer*, 184 U. S. 399, 415, 46 L. ed. 612, 619, 22 Sup. Ct. Rep. 384, 390, the reason clearly appears in the admitted facts that the payments were in arrear for a considerable period of time, and that the tender made, if it ever had any legal effect at any time, was manifestly too late after the state had declared a forfeiture and sold the land to another.

We cannot see any difference in principle between a case where an act was in existence when a contract was made, providing a certain remedy for a violation of the contract, and *then, after the contract is en- [605] tered into, the legislature passes another act, giving an altogether different remedy, as in *Wilson* v. *Standefer*, 184 U. S. 399, 46 L. ed. 612, 22 Sup. Ct. Rep. 384, and a case where an act which denied the remedy of forfeiture when the contract was made, was repealed by a subsequent enactment which provided a forfeiture as a remedy. In both cases there is a plain alteration of remedy, while in neither is there any contract springing from the passage of the first act that no other remedy more effective should be given as against one who purchased land during the existence of the statute. The right to rescind the contract on the part of the state, upon the failure of the purchaser to pay as he had agreed, resided in the state at common law, as the supreme court of Texas has held. *Fristoe* v. *Blum*, 92 Tex. 76, 84, 45 S. W. 998. The act of

1897 simply provided a particular means by which such right might be enforced.

We are of opinion that the act of 1897 does not impair the obligation of any contract within the meaning of the Federal Constitution, as asserted by the plaintiff in error, and *the judgment of the Court of Civil Appeals of Texas is therefore affirmed.*

Mr. Justice **Brewer** concurred in the result.

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RUDOLPH HELWIG, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 605-619.)

*Courts—jurisdiction of district court—action to recover penalty—additional sum collected from importer for undervaluation.*

The "further sum," equal to 2 per cent of the appraised value of imported merchandise for each 1 per cent that such appraised value exceeds the value declared in the entry, which, under the customs administrative act of June 10, 1890, § 7 (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1892), may be collected from an importer for undervaluation "in addition to the duties imposed by law," is a penalty, and exclusive jurisdiction of a suit to recover such sum is, therefore, by U. S. Rev. Stat. § 563 (U. S. Comp. Stat. 1901, p. 455), vested in the district courts of the United States.

[No. 65.]

*Argued November 4, 1902. Decided February 23, 1903.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting a question as to the jurisdiction of a United States Circuit Court of an action to recover the "further sum" imposed by the customs administrative act on an importer for undervaluation, "in addition to the duties imposed by law." *Answered in the negative.*

Statement by Mr. Justice **Peckham**:

[606] *This case comes before the court upon a certificate from the United States circuit court of appeals for the second circuit. The certificate contains the following statement:

"In February and March, 1895, Rudolph Helwig, plaintiff in error, made three certain importations of wood pulp into the United States, entering the same at the custom house at the port of New York. As the facts are substantially the same in respect to each importation, except as to values, amounts, date, etc., they are spoken of herein as one importation.

"At the time when said wood pulp was imported the duty imposed by law on wood pulp was ten (10) per centum ad valorem (par. 303, act of August 27, 1894 [28 Stat. at L. 532, chap. 349]).

"Upon making the entries at the custom house, Helwig declared the invoice and market value to be marks 191 per ton: the aggregate invoice value of all three importations was $13,252 in United States currency; at the time of making the entries Helwig paid to the collector of customs $1,325.20, being the duty upon said wood pulp at the rate of ten (10) per centum ad valorem based upon the invoice value.

"The merchandise was thereafter appraised by the United States appraiser, as provided in § 7 of the act of June 10, 1890 (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1892), who reported that the foreign market value of said wood pulp was marks 263.70 per ton; Helwig thereupon requested a reappraisement by a United States general appraiser, in accordance with § 13 of the act of June 10, 1890 [26 Stat. at L. 136, chap. 349, U. S. Comp. Stat. 1901, p. 1932], a reappraisement was had, and the United States general appraiser reappraised the market value of said wood pulp at marks 245 per ton net; thereupon Helwig appealed to the board of United States general appraisers, in accordance with said § 13 of the act of June 10, 1890, and said board affirmed the decision of the United States general appraiser, thereby deciding that the foreign market value of said wood pulp was marks 245 per ton net, and making an advance over the invoice and entered value of over 27 per centum.

"Thereupon the collector of customs liquidated said entries, *fixing the dutiable value [607] of all of said merchandise at $16,792.20, and computing the duty thereon at the rate of 10 per centum at $1,679.20, and made demand upon said Helwig for the sum of $354, being the difference between the amount already paid by Helwig and the amount of duty at the rate of ten (10) per centum ad valorem found to be due on said final reappraisement; thereafter Helwig paid the sum of $354, and that amount is not in question on this appeal.

"At the time the collector of customs found said additional sum of $354 to be due, as aforesaid, he also found and decided that there was due from Helwig to the United States the further sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), and made demand for said amount, said amount being the further sum in addition to the duties imposed by law, ascertained, and fixed as provided in § 7 of the said act of June 10, 1890, being 2 per centum of the total appraised value of said merchandise for each 1 per centum that such appraised value exceeded the value declared in the entry.

"Before the commencement of this action Helwig duly presented his petition to the United States district court for the southern district of New York, claiming that said sum of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68) was a penalty, and praying that the district judge would cause an investigation of the facts to be made, in accordance with § 5292 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3604) and §§ 17 and 18 of the act of June 22, 1874 (18 Stat. at L. 186, chap. 391, U. S. Comp. Stat. 1901, p. 3606), and

cause the facts to be stated and transmitted to the Secretary of the Treasury, and praying that said penalty be remitted on the ground that it had been incurred without wilful negligence or intent to defraud.

"The said district judge caused such summary investigation to be made, and a statement of the facts shown thereon was duly transmitted to the Secretary of the Treasury, who, thereafter, and on the 6th day of July, 1898, found and decided that said penalties had been incurred without wilful negligence or intention of fraud on the part [608] of said Helwig, and thereupon *mitigated the penalties to one half of the amount thereof, namely, $4,533.84.

"Subsequently the collector of customs reliquidated said entries, reducing the amount of said further sum to $4,533.84, and again made demand upon Helwig for payment. As Helwig did not pay the amount, suit was commenced against him in the circuit court for the southern district of New York on the 24th of August, 1898. Upon learning of the pendency of that suit, however, the Secretary of the Treasury advised the collector that he revoked his decision of the 6th of July, 1898, and directed the collector to reliquidate the entries at the original amount and to request the United States attorney to institute suit for nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68).

"The collector followed these instructions and again reliquidated the entries accordingly.

"The suit then pending was discontinued and the present action begun, including the full amount of the penalty, namely, nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68).

"The case was tried at the circuit court upon an agreed statement of facts.

"Upon the reading of the agreed statement of facts, the plaintiff in error moved to dismiss the complaint and for the direction of judgment in his favor on the ground that the action was to recover a penalty or penalties arising under the customs laws, and that under the provisions of §§ 629 and 563 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 503, 455) the United States circuit court had no jurisdiction in such an action. The motion was denied and plaintiff in error duly excepted.

"The court subsequently directed judgment in favor of the United States for the amount of nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.68), together with interest and costs.

"The defendant thereafter sued out his writ of error to this court.

"The sum for which judgment was rendered, namely, nine thousand and sixty-seven dollars and sixty-eight cents ($9,067.-[609] 68), *being the 'further sum' accruing 'in addition to the duties imposed by law,' upon wood pulp, under the provisions of § 7 of the act of June 10, 1890."

Upon these facts the court has asked the following question:

"Has the United States circuit court jurisdiction of an action to recover the aforesaid 'further sum' accruing 'in addition to the duties imposed by law,' under the provisions of § 7 of the act of June 10, 1890 (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1892)?"

*Mr.* **Henry W. Rudd** argued the cause and filed a brief for plaintiff in error:

The United States circuit court has no jurisdiction of an action to recover penalties arising under the customs laws.

*United States* v. *Mooney*, 116 U. S. 104, 29 L. ed. 550, 6 Sup. Ct. Rep. 304; *Lees* v. *United States*, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163.

The "further sum" levied under the provisions of § 7 of the act of June 10, 1890 (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1892), is a penalty arising under the customs revenue laws; it is not a customs duty.

*Greely* v. *Thompson*, 10 How. 225, 13 L. ed. 397; *Maxwell* v. *Griswold*, 10 How. 242, 13 L. ed. 405; *Bartlett* v. *Kane*, 16 How. 263, 14 L. ed. 931; *Ring* v. *Maxwell*, 17 How. 147, 15 L. ed. 25; *Stairs* v. *Peaslee*, 18 How. 521, 15 L. ed. 474; *Passavant* v. *United States*, 148 U. S. 214, 37 L. ed. 426, 13 Sup. Ct. Rep. 572; *Additional Duties*, 20 Ops. Atty. Gen. 660; *Penalties under Tariff Act of 1842*, 4 Ops. Atty. Gen. 183; *Morris* v. *Robertson*, 37 Fed. 199; *Grinnell* v. *Lawrence*, 1 Blatchf. 346, Fed. Cas. No. 5,831; *Bannendahl* v. *Redfield*, 4 Blatchf. 223, Fed. Cas. No. 964; *Bischoff* v. *Maxwell*, 4 Blatchf. 384, Fed. Cas. No. 1,438; *Lehmaier* v. *Maxwell*, Fed. Cas. No. 8,214; *Manhattan Gaslight Co.* v. *Maxwell*, 2 Blatchf. 405, Fed. Cas. No. 9,023.

*Assistant Attorney General* **Hoyt** argued the cause, and, with *Mr. James A. Finch*, filed a brief for defendant in error:

Unless the duty is recoverable by suit in the same manner as other fines and penalties it is not a penalty within the meaning of the statute giving jurisdiction to the United States district courts.

*Remission of Penalties*, 5 Ops. Atty. Gen. 731.

The almost uninterrupted practice of the Treasury Department has been to treat these "additional duties," or "further sums," as duties, and not as penalties.

Treasury Regulations 1857, § 369; Customs Regulations 1874, § 494; Customs Regulations 1899, art. 1426.

There are two instances in which the courts were obliged to pass upon this very question, and wherein these duties were held to be duties, and not penalties.

*United States* v. *Collier*, 3 Blatchf. 325, Fed. Cas. No. 14,833; *Maillard* v. *Lawrence*, 3 Blatchf. 378, Fed. Cas. No. 8,972.

Protest is a prerequisite to the recovery of additional duty, but is not required in case of a penalty.

*Falleck* v. *Barney*, 5 Blatchf. 38, Fed. Cas. No. 4,625; *Kriesler* v. *Morton*, 2 Curt. C. C. 239, Fed. Cas. No. 7,934.

Statutes in regard to the recovery of additional duties for innocent undervaluation, and those which refer to fraudulent under-

valuation, "do not relate to the same matters; they describe and provide for dissimilar cases."

*United States* v. *25 Cases of Cloth*, Crabbe, 356, Fed. Cas. No. 16,563; *United States* v. *67 Packages of Dry Goods*, 17 How. 87, 15 L. ed. 54.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

That part of § 7 of the customs administrative act of 1890 (26 Stat. at L. 131, 134, chap. 407, U. S. Comp. Stat. 1901, p. 1892), which relates to the question involved in this case is set forth in the margin.†

[610] *By § 629, Revised Statutes (U. S. Comp. Stat. 1901, p. 503), subdivisions 3d and 4th, jurisdiction is granted to the circuit court of all suits at common law where the United States, or any officer thereof, suing under the authority of any act of Congress, are plaintiffs, and of all suits at law or equity, arising under any act providing for revenue from imports or tonnage, except suits for penalties and forfeitures.

Under this section the plaintiffs claim the circuit court had jurisdiction in this action as one at common law, etc., or as one arising under any act providing for revenue, and not being one for a penalty or forfeiture.

By § 563, Revised Statutes (U. S. Comp. Stat. 1901, p. 455), jurisdiction is conferred upon the district court in various cases, the 3d subdivision of which section gives it jurisdiction of all suits for penalties and forfeitures incurred under any law of the United States.

It has been heretofore held that the act conferred exclusive jurisdiction upon the district court in suits for penalties or forfeitures. The early cases to that effect are cited in *United States* v. *Mooney*, 116 U. S. 104, 29 L. ed. 550, 6 Sup. Ct. Rep. 304; *Lees* v. *United States*, 150 U. S. 476, 478, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163, and the above two cases reiterate the same holding. It would seem to be beyond the necessity of further argument since the decision of these cases, that the jurisdiction is exclusive in the district court of all actions to recover for a penalty or forfeiture. Indeed, the counsel for the government frankly concedes that if this action be one to recover a penalty or forfeiture exclusive jurisdiction is by the law vested in the district court.

The sole question is whether the sum imposed by § 7, already quoted, is a penalty.

Without other reference than to the language of the statute itself, we should conclude that the sum imposed therein was a penalty. It is not imposed upon the importation of all goods, but only upon the importer in certain cases which are stated *in [611] the statute, and it is clear that the sum is not imposed for any purpose of revenue, but is in addition to the duties imposed upon the particular article imported, and in each individual case when the sum is imposed it is based upon the particular act of the importer. That particular act is his undervaluation of the goods imported, and it is without doubt a punishment upon the importer on account of it. Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character. If it be said that the provision operates as a warning to importers to be careful and to be honest, it is a warning which is efficacious only by reason of the resulting imposition of the "further sum," in addition to the duties, provided for by the statute.

This case is a good illustration of the penal features of the statute. The aggregate value of the merchandise as entered by the importer was $13,252, and the amount of duty provided for by the statute (10 per centum) was $1,325.20. The final reappraisement made under § 13 of the same act was $16,792.20, and the duties $1,679.20, the difference being $354; yet this difference in valuation between the importer and the appraisers, though the valuation of the importer was made without intent to defraud, brought upon him the imposition, under the statute, § 7, of the additional sum of $9,067.68, being the "further sum" spoken of in the statute in addition to the payment of the $354 of duty, which was demanded of the importer by reason of this difference. Now what can this be but a punishment, or,

†Sec. 7. . . . And the collector within whose district any merchandise may be imported or entered, whether the same has been actually purchased or procured otherwise than by purchase, shall cause the actual market value or wholesale price of such merchandise to be appraised; and if the appraised value of any article of imported merchandise shall exceed by more than ten per centum the value declared in the entry, there shall be levied, collected, and paid, in addition to the duties imposed by law on such merchandise, a further sum equal to two per centum of the total appraised value for each one per centum that such appraised value exceeds the value declared in the entry; and the additional duties shall only apply to the particular article or articles in each invoice which are undervalued; and if such appraised value shall exceed the value declared in the entry more than forty per centum, such entry may be held to be presumptively fraudulent, and the collector of customs may seize such merchandise and proceed as in cases of forfeiture for violations of the customs laws; and in any legal proceedings which may result from such seizure the fact of such undervaluation shall be presumptive evidence of fraud, and the burden of proof shall be on the claimant to rebut the same, and forfeiture shall be adjudged unless he shall rebut said presumption of fraudulent intent by sufficient evidence: *Provided*, That the forfeitures provided for in this section shall apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles in each invoice which are undervalued: *And provided further*, That all additional duties, penalties, or forfeitures applicable to merchandise entered by a duly certified invoice, shall be alike applicable to goods entered by a *pro forma* invoice or statement in form of an invoice. The duty shall not, however, be assessed upon an amount less than the invoice or entered value.

in other words, a penalty for undervaluation, whether innocently done or not? It certainly was no reward of merit, and whether called a "further sum" or an "additional duty," or by some other name, the amount imposed was so large in proportion to the value of the merchandise imported, as to show beyond doubt that it was a sum imposed not, in fact, as a duty upon an imported article, but as a penalty, and nothing else.

The statute also provides that, if the appraised value exceed by more than 40 per centum the value declared in the entry, then the entry value is presumed fraudulent and the whole property is to be seized by the col-[612] lector, who is to proceed as *in the case of a forfeiture, and the burden of showing that the undervaluation was not fraudulent is cast upon the importer. Now, whether the excess in valuation on the reappraisement is more or less than 40 per centum of the value declared in the entry, seems to be important only upon the question of the presumption of fraud and the consequent forfeiture of the whole property. If more than 40 per centum, the presumption of fraud is declared by the statute and the property is forfeited, unless the importer shows there was no fraud. If less, the sum imposed by the statute is to be paid, but the property is not forfeited. In the case of good faith, it is simply a less penalty than in the case of fraud. It is, however, argued that the error for undervaluation not fraudulent is repaired by imposing an additional duty on the particular goods in such invoice which have been undervalued, and there is no penalty, a simple enlarged duty upon merchandise, while in the other case, the presumed fraudulent undervaluation (if the fraud be found), the whole of the merchandise is forfeited by the express terms of the statute.

Whether the error is repaired by imposing the sum named as an additional duty is not material in the consideration of the nature of the imposition. It is still a punishment and nothing else, because of the carelessness, ignorance, or mistake, without fraudulent intent, upon the part of the importer. If the fraudulent intent were present, the penalty would be enlarged and the goods forfeited. In both cases the nature of the penalty is the same, only in one case it is satisfied by the imposition of a certain amount of money, while in the other a total forfeiture is demanded.

To the question, why the additional sum is imposed in the one case, or why the goods are forfeited in the other, there can be but one answer. It is because of the action of the importer with relation to the importation in question, and in one case such action calls down upon his head punishment by way of a money imposition, and in the other it is a forfeiture of his property. In either case there is to be punishment, either for carelessness or fraud.

Although the statute, under § 7, *supra*, [613] terms the *money demanded as "a further sum," and does not describe it as a penalty, still the use of those words does not change the nature and character of the enactment. Congress may enact that such a provision shall not be considered as a penalty or in the nature of one, with reference to the further action of the officers of the government, or with reference to the distribution of the moneys thus paid, or with reference to its effect upon the individual, and it is the duty of the court to be governed by such statutory direction, but the intrinsic nature of the provision remains, and, in the absence of any declaration by Congress affecting the manner in which the provision shall be treated, courts must decide the matter in accordance with their views of the nature of the act. Although the sum imposed by reason of undervaluation may be simply described as "a further sum" or "an additional duty," if it is yet so enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature, and it is imposed by reason of the action of the importer, such facts clearly show it is a penalty in its intrinsic nature, and the failure of the statute to designate it as a penalty, but describing it as "a further sum," or " an additional duty," will not work a statutory alteration of the nature of the imposition, and it will be regarded as a penalty when by its very nature it is a penalty. It is impossible, judging simply from its language, to hold this provision to be other than penal in its nature.

But it is urged that although this part of the section may be of a penal character within the ordinary or general meaning of the words, yet as used in the various statutes upon the subject it will be seen that those words are not regarded by Congress as imposing a penalty and should not be so treated by the court. If it clearly appear that it is the will of Congress that the provision shall not be regarded as in the nature of a penalty, the court must be governed by that will. This leads to a short examination of the previous legislation upon the subject.

By the act of April 20, 1818, chap. 79, § 11 (3 Stat. at L. 433, 436), the manner of collecting the additional sum imposed by reason of undervaluation was by adding 50 per centum to *the appraised value of the [614] property, and on that aggregate amount the usual duties were to be estimated. The 25th section of that act enacted "That all penalties and forfeitures incurred by force of this act shall be sued for, recovered, distributed, and accounted for in the manner prescribed by" the act of March 2, 1799 (1 Stat. at L. 627, chap. 22), "and may be mitigated or remitted, in the manner prescribed" by the act of March 3, 1797 (1 Stat. at L. 506, chap. 13).

In an opinion delivered by Attorney General Wirt, February, 1821 (5 Ops. Atty. Gen., 730), that officer ruled that the 50 per centum provided by § 11 could not be remitted, because he thought that by the language of the statute, Congress permitted the Secretary of the Treasury to remit penalties or forfeitures only in such cases where, by the provisions of the act, they could be recovered by suit. He did not deny

that the additional sums imposed by statute were in the nature of penalties, but the 50 per centum not being recoverable by suit, he thought the Secretary of the Treasury had no power to mitigate or remit.

By the act of March 1, 1823 (3 Stat. at L. 729, 734, chap. 21, § 13), reference was made to a penalty of 50 per centum (the same provision in substance as is set forth in the statute under consideration, only different amounts are provided for), and Congress described the provision as a penalty.

Section 9 of the act passed May 19, 1828 (4 Stat. at L. 270, 274, chap. 55), provided that where the appraisement exceeded by 10 per centum the invoice value there was to be imposed, in addition to the duty imposed by law on the same property, 50 per centum of the duty imposed on the same goods when fairly invoiced, and this amount is described in the statute as a duty of 50 per centum. Further on in the same section, it is provided that the penalty of 50 per centum imposed by the 13th section of the act approved March 1, 1823, *supra*, was not to attach to any of the property subject to the additional duty of 50 per centum imposed by § 9 of the act of 1828. The sum imposed was in its nature no more a penalty under the 13th section of the act of 1823 than it was a penalty under the 9th section of the [615] act of 1828, yet in the earlier act *it is described as a penalty, and in the later a duty. The mere description was evidently not regarded as of vital importance.

By § 17 of the act of 1842, chap. 270 (5 Stat. at L. 548, 564), the amount imposed is stated to be, "in addition to the duty imposed by law on the same, there shall be levied and collected on the same goods, wares, and merchandise 50 per centum of the duty imposed on the same, when fairly invoiced." Although this 50 per centum mentioned in the above act is not designated in terms as a penalty, yet it was regarded as such by the then Attorney General, Legare, who in response to the question put by the Secretary of the Treasury, whether the latter had power to remit it as a penalty within the meaning of the act of 1797, stated that in his opinion he had, as it was very clear that the 50 per centum was a penalty. 4 Ops. Atty. Gen. 182.

By the act of February 11, 1846, relative to collectors and other officers of the customs (9 Stat. at L. 3, chap. 7, § 3), it was provided that no portion of the additional duties mentioned in the 17th section of the act of 1842, *supra*, "shall be deemed a fine, penalty, or forfeiture" for the purpose of being distributed to any officer of the customs, but the whole amount thereof, when received, was to be paid directly into the Treasury. This would seem to be a recognition on the part of Congress that the additional duties mentioned in the 17th section would be regarded as penalties, and that it was necessary to provide specifically that they should not be so treated, so far as distribution was concerned. It may possibly be that the legislation was enacted in order to meet the construction of the 17th section put upon it by the Attorney General in his answer to the Secretary of the Treasury, June 7, 1843. At any rate, the opinion and the legislation show that the additional duties had been regarded as penalties, and that such construction was only altered by Congress to the extent of providing that for the purpose of being distributed to any customs officer they should not be so regarded.

The statute of July 30, 1846, chap. 74 (9 Stat. at L. 42), relating to duties, by its 8th section provided that, in case of undervaluation, in addition to the duties imposed by law, a duty of 20 *per centum ad valorem [616] on such appraised value should be imposed, using the same language substantially as had been used in the 17th section of the act of 1842, only reducing the amount from 50 to 20 per centum.

By the 23d section of the act approved June 30, 1864, chap. 171 (13 Stat. at L. 202, 216), it is again declared that, "in addition to the duties imposed by law on the same, there shall be levied, collected, and paid a duty of 20 per centum ad valorem, on such appraised value."

The language used in these various statutes, in making provision for the imposition of additional sums on account of the action of the importer in undervaluing the goods imported, does not give any clear indication on the part of Congress that the sum imposed shall not be regarded as a penalty excepting as to the act of 1846 (9 Stat. at L. 3, chap. 7), relative to collectors, etc., and there the provision is limited to the statement that the sum shall not be deemed a fine, penalty, or forfeiture for the purpose of being distributed to any officer of the customs. At that time, it must be remembered, moiety legislation was in force, by which a certain proportion of some fines and penalties was distributed to the customs officer.

By the act of July 24, 1897, chap. 11, § 32 (30 Stat. at L. 212), Congress has plainly directed that the additional duty therein spoken of shall not be construed as a penalty, and shall not be remitted nor payment thereof in any way avoided, with the exception stated in the statute. As this statute was passed subsequently to the importation mentioned in this case, it does not affect the question as to the character of the legislation which preceded it and which had no such provision as is contained in the last act. It was under the act as it stood in the customs administrative act of 1890, the same under which the question here arises, that on September 9, 1893, Mr. Olney, who was then Attorney General, gave an opinion upon this same question in response to a communication from the Secretary of the Treasury (20 Ops. Atty. Gen. 660). In that opinion the Attorney General reviewed the previous legislation of Congress on this subject, and came to the conclusion that, as the law then stood, the additional duty, so-called, was in its *nature a penalty, [617] and that being so, it was subject to remission like other fines, penalties and forfeitures by the Secretary of the Treasury.

Referring to some of the decisions of this court, we think it is made quite apparent that these provisions of the statute were regarded as in the nature of penalties.

In *Bartlett* v. *Kane*, 16 How. 263, 14 L. ed. 931, decided in 1853 under the statute of 1846, where the question of drawback arose, the additional duty of 20 per centum mentioned in the act was regarded as in the nature of a penalty. Mr. Justice Campbell, in delivering the opinion of the court (at page 274, L. ed. p. 935), said:

"An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts, this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty. . . . It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the government comprehend them within its regular estimates of supply. They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice."

In *Greely* v. *Thompson*, 10 How. 225, 13 L. ed. 397, Mr. Justice Woodbury, speaking of the language on this subject used in the act of 1842 (at page 238, L. ed. p. 404), said: "Especially in a penal provision, it could not seem judicious, any more than legal, to extend it beyond the clear language of the act;" and he referred to the immediately succeeding case of *Maxwell* v. *Griswold*, 10 How. 242, 13 L. ed. 405. In that case, as stated by Mr. Justice Woodbury, in the opinion of the court (at page 255, L. ed. p. 410), "The importer had put in his invoice the price actually paid for the goods, with [618] charges, and *proposed to enter them at the value thus fixed. But the collector concluded, in that event, to have them appraised, and the value would then, by instructions and usage at New York, be ascertained as at the time of the shipment, which was considerably higher, and would probably subject the importer, not only to pay more duties, but to suffer a penalty. The importer protested against this, but in order to avoid the penalty under such a wrong appraisal, adopted the following course." And again, in speaking of the manner in which the question arose, the justice continued: "The importer, knowing that this would subject him to a severe penalty, in order to avoid it, felt compelled to add to his invoice the amount which the price had risen between the purchase and the shipment." This is in relation to the language already referred to in the act of 1842.

In *Ring* v. *Maxwell*, 17 How. 147, 15 L. ed. 25, the court did not find it necessary to determine whether the additional duties prescribed under the acts of 1842 and 1846 might have been deemed penalties, because the court was of opinion that, whatever was the nature of the sums levied as additional duties under the 8th section of the act of 1846, they were not distributable to the customs officers as penalties.

In *Stairs* v. *Peaslee*, 18 How. 521, 15 L. ed. 474, it was said that the penal duty of 20 per centum exacted by the 8th section of the tariff act of July 30, 1846 (9 Stat. at L. 43, chap. 74), was properly levied upon goods entered at their invoice value. Mr. Chief Justice Taney (page 527, L. ed. p. 477), in speaking of the language of the act of 1842 (5 Stat. at L. 563, chap. 270, *supra*), providing for levying an additional 50 per centum because of undervaluation, said:

"It would seem, however, that this provision was found by experience to operate, in some instances, unjustly upon the importer; and that it sometimes happened that, under favorable opportunities of time or place, goods were purchased in a foreign country for 10 per cent less than their market value in the principal markets of the country from which they were imported into the United States. And if they were so invoiced, the importer was liable for the above-mentioned penal duty, although he was willing and offered to make the entry at their dutiable value. The fact that the invoice value was 10 per *cent below the [619] standard of value fixed by law subjected him to the penal duty and he had no means of escaping from it. The 8th section of the tariff act of 1846 was obviously intended to relieve the importer from this hardship."

See also *Swanston* v. *Morton*, 1 Curt. C. C. 294, Fed. Cas. No. 13,677, where the court described it as an additional duty, by way of penalty, and the court was by no means clear that the strictly technical term appropriate to such a demand would not be the word "penalty," though in that case it did not feel compelled to go so far.

In *Passavant* v. *United States*, 148 U. S. 214, 37 L. ed. 426, 13 Sup. Ct. Rep. 572, the question of whether these sums are to be regarded as penalties or simply additional duties was not regarded as material, and consequently was not decided in terms, although the case of *Bartlett* v. *Kane*, 16 How. 263, 14 L. ed. 931, was quoted from as to the sums imposed by statute being a "compensation for a violated law," etc.

From these various decisions it is seen that the courts have either regarded the language used in these statutes as penal in its nature, and that the sums imposed under the various sections of the statutes were imposed as penalties or the property forfeited, for the careless or fraudulent conduct of the importer in making an undervaluation, or else they have declined to decide the question, because not involved. We think the sum sought to be recovered in this action was a penalty, and the circuit court, therefore, had no jurisdiction.

Whether the Secretary had the power, after he had once reduced the amount to be paid, to raise it to the original sum, as stated in the foregoing certificate, is not material to the question now before us, and we express no opinion regarding it.

*The question propounded by the Circuit Court of Appeals is answered in the negative*, and it will be so certified.

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[620]*HARRY J. JAQUITH, Trustee in Bankruptcy of William S. Franklin, Bankrupt, *Appt.*,

*v.*

CLARENCE W. ROWLEY *et al.*

(See S. C. Reporter's ed. 620-626.)

*Bankruptcy — jurisdiction of bankruptcy court—adverse claimant—enjoining proceedings in state courts.*

1. The surety on a bankrupt's bail bond, in whose hands property was deposited by the bankrupt to indemnify him for his liability, is an adverse claimant within the meaning of the bankruptcy act of 1898, §§ 23*a*, *b* (30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3431), and cannot be proceeded against in the bankruptcy court unless by his consent, as provided for therein.
2. A court of bankruptcy is without jurisdiction to enjoin the plaintiffs in suits against the bankrupt in the state courts from collecting their judgments from the surety on the bankrupt's bail bond.

[No. 81.]

*Argued and submitted November 10, 1902. Decided February 23, 1903.*

APPEAL from the District Court of the United States for the District of Massachusetts to review a judgment which dismissed for want of jurisdiction a petition to enjoin proceedings in a state court, and to compel the surety on a bankrupt's bail bond to pay over to the trustee in bankruptcy money deposited in his hands to indemnify him for his liability. *Affirmed.*

Statement by Mr. Justice **Peckham:**

The appellant herein was appointed a trustee in bankruptcy by the United States district court in Massachusetts on September 18, 1900, and his bond was approved on the 21st of that month. The bankrupt was duly adjudged such on August 15, 1900; and at the date of that adjudication there were pending in the superior court of Massachusetts, for Middlesex county, two suits, —one of E. W. Thayer against the bankrupt, in which a bail bond had been taken on November 14, 1899, and the other a suit of E. F. Flanders against the bankrupt, in which case a bail bond had also been taken on that day; and in order to protect the surety, Joseph P. Silsby, Jr., on the bail bond in each of the two cases, the bankrupt on the same day deposited in the hands of the surety the two sums of $148 in the Thayer suit and $125 in the Flanders suit. These sums were to be held to indemnify the surety in each case, respectively, if the bankrupt avoided the bail bond. After the adjudication in bankruptcy these suits proceeded to judgment in the state court, and the plaintiffs took out execution, which they are seeking to enforce *against the surety on [621] the bail bond, but not against the bankrupt himself.

At the first meeting of the creditors the plaintiff Thayer in the suit in the state court against the bankrupt appeared in the bankruptcy court and proved her claim for $150. Flanders, the plaintiff in the other suit in the state court, did not appear or prove his claim. After the appointment of the trustee, and without leave of the bankruptcy court, and without notice to or the knowledge of the trustee, the plaintiff in each of the two suits took judgment by default in the state court. Upon learning of the entry of the judgments the trustee notified the surety not to pay the money over, and then, in the name of the bankrupt, petitioned the state court to vacate the judgment and to order the execution returned, which the state court refused to do; and thereupon the trustee filed his petition in the district court of the United States for the district of Massachusetts against the plaintiffs in the two suits, their attorney, and the surety, setting up that the prosecution of the suits in the state court was contrary to the provisions of the bankruptcy act and a contempt of court, and praying that the plaintiffs and their attorney be enjoined from collecting the judgments, and that the surety be enjoined from paying the money in his hands, and that the parties plaintiffs in the judgments and their attorney be adjudged in contempt, etc. This motion was denied and the restraining order refused.

The petition was subsequently amended by leave of the court so as to ask that the plaintiffs and their attorney in the state suits be enjoined from collecting the judgments, or making any levy under the execution, or taking any further proceedings therein pending the further and final determination of the court in bankruptcy upon the petition of the trustee, and also that the surety, Joseph P. Silsby, Jr., be ordered to pay over to the trustee the funds deposited in his hands; also that the several plaintiffs in the state suits be ordered to appear before the referee in bankruptcy and prove their claims against his estate and establish their liens, if any, upon the funds paid over to the trustee by Joseph P. Silsby, Jr. This amended petition omitted the prayer that the plaintiffs in the suits in the state court might *be adjudged guilty of contempt, etc. [622] Upon the petition as amended a motion for a rehearing was made and granted, and the appellees appeared and objected that the court had no jurisdiction in the matter of

NOTE.—*On the right of a court of bankruptcy to enjoin proceedings in a state court*—see note to Garner v. Second Nat. Bank, 16 C. C. A. 96.

the petition, and after argument the court so held and denied the petition for want of jurisdiction only, and allowed an appeal to this court.

In dismissing the petition the district judge certified that the following questions arose before him, namely:

"1. Do the provisions of the 2d clause of § 23 of the act of Congress known as the bankruptcy act of 1898 control and limit the jurisdiction of the several district courts of the United States, so that said courts cannot permanently enjoin a creditor of the bankrupt who *has* proved his debt in the bankruptcy court, from collecting a judgment recovered in the state court, and from making levy under an execution taken out on said judgment; and do they limit the jurisdiction of the said courts so that these courts may not require said creditor to submit the controversy to their judgment?

"2. Do the provisions of the 2d clause of § 23 of the act of Congress known as the bankruptcy act of 1898 control and limit the jurisdiction of the several district courts of the United States, so that said courts cannot permanently enjoin a creditor of the bankrupt who *has not* proved his debt in the bankruptcy court, from collecting a judgment recovered in the state court, and from making levy under execution taken out on said judgment; and do they limit the jurisdiction of the said courts so that these courts may not require said creditor to submit the controversy to their judgment?

"3. Do the provisions of the 2d clause of § 23 of the act of Congress known as the bankruptcy act of 1898 control and limit the jurisdiction of the several district courts of the United States over controversies between the trustee and a third person in the possession of property alleged to belong to the bankrupt, it being also alleged that said third person has no beneficial interest in the said property, but has the sole duty of paying or delivering it over in settlement of the debts of the bankrupt?

"4. Can the district court of the United [623] States entertain *jurisdiction of proceedings on petition by a trustee in bankruptcy to recover property alleged to belong to the bankrupt, but held under a claim of lien or security by the bankrupt's creditor, or by third parties for the benefit of said creditors?

"5. Can the district court for the district of Massachusetts take jurisdiction over this suit as it now stands on record?"

*Mr.* **Harry J. Jaquith** *in propria persona* submitted the cause for appellant:

A general appearance by a creditor gives, and gave, to the bankruptcy court full power to deal with the claim and its security.

*Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *Re Seebold*, 45 C. C. A. 117, 105 Fed. 910.

The creditor was a party and was before the court as a party; all creditors are parties.

*Ex parte City Bank*, 3 How. 292, 11 L. ed. 603; *Shawhan* v. *Wherritt*, 7 How. 627, 12 L. ed. 847; *Bear* v. *Chase*, 40 C. C. A. 182, 99 Fed. 920; *Carter* v. *Hobbs*, 92 Fed. 594; *Re Cobb*, 96 Fed. 821; *Keegan* v. *King*, 96 Fed. 758; *Re Mason*, 99 Fed. 256; *Re Lesser*, 100 Fed. 433; *Re Fredenberg*, 2 Ben. 133, Fed. Cas. No. 5,075; *Re Lake*, 3 Biss. 204, Fed. Cas. No. 7,992; *Davis* v. *Anderson*, 6 Nat. Bankr. Reg. 145, Fed. Cas. No. 3,623; *Re Davis*, 2 Nat. Bankr. Reg. 391, Fed. Cas. No. 3,618; *Lee* v. *Franklin Ave. German Sav. Inst.* 3 Nat. Bankr. Reg. 218, Fed. Cas. No. 8,188.

So that, on notice, his rights to alleged security might be determined on a petition in equity ancillary to the bankruptcy proceedings.

*White* v. *Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018.

The court may compel a creditor to come in and prove and set out his security, and such security may then be passed on by the court.

*Bromley* v. *Smith*, 2 Biss. 511, Fed. Cas. No. 1,922.

The fact of proof in bankruptcy defeats and annuls the suit and the attachment made therein.

*Cook* v. *Coyle*, 113 Mass. 252.

A judgment obtained contrary to a prohibition is null and void.

*Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565.

Federal courts will give relief against such a judgment.

*Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332, 3 L. ed. 362.

Where interests have been created for the purpose of preventing recovery, relief will be granted.

Foster's Fed. Pr. § 54.

Under the Massachusetts law, bail is discharged in civil actions if the defendant is released from his liability to arrest by operation of law; and it was not necessary to surrender the bankrupt in order to maintain the claim of the estate upon the funds in the hands of Silsby.

*Ingersoll* v. *Strong*, 9 Met. 447; *Collamore* v. *Fernald*, 3 Gray, 318; *Carpenter* v. *Turrell*, 100 Mass. 452; *Long* v. *Dickerson*, 15 Blatchf. 459, Fed. Cas. No. 8,480; *Beers* v. *Haughton*, 9 Pet. 329, 9 L. ed. 145.

Had the suits been pending they might have been stayed.

*Hill* v. *Harding*, 107 U. S. 631, 27 L. ed. 493, 2 Sup. Ct. Rep. 404; *Boynton* v. *Ball*, 121 U. S. 457, 30 L. ed. 985, 7 Sup. Ct. Rep. 981; *Re Basch*, 97 Fed. 761; *St. Cyr* v. *Daignault*, 103 Fed. 854; *Re Neely*, 108 Fed. 371.

The final judgment denied the jurisdiction of this court over controversies between the trustee and a third person in the possession of property alleged to belong to the bankrupt, it being also alleged that said third person has no beneficial interest in the said property, but has the sole duty of paying or delivering it over in settlement of the debts of the bankrupt.

*Chapman* v. *Brewer*, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; *Bryan* v. *Bern-*

*heimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; *Pirie* v. *Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906; *Wall* v. *Cox*, 41 C. C. A. 408, 101 Fed. 403; *Hall* v. *Kincell*, 42 C. C. A. 360, 102 Fed. 301.

Such judgment denied the jurisdiction of this court to entertain jurisdiction of proceedings on a petition by a trustee in bankruptcy to recover property alleged to belong to the bankrupt, but held under a claim of lien or security by the bankrupt's creditor, or by a third party for the benefit of said creditor.

*Sharpe* v. *Doyle*, 102 U. S. 686, 26 L. ed. 277; *Feibelman* v. *Packard*, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 289; *Re Metzler*, 1 Ben. 356, Fed. Cas. No. 9,512.

Universally, after the law takes the bankrupt into its own hands his creditors are prohibited from suing.

*Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. ed. 606.

All creditors are described as claimants, and their interests must necessarily be adverse to the estate. But there are not adverse claimants as defined in *Bardes* v. *First Nat. Bank*, 178 U. S. 532, 44 L. ed. 1180, 20 Sup. Ct. Rep. 1000.

The power to bring in other parties is not incompatible with § 23*b*.

*White* v. *Ewing*, 159 U. S. 36, 40 L. ed. 67, 15 Sup. Ct. Rep. 1018.

Creditors can be brought in on notice.

*Ingersoll* v. *Strong*, 9 Met. 447; *Collamore* v. *Fernald*, 3 Gray, 318.

Uniformity, economy, and despatch were clearly within the intent of the bankruptcy law.

*Ex parte City Bank*, 3 How. 314, 11 L. ed. 613.

The framers of the act only intended that suits against third parties, not creditors, strangers to the bankruptcy proceedings, should go to the state courts, but that everything pertaining to bankrupt and creditor, including all accountings and securities between them, should be exclusively heard and determined by the district court, unless that court ordered the question tried out in a pending suit.

This view seems to be supported by the prohibition upon trustees venturing into pending suits except by order of the court.

*Price* v. *Price*, 48 Fed. 823; *Re Klein*, 97 Fed. 31; *Bear* v. *Chase*, 40 C. C. A. 182, 99 Fed. 920.

And this is particularly true where the litigation in the state court is practically ended.

*Traders Nat. Bank* v. *Campbell*, 14 Wall. 87, 20 L. ed. 832; *Norton* v. *Switzer*, 93 U. S. 355, 23 L. ed. 903.

*Mr.* **Clarence W. Rowley** argued the cause and filed a brief for appellees:

None of the choses in action involved are within the jurisdiction of the bankruptcy court. All must be determined in the courts where, but for the bankruptcy, the bankrupt might have prosecuted them.

*Bardes* v. *First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1170, 20 Sup. Ct. Rep. 1000; *Mitchell* v. *McClure*, 178 U. S. 539, 44 L. ed. 1182, 20 Sup. Ct. Rep. 1000; *Hicks* v. *Knost*, 178 U. S. 541, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1006; *Bryan* v. *Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; *Mueller* v. *Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court.

This proceeding is governed by the principles decided in *Bardes* v. *First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Bryan* v. *Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557, and *Mueller* v. *Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269.

The objection that it is not a suit within the meaning of the 23d section of the bankruptcy law is without force. The proceeding was a summary application to the court in bankruptcy to grant an order in a matter, the result of the granting of which would be to immediately take from the surety moneys which had been deposited with him before the commencement of the proceedings in bankruptcy, and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. It would also enjoin the plaintiffs in the state suits from proceeding to collect their judgments from the surety in the bail bonds. To extend such a jurisdiction over an adverse claimant would be within the prohibition of § 23, *a* and *b* [30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3431], whether such jurisdiction were exerted by an action strictly so-called or by a summary application to the court in bankruptcy. It is the exercise of jurisdiction which the section prohibits, and the particular method of procedure in the court is immaterial. The surety in whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the act, and could not be proceeded *against in the bankruptcy court unless by [624] his consent, as provided for therein. It is not necessary, in order to be an adverse claimant, that the surety should claim to be the absolute owner of the property in his possession. It is sufficient if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond, and that liability had not been determined and satisfied. If the trustee desires to test the question of the right of the surety to retain the money, he must do so in accordance with the provisions of the section of the bankrupt law above referred to.

*Bryan* v. *Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557, does not, so far as the question here involved is concerned, touch or limit the decision in *Bardes* v. *First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

In *Mueller* v. *Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269, it was claimed that where property of a bankrupt came

into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which the agent asserted no adverse claim, the bankruptcy court, nevertheless, had no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed. In regard to this claim it was said by the court, through Mr. Chief Justice Fuller, as follows:

"In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt or his agent to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt or his agent so to deliver up oblige the trustee to resort to a plenary suit in the circuit court or a state court, as the case may be? If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired, and, in many respects, rendered practically inefficient. The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accom-[625] paniments of delay, complication, *and expense intended to be avoided by the simpler methods of the bankrupt law.

. . . . . .

"The position now taken amounts to no more than to assert that a mere refusal to surrender constitutes an adverse holding in fact and therefore an adverse claim when the petition was filed, and to that we cannot give our assent.

. . . . . .

"In this case, however, respondent asserted no right or title to the property before the referee, and the circumstances under which he held possession must be accepted as found by the referee and the district court.

. . . . . .

"In the case before us, William T. Nugent held this money as the agent of his father, the bankrupt, and without any claim of adverse interest in himself. If it was competent to deal with Davidson, the assignee in the case of *Bryan* v. *Bernheimer*, by summary proceedings, William T. Nugent could be dealt with in the same way."

In other words, *Nugent's Case* simply holds that, where the agent held money belonging to the bankrupt, to which he made no claim, but simply refused to give up the property, which he acknowledged belonged to the bankrupt, the bankruptcy court had power, by summary proceedings, to order him to deliver such property to the trustee in bankruptcy.

The case before us is wholly different. The surety claims the right to hold the money as against everybody until his liability on the bail bond is satisfied, and that claim is adverse to any claim that the trustee may make upon him for the money which is to indemnify him as stated.

There is no difference between the two plaintiffs in the state court on account of one having proved her claim in bankruptcy and the other having failed so to do. She did not waive her claim against the surety in the bail bond even by implication, but, on the contrary, stated that she intended to retain the same.

If the trustee has the right to obtain possession of the money from the surety, he must assert it in accordance with the provisions *of § 23 of the bankruptcy act, and [626] not by this summary proceeding in bankruptcy.

The plaintiffs in the suits in the state court had the right to proceed to judgment in that court and to collect their judgments against the surety on the bail bond, and the court in bankruptcy had no power to prevent such proceedings in suits over which the state court had full cognizance. *Eyster* v. *Gaff*, 91 U. S. 521, 23 L. ed. 403, cited in *Bardes* v. *First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

Our conclusion is that the District Court was without jurisdiction in the matter submitted to it in the petition of the trustee, *and its decree dismissing such petition for want of jurisdiction is therefore affirmed.*

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AMERICAN ICE COMPANY and William G. Johnson, Assignee, *Appts.*,

*v.*

EASTERN TRUST & BANKING COMPANY.

(See S. C. Reporter's ed. 626-632.)

*Mortgage—right of mortgagee to insurance moneys—insurance by mortgagor's assignee.*

The proceeds of policies of insurance on mortgaged property, taken out by the mortgagor's assignee for the benefit of creditors, inure to the trustee in the mortgage for the benefit of the bondholders secured thereby, where it requires the mortgagor to insure, and provides that in case of loss the insurance money may be applied by the trustee toward the renewal of, or additions to, the property destroyed, or, at his option, be retained and invested as a sinking fund for the redemption of the bonds, or applied to the payment of the principal.

[No. 95.]

*Argued December 2, 1902. Decided February 23, 1903.*

APPEAL from the Court of Appeals of the District of Columbia to review a judgment which modified a judgment of foreclosure of the Supreme Court of the District by reducing the amount of the indebtedness found due by the trial court and

NOTE.—*As to the right of a mortgagee to the benefit of insurance taken in the name of the mortgagor*—see note to Chipman v. Carroll (Kan.) 25 L. R. A. 305.

secured by the mortgage, and affirmed the judgment as modified. *Affirmed.*

See same case below, 17 App. D. C. 422.

Statement by Mr. Justice **Peckham:**

The appellee herein was the complainant in the court of original jurisdiction and commenced its suit in the supreme court of the District of Columbia to foreclose a [627]mortgage executed *by the American Ice Company, one of the appellants, to the appellee as trustee, etc. Judgment of foreclosure was entered, from which an appeal was taken to the court of appeals of the District, where it was modified by reducing the amount of the indebtedness found due by the trial court and secured by the mortgage, and as so modified the judgment was affirmed. 17 App. D. C. 428; also reported on former hearing in the court of appeals, 14 App. D. C. 304. Another phase of the controversy appears in 6 App. D. C. 375, and 169 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347.

The facts are somewhat numerous, but for the purpose of presenting the question discussed in the opinion herein the following only are necessary to be noticed:

The American Ice Company was a Maine corporation, and in that state it made a mortgage to the appellee, which was also a Maine corporation, to secure the payment of bonds executed by the ice company to the amount of $40,000, payable in instalments of $5,000 each. The bonds were payable to the mortgagee or bearer, and all were duly sold and delivered to various persons for full value before maturity. The property mortgaged embraced real estate in Maine, and also certain real estate which the mortgagor claimed to own in the city of Washington, D. C., opposite square 270, and being within the limits of the bed of the Potomac river. On this property were erected a wharf and ice houses for storing and distributing the ice gathered in Maine and shipped to Washington. The mortgage contained the following provisions as to insurance:

"Article 7. The American Ice Company hereby expressly covenants and agrees to pay any and all taxes, assessments, and governmental charges assessed or laid upon the property herein conveyed or intended so to be, and also to keep said premises and property at all times insured in such insurance companies as may be approved by the trustee, in such amounts as shall reasonably protect all the insurable property, payable in case of loss to the trustee as its interest may appear. In case of loss the insurance money may be applied by the trustee toward the renewal of or additions to the property destroyed or injured, or, at the option of the trustee, the money may either be retained [628]*and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due, or be applied to the payment of the principal of such of the aforesaid bonds as may be at the time due and unpaid and of the interest which may at that time have accrued upon the principal and be unpaid, without discrimination or preference; and ratably to the aggregate amount of said unpaid principal and accrued and unpaid interest, rendering the surplus, if any, to the American Ice Company, or to whomsoever may be lawfully and equitably entitled to receive the same."

The mortgagor company thereafter fell into financial difficulties, defaulted in the payment of its bonds and other indebtedness, and on October 13, 1893, it made an assignment to William G. Johnson, the other appellant, as assignee, for the benefit of its creditors. The assignee took possession of the real property mortgaged and situate in Washington, and in November, 1896, took out fire insurance policies to the extent of $3,000 on the buildings and improvements on the Washington property, the premiums being paid from the assigned estate. On February 11, 1896, the buildings and improvements were destroyed by fire and the insurance moneys were paid to the assignee, who set up in his answer to the bill of foreclosure that he had taken out the insurance upon his separate interest as owner of the equity of redemption for the benefit of all the creditors of the ice company, secured and unsecured; while the trustee claims the insurance moneys for the benefit of the bondholders.

The trial court decreed the foreclosure of the mortgage and sale of the mortgaged premises, and in the event that the proceeds arising therefrom should be insufficient to pay the bonded indebtedness, it further decreed that the assignee should pay to the trustee the insurance moneys, or so much as might be necessary to pay the deficit, and that the trustee should apply the same as directed.

*Mr.* **William G. Johnson** argued the cause and filed a brief for appellants:

The assignee, representing general creditors and being the owner in fee of the equity of redemption, had an insurable interest in the property, separate and distinct from that of the trustee under the mortgage; and it was that interest which the assignee undertook to insure.

*Royal Ins. Co.* v. *Stinson*, 103 U. S. 25, 26 L. ed. 473; *United States* v. *American Tobacco Co.* 166 U. S. 468, 41 L. ed. 1081, 17 Sup. Ct. Rep. 619; *Wheeler* v. *Factors & T. Ins. Co.* 101 U. S. 439, 25 L. ed. 1055; *Wainer* v. *Milford Mut. F. Ins. Co.* 153 Mass. 335, 11 L. R. A. 598, 26 N. E. 877.

At the time of the insurance and of the fire the assignee in this case was in possession of the property on which the insurance was effected, and of its rents and profits. That possession was adjudged rightful by this court.

*Willis* v. *Eastern Trust & Bkg. Co.* 169 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347.

A covenant to insure, unless upon the express obligation of both parties, and not at the option of either, that the insurance be expended in repairs (in which case it is a covenant to repair by particular means), is not one running with the land, but lacks the essential elements of such a covenant.

Platt, Covenants, 183, 185, 186, 187, 188; *Cushing* v. *Thompson*, 34 Me. 496; *Carpenter* v. *Providence Washington Ins. Co.* 16 Pet. 495, 10 L. ed. 1044.

That covenants to insure merely are not covenants running with the land has been expressly decided by the court of appeals of New York.

*Dunlop* v. *Avery*, 89 N. Y. 592; *Reid* v. *McCrum*, 91 N. Y. 412.

*Mr.* **B. F. Leighton** argued the cause and filed a brief for appellee:

A covenant to insure runs with the land, and is not a mere personal obligation of the covenantor.

*Thomas* v. *Vonkapff*, 6 Gill & J. 372; *Vernon* v. *Smith*, 5 Barn. & Ald. 10; *Re Sands Ale Brewing Co.* 3 Biss. 175, Fed. Cas. No. 12,307.

A covenant to rebuild buildings destroyed or injured by fire, which were upon the property at the time of the covenant, is a covenant running with the land.

*Spencer's Case*, 1 Smith Lead. Cas. 116.

If the covenant in controversy was merely a covenant to insure, without more, it might be questionable whether it ran with the land or was a mere personal obligation binding the covenantor alone.

*Dunlop* v. *Avery*, 89 N. Y. 596; *Reid* v. *McCrum*, 91 N. Y. 412.

The assignee under an assignment for the benefit of creditors is the representative of the assignor, and not the representative of the creditors, and cannot, therefore, take to himself any of their rights. He succeeds to and enjoys the rights of the assignor, and none other, except that the property in his hands is not liable to execution. He is but the assignor himself, so far as the rights of the creditors are concerned.

Burrill, Assignm. 391.

Where there is an agreement between the mortgagor and the mortgagee that the mortgagor shall keep the premises insured for the benefit of the mortgagee, and the mortgagor takes out a policy of insurance in his own name, which is not assigned to the mortgagee or made payable to him in any way, the mortgagee has an equitable lien upon the proceeds of the policy; and this agreement may be shown by parol evidence.

*Chipman* v. *Carroll*, 53 Kan. 163, 25 L. R. A. 305, 35 Pac. 1109; *Giddings* v. *Seevers*, 24 Md. 372; *Miller* v. *Aldrich*, 31 Mich. 411; *Cromwell* v. *Brooklyn F. Ins. Co.* 44 N. Y. 46, 4 Am. Rep. 641; *Nichols* v. *Baxter*, 5 R. I. 491; *Ellis* v. *Kreutzinger*, 27 Mo. 311, 72 Am. Dec. 270; *Lazarus* v. *Commonwealth Ins. Co.* 2 Am. Lead. Cas. 834; *Grange Mill Co.* v. *Western Assur. Co.* 118 Ill. 396, 9 N. E. 274; *Masury* v. *Southworth*, 9 Ohio St. 348.

Had this insurance been effected by the ice company, there could be no question as to the right of the appellee to intercept the insurance money, and apply it, so far as necessary, in the discharge of the bonded debt. Has the assignee of the grantor in the deed of trust a better right to the insurance money?

*Wheeler* v. *Factors & T. Ins. Co.* 101 U. S. 439, 25 L. ed. 1055.

*Mr. Justice **Peckham**, after making the [629] above statement of facts, delivered the opinion of the court:

The appellants have made several assignments of error which have been argued before us, but the only one we think it necessary to notice is that which relates to the disposition of the moneys received by the assignee on account of the insurance effected by him upon the property destroyed by fire.

The assignee claims to be entitled to pay these moneys for the benefit of all the creditors, unsecured as well as secured, while the appellee, the trustee in the mortgage, demands that the moneys should be paid to it for the purpose of reducing the deficit which may arise from the sale of the mortgaged premises, and the courts below have so decreed. The claim of the appellee is founded upon the language used in the mortgage, by which the ice company was to keep the "premises and property at all times insured . . . in such amounts as shall reasonably protect all the insurable property. . . . In case of loss the insurance money may be applied by the trustee toward the renewal of or additions to the property destroyed or injured, or, at the option of the trustee, the money may either be retained and invested in such securities as it approves, as a sinking fund for the redemption of the bonds when due, or to be applied to the payment of the principal" of such bonds, etc. This language, it is urged, takes the case out of the ordinary rule that a simple covenant to insure, contained in a mortgage, does not run with the land. The assignee appellant founds his claim upon the assertion that, as assignee, he was the owner of the equity of redemption, having an insurable interest in the premises as such, and that, in fact, he intended such insurance for the benefit of all creditors, and not as a fund for the security of the bondholders alone.

In *Farmers' Loan & T. Co.* v. *Penn Plate Glass Co.* 186 U. S. 434, 46 L. ed. 1234, 22 Sup. Ct. Rep. 842, we had occasion to examine the nature and effect of a covenant to insure contained in a mortgage, and we concluded that such a covenant does not run with the land, so that one taking a conveyance subject to the mortgage comes under a primary obligation to insure. In that case the mortgage was *foreclosed and the [630] property bid in at the judicial sale, and the grantee of the master took out insurance in his own name for the purpose of insuring his own interest in the premises which he had purchased, and he repudiated in terms any obligation to insure for the benefit of the mortgagee, and accordingly the policies were issued, and they stated they did not cover the mortgagee's interest in the premises.

Here there is in substance no difference between the mortgagor and its assignee for the benefit of creditors, so far as this question is concerned. The mortgagor had in-

deed failed to insure, as it had covenanted to do, but when it transferred the legal title of the property to its voluntary assignee, he stood in the shoes of his assignor, and when he took out insurance policies upon the property he in effect fulfilled the obligation which had rested upon the mortgagor to insure, and the insurance thus becomes by virtue of the covenant a security for the payment of the bonds secured by the mortgage. This does not make a case of a covenant to insure running with the land as against a subsequent purchaser of the property for value, but, as we have said, it is simply the case of a taking out of insurance by a voluntary assignee having no beneficial interest in the property, and when such assignee insures the premises under the circumstances herein stated, with such a covenant in a mortgage, the insurance moneys inure to the benefit of the bondholders secured by the mortgage.

It was conceded in the court below that, as a general proposition, a covenant to insure was a mere personal covenant, and did not attach to and run with the land, but it was held that the peculiar language of this mortgage took it out of that rule.

Mr. Chief Justice Alvey said in the court of appeals in this case:

"It is very clear that, by the terms of the covenant, it had relation to the land, and its principal object was to keep and maintain the buildings on the property in condition for carrying on the ice business. This was the great object of the insurance required, as means of security to the bondholders. Without this, the property, by fire, might be rendered of little value, and the bondholders be left without security. [631] By means of the insurance it was intended that the property should be maintained as security; and hence it was provided, primarily, that the insurance money might be expended in renewal of or adding to the buildings. In such cases it has been repeatedly held that the covenant does run with the land,—at least in an equitable sense; and where an insurance has been obtained, though by an assignee, and a fire has occurred, and the insurance money has been received, a court of equity has held that the insurance money should be applied for the benefit of those for whose protection the original covenant was made." [14 App. D. C. 331.]

The cases of *Vernon* v. *Smith*, 5 Barn. & Ald. 7; *Thomas* v. *Vonkapff*, 6 Gill & J. 372; *Miller* v. *Aldrich*, 31 Mich. 411; *Ellis* v. *Kreutzinger*, 27 Mo. 311, 72 Am. Dec. 270; *Nichols* v. *Baxter*, 5 R. I. 491; *Masury* v. *Southworth*, 9 Ohio St. 348, and *Re Sands Ale Brewing Co.* 3 Biss. 175, Fed. Cas. No. 12,307,—were cited by the chief justice in support of his contention.

In the case of *Wheeler* v. *Factor's & T. Ins. Co.* 101 U. S. 439, 25 L. ed. 1055, it was held that where a mortgagor is bound by his covenant to insure the mortgaged premises for the better security of the mortgagees, the latter have, to the extent of their interest in the property destroyed, an equitable lien upon the money due from the policy taken out by him, and that this equity exists, although the contract provides that, in case of the mortgagor's failure to procure and assign such insurance, the mortgagees may procure it at the mortgagor's expense.

So in this case, we practically have a fulfilment of the mortgagor's covenant to insure, because its voluntary assignee, standing in its shoes, did himself insure the premises, and such insurance inures to the benefit of the mortgagee, because the assignee is a voluntary one, and is but carrying out an obligation imposed originally upon his assignor. The peculiar language of the mortgage upon the subject of insurance takes it out of the general rule governing such covenants.

We think the case at bar is not covered by the case of *Farmers' Loan & T. Co.* v. *Penn Plate Glass Co.* 186 U. S. 434, 46 L. ed. 1234, 22 Sup. Ct. Rep. 842, and that the court below made the proper decree in relation to the insurance moneys.

We have examined the other assignments of error argued before us, but are of opin- [632] ion that they are clearly untenable and were properly disposed of by the court below.

Finding no error in the record, *the judgment is affirmed.*

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BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING COMPANY, *Appt.*,

*v.*

MONTANA ORE PURCHASING COMPANY *et al.*

(See S. C. Reporter's ed. 632-645.)

*Courts—jurisdiction of circuit court—Federal question—not set up by allegations anticipating defense—disclaimer of anticipated defense—bill to quiet title—must allege prior suit at law—must aver possession.*

1. The Federal question relied upon as conferring original jurisdiction on a circuit court of the United States must appear necessarily by plaintiff's statement of his own claim, and cannot arise from mere allegations in the bill of the defense which the defendants intend to set up, or which they rely upon.
2. A suit over the ownership of ore taken by defendants from a mining claim alleged to be the property of complainant by virtue of a patent from the United States is not brought within the jurisdiction of a circuit court of the United States by allegations in the bill that defendants intend to assert a defense based on certain other patents and the mining laws of the United States, on

NOTE.—*As to Federal question as conferring jurisdiction on United States courts*—see notes to Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7; Bailey v. Mosher, 11 C. C. A. 308; and *Re* Buchanan, 39 L. ed. U. S. 884.

*As to the necessity and sufficiency of allegations of possession in suits to quiet title*—see note to Jackson v. Simmons, 39 C. C. A. 526.

the theory that such suit, being alleged to have been brought in equity to avoid a multiplicity of suits, is in effect one to quiet title, and that such averments are therefore necessarily set forth as part of the cause of action.

3. A bill to quiet title against a single adverse claimant must aver that complainant's title has been successfully tried at law at least once.

4. An averment of possession in the complainant is essential to the maintenance of a bill to quiet title in a Federal court, although under the state practice a person not in possession may maintain an action to quiet title.

5. Jurisdiction, if conferred on a circuit court of the United States by averments in the bill as to the defense which defendants intend to assert, is ousted by the filing of answers which disclaim any intention of relying on such defense.

[No. 103.]

*Argued December 3, 1902. Decided February 23, 1903.*

APPEAL from the Circuit Court of the United States for the District of Montana to review a judgment which dismissed for want of jurisdiction a bill which sought to enjoin the removal of ore from a mining claim alleged to be the property of the complainant under a patent from the United States. *Affirmed.*

Statement by Mr. Justice **Peckham:**

The appellant in this case (being the complainant below) has brought it to this court by an appeal from the judgment of the circuit court of the United States for the district of Montana dismissing its complaint and ordering judgment for the defendants on the ground that the court had no jurisdiction of the action. A decree having been entered in accordance with the direction of the court dismissing the bill, the circuit court has certified to this court the question of jurisdiction, and whether or not a Federal question is presented in complainant's amended bill and the answer of the defendant corporation.

[633] *The cause of action relates to the ownership of a certain quantity of copper ore taken and converted by the defendants from the mining ground alleged to be owned by the complainant. For the purpose of presenting the question of jurisdiction, the court below has certified to this court the amended bill and the answer of the defendants. The complainant in the bill alleges that it is the owner and entitled to possession of certain property therein described, known as and called the Pennsylvania lode mining claim, lot No. 172, situated in Summit Valley mining district, county of Silver Bow, Montana. A full description of the land is given in the bill. The complainant's title is next set out with much particularity and detail, from which it appears that the original source of its title is a United States patent covering the claim, dated April 9, 1886, issued to persons named therein, from whom the complainant deraigns title. It is then averred that on April 1, 1895, defendants wrongfully and unlawfully entered upon complainant's premises, and from that time on extracted from the mine large quantities of valuable ores, of the reasonable value of $500,000, and that they have continued to extract and mine ores from the premises belonging to the complainant, and are now mining and extracting ores therefrom and threatening to continue to do so unless enjoined by the court.

The land which the complainant claims to own is valuable almost exclusively for the copper, silver, and gold ores which are found there in large quantities, and it is these ores that the defendants have extracted and are threatening to continue to extract in the future.

It is averred that the complainant has no means of ascertaining the quantity or value of the ores which the defendants have extracted or may hereafter extract from such premises, and if the defendants are permitted to continue to extract such ores it will be altogether uncertain and indefinite as to what the amount or the value of such ores may be, and the complainant will be compelled to rely to a great extent on the defendants as to such amount and value; that unless the defendants are enjoined and restrained from taking the ores the complainant will be required to bring numerous actions for the determination *of the dam- [634] ages it has from time to time sustained by reason of such trespasses, which are continuing on the part of the defendants. Therefore the complainant brings this suit in order to avoid a multiplicity of suits in the premises; and by reason of the trespasses of the defendants and their threatened continuance the complainant has suffered and will suffer great and irreparable injury and damage, unless the defendants are enjoined from further trespass, as prayed for.

This is the complainant's cause of action, as set forth in the bill, regarding the trespass and the injury inflicted and the difficulty of proof thereof and the prevention of a multiplicity of suits.

The complainant then further averred in the bill, for the purpose, as therein stated, of showing the jurisdiction of the court to determine the matters set forth in such bill, that the determination of the controversy between the parties involved the construction of the mining laws of the United States; that the property of the complainant is a mining claim and has been patented as such under the provisions of the Revised Statutes of the United States relating to mines and mineral lands; that the defendants owned a portion of certain properties called the Rarus lode claim, lot No. 179; the Johnstown lode claim, lot No. 173; and the Little Ida lode claim, lot No. 126, which claims lie north of and partially adjoining and near to the Pennsylvania lode claim, owned by the complainant.

It is further stated that the various claims which are and will be made by the defendants as to their rights in complainant's mine by reason of their ownership of the other mines above mentioned are with-

out foundation, yet, nevertheless, they will be urged as a defense to the cause of action set forth in the bill of complaint, and the claims of defendants are denied and disputed, as are also the facts upon which the defendants base their defense, and the law arising from the same, and complainant adds "that it disputes each and every one of the claims made by the defendants, relative to the construction of said several patents, and it (complainant) claims that all veins whose apexes lie within the Johnstown patent must be governed and regulated in extralateral rights, if any they have, [635] under the *Johnstown patent, and not under or by virtue of the Rarus patent." The complainant also averred "that the said defendants contend and claim that the complainant cannot under any circumstances obtain any relief for ores extracted within that portion of the premises owned by it, without first showing that the apices of the veins from which the ores were extracted are within the surface lines of the ground owned and claimed by the complainant, whereas your orator claims that prima facie it is the owner of all ores found within its boundaries extended downward into the earth, until it has been shown that some other person or company has some right thereto by reason of ownership of the apex of the vein within some other claim." The complainant further stated its right to enjoin defendant from mining ore beneath the ground of complainant, because no vein having its apex in the defendant's claim passes in its strike through the end lines thereof so as to confer extralateral rights.

And finally: "Wherefore, your orator shows to your honors that there is involved in the matters in controversy, between your orator and the said defendants, the numerous questions aforesaid, involving the construction of the statutes of the United States relative to locating, purchasing, and patenting of mineral lands and the construction of the statutes relative to the right of one claimant to follow veins down to and into the premises of another, under the circumstances and situation of the parties as hereinbefore set out, and also the construction of the said statutes in relation to patenting of claims and whether the vein can be patented to one person and the surface to another, and to the right of the Land Department to segregate the surface from the mineral in the ground, granting one to one person and the other to another, and as to whether said action is authorized under and by virtue of said statutes; and also as to whether, when an apex of a vein is divided upon the surface, part being within the premises granted in one patent and a part within another, as to what, if any, extralateral rights are granted under such circumstances to either party."

The answer of the defendants is also set forth in the certificate of the court below, in which the defendants deny that they [636] *wrongfully or unlawfully entered the premises of the complainant or that they took out any amount of ore belonging to the complainant from that mine, and deny that the defendants ever mined or extracted ores from premises belonging to the complainant, or threatened to do so; also deny the averments as to the value of the ore as set forth in the bill. Defendants also deny that the determination of the controversy between the parties involves a construction of the mining acts of the United States, or the construction of any statute of the United States whatever. They admit that the Rarus and the Johnstown lode claims are mineral claims, located under the laws of the United States, and that the same have been patented under those laws, and that the defendants own a portion of the lode called the Rarus lode claim. The defendants also assert that they are the owners of a certain parcel of ground within the Johnstown lode claim, and also the owners of that portion of the Pennsylvania lode claim thereafter described, and they claim the right to enter upon the premises of the complainant, namely, that portion of the Pennsylvania lode claim described in its amended bill of complaint, by reason of the fact that certain veins owned and claimed by the defendants and in their possession have their dip or apices within the Johnstown lode claim, lot No. 173, and that portion thereof owned by the defendants, and that the defendants assert the right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from the said Johnstown lode claim and from that portion thereof claimed by the defendants, and enter the premises owned and claimed by the complainant, namely, that portion of the Pennsylvania lode claim described in its amended bill of complaint. But the defendants deny that they claim the right to enter complainant's premises by reason of the fact that any veins owned or claimed by them or in their possession have their top or apices within the Rarus lode claim or in that portion thereof owned by the defendants, or by reason of the fact that the same have their top or apices within the Little Ida lode claim or any portion thereof, and deny that the defendants assert the right or any right to follow such veins on their downward course or dip, although the same so far depart *from a perpendicular as to de- [637] part from said Rarus lode claim, and to enter the premises claimed by the complainant; and deny that they assert or claim the right to enter the premises of the complainant by reason of the fact that any veins owned or claimed by the defendants have their top or apices [in said lode claim or any part thereof, but alleges that the defendants claim the right to enter the premises of the claimant by reason of the fact that certain veins have their top or apices]† within that portion of the Johnstown lode claim owned by the de-

†The clause in brackets was, by an evident misprint, omitted from the answer as copied in the certificate of the court below, from which is here quoted the statement of the defendants' allegations. The insertion of the bracketed clause makes the statement correct as shown by the defendants' answer. [Ed.

fendant, or that they assert the right to follow such veins on their downward course or dip, although the same so far depart from a perpendicular as to depart from the Johnstown lode claim and from the portions thereof owned by the defendants, and enter the premises of the complainant.

It was further averred in the answer "that in this action it makes no claim of any right under the Rarus patent to enter upon the veins within the ground claimed or owned by the complainant, but that it asserts its right to do so by reason of its ownership of a portion of the Johnstown lode claim, and the fact that the top or apices of the veins or lode in question are within said portion of the Johnstown lode claim." It also "denies that in this action it contends or claims that only the surface ground of the Johnstown claim was patented to the patentees named therein, or that all or any veins lying within the original location lines of the Rarus claim were patented to the claimant under the Rarus claim; . . . but defendant alleges that it contends and claims in this action, and in so far as this controversy between complainant and defendant is concerned, that its extralateral rights to the veins in question should be determined by its ownership of that parcel of ground now included within the Johnstown claim, and not by the Rarus, for the reason that said veins or lodes have their tops or apices within the said parcel of ground owned by defendant."

Various other denials were made, from which it appears that the only claim made by the defendants in this action is by virtue of their ownership of the Johnstown lode claim. The defendants by this answer, therefore, admit the averments in the bill that their rights must be governed and regulated in this action by reason of their ownership of the Johnstown patent, and not by virtue of the Rarus patent, and as to those rights the complainant claims that the course of the vein cannot be followed because of the nature of the ground.

*Mr.* **Louis Marshall** argued the cause, and, with *Mr. John F. Forbis*, filed a brief for appellant:

Federal courts will not strain to decline the exercise of jurisdiction, where a reasonable showing for assuming it has been made.

*Nashville, C. & St. L. R. Co.* v. *Taylor*, 86 Fed. 168.

A suit cannot properly be dismissed by a circuit court of the United States as not involving a controversy within the jurisdiction of the court, unless the facts as made to appear on the record create a legal certainty of that conclusion.

*Barry* v. *Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Deputron* v. *Young*, 134 U. S. 241, 33 L. ed. 923, 10 Sup. Ct. Rep. 539.

Federal questions existing, it by no means follows that to confer jurisdiction it will be actually necessary for the court, when it comes to pass upon the case, to base its decision on those questions, or even to conclude that the appellant's position on the merits of those questions is sound.

*Nashville, C. & St. L. R. Co.* v. *Taylor*, 86 Fed. 168; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Southern P. R. Co.* v. *California*, 118 U. S. 112, 30 L. ed. 104, 6 Sup. Ct. Rep. 993; *Penn Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 695, 42 L. ed. 630, 18 Sup. Ct. Rep. 223.

The fact that the case involves questions depending on general principles of law, in addition to the Federal questions, and may be eventually decided on the former, does not prevent the jurisdiction from attaching.

*Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *New Orleans, M. & T. R. Co.* v. *Mississippi*, 102 U. S. 140, 26 L. ed. 98; *Nashville* v. *Cooper*, 6 Wall. 253, 18 L. ed. 853; *Little York Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 203, 24 L. ed. 658.

This case does not come within the principle of the authorities which deny jurisdiction where it does not appear from the statement of the complainant's cause of action that a Federal question exists.

*Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Cox* v. *Gilmer*, 88 Fed. 343.

The attempted disclaimer by the appellees —that they make no claim of any rights under the Rarus patent in this action—is a sham, and in no view of the case can it operate as an ouster of jurisdiction.

1 Dan. Ch. Pl. & Pr. 6th Am. ed. 706; 1 Beach, Modern Eq. Pr. § 282; *Bentley* v. *Cowman*, 6 Gill & J. 152; *Prescott* v. *Hutchinson*, 13 Mass. 441; *Oakham* v. *Hall*, 112 Mass. 535.

Being designed to operate as a release, the disclaimer must be signed by the defendant himself, and his signature attested by some person competent to be a witness.

*Dickerson* v. *Hodges*, 43 N. J. Eq. 45, 10 Atl. 111; 6 Enc. Pl. & Pr. p. 728, title *Disclaimer*; *Mardes* v. *Meyers*, 8 Tex. Civ. App. 542, 28 S. W. 693.

A disclaimer contained in an answer, to be effective, must be absolute and unqualified.

*De Uprey* v. *De Uprey*, 27 Cal. 329, 87 Am. Dec. 81.

Where a disclaimer relates to one of several titles asserted by the party disclaiming, it merely operates as an estoppel against the assertion of the particular title thus disclaimed.

*Tappan* v. *Boston Water Power Co.* 157 Mass. 24, 16 L. R. A. 353, 31 N. E. 703.

Jurisdiction depends upon the state of things existing when an action is brought. The right to sue and to invoke jurisdiction is anterior to the defense.

*Osborn* v. *Bank of United States*, 9 Wheat. 824, 6 L. ed. 224; *Sawyer* v. *Concordia*, 4 Woods. 273, 12 Fed. 754; *Mollan* v. *Torrance*, 9 Wheat. 537, 6 L. ed. 154.

Where jurisdiction is given by the amount of plaintiff's demand, it is not ousted because there is a verdict or judgment for less, or because the demand is reduced below the limit by offsets.

*McKnight* v. *Ramsey*, 1 Cranch C. C. 40, Fed. Cas. No. 8,868; *Hulsecamp* v. *Teel*, 2 Dall. 358, Fed. Cas. No. 6,862; *West* v. *Woods*, 18 Fed. 665; *Schunk* v. *Moline, M. & S. Co.* 147 U. S. 500, 37 L. ed. 255, 13 Sup. Ct. Rep. 416.

So, also, jurisdiction is not lost by the complainant's change of residence subsequent to the filing of his bill or declaration.

*Clarke* v. *Matthewson*, 2 Sumn. 262, Fed. Cas. No. 2,857; *Connolly* v. *Taylor*, 2 Pet. 556, 7 L. ed. 518; *Morgan* v. *Morgan*, 2 Wheat. 297, 4 L. ed. 244; *Ober* v. *Gallagher*, 93 U. S. 199, 23 L. ed. 829; *Stewart* v. *Dunham*, 115 U. S. 61, 29 L. ed. 329, 5 Sup. Ct. Rep. 1163; *Phelps* v. *Oaks*, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714.

So, where jurisdiction has been once given by the existence of diverse citizenship, it is not affected by subsequent change of parties.

*Hardenbergh* v. *Ray*, 151 U. S. 112, 38 L. ed. 93, 14 Sup. Ct. Rep. 305; *Wetherby* v. *Stinson*, 10 C. C. A. 243, 18 U. S. App. 714, 62 Fed. 173.

For purposes of jurisdiction of the Federal court, both in a case where jurisdiction is originally invoked on the ground that the determination of the suit depends upon some question of a Federal nature, and where the case is removed from the state court on that ground, the jurisdiction depends not upon the defenses interposed, but upon the case made by the declaration or bill of complaint.

*Tennessee* v. *Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

Where a plaintiff complains of a trespass of a continuing nature, so that redress at law would require a multiplicity of actions, the remedy at law would not be so adequate as that afforded by a court of equity.

*Holland* v. *Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *United States* v. *Wilson*, 118 U. S. 89, 30 L. ed. 112, 6 Sup. Ct. Rep. 991; *Frost* v. *Spitley*, 121 U. S. 552, 30 L. ed. 1010, 7 Sup. Ct. Rep. 1129.

Irrespective of the statutory provision of the Montana Code, the right to maintain an action of this character in order to prevent a multiplicity of suits falls under one of the well-recognized heads of equity jurisprudence, and has been recognized in many mining cases.

*Erhardt* v. *Boaro*, 113 U. S. 537, 28 L. ed. 1116, 5 Sup. Ct. Rep. 560; *Waterloo Min. Co.* v. *Doe*, 27 C. C. A. 50, 48 U. S. App. 411, 82 Fed. 45.

Statutory enactments to the effect that anyone, whether in actual possession or not, claiming title to real estate, may bring an action against any adverse claimant for the purpose of quieting his title, enlarge, but do not change the character of, the equitable rights of persons claiming title to real property; and a Federal court sitting in such a state, as a court of equity, has jurisdiction to give the relief accorded by the statute.

*Holland* v. *Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Reynolds* v. *First Nat. Bank*, 112 U. S. 405, 28 L. ed. 733, 5 Sup. Ct. Rep. 213; *Bardon* v. *Land & River Improv. Co.* 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; *Clark* v. *Smith*, 13 Pet. 195, 10 L. ed. 123.

The commission of a trespass on real estate, and of acts of waste upon it, do not constitute a possession which in itself would drive the owner to an action of ejectment, and prevent him from filing a bill *quia timet*.

*Simmons Creek Coal Co.* v. *Doran*, 142 U. S. 417, 35 L. ed. 1063, 12 Sup. Ct. Rep. 239.

*Mr.* **John J. McHatton** argued the cause, and, with *Mr. John W. Cotter*, filed a brief for appellees:

Actions brought on the equity side of the United States circuit court for the purpose of quieting title cannot be maintained unless the complainant is, at the time the action is brought, in the possession of the premises.

*Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* 50 C. C. A. 79, 112 Fed. 4; *United States Min. Co* v. *Lawson*, 115 Fed. 1005; *California Oil & Gas Co.* v. *Miller*, 96 Fed. 12.

So far as the complaint is concerned, in its statement of a cause of action it appears that any questions which might arise would be simply questions of fact; and this is true, even if the allegations contained in the complaint for the purpose of attempting to give the court jurisdiction were proper to be considered.

*California Oil & Gas Co.* v. *Miller*, 96 Fed. 12; *Dewey Min. Co.* v. *Miller*, 96 Fed. 1.

The controversy must be a real and substantial one; a mere claim in words is not enough.

*Lampasas* v. *Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *McCain* v. *Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644.

In a suit to quiet title to a mining claim, the fact that the defendant claims under a location does not raise a Federal question.

*De Lamar's Nevada Gold Min. Co.* v. *Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715.

Trespass on a mining claim does not present or involve a Federal question.

*Peabody Gold Min. Co.* v. *Gold Hill Min. Co.* 97 Fed. 657; *Argonaut Min. Co.* v. *Kennedy Min. & Mill. Co.* 84 Fed. 2.

The complaint in its statement of a cause of action must present a Federal question.

*Tennessee* v. *Union & P. Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Postal Teleg. Cable Co.* v. *United States*, 155 U. S. 482, *sub nom. Postal Teleg. Cable Co.* v. *Alabama*, 39 L. ed. 231, 15 Sup. Ct. Rep. 192; *Oregon Short Line & U. N. R. Co.* v. *Skottowe*, 162 U. S. 495, 40 L. ed. 1050, 16 Sup. Ct. Rep. 869; *Galveston, H. & S. A. R. Co.* v. *Texas*, 170 U. S. 226, 42 L. ed. 1017, 18 Sup. Ct. Rep. 603; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

A Federal question is not involved so as to give the circuit court jurisdiction, because in the course of the litigation it may

become necessary to construe the Constitution or some law of the United States.

*Wise* v. *Nixon*, 78 Fed. 203; *Little York Gold Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 24 L. ed. 656.

It must appear from plaintiff's statement of his cause of action.

*Montana Ore-Purchasing Co.* v. *Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 1, 93 Fed. 274; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

Abstract questions of law are not to be considered unless it appears, from the statement of facts constituting the cause of action, that they are material and necessary to a decision of the case.

*New York, L. E. & W. R. Co.* v. *Madison*, 123 U. S. 524, 31 L. ed. 258, 8 Sup. Ct. Rep. 246.

A claim to land under a patent from the United States does not present a Federal question.

*Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

A suit brought in support of an adverse claim to a mine is not a suit involving the construction of the Constitution or any law of the United States.

*Bushnell* v. *Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726; *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222.

Plaintiff cannot anticipate the defense of the defendant, and, by statements contained in his pleadings for that purpose, present a Federal question.

*Montana Ore-Purchasing Co.* v. *Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 1, 93 Fed. 274; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399. See also *Third Street & Suburban R. Co.* v. *Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451; *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35; *Eagan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

Where jurisdiction is shown by the complaint it may be taken away by the answer.

*Robinson* v. *Anderson*, 121 U. S. 522, 30 L. ed. 1021, 7 Sup. Ct. Rep. 1011; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *Excelsior Wooden Pipe Co.* v. *Pacific Bridge Co.* 185 U. S. 282, 46 L. ed. 910, 22 Sup. Ct. Rep. 681; *Montana Ore-Purchasing Co.* v. *Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 1, 93 Fed. 274; *Third Street & Suburban R. Co.* v. *Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep 451; *Colorado Cent. Consol. Min. Co.* v. *Turck*, 150 U. S. 138, 37 L. ed. 1030, 14 Sup. Ct. Rep. 35.

Where the complaint does not show that a Federal question is involved and necessary to a decision of the case, it is equally well settled that a defense which may be interposed by pleading or evidence under a law of the United States will not confer jurisdiction.

*Peabody Gold Min. Co.* v. *Gold Hill Min. Co.* 49 C. C. A. 637, 111 Fed. 817; *Pratt* v. *Paris Gaslight & Coke Co.* 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

It is quite plain that the various averments contained in the complainant's bill for the purpose of showing jurisdiction in the circuit court are wholly unnecessary in order to make out complainant's cause of action for the conversion of ore by the defendants on premises belonging to complainant. To make out a prima facie case on the part of complainant, so far as its right to the ore in question is concerned, all that was necessary was to show the patent and the complainant's possession under it, and from such patent and possession the presumption would be that the complainant was the owner of all ores found within the boundaries contained in the patent extended downward into the earth, and the burden would then rest upon the defendants to show that, notwithstanding such presumption, they had the right to enter upon and take the ore from the ground within the limit described in the patent under which the complainant derives title. It could then prove facts to sustain its averments in regard to ascertaining the quantity and value of the ores which the defendants were extracting or might extract from the complainant's premises, and that it would be altogether uncertain and indefinite as to what amount of ores or the value thereof the defendants might extract in the future, and that the complainant would be compelled to rely upon the good faith and showing of the defendants as to the amount and value of the ores which they had theretofore extracted and might thereafter extract from the premises. Indeed, the complainant asserted in the bill, an extract from which is contained in the foregoing statement, that prima facie it is the owner of all ores found within its boundaries extended downwards into the earth, until the contrary has been shown. It would be wholly unnecessary and improper, in order to prove complainant's cause of action, to go into any matters [639] of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading so far as we are aware, and is improper.

The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of complain-

ant's cause of action, imposing upon the defendant the burden of proving such defense.

Conforming itself to that rule, the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defense of defendants would be, and complainant's answer to such defense. Under these circumstances the case is brought within the rule laid down in *Tennessee* v. *Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654. That case has been cited and approved many times since, among the latest being *Arkansas* v. *Kansas & T. Coal Co.* 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47, where it was stated by Mr. Chief Justice Fuller, speaking for the court, at p. 188, L. ed. p. 146, Sup. Ct. Rep. p. 48, as follows:

"Hence it has been settled that a case cannot be removed from a state court into the circuit court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by plaintiff's statement of his own claim; and if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. And, moreover, that jurisdiction is not conferred by allegations that defendant intends to assert a defense based on the [640] Constitution *or a law or treaty of the United States, or under statutes of the United States or of a state, in conflict with the Constitution." See also *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

The test of the right of removal is that the case must be one over which the circuit court might have exercised original jurisdiction under § 1 of the act of March 3, 1887, as corrected by the act of August 13, 1888 (24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 514; 25 Stat. at L. 433, chap. 866). The cases hold that to give the circuit court original jurisdiction the Federal question must appear necessarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defense which the defendants intend to set up, or which they rely upon. *Third Street & Suburban R. Co.* v. *Lewis*, 173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 541.

It is urged, however, on the part of the complainant, that its averments in regard to the jurisdiction of the court are necessary to be set forth as a part of its cause of action, and that they show that the appellees are questioning complainant's title and interfering with its enjoyment of its property right by asserting ownership to a portion of such claim of complainant based upon two government patents issued for the Rarus and Johnstown claims respectively, and although such assertion of ownership of the appellees is, as complainant avers, without legal foundation, yet, for reasons stated in the bill, the consideration of which necessitates an examination of Federal questions, the case is in effect one to quiet complainant's title or to prevent an interference with its rights and property, and complainant avers that the allegations of jurisdiction relate to its cause of action; that they state the controversy existing between the parties as to its subject-matter, not as anticipatory of the defense, but as establishing the complainant's right to have its title quieted.

But it is plain that the suit is not in truth a suit to quiet title. There is a cause of action alleged that is not founded upon any such theory, to prove which it is not necessary or proper to go into the defendants' title or to anticipate its defense to the cause of action alleged by the complainant. What is thereafter said is for the purpose of showing jurisdiction in the Federal *court, not over an equitable cause [641] of action in the nature of a bill to quiet title, but over a cause of action arising out of the laws of the United States; and the various mining laws of the United States are cited to show the truth of the assertion. It is also clear that jurisdiction in a Federal court cannot be predicated in this case upon an assertion that it is brought to prevent a multiplicity of suits. Even then the complainant's proof in the first instance would remain the same as already stated. The frequent trespasses, as alleged, of the defendants, by reason of which an equitable remedy by injunction is sought, might exist, and still it would not necessarily appear from the complainant's proof that the defendant's justification arose by reason of an alleged right under the Constitution or laws of the United States. That might appear in the defense, but would constitute no cause of action by complainant.

If, however, the bill is to be looked upon as one in the nature of a bill of peace or to quiet title, it is fatally defective in that aspect. There are two distinct kinds or classes of bills of peace, or bills to quiet title, the one brought for the purpose of establishing a general right between a single party and numerous persons claiming distinct and individual interests; the other for the purpose of quieting complainant's title to land against a single adverse claimant. In the second class the suit can be maintained by a party in possession against a single defendant ineffectually seeking to establish a legal title by repeated actions of ejectment, and in such case it is necessary to aver that the title of complainant has been established by at least one successful trial at law before equity will entertain jurisdiction. 3 Pom. Eq. Jur. 2d ed. § 1394, note 3, and 1 Pom. Eq. Jur. § 246.

This bill evidently would come under the second of these classes, and it is defective in not containing an averment that the complainant's title has been at least once successfully tried at law. On the contrary, it

appears from the bill itself that an action at law has been commenced involving the same questions, but has not been tried.

It is also objected that, as a bill of peace or to quiet title, it is defective, because there is no allegation that the complainant was in possession, which is necessary in [642] such a bill. If not in *possession, an action of ejectment would lie. The contention that under the Code of Montana a person not in possession may maintain an action to quiet title cannot prevail in a Federal court. *Whitehead* v. *Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276.

The complainant fails, on both these grounds, to show that its bill is sufficient as one to quiet its title, and it therefore fails to show that the case is not covered by the *Union & Planters' Bank*, and other cases, above cited. If the bill do not contain facts sufficient to constitute it a bill to quiet title, all the averments as to defendants' claims as defenses, and complainant's answers thereto, are only material for the purpose of showing that the defense may disclose facts which will show a case arising out of the mining laws of the United States. But this would not constitute complainant's cause of action.

But assuming for this purpose (what is otherwise denied) that the bill is sufficient to confer jurisdiction, it is so only because of its averments as to the defense to be made by the defendants to the complainant's cause of action. When we come to examine their answer we find that defendants disclaim any right under the patent for the Rarus lode claim, and confine their alleged rights to such as exist by virtue of their ownership of the Johnstown lode claim only. Defendants' claim of right to follow the veins which they aver have their top or apices in the Johnstown patent is denied by complainant. It sets up in the bill that it denies and disputes the fact that the veins upon which defendants have mined in the claim of complainant, even if such veins had their apices in defendants' ground (which complainant does not admit), are yet such veins as can be followed on their dip beyond the lines of defendants' possessions into the ground of complainant, and complainant alleges that the veins are broken and intersected by faults in such a manner that the same cannot be traced or followed from the ground of defendants into that of the complainant, and therefore defendants have no right to enter upon the ground of complainant for the purpose of extracting ores therefrom by reason of their ownership of the apices of any veins within their ground. There is the further fact alleged that the veins, if any, which have [643] their *apices in defendants' claim, do not pass in their strike through the end lines of defendants' claim. This alleged inability to follow the veins, assuming that they apex in the defendants' Johnstown patent, and the allegation as to the veins not passing through end lines, are mere questions of fact, depending upon the proof as to the truth of those averments. This does not constitute a question arising out of the Constitution or laws of the United States. The answer, by its denials and disclaimers as to what it sets up by way of defense, takes away a defense which might show the case as arising under such Constitution or laws.

Complainant contends, however, that if a case of jurisdiction is made out by the bill, the court is not ousted thereof by whatever is set up in the answer. In this case the contention cannot be maintained. The only foundation for the alleged jurisdiction consists of the averments of complainant relative to the contention of the defendants as to their defense. Now, if it appear from the answer of defendants that no such claim as is necessary to give the court jurisdiction is in fact made, but, on the contrary, is disclaimed and denied, then the basis of jurisdiction fails, and the court cannot proceed. This is so held in *Robinson* v. *Anderson*, 121 U. S. 522, 524, 30 L. ed. 1021, 1022, 7 Sup. Ct. Rep. 1012. In that case Mr. Chief Justice Waite, speaking for this court and delivering its opinion, said:

"Even if the complaint, standing by itself, made out a cause of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on." See also *Crystal Springs Land & Water Co.* v. *Los Angeles*, 82 Fed. 114, Affirmed in 177 U. S. 169, 44 L. ed. 720, 20 Sup. Ct. Rep. 573.

Jurisdiction in this class of cases must be based upon the fact that the case is one arising under the Constitution or laws of the United States. If it appear to be such in the plaintiff's pleading simply because of the allegations as to what the defenses are on the part of the defendant, if when the answer *come in it is seen that no such de- [644] fense in fact is set up or insisted upon, it is then seen that no such case exists as stated in the complaint, and no jurisdiction therefor exists to try questions which are not of a kind coming within the statute, and the court should then dismiss for want of jurisdiction.

The complainant also objected that the defendants did not properly or effectively disclaim or deny the allegations of the complainant's bill.

In relation to the evasive character of the answer, it was stated by Circuit Judge Gilbert in 35 C. C. A. 1, 93 Fed. 274, in regard to this case, as follows:

"It is objected that the denials of the answer do not fully and explicitly traverse the new averments of the amended bill, but that they are denials only that the defendant relies in 'this action' upon the alleged rights and claims, and that the defendant disclaims only for the purpose of this present suit, without waiving its right to assert such claims in some other suit or proceeding hereafter. No exception, however, was

taken to the answer for insufficiency. It was accepted as responding to the allegations of the amended bill. We think it was properly so accepted. If, in view of some possible other action affecting other interests, the defendant has attempted to reserve the privilege to assert other rights under the Rarus patent, it is immaterial to the present controversy. It is only to the rights asserted by the complainant in this suit that the defendant must make answer. It is required to make its defense to the allegations of the bill, and to show cause why the relief prayed for should not be decreed. It has answered as to its rights to extract the ores in question. It says that it claims nothing by virtue of the Rarus patent, but that it relies solely upon the fact that the ores it has taken belong to a vein which has its apex in the Johnstown lode claim, and in its strike passes through the end lines of said claim, and in its downward course extends beneath the surface of the complainant's claim. Upon such a bill and such an answer all questions concerning the right of the defendant to mine the ores in controversy are determinable, and the decree, if against the defendant, would be as effective [*645] to bar it from hereafter asserting *rights under the Rarus patent as would be a decree upon any other form of answer."

We concur in the views thus expressed, and the result of the whole case is that the complainant failed to show any jurisdiction in the Circuit Court to try this case, and *the order of the Circuit Court dismissing complainant's bill and giving judgment for the defendant is therefore affirmed.*

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BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING COMPANY, *Plff. in Err.*,

*v.*

MONTANA ORE PURCHASING COMPANY *et al.*

(See S. C. Reporter's ed. 645.)

*Courts—jurisdiction of circuit court—Federal question—not set up by allegations anticipating defense.*

This case is governed by the decision in *Boston & Montana Consolidated Copper & Silver Mining Company* v. *Montana Ore Purchasing Company, ante,* 626.

[No. 102.]

*Argued December 3, 1902. Decided February 23, 1903.*

IN ERROR to the Circuit Court of the United States for the District of Montana to review a judgment which dismissed for want of jurisdiction a complaint in an action to recover damages sustained by the wrongful taking of ore from a mining claim. *Affirmed.*

*Mr.* **Louis Marshall** argued the cause, and, with *Mr. John F. Forbis,* filed a brief for plaintiff in error.

*Mr.* **John J. McHatton** argued the cause, and, with *Mr. John W. Cotter,* filed a brief for defendants in error.

For contentions of counsel see their briefs as reported in *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co. ante,* 626.

Mr. Justice **Peckham** delivered the opinion of the court:

This case arises upon demurrer to the complainant's complaint. The demurrer was sustained and the complaint dismissed, and judgment given for the defendants, and thereupon the circuit judge certified the question of jurisdiction to this court.

The action was brought to recover $500,000 damages sustained by the plaintiff in error by reason of the wrongful taking of ore of that value from the mining claim of the plaintiff in error. Substantially the same averments are made in the complaint as in the case which immediately precedes and the questions involved are the same, excepting that the former is a suit in equity and this is an action at law.

For the reasons stated in the opinion in No. 103 [*Boston & M. Consol. Copper & Silver Min. Co.* v. *Montana Ore Purchasing Co.* 188 U. S. 632, *ante,* 626, 23 Sup. Ct. Rep. 434], *the judgment in this case is affirmed.*

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BOSTON & MONTANA CONSOLIDATED COPPER & SILVER MINING COMPANY, *Appt.*,

*v.*

CHILE GOLD MINING COMPANY *et al.*

(See S. C. Reporter's ed. 645-646.)

*Courts—jurisdiction of circuit court—Federal question—not set up by allegations anticipating defense.*

This case is governed by the decision in *Boston & Montana Consolidated Copper & Silver Mining Company* v. *Montana Ore Purchasing Company, ante,* 626.

[No. 104.]

*Argued December 3, 1902. Decided February 23, 1903.*

APPEAL from the Circuit Court of the United States for the District of Montana to review a judgment dismissing for want of jurisdiction a complaint in a suit to prevent interference with complainant's right of property in a mining claim. *Affirmed.*

*Mr.* **Louis Marshall** argued the cause, and, with *Mr. John F. Forbis,* filed a brief for appellant.

*Mr.* **John J. McHatton** argued the cause and, with *Mr. John W. Cotter,* filed a brief for appellees.

For contentions of counsel see their briefs

as reported in *Boston & M. Consol. Copper & S. Min. Co.* v. *Montana Ore Purchasing Co. ante*, 626.

[646] *Mr. Justice **Peckham** delivered the opinion of the court:

This case involves the same questions as that of the *Boston & M. Consol. Copper & Silver Min. Co.* v. *Montana Ore Purchasing Co.* (No. 103 [188 U. S. 632, *ante*, 626, 23 Sup. Ct. Rep. 434]), the only point of difference between the two being that the Chile Gold Mining Company and the other defendants herein are sued as lessees of the Montana Ore Purchasing Company, they having, as such lessees, attempted to interfere with the complainant's right of property. The complaint was dismissed for want of jurisdiction.

For the reasons stated in the opinion in No. 103, *this decree is also affirmed.*

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FRANCIS WINSLOW *et al., Appts.,*
*v.*
BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 646-661.)

*Covenant—to renew—satisfied by one renewal—trusts—power of one trustee to execute lease—ratification—specific performance—part performance—statute of frauds—injunction against dispossession to permit condemnation.*

1. A covenant in a lease to renew at its expiration with the same covenants and privileges as contained in the original lease is satisfied by one renewal without the insertion of another covenant to renew.
2. A valid lease of real property containing a covenant to renew cannot be made by one of the trustees in whom the title to the property is vested, as such an act is of a nature to require the deliberate discretion and judgment of all the trustees.
3. Recognition by all the trustees of a lease for five years of a portion of the realty included in the trust estate, executed by one of their number, even assuming that it could cure the invalidity of such lease under the statute of frauds, must have been founded upon full knowledge of all the facts, in order to have that effect.
4. The continued possession of land by a lessee after the expiration of a five years' lease which contained a covenant to renew for a like period, and the payment and acceptance of rent therefor during the period covered by the renewal clause, are not such part performance as calls for the specific performance of a covenant to renew contained in a lease which purports to have been executed in compliance with the renewal covenant in the prior lease, but which is invalid under the statute of frauds because signed by only one of the trustees in whom the title to the property was vested.
5. The receipt of rent by the beneficiary in a trust, after the expiration of a lease containing a covenant to renew, in ignorance of the invalidity of such lease under the statute of frauds, is not such part performance as calls for the specific performance of such covenant,—especially where her action was unknown to the trustees, who had substantially refused to renew on the old basis, and took place while negotiations were pending between them and the lessee relative to the terms of a continued occupation of the land.
6. A railroad company which enters upon the use and occupation of real property under a lease, with a view to its purchase when that can properly be effected, and constructs a portion of its line thereon, is entitled to an injunction restraining its lessors for a reasonable time from proceeding to dispossess the company from the land, in order to enable it to condemn such land in proper proceedings for that purpose.

[No. 125.]

*Argued December 17, 18, 1902. Decided February 23, 1903.*

APPEAL from the Court of Appeals of the District of Columbia to review a decree which reversed the judgment of the Supreme Court of the District dismissing a bill in a suit to establish the validity of a lease and compel the specific performance of a contract to sell, and to enjoin further proceedings at law to obtain possession of the premises, and the further prosecution of an action to recover damages for its use and occupation, and directed that court to give judgment for complainant. *Reversed* and remanded for further proceedings.

See same case below, 18 App. D. C. 438.

Statement by Mr. Justice **Peckham:**

The court of appeals of the District of Columbia, reversing the judgment of the supreme court of the District (which dismissed the bill of the railroad company), directed that court to give judgment in favor of the company, and from the judgment of the court of appeals an appeal to this court has been taken by the defendants below.

The company brought this suit to obtain a judgment declaring the validity of an alleged lease to it for five years from the 1st day of August, 1897, and to compel the specific performance of an alleged contract to sell to it the same land mentioned in the lease and lying in the city of Washington, owned by the defendants as substituted trustees under the will of the late Catherine Pearson, deceased, and to enjoin the defendants from continuing proceedings at law which they had commenced to obtain possession of the premises, and also to enjoin them from the prosecution of an action to recover damages for the use and occupation of the land by the railroad company. The facts are as follows:

*Catherine Pearson in her lifetime owned [648] certain land, consisting of unimproved lots in the city of Washington, near the Balti-

NOTE.—*As to when trustees cannot act separately*—see note to Wilbur v. Almy, 13 L. ed. U. S. 944.

*As to when a court of equity will interfere to remove improper impediments and defects of law, or to restrain proceedings at law*—see note to Davis v. Wakelee, 39 L. ed. U. S. 578.

more & Ohio Railroad Company's depot, and lying on the line of its Metropolitan branch as subsequently constructed in that city. After the decease of Mrs. Pearson, and on June 30, 1868, her will was duly proved before the proper probate court in the District. In it she devised the premises to trustees for the sole and separate use of her daughter, Eliza W. Patterson—

"During the term of her natural life, and so that the same shall not be liable for the debts or subject to the control, contracts, or engagements of her present or any after-taken husband; to permit her by herself, or her special attorney appointed in writing, to be signed by her, to receive the annual income and profits of the same for her own sole and separate use, her receipt or that of her attorney so appointed as aforesaid alone to be an acquittance to the person or persons charged with the payment of such income or any part of the same, and to the extent only therein expressed to have been paid; and if she pleases to occupy, possess, and use for her own account, accommodation, and convenience and that of her family any part of the property, real and personal, so held for her separate use and benefit, she shall be allowed to do so; and if at any time the said Eliza Patterson shall in writing, to be signed by her in the presence of and to be attested by a subscribing witness, desire the said Carlisle P. Patterson, William H. Philip, and Walter S. Cox, or the survivors and survivor of them, to sell any part of the estate, real and personal, held by them for her separate use, for the purpose of changing the investment thereof, it shall be lawful for the said named trustees or the survivors or survivor of them to sell the same for such purpose only, and to transfer and convey the absolute estate in fee therein, to the purchaser thereof; to receive the proceeds of any and every such sale of the purchaser, who shall not be required to see to the application thereof; and to invest the same in such manner as the said Eliza W. Patterson may require; and such new investment shall be held by the said trustees for the same use, trusts, and [649] purposes, and with the *same powers and authority of sale and reinvestment, as is herein declared of and concerning the original trust, subject, and separate estate.

"And after the death of the said Eliza W. Patterson the said named trustees and their successors shall hold the said trust, subject, and separate estate—original and subsequently acquired by sale and reinvestment—for the use and benefit of any child, or children, of the said Eliza W. Patterson, and the issue of any child or children of the said Eliza who may die leaving issue in the lifetime of the said Eliza, and such issue shall take the share or portion of the said estate which their parent or parents would have taken had they survived the said Eliza. And if the said Eliza W. Patterson shall die without leaving a child or children, or issue of any child or children, living at the time of her death, the said trustees and their successors shall hold the said trust, subject, and separate estate for my right heirs. And if it shall happen that either of the said trustees shall die, or become incapable of acting, or shall refuse to act in the execution of said trust, then and in every such case the continuing trustees or trustee shall from time to time nominate some other person or persons to be approved by the said Eliza W. Patterson to be trustee or trustees in the place and stead of the person or persons so dying, or becoming incapable or refusing to act, and shall convey and settle the said trust, subject and separate estate in such manner that the same shall be legally vested in such continuing trustees or trustee, and such person or persons so named and appointed to that office for the same uses, trusts, and purposes, and with the same power and authority of administration, sale, and reinvestment as is hereinbefore declared of and concerning the said trusts, subject, and estate, and the said new trustee or trustees shall have the same power to act in the premises in conjunction with the continuing trustees or trustee, and as survivors of them, as if they had been originally named trustee or trustees in the premises in this my last will and testament.

"I do hereby nominate and appoint Carlisle P. Patterson, William H. Philip, and W. S. Cox to be the executors of this my last will and testament."

*In 1872 the trustees under Mrs. Pearson's [650] will leased to the railroad company the land for five years, the lease containing a privilege to the railroad company to purchase such land during those five years on payment of $12,592. It also contained an agreement to renew the lease with the same covenants and privileges for another term of five years, or until the lessors were prepared to convey the premises as agreed in the lease with a perfect title in fee simple.

From the time of the first lease in 1872, and under various leases thereafter, the company occupied the land, constructed part of its branch line thereon, and paid rent therefor up to 1888. On January 30 of that year a lease was made, which was signed by the trustees and by the president of the railroad company, though not by Mrs. Patterson. By the terms of that lease the premises were rented for five years from August 1, 1887, at the same rent and with the same covenants as to renewal and for the sale of the lands as contained in the first lease of 1872. The company continued in the occupation of the premises under this lease for the five years mentioned therein. Upon October 17, 1892, the company still being in occupation of the land, another instrument was executed in the form of a lease, signed by but one of the trustees, and purporting to lease the land for five years from August 1, 1892, at the same rental as the lease of 1888, and with the same covenants to sell at the same price ($12,592), and to renew the lease for five years, as contained in the lease of 1888. This lease was signed by Winslow, alone, he then being one of the substituted trustees, but Jay, another of the substituted trustees, did not sign it, and, so far as appears, never saw it. These two substituted trustees had been

duly appointed prior to or in the year 1883. The former trustee, Judge Cox, had resigned in June, 1892, and it does not appear that his successor had then been appointed.

The company retained possession of the property from August 1, 1892, up to August 1, 1897, and paid the amount of money mentioned in the paper of 1892, being at the same rate that had been paid since 1872, and as was provided in the lease of 1888. About the 1st of August, 1897, questions arose as to the terms of future occu-[651]pation of the land. The trustees refused *to execute any further lease, denied any obligation to renew it for any term, and said they preferred to sell, but refused to do so on the old terms, the land having in the meantime largely appreciated in value. In September, 1897, Mr. Winslow, in a letter to the company, said they were prepared to convey the property with a perfect title, and that they also preferred to execute such conveyance to any renewal of the lease. The company, however, prepared a lease, which provided for again leasing the land to it on the same terms for a period of five years, commencing on August 1, 1897, and this lease also contained a provision for a renewal for another five years, or until the lessors could convey the premises in fee simple to the company. This lease was never signed. Negotiations continued in regard to the matter, the company insisting it had the right to a renewal of the lease by virtue of the instrument dated August 1, 1892, while the trustees denied that contention, and, though willing to sell, were not willing to do so at the price named in the former lease, as they said that the value of the land had increased from $12,592 to over $30,000. During these negotiations and disputes the company retained possession of the land, and on or about February 1, 1898 (the dispute and the negotiations between the trustees and the company being still unsettled), in accordance with the custom which it had followed during the running of the various instruments since 1872, of paying the rent semi-annually on the 1st days of February and August as it accrued, it sent the money that would have been due for rent (if a lease were then in existence), in the form of a money order payable to the order of Mr. Winslow, trustee of Eliza W. Patterson, and inclosed it in a letter addressed to Mr. Winslow, in care of Fisher & Co., agents, who sent it to Mrs. Patterson, as Mr. Winslow was then absent in Nicaragua as secretary of the Canal Commission. This money order was received by Mrs. Patterson, who thereupon wrote the following letter, under date of February 5, 1898, to one of the officers of the company:

Dear Sir:—

I returned to you a few days ago the draft which you sent me for the rent of my [652]property on First street, *Washington, by the railroad company of Balto. & Ohio of $377.77. The draft was made out to Mr. Francis Winslow, trustee, and I could not draw it as Mr. Winslow is in Nicaragua, and I could not send it so far away to him, fearing it might be lost. I therefore return it to you, with the request that you would sign it, as you always have done heretofore, Cox, Jay, & Winslow, trustees. Judge Cox & Mr. Jay are both here, so that they can sign it at once and I can have the money. By giving prompt attention to this small matter of business you will greatly oblige,

Eliza W. Patterson.

The statement in this letter, that Judge Cox could sign the draft or order, was evidently a mistake, as his resignation had been accepted by the court years prior to the date of the letter.

The company afterwards sent back the draft, and, under some arrangement between Mrs. Patterson and Fisher & Co., which it does not appear was known by the trustees, but which was consented to by the company, the same was indorsed "Francis Winslow, trustee, by Thomas J. Fisher & Co., attorneys," and on such indorsement the money on the voucher was obtained from the company and received by Mrs. Patterson.

On August 1, 1898, the company sent a draft or money order for $377.77, the amount of rent which would have been due if there had been a valid lease in existence, the draft being sent to Mr. Winslow, trustee, which he declined to negotiate, and insisted that the rights of the company had been terminated by his notice prior to and in September, 1897, and that since that time the company had been occupying the property as tenants by sufferance.

This voucher, and those which succeeded it, and which were forwarded to Mr. Winslow, as trustee, and made payable to his order, were retained by him until January, 1900, when they were returned to the company and a check given for the aggregate amount under an agreement that its acceptance should be without prejudice to the rights of the respective parties and their claims relating to the leasing of the land or *the renewal of the lease, or to any ques-[653]tion or matter connected therewith.

The dispute between the parties continued, as also did the negotiations in regard to a settlement thereof, until some time in March, 1900, when Mr. Winslow, Mr. Jay, and the American Security & Trust Company, the substituted trustees, took proceedings against the company before a justice of the peace to obtain possession of the premises, based upon a notice to quit, given under the statute. Judgment in favor of the trustees was rendered in that case by default, and an appeal by the company, as provided for by law, was prosecuted, and was undetermined at the time of the commencement of this suit. On August 15, 1900, the substituted trustees also commenced an action against the company for the use and occupation of the premises from August 1, 1897, to April 16, 1900, claiming $6,500, with interest from the last-named date. Soon thereafter the company commenced this suit asking for a judgment that the company was entitled to a lease from August 1, 1897, for five years,

and also for a judgment for specific performance of the contract to sell, and obtained an injunction restraining the prosecution of both of the proceedings above mentioned.

The trial court held that there had been no valid contract for a sale, and that there was then no valid lease in existence such as was required to be proved before a court of equity would decree specific performance. The court expressed no opinion as to the effect of continued occupation after the expiration of any lease under the facts in the case with reference to the amount of the rental to be paid. That was a matter which it was held could be determined on the law side of the court. A decree was therefore entered dismissing the bill and dissolving the injunction which had been granted.

The court of appeals reversed the judgment of the trial court and remanded the case, and in its opinion it was stated as follows:

"In view of what has been said, we are of opinion that, under the provisions of the lease of 1892, executed by Francis Winslow, trustee, for and on behalf of the life tenant, Mrs. Eliza W. Patterson, the appellant was and is entitled to one *renewal [654] of such lease for the term of five years from and after the 1st day of August, 1897, upon the terms and conditions of said lease as to the rents to be paid therefor, and that during the continuance of such term no suit for the dispossession of the appellant can be maintained. We are also of opinion that, for the time subsequent to the determination of said renewal lease for which the appellant shall require the use and occupation of said land, the appellant is entitled, and it is its duty, to acquire the right to such use and occupation, under the exercise of the right of eminent domain conferred upon it by the act of Congress, by the ascertainment of the value of such use and occupation, and payment to the owners of the land of the just compensation so to be ascertained. And the bill of complaint in this cause may be retained for the purpose of such ascertainment of value and just compensation. It follows that the decree of the supreme court of the District of Columbia, dissolving the injunction granted in this cause and dismissing the bill of complaint, must be reversed, with costs, and that the cause will be remanded to that court, with directions to vacate said decree, to restore the injunction and make the same perpetual, and for such further and other proceedings as may be just and proper, according to law and in conformity with this opinion; and it is so ordered." [18 App. D. C. 438.]

Mr. **William G. Johnson** argued the cause and filed a brief for appellants:

A covenant for a renewal does not amount to a perpetuity, but gives the right to but one renewal.

*Hyde* v. *Skinner*, 2 P. Wms. 196; *Tritton* v. *Foote*, 2 Bro. C. C. 636; *Moore* v. *Parker*, 6 Ves. Jr. 232; *Rutgers* v. *Hunter*, 6 Johns. Ch. 215; *Piggot* v. *Mason*, 1 Paige, 412; *Carr* v. *Ellison*, 20 Wend. 178; *Cunningham* v. *Pattee*, 99 Mass. 248; *Banker* v. *Braker*, 9 Abb. N. C. 411; *Syms* v. *New York*, 105 N. Y. 153, 11 N. E. 369; Taylor, Land. & T. § 333.

The unauthorized inclusion in the lease of October 17, 1892, of the covenant for renewal, whatever might have been its effect had the lease been executed by all the trustees, was a mere nullity because signed by only one of the trustees, entirely apart from any question of power under the will.

*Sinclair* v. *Jackson ex dem. Field*, 8 Cow. 543; *Ridgeley* v. *Johnson*, 11 Barb. 527; Hill, Trustees, 3d Am. ed. 445, *p. 305; *Latrode* v. *Tierman*, 2 Md. Ch. 474.

Even if the complainant were vested with the right to condemn the land under the exercise of the power of eminent domain, and that fact had been proved in the cause, it could not have availed him, because it is not made a ground of the relief sought, or even alluded to in the pleadings.

*Kochler* v. *Black River Falls Iron Co.* 2 Black, 715, 17 L. ed. 339; *Grosholz* v. *Newman*, 21 Wall. 481, 22 L. ed. 471; *Foster* v. *Goddard*, 1 Black, 506, 17 L. ed. 228; *Harrison* v. *Nixon*, 9 Pet. 483, 9 L. ed. 201; *Eyre* v. *Potter*, 15 How. 42, 14 L. ed. 592; *Reynolds* v. *Stockton*, 140 U. S. 254, 35 L. ed. 464, 11 Sup. Ct. Rep. 773; *Munday* v. *Vail*, 34 N. J. L. 418.

The power to sell, being a mere power for a limited purpose, must be executed in all respects in strict conformity with the terms of the will creating it.

*Powles* v. *Jordan*, 62 Md. 499; *Richardson* v. *Crooker*, 7 Gray, 190; *Kissam* v. *Dierkes*, 49 N. Y. 602; *Alley* v. *Lawrence*, 12 Gray, 373; *Barber* v. *Cary*, 11 N. Y. 397.

The gross inequity and lack of mutuality in the alleged agreement is a bar to its enforcement by a decree for specific performance.

*Geiger* v. *Green*, 4 Gill. 472; *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339, 19 L. ed. 955; *Brashier* v. *Gratz*, 6 Wheat. 528, 5 L. ed. 322; *Duvall* v. *Myers*, 2 Md. Ch. 401; *Parkhurst* v. *Van Cortlandt*, 1 Johns. Ch. 274.

Congress had the right to prescribe the route of the company and to confine it to the "public streets and alleys;" and neither the private owner, nor the company, nor both together, could abrogate the statute.

*Pittsburgh & L. E. R. Co.* v. *Bruce*, 102 Pa. 23.

*Messrs.* **George E. Hamilton** and **M. J. Colbert** argued the cause and filed a brief for appellee:

Winslow was clearly the agent of the other trustees and of Mrs. Patterson herself in the execution of the lease of 1892, and his act bound them all.

Tiffany & Bullard, Trusts & Trustees, pp. 539 *et seq.*; *Ex parte Rigby*, 19 Ves. Jr. 463; *Sinclair* v. *Jackson ex dem. Field*, 8 Cow. 543; *Bowes* v. *Seeger*, 8 Watts & S. 222; *Abbot* v. *American Hard Rubber Co.* 33 Barb. 579; *Leggett* v. *Hunter*, 19 N. Y. 445; *Messeena* v. *Carr*, L. R. 9 Eq. 260.

Actions unauthorized when performed by

a single trustee in respect to the trust estate may be subsequently ratified and validated, either in writing or *in pais*, by his cotrustee.

*Howard F. Ins. Co.* v. *Chase*, 5 Wall. 512, 18 L. ed. 526; *Blanchard* v. *Waite*, 28 Me. 59, 48 Am. Dec. 474; *Messeena* v. *Carr*, L. R. 9 Eq. 260.

The occupation of this land by the appellee with its metropolitan branch is not a question between the parties to this suit only, but it is a question in which the public has even a larger interest than either of the parties.

*Joy* v. *St. Louis*, 138 U. S. 47, 34 L. ed. 858, 11 Sup. Ct. Rep. 243.

Courts will give the charter such a construction as is necessary to effectuate all the powers, privileges, and immunities conferred by it, and to carry into full effect its purposes and objects. It is upon this principle that it is held that a charter authorizing the construction of a railroad from one point to another carries with it authority to take lands necessary for that purpose, although such authority is not expressly given.

1 Wood, Railroads, 2d ed. p. 14.

Although the power of eminent domain may not have been expressly delegated to a corporation, yet if the enterprise which it is organized to conduct appears, from its charter and the circumstances of the case, to be of a public nature, the power is deemed to have been granted by implication.

2 Beach, Priv. Corp. p. 654.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

It is quite plain that a lease containing a covenant to renew at its expiration with similar covenants, terms, and conditions contained in the original lease is fully carried out by one renewal without the insertion of another covenant to renew. Otherwise a perpetuity is provided for. *Piggot* v. *Mason* (1829) 1 Paige, 412; *Carr* v. *Ellison* (1838) 20 Wend. 178; *Syms* v. *New York* (1887) 105 N. Y. 153, 11 N. E. 369; *Cunningham* v. *Pattee* (1868) 99 Mass. 248; Taylor, Landl. & T. 8th ed. §§ 333, 334.

[655]

From the ordinary covenant to renew, a perpetuity will not be regarded as created. There must be some peculiar and plain language before it will be assumed that the parties intended to create it.

There is no question of the validity of the lease of 1888. It was for five years from the 1st of August of the year 1887, with a covenant of renewal, and that covenant would have been satisfied by giving a lease in 1892 for five years, up to August, 1897, without any covenant therein for a further renewal. In fact, however, the lease was not legally renewed in 1892, because the paper of that year was signed by one trustee only. In our opinion his signature did not make a valid lease. It required the signatures of all the trustees. A deed of land executed by one trustee does not convey his share as in the case of ordinary joint tenants. So, where a deed of land was executed by two out of three trustees, the burden is upon the purchaser to prove the third trustee was dead. 1 Perry, Tr. 2d ed. § 411; 2 Perry, Tr. §§ 499, 502; 2 Story, Eq. Jur. 12th ed. § 1280; *Brennan* v. *Willson*, 71 N. Y. 502–507.

The authorities cited by the counsel for the company, to the effect that one of several trustees may, when so authorized by his associates, act with regard to the execution of some portions of the trust, as their agent, and that when not previously so authorized a subsequent ratification of his act by his associates may bind them all, do not embrace the facts in this case. There is no evidence of any authority to one trustee to sign a lease. The granting of a lease was an important and material act in the way of carrying out the trust under the will, requiring an exercise of the judgment and discretion of all the trustees. It was therefore necessary for them all to act in order to make a valid instrument.

That one of several trustees can be intrusted by his associates with the transaction of the business of the trust may be, under certain circumstances, conceded, but those circumstances will not justify the doing of an act by one trustee on his own responsibility which is of a nature to require the deliberate discretion and judgment of all the trustees. In the case of a lease of property, such as is presented herein, the signatures of all are necessary to the validity of the paper.

[656]

The case cited of *Howard F. Ins. Co.* v. *Chase*, 5 Wall. 509, 18 L. ed. 524, relates to an insurance effected by one of several trustees, and the question was whether the policy covered the individual interest of the person taking out the insurance or his interest as a trustee; if the former it was void because he had no interest as an individual, and the policy was therefore one in the nature of a wager. The court in the course of the opinion remarked:

"It is true that in the administration of the trust, where there is more than one trustee, all must concur, but the entire body can direct one of their number to transact business, which it may be inconvenient for the others to perform, and the acts of the one thus authorized are the acts of all, and binding on all. The trustee thus acting is to be considered the agent of all the trustees, and not as an individual trustee. If, within the scope of his agency, he procures an insurance, it is for the other trustees, as well as himself. If he does it without authority, still it is a valid contract, which the underwriter cannot dispute, if his cotrustees subsequently ratify it. In fact, so liberal is the rule on this subject, that where a part owner of property effects an insurance for himself and others, without previous authority, the act is sufficiently ratified, where suit is brought on the policy in their names."

The facts in this case do not bring it within the principle mentioned, and it is clear that to render the lease originally

valid it must have been signed by all the trustees. Without it the instrument as a lease for five years was void under the statute of frauds. D. C. Comp. Stat. 231, § 4.

It is contended that the act of one of the trustees in signing the lease was subsequently ratified by the other by a recognition of its existence by long continued silence, if not by an express ratification. But an express ratification would consist of the signature of the other trustee to the paper, and of that there is no pretense. A ratification of an invalid instrument of this nature by recognition, we do not understand. [657] The instrument *was void under the statute of frauds, because of the lack of those signatures which could alone render it valid as a lease for five years. Recognition could not take the place of the absent signature. Whether the conduct of the trustees, or of Mrs. Patterson, amounted to such a part performance of an invalid contract as would take the place of the otherwise necessary signatures is another question. It is difficult to see how there could be any technical ratification of this instrument without a signing thereof by the other trustee.

But, assuming that something in the nature of a ratification might be based upon subsequent recognition, yet such recognition or ratification must be shown to have been founded upon a full knowledge of all the facts. There is no evidence of that kind in the case; none that the other trustee even knew of the existence either of the written paper of 1892 or that it contained a covenant to renew at all for any time. The possession by the company and the payment of rent were provided for by the covenant to renew contained in the lease of 1888, and hence there was a justification for that possession and for the payment of the money, which was entirely compatible with the nonexistence of any written lease from 1892, or of any covenant to again renew for five years from August 1, 1897. This possession and payment cannot, therefore, be used as a basis for the presumption of knowledge on the part of the trustee of the existence of the so-called lease of 1892 or of the covenant contained therein.

Regarding the asserted part performance of the alleged contract of lease in 1892, or of the covenant contained in that lease, we think there was none such as to justify the contention that the covenant to renew in 1897 for five years was thereby so far rendered valid as to call for its recognition and enforcement. In this case there was reason, as we have said, without reference to any assumed part performance of, and aside from the alleged covenants in the paper of 1892, for the possession by the company and for the taking of the rent of the land by the trustees up to 1897. This reason was based upon the obligation which existed under the valid lease of 1888. The remaining in possession from 1892 to 1897 and the payment [658] of the money *need not, therefore, be referred to as a part performance of the invalid contract of lease and renewal contained in the paper of 1892. Without any reference to any paper of that character, possession and payment of rent were proper, and amounted to nothing more than an acknowledgment of the obligations provided for in the before-mentioned lease of 1888.

Acts of part performance which will take a case out of the statute must be referable solely to the contract. *Williams* v. *Morris*, 95 U. S. 444, 457, 24 L. ed. 360, 362; *Phillips* v. *Thompson*, 1 Johns. Ch. 131; *Byrne* v. *Romaine*, 2 Edw. Ch. 445; *Jervis* v. *Smith*, Hoffm. Ch. 470; *Lord* v. *Underdunck*, 1 Sandf. Ch. 46; *Wolfe* v. *Frost*, 4 Sandf. Ch. 72.

And again, specific performance of a void contract will not be decreed because of part performance, unless fraud and injustice would be done if the contract were held inoperative. *Purcell* v. *Miner*, 4 Wall. 513, *sub nom. Purcell* v. *Coleman*, 18 L. ed. 435; *Williams* v. *Morris*, 95 U. S. 444, 24 L. ed. 360. Such would not be the result here.

Nor can the receipt of rent in February, 1898, by Mrs. Patterson, under the circumstances detailed in the foregoing statement of facts, amount to such part performance of the invalid covenant to renew as to authorize its enforcement. Neither trustee received the rent. The signing of the name of Mr. Winslow, one of the trustees, on the back of the draft from the company in February, 1898, was without the knowledge of or authority from such trustee, although the indorsement was made in perfect good faith by Fisher & Co., and the money was paid to and received by Mrs. Patterson. That signing was not a part performance of the contract of lease on the part of the trustees or either of them.

Mr. Winslow was at this time absent in Nicaragua. There is no proof in the case that Mrs. Patterson knew there was no valid covenant in existence for the granting of a further five-year lease from August 1, 1897. Her receipt of the money as beneficiary under the will of her mother would not bind the trustees to renew a lease under an invalid covenant to do so, or operate as a part performance of that invalid covenant. Especially would this be so where, as in this case, there had for months, or ever since August 1, 1897, been a substantial refusal *by the trustees to renew on the [659] old basis or to sell at the old price, and negotiations were still in progress between the trustees and the company relative to the terms of a continued occupation of the lands. The trustees and the company were alone the parties who could agree upon a lease, and while negotiations were pending on the subject, the receipt, unknown at the time to the trustees, of the money by Mrs. Patterson, as stated, could not be equivalent to a part performance by the trustees, or either of them, of an alleged covenant to renew contained in the paper of 1892, the validity of which was at the same time denied.

Subsequently when drafts were received by the trustees they were not cashed, and when they were finally paid it was under a specific agreement that the payment should not in any way affect the situation between the parties. Hence the receipt of these

drafts constituted no part performance upon which to base the recognition of the covenant to renew from August 1, 1897, which was repudiated as invalid by the trustees and which was in fact invalid.

Upon the question of the alleged contract to sell, after carefully examining all the facts, we agree with the court of appeals in holding that the company was not entitled to a decree for the specific performance of that alleged contract, and, therefore, specific relief of that nature should be denied. Under the terms of the will it is plain the trustees had no general and absolute power of sale, and the conditions upon which it could be exercised did not exist.

Regarding the other relief, we are of opinion that the portion of the injunction prohibiting the further prosecution of the trustees' action to recover the rental value of the land occupied by the company from August 1, 1897, up to the time mentioned in the complaint in that action, should be dissolved.

As to that part of the injunction which prohibits the further prosecution of the proceedings to recover the possession of the land there is more to be said. We agree with the court of appeals upon the subject of ousting the company from such possession. That court held that the evidence showed the company entered upon the use [660] and occupation of the property *in controversy with a view to its purchase when it could properly be effected. It was understood by all the parties what the character of the use and occupation of the land by the company was intended to be. Subsequently to its obtaining possession of the land in 1872 the railroad company constructed what is known as its Metropolitan branch, part of a highway between Washington city, the adjoining states and the west. This highway is not a merely private enterprise, nor a matter of purely private concern. It is a public road, constructed for public purposes, under the sanction of the public authority, and over which the public have rights which cannot be permitted to be obstructed, much less destroyed, either by the company itself, to which the franchise has been granted as a public trust to construct and operate this road, or by antagonistic parties claiming the ownership of the land upon which it has been permitted to enter without previous payment therefor, or as the result of any private controversy between the railroad company and such parties. The company having entered by the license of the lessors, an action at law for the dispossession of the railroad company cannot be maintained if the company is willing to make compensation for its use and occupation of the land.

These views of the court of appeals we concur in, but we do not say that the company can take proceedings in this suit to condemn the land. The proceeding to condemn is otherwise provided for by law, and, although the appellants contend that the company has no power under the law to do so, we are of opinion that by virtue of the various acts passed relative to the company, it has such power in this city with reference to this land. The court ought to keep in force for a reasonable time, say six months, that portion of the injunction prohibiting the trustees from continuing their proceeding to dispossess the company from the land, in order to enable it to condemn such land in proper proceedings for that purpose, which cannot be taken in the present suit. If more time is needed, the trial court may, upon application, after notice, extend the time as to it may seem reasonably necessary. If no proceedings to condemn are taken within six months from the issuing of the *mandate from this court to [661] the court below, then the injunction should be wholly dissolved.

Our judgment, therefore, will be to reverse the judgment of the court of appeals of the District of Columbia, with directions to remand the case to the supreme court of the District, with directions to that court to refuse specific performance of the alleged contract to sell the land, and to deny enforcement of any alleged covenant to lease the same from August 1, 1897, and also to dissolve that portion of the injunction enjoining the trustees from prosecuting their suit to recover the rental value of the land from August 1, 1897, and to retain that portion which enjoins further action on the part of the trustees to oust the company from the land, for six months from the date of the mandate of this court, and for further time, if the supreme court of the District shall be of opinion that it is proper. If no proceedings are taken to condemn the land within six months, then the injunction shall be dissolved. When the condemnation proceedings are concluded, or if not taken within the time stated, then, at the end of that time, application may be made to the trial court, and such judgment then entered as shall be consistent with this opinion, and with such provision in regard to costs incurred, subsequent to the mandate from this court, as shall to that court seem proper.

*Reversed* and remanded, with directions to reverse the decree below and remand the case for further proceedings in conformity to this opinion.

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*BOARD OF DIRECTORS OF THE CHI- [662] CAGO THEOLOGICAL SEMINARY, *Plff. in Err.*,

v.

PEOPLE OF THE STATE OF ILLINOIS *ex rel.* SAMUEL B. RAYMOND, County Treasurer and *ex officio* Collector of Cook County, Illinois.

(See S. C. Reporter's ed. 662-681.)

*Taxation—contract exemption—construction by state court followed when not obviously erroneous.*

The decision of a state court that a charter

NOTE.—*On the power to exempt from taxation*—see notes to Hegg v. Mackay (Or.) 19

exemption from taxation of the property, of whatever kind and description, belonging or appertaining to a theological seminary, does not include property owned, rented, or held by it as an investment, but not used in immediate connection with the seminary, although the income thereof is used only for the purposes of the school, is not so obviously erroneous as to require reversal by the Supreme Court of the United States because the charter provides that the act "shall be construed liberally in all courts for the purposes therein expressed."

[Nos. 140 and 265.]

*Argued and Submitted January 20, 21, 1903. Decided February 23, 1903.*

IN ERROR to the Supreme Court of the State of Illinois to review judgments which affirmed judgments of the County Court of Cook County denying an exemption from taxation in favor of a theological seminary. *Affirmed.*

See same cases below, in Illinois Supreme Court, case No. 140, 189 Ill. 439, 59 N. E. 977, case No. 265, 193 Ill. 619, 61 N. E. 1022.

Statement by Mr. Justice **Peckham:**

These cases, between the same parties, come here by writs of error to the supreme court of Illinois, which held certain property of the plaintiff in error not exempt from taxation. 189 Ill. 439, 59 N. E. 977.

The case No. 140 involves taxes for the year 1899, and No. 265 for the year 1900.

The plaintiff in error claims exemption under its charter, passed in 1855, entitled "An Act to Incorporate the Chicago *Theo- [663]

L. R. A. 77; and Whiting v. West Point (Va.) 15 L. R. A. 860.

*On construction of exemptions from taxation*—see notes to Catlin v. Trinity College (N. Y.) 8 L. R. A. 206; and Church of St. Monica v. New York (N. Y.) 7 L. R. A. 70.

*As to taxation of property devoted to educational, literary, and scientific purposes*—see note to Auditor General v. University of Michigan (Mich.) 10 L. R. A. 376.

*On the effect of using property of a religious, charitable, or educational institution in secular business or for revenue, upon its right to exemption from taxation*—see note to Book Agents of M. E. Church, South v. Hinton (Tex.) 19 L. R. A. 289.

*Exemption of property of educational institutions from taxation, as affected by use for other than educational purposes.*

This question depends for its solution upon the construction of the various statutes granting the exemption. Frequently the exemption is granted in such general terms and so absolutely that it may be claimed regardless of the use to which the property is devoted.

Thus, an exemption of real estate "so long as it belongs to an incorporated institution of learning" remains in force as long as the title remains in the institution, although the property is leased to third persons. The exemption does not depend on the use. University of the South v. Skidmore, 87 Tenn. 155.

And an exemption of all corporate property belonging to the institution applies to all property of the corporation which it may lawfully acquire and hold under the terms of its charter, and is not limited to property actually used and occupied by it. State v. Hamline University, 46 Minn. 316, 48 N. W. 1119.

And where all houses, lots, or revenues of a college, not exceeding a certain value per annum, are exempted from taxation, lands acquired by the college before the income reached the designated amount would not be taxable even to one to whom it had been leased by the college. Hardy v. Waltham, 7 Pick. 108.

The president's house, when used by him in the discharge of his official duties, has been regarded as exempt.

Thus the president's house owned by a college and used by him in the discharge of his duties connected with the institution is a part of the college plant, and as such exempt from taxation under Pa. act May 14, 1874, P. L. 158, although separated from the college campus by a public street. Ursinus College v. Collegeville, 17 Montg. Co. L. Rep. 61.

And a dwelling house occupied by the president of the college and his family, built with funds expressly given for the purpose of erecting such a house for the president and his successors in office, situated on the college grounds and kept in order and repair at the expense of the college, and largely used for college functions, and for the convenience of the college and president for faculty and student conferences, is within a statutory exemption from taxation of property occupied by a college or an officer thereof for the purposes for which it was incorporated. Harvard College v. Cambridge, 175 Mass. 145, 48 L. R. A. 547, 55 N. E. 844.

In Amherst College v. Amherst, 173 Mass. 232, 53 N. E. 815, it appeared that premises belonging to a college were occupied as a residence by its president and his family; that such president paid rent to the college and water rates; established a tennis court thereon at his own expense, and for some years paid for the care of the grounds; that he paid the inside expenses of the house, and might be found to have exercised the same control over it that he did over another house which he previously had hired. The court held that it was error to hold as a matter of law that his occupation was for the purposes for which the college was incorporated, as the most that could be contended was that there was evidence warranting a finding of fact that the dominant purposes of the president's occupation were not private, but for such purposes.

A residence for teachers is generally held to be necessary to the efficiency of the institution, and is therefore exempt from taxation unless the exemption is a very limited one.

Thus, under a statute exempting colleges and the grounds attached to such institutions, necessary to their proper occupancy, use, and enjoyment, and not leased or otherwise used with a view to profit, houses erected near the college buildings, and used as places of residence for the professors without charge for rent, are exempt. Ramsey County v. Macalester College, 51 Minn. 437, 18 L. R. A. 278, 53 N. W. 704.

And a convent building used solely as a residence for the teachers in a school maintained as a charity, and which is part of the school property and is necessary for the efficient operation and management of the school, is included in a statutory exemption from taxation of such "institutions of learning, . . . with the grounds thereto annexed and necessary for occupancy and enjoyment of the same." White v. Smith, 189 Pa. 222, 43 L. R. A. 498, 42 Atl. 125.

logical Seminary," a copy of which is set forth in the margin.†

The supreme court of the state held that the provision granting the exemption from taxation in § 5 referred only to property used in connection with the seminary, and

†Sec. 1. *Be it enacted by the People of the state of Illinois, represented in the General Assembly,* That Stephen Peet (and twenty-three other persons, named in the act), and their successors be, and they hereby are, created a body politic and corporate, to be styled "The Board of Directors of the Chicago Theological Seminary," and by that name and style to remain and have perpetual succession, with full power to sue and be sued, plead and be impleaded; to acquire, hold, and convey property, real and personal; to have and use a common seal; to alter and renew the same at pleasure; to make and alter a constitution and by-laws for the conducting and government of said institution, and fully to do whatever may be necessary to carry out the object of this act of incorporation.

Sec. 2. That the seminary shall be located in or near the city of Chicago. The object shall be to furnish instruction and the means of education to young men preparing for the gospel ministry, and the institution shall be equally open to all denominations of Christians for this purpose.

Sec. 3. That the board of directors shall consist of twenty-four members, nine of whom shall constitute a quorum for the transaction of business. The directors shall hereafter be elected in accordance with the provisions of the constitution under which they act, and shall hold their office until their successors are appointed.

Sec. 4. The board of directors shall have power to appoint an executive committee and such agents as they may deem necessary, and such officers, professors, and teachers as the government and instruction of the seminary may require, and prescribe their duties, to remove any of them for sufficient reasons, and prescribe and direct the course of studies to be pursued in the institution; also to confer such degrees as are consistent with the object of the institution.

Sec. 5. That the property, of whatever kind or description, belonging or appertaining to said seminary, shall be forever free and exempt from all taxation, for all purposes whatsoever.

Sec. 6. This act to take effect and be in force from and after its passage, and it shall be deemed a public act, and shall be construed liberally in all courts for the purposes therein expressed.

So, houses belonging to the college and within the college grounds are not deprived of exemption because occupied as places of residence by teachers employed in the institution. Northampton County v. Lafayette College, 128 Pa. 132, 18 Atl. 516.

And an exemption of all colleges and the lands whereupon they are erected will include houses erected on the college grounds for the residence of professors, and occupied by them free of rent. State v. Ross, 24 N. J. L. 498.

But under a statute exempting all lots of ground set apart for schoolhouses, academies, and colleges, with the buildings thereon occupied for those purposes, but declaring that the buildings not occupied for literary purposes may be taxed, houses erected on the college grounds and occupied by the professors as residences are taxable. Kendrick v. Farquhar, 8 Ohio, 196.

Houses occupied by college professors, for the use of which an allowance is made as part of the compensation for their services, the principal or dominant consideration in regard to such occupation having reference to the performance of their official duties, rather than to the private benefit which they receive in the way of homes for themselves and their families, are occupied by them for the purpose for which the college was incorporated, and are therefore exempt from taxation. Harvard College v. Cambridge, 175 Mass. 145, 48 L. R. A. 547, 55 N. E. 844.

But the occupancy of real property by an educational institution or its officers for the purposes for which it was incorporated, in order to exempt the property from taxation, under Mass. Pub. Stat. chap. 11, § 5, cl. 3, as amended by Mass. Stat. 1889, chap. 465, must have, or be supposed to have, a direct connection with such purposes. Phillips Academy v. Andover, 175 Mass. 118, 48 L. R. A. 550, 55 N. E. 841.

And premises occupied by professors, instructors, or employees in the college strictly as private residences, under an agreement by which the rent was to be paid by a deduction made monthly by the college from their salaries, are not so occupied for the purposes for which the college was incorporated as to be exempted from taxation. Williams College v. Williamstown, 167 Mass. 505, 46 N. E. 394.

And premises used as the home of teachers whose duties are almost entirely performed in a school held in a church on adjoining premises belonging to a different owner are not exempt. St. James Educational Inst. v. Salem, 153 Mass. 185, 10 L. R. A. 573, 26 N. E. 636.

Real property substantially owned and enjoyed by a professor in a college is not within the exemption of college property from taxation, although the title remains in the college. Yale University v. New Haven, 71 Conn. 316, 43 L. R. A. 490, 42 Atl. 87.

In Pierce v. Cambridge, 2 Cush. 612, one of the professors of Harvard College, who had leased from the college for a residence for himself and family a house and lot owned by it, was held to be taxable on his interest therein, notwithstanding the statutory exemption from taxation of "such real estate belonging to such institutions as shall be actually occupied by them or by their officers for the purposes for which they are incorporated." But the court expressed the opinion that it would be otherwise if the building had been occupied by the professor by permission of the college, without having any estate therein or paying any rent therefor.

Professors and instructors in a college are officers thereof within the meaning of Mass. Stat. 1889, chap. 465, exempting from taxation real property occupied by a college or its officers for the purposes for which it was incorporated. Williams College v. Williamstown, 167 Mass. 505, 46 N. E. 394.

Even where the exemption is confined to property "exclusively" used for educational purposes, an incidental use of such property for residential purposes has sometimes been held to be within such exemption.

Thus, a theological school building where the students attend recitations and lectures is exempt from taxation as "used solely and exclusively for . . . schools," within the meaning of Colo. Const. art. 10, § 5, and 2 Mill's Ann. Stat. § 3768, although the entire building is used by the bishop of the diocese and his family as a residence, in accordance with one of the conditions attached to a part of the donation which was used for buying the premises. Cathedral of St. John v. Arapahoe County Treasurer, 29 Colo. 143, 68 Pac. 272.

did not include other property which might be owned, rented, or held by the seminary as an investment, although the income thereof was used solely for school purposes. Accordingly, property which was not so included, and which is involved in these actions, was taxed under the general taxing [664] law of the state, enacted in 1872. *In enforcing the taxation of the outside property of plaintiff in error under that act, it is claimed that the obligation of the contract contained in the act of 1855, the charter of the plaintiff in error, was impaired.

It is conceded that the charter of incorporation was duly accepted, and that, acting on the faith of its provision, the plaintiff in error has acquired by donation and purchase a part of the real estate on which the taxes in question were levied, and, in addition, has expended in the erection and purchase of buildings on the real estate owned by it an amount exceeding $200,000, and a large number of students have been and are being instructed by it in pursuance of its charter. The pieces of real estate upon which the taxes in these cases were levied were acquired by the plaintiff in error by gift or purchase, and were held by it to promote the objects for which it was incorporated, and the rentals received from such real estate are used for those purposes, although the property is not used in immediate connection with the seminary.

*Mr.* **John J. Herrick** argued the cause, and, with *Mr. Davis Fales*, filed a brief for plaintiff in error:

In the following cases, in which the jurisdiction of this court was invoked on the ground that the subsequent law and the

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And the partial use of a college building by the teachers employed in the college is incidental to the purpose of such college, and such building is therefore within a constitutional exemption of all buildings and property used exclusively for colleges or other school purposes. State *ex rel.* Cunningham v. Orleans Bd. of Assessors, 52 La. Ann. 223, 26 So. 872. The court said, however: "We feel called on to state that our decision on this point is to be deemed strictly confined to the facts of this case as presented in the record. We are not inclined to strain college and school exemptions so as to embrace property substantially devoted to residences."

And the fact that teachers employed in the school occupy rooms in the building does not destroy the right to exemption. Blackman v. Houston, 39 La. Ann. 593, 2 So. 193.

But property used partly for school purposes and partly for purposes of residence by the owner and his family cannot claim the full exemption from taxation accorded by La. Const. 1879, art. 207, La. Const. 1898, art. 230, to property "used exclusively for colleges and other school purposes." Ferrell v. Penrose, 52 La. Ann. 1481, 27 So. 945.

And under an exemption of the buildings used exclusively for school purposes a building in which the owner resides with his family, who are all either teachers or pupils in the school, is not exempt, although the main use of the building is for school purposes. Red v. Johnson, 53 Tex. 288.

A building used at the same time for school purposes and as a family residence by the person having charge of the school is not exempt from taxation as used exclusively for school purposes, unless such occupancy is necessary in the discharge of his duties as an educator, or to promote the success of the school. Watson v. Cowles, 61 Neb. 216, 85 N. W. 35.

The residence of a practising attorney is not exempted from taxation, under Tex. Rev. Stat. 1895, art. 5065, as a building used exclusively for school purposes, because his wife conducts a school therein. Edmonds v. San Antonio, 14 Tex. Civ. App. 155, 36 S. W. 495.

Real property containing buildings, some of which are used solely for school purposes and others for residence and family purposes of those conducting the school, is not, as a whole, within a statutory exemption from taxation of property used exclusively for school purposes. San Antonio v. Seeley (Tex. Civ. App.) 57 S. W. 688.

So far as a Jesuit college building is used as a residence by priests of an adjoining Jesuit church who are not teachers in the college, the building is deprived of its exemption from taxation under a constitutional exemption of property used "exclusively" for schools and colleges. State *ex rel.* Cunningham v. Orleans, 52 La. Ann. 223, 26 So. 872.

Dormitories and dining halls furnished by Harvard College for the use of its students are devoted to college purposes, and are therefore exempt from taxation. Harvard College v. Cambridge, 175 Mass. 145, 48 L. R. A. 547, 55 N. E. 844.

Buildings used by a college exclusively as dormitories and dining halls for students are "exclusively occupied" as a college within the meaning of Conn. Gen. Stat. § 3820, providing for the exemption of buildings so occupied from taxation. Yale University v. New Haven, 71 Conn. 316, 43 L. R. A. 490, 42 Atl. 87.

Under an exemption of lands owned or leased by colleges, etc., the mere incidental renting of portions of buildings acquired for purposes of the school, such as dormitories and residences for teachers, etc., will not annul the exemption. Willard v. Pike, 59 Vt. 202, 9 Atl. 907.

But buildings belonging to an academy, which are rented by it to its professors and students for living apartments, are not within the exemption from taxation of "seminaries of learning," made by N. H. Pub. Stat. chap. 55, § 2. New London v. Colby Academy, 69 N. H. 443, 46 Atl. 743.

And the exemption of lands "for the use of the academy" will not include a building used as a boarding house and dormitory for students, under the charge of a superintendent who has possession of all the room not needed by them, and derives a revenue from it by using it as a hotel. Phillips Exeter Academy v. Exeter, 58 N. H. 306, 42 Am. Rep. 589.

School farms and gardens are generally held to be exempt.

Thus, a farm and the farming stock owned by a college, and by it worked only to raise produce for a boarding house kept by the institution to supply board to students at its actual cost, is exempt from taxation under a statute exempting the property of such institutions and the real estate belonging to them, which is occupied by them or their officers for the purposes for which they were incorporated. Wesleyan Academy v. Wilbraham, 99 Mass. 599.

So, under an exemption of every incorporated academy or other seminary of learning, and the several lots whereon such buildings are used or situated, a farm containing nearly 300 acres, which is used in connection with the seminary, is exempt. People *ex rel.* Seminary of Our Lady of Angels v. Barber, 42 Hun, 28.

And the fact that a portion of the land is

action of the state officers in levying a tax under it impaired the obligation of the contract of exemption, this court sustained the jurisdiction and enforced the obligation of the contract:

*Northwestern University* v. *Illinois*, 99 U. S. 309, 25 L. ed. 387; *St. Anna's Asylum* v. *New Orleans*, 105 U. S. 362, 26 L. ed. 1128; *Piqua Branch of State Bank* v. *Knoop*, 16 How. 378, 14 L. ed. 981; *Home of the Friendless* v. *Rouse*, 8 Wall. 430, 19 L. ed. 495; *Washington University* v. *Rouse*, 8 Wall. 439, 19 L. ed. 498.

The determination of the Federal question presented involves the decision of the question as to the proper construction of the exemption provision of the charter of plaintiff in error; and this court will, therefore, determine for itself, in the exercise of its appellate and revisory jurisdiction, the question of construction presented, irrespective of the decision made by the state supreme court.

*Northwestern University* v. *Illinois*, 99 U. S. 309, 25 L. ed. 387; *Jefferson Branch Bank* v. *Skelly*, 1 Black, 443, 17 L. ed. 177; *Proprietors of Bridges* v. *Hoboken Land & Improv. Co.* 1 Wall. 144, 17 L. ed. 576; *Piqua Branch State Bank* v. *Knoop*, 16 How. 369, 14 L. ed. 977; *Delmas* v. *Merchants' Mut. Ins. Co.* 14 Wall. 668, 20 L. ed. 760; *Houston & T. C. R. Co.* v. *Texas*, 177 U. S. 66, 44 L. ed. 673, 20 Sup. Ct. Rep. 545; *Columbia Water Power Co.* v. *Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247.

The title of an act may properly be referred to, to ascertain the legislative intention.

*Church of Holy Trinity* v. *United States*,

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used for a vegetable garden for the use of the pupils and teachers of the school does not remove the exemption. People *ex rel.* Academy of Sacred Heart v. New York Tax & A. Comrs. 6 Hun, 110; People *ex rel.* St. Johns College v. New York Tax Comrs. 10 Hun, 246; Cassiano v. Ursuline Academy, 64 Tex. 673; *Re* Application against Certain Lots (Minn.) March 22, 1881.

And lands within the same inclosure with the seminary buildings are exempt, although a part are used for a vegetable garden, etc., for the exclusive use of the institution, and not "otherwise used with a view to profit." Monticello Female Seminary v. People, 106 Ill. 398, 46 Am. Rep. 702.

Under an exemption of property actually used for the purpose for which the college was created, land is exempt which is used to raise vegetables, etc., for use in boarding students. State v. Fisk University, 87 Tenn. 238, 10 S. W. 284.

Land belonging to an educational institution, on which are some of its minor buildings and a hospital for contagious diseases, the remainder of which is used as a pleasure ground for the pupils and for a garden and for pasturage, the vegetable and dairy products being largely consumed in the institution, is within the statutory exemption from municipal school taxes of property occupied by educational institutions for the purposes for which they were established. Commissaires d'Ecoles de la Cote des Neiges v. Les Soeurs de la Congregation de Notre Dame, Rep. Jud. Quebec, 12 C. S. 444.

To the contrary is St. Gabriel v. Notre Dame, 12 Can. S. C. 45, where the Canadian supreme court, following the dissenting opinion of Dorion, Ch. J., in Verdun v. Notre Dame, 1 Dor. Q. B. Rep. 164, held that land belonging to an educational institution, but situated in a different municipality and used by it as a farm, the products of which were consumed by such institution, was not within the exemption from municipal school taxes of all property occupied by such institution for the objects for which it was instituted, and not held for the purpose of deriving any income therefrom.

So, in Quebec v. Limoilou [1899] A. C. 288, land belonging to a seminary and worked by it as a farm in order to derive revenue therefrom was held not to be within an exemption from municipal taxation of property belonging to or occupied by educational institutions for the ends for which they were established, "and not possessed solely by them for the purpose of deriving a revenue therefrom," although such land was not detached from other land belonging to the seminary used by it as a country resort for its students, and was itself occasionally used for recreation purposes.

The mere fact that the surplus products of the farm, which cannot be used in the school, are sold for cash and the proceeds applied to school purposes, will not remove the exemption. Mount Hermon Boys' School v. Gill, 145 Mass. 149, 13 N. E. 354.

But where the exemption is of property exclusively devoted to educational purposes, a farm connected with a college is not exempt, although agriculture is taught thereon if a portion of the products are each year sold for cash, the proceeds of which are applied to the purposes of the institution. St. Mary's College v. Crowl, 10 Kan. 448.

And land belonging to a university and used for pasturing cows and raising vegetables for the institution, or to afford the students the means of acquiring practical knowledge of gardening, cannot be deemed included under the constitutional exemption of property used exclusively for schools and colleges. State *ex rel.* Cunningham v. Orleans, 52 La. Ann. 223, 26 So. 872.

An unused tract, chiefly forest land, on one side of which a schoolhouse stands, is, as regards the excess over the land necessary for the use of the school, not so "set apart and exclusively used" for educational purposes as to be within a statutory exemption from taxation of land so used. Congregation of U. B. v. Forsyth County, 115 N. C. 489, 20 S. E. 626.

Vacant and unused land belonging to a college is not within a statutory exemption from taxation of grounds and buildings of literary institutions devoted solely to the appropriate objects of such institutions, and not leased or otherwise used with a view to pecuniary profit. Foy v. Coe College, 95 Iowa, 689, 64 N. W. 636.

The statutory exemptions are, in general, not broad enough to cover property rented or kept with a view of obtaining revenue therefrom.

Real estate held for sale to raise money for the institution is not exempt under a statutory exemption of such property as may be necessary for carrying out the design of the seminary while used exclusively for that purpose. County Comrs. v. Colorado Seminary, 12 Colo. 497.

Realty belonging to an educational association, the rents and profits of which are used exclusively for educational purposes, is not within a charter exemption from taxation of all the property held or appropriated by or for said association "for the exclusive purposes of

143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; *Smythe* v. *Fiske*, 23 Wall. 374, 23 L. ed. 47; *Emerson* v. *Hall*, 13 Pet. 409, 10 L. ed. 223; *Bell* v. *New York*, 105 N. Y. 144, 11 N. E. 495; *St. Vincent's College* v. *Schaefer*, 104 Mo. 261, 16 S. W. 395.

There can be no room for question that the mention of the "Chicago Theological Seminary," in the title of the act, referred to the institution incorporated by the act, and not "to the property," the school buildings, etc.

*Emerson* v. *Hall*, 13 Pet. 409, 10 L. ed. 223; *Bell* v. *New York*, 105 N. Y. 139, 11 N. E. 495; *St. Vincent's College* v. *Schaefer*, 104 Mo. 261, 16 S. W. 395.

It was natural and appropriate to use the words "said seminary" to designate the incorporated institution referred to in the title of the act as "The Chicago Theological Seminary," and again, in § 4, as "the seminary."

*Marine Bank* v. *Biays*, 4 Harr. & J. 338; *St. Vincent's College* v. *Schaefer*, 104 Mo. 261, 16 S. W. 395; *Nobles County* v. *Hamline University*, 46 Minn. 316, 48 N. W. 1119.

The precise word "located" is frequently used in charters and other statutes as ap-

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religion or education." Stahl v. Kansas Educational Asso. 54 Kan. 542, 38 Pac. 796.

Property rented out is not "set apart and exclusively used" for educational purposes within the meaning of a statutory exemption from taxation of property so used, even though the rents may be so applied. Congregation of U. B. B. v. Forsyth County, 115 N. C. 489, 20 S. E. 626.

Real property owned by a theological seminary is not, unless its corpus as well as its income is used for educational purposes, within a charter exemption from taxation of "all personal estate, real estate not exceeding 100 acres in land belonging to the corporation, . . . so long as the same shall be used and the avails thereof expended solely for the purposes of education and instruction." Hartford v. Hartford Theological Seminary, 66 Conn. 475, 34 Atl. 483.

And land belonging to a theological seminary, partly vacant and in part yielding rents for its support, are not even within a charter exemption from taxation of "the property, of whatever kind or description, belonging or appertaining to said seminary." People *ex rel.* Kochersperger v. Chicago Theological Seminary, 174 Ill. 177, 51 N. E. 198; Chicago Theological Seminary v. People, 189 Ill. 439, 59 N. E. 977; Chicago Theological Seminary v. People, 193 Ill. 619, 61 N. E. 1022.

An exemption of all buildings used exclusively for literary purposes, and not leased or otherwise used with a view to profit, does not extend to a building a portion of which is rented for stores, etc., although the remainder is used for the purposes of a college, and the income derived from the rent of the stores is applied to the support of the college and payment of its debts. Cincinnati College v. State, 19 Ohio, 113.

An exemption of schoolhouses so long as the same are used for that purpose does not exempt a portion of a building owned by a person who conducts a school in the upper stories, and lets the lower floors for business purposes. Wyman v. St. Louis, 17 Mo. 336.

The exemption of college grounds will not include land and buildings rented to a third person to be used as a private school. State v. Ross, 24 N. J. L. 498.

A portion of a college campus, leased for nursery purposes in consideration of a cash rental and its permanent improvement, is not within a statutory exemption from taxation of such real property belonging to educational institutions as shall be "actually occupied for the purposes for which they were incorporated." Willamette University v. Knight, 35 Or. 33, 56 Pac. 124.

But a seminary does not waive its exemption by leasing the premises used by it as a boarding house during the usual summer vacation. Temple Grove Seminary v. Cramer, 98 N. Y. 121, Affirming 26 Hun, 309, 10 Abb. N. C. 424.

And the statute may be so worded as to include all property held by a school, the income from which is devoted to school purposes.

Thus, real property which constitutes a part of the endowment is within a charter exemption of the college estate. Brown University v. Granger, 19 R. I. 704, 36 L. R. A. 847, 36 Atl. 720.

And an exemption from taxation of the property of a college "while so used for the promotion of science" exempts property so invested as to produce an income which is used for the purposes of the college. New Haven v. Sheffield Scientific School, 59 Conn. 163, 22 Atl. 156.

So, an exemption of "institutions of education, not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education," will include property held by such institutions for rent, the income of which is used for the work of such institution, there being no qualifying words which show or tend to show that only property used by the institution or connected with it is to be exempted. Kentucky Female Orphan School v. Louisville, 100 Ky. 470, 40 L. R. A. 119, 36 S. W. 921.

Under a Constitution permitting the legislature to exempt "such property as they may deem necessary for school purposes," the Supreme Court of the United States has held that lands and other property the annual profits of which, by way of rent or otherwise, are devoted to the business of the institution as a school, may be exempted. Northwestern University v. Illinois, 99 U. S. 309, 25 L. ed. 387.

Thereby overruling a decision of the Illinois supreme court that under such provision it is not competent to exempt property owned by educational corporations, which is not itself used directly in aid of the purposes for which the corporation was chartered, but which is held for profit merely, although the profit is to be devoted to the proper purposes of the corporation. Northwestern University v. People, 80 Ill. 336, 22 Am. Rep. 187, 86 Ill. 141.

A corporation organized to impart instruction to theological students has not ceased to devote its property to the uses for which it was created, so as to forfeit the exemption from taxation conferred by its charter, because it has become a department of a university, and occupies quarters provided by the latter institution, where, in exchange for such accommodations, it furnishes the university with a building, and retains its corporate existence, appoints the members of its faculty, prescribes their duties, and pays their salaries, and defrays the entire expenses of the school out of its own income. People *ex rel.* Kochersperger v. Baptist Theological Union, 171 Ill. 304, 49 N. E. 559.

plied to corporations. At common law it was an attribute of every corporation that it had a locality. Its locality was the place where it carried on its operations,—where it did business.

Ang. & A. Priv. Corp. § 103; *Sangamon & M. R. Co.* v. *Morgan County*, 14 Ill. 163, 56 Am. Dec. 497; *Bristol* v. *Chicago & A. R. Co.* 15 Ill. 436; *First Nat. Bank* v. *Morgan*, 132 U. S. 141, 33 L. ed. 282, 10 Sup. Ct. Rep. 37.

Giving to the word "belonging," in § 5, its primary and ordinary meaning of ownership, the words "said seminary," in the same section, could only refer to the corporation.

*Gammon* v. *Gammon*, 153 Ill. 41, 38 N. E. 890.

Similar general words, "belonging to," and "the college," "the institution," "the asylum," etc., have been held to refer to the corporation created by the act, and to render exempt all the property of the corporation.

*Nobles County* v. *Hamline University*, 46 Minn. 316, 48 N. W. 1119; *St. Anna's Asylum* v. *New Orleans*, 105 U. S. 362, 26 L. ed. 1128; *St. Vincent's College* v. *Schaefer*, 104 Mo. 261, 16 S. W. 395; *University of the South* v. *Skidmore*, 87 Tenn. 156, 9 S. W. 892; *Humphries* v. *Little Sisters of the Poor*, 29 Ohio St. 201.

An absurd or unreasonable meaning will not be attributed to the legislature, if the language admits of any other construction.

*Lau Ow Bew* v. *United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517; *People ex rel. Bussey* v. *Gaulter*, 149 Ill. 39, 36 N. E. 576.

The rule of strict construction does not apply to exemptions in favor of charitable corporations, but such exemptions should be construed liberally, to promote the charitable objects for which the corporations were created.

*Yale University* v. *New Haven*, 71 Conn. 316, 43 L. R. A. 490, 42 Atl. 87; *Phillips Academy* v. *Andover*, 175 Mass. 118, 48 L. R. A. 550, 55 N. E. 841; *Association for Benefit of Colored Orphans* v. *New York*, 104 N. Y. 581, 12 N. E. 279; *People* v. *Sayles*, 50 N. Y. Supp. 8; *State, Long Branch Firemen's Relief Asso., Prosecutor*, v. *Johnson*, 62 N. J. L. 625, 43 Atl. 573; *State, Sisters of Charity, Prosecutor*, v. *Chatham Twp.* 52 N. J. L. 373, 9 L. R. A. 198, 20 Atl. 292; *State* v. *Fisk University*, 87 Tenn. 233, 10 S. W. 284; *Methodist Episcopal Church, South, Book Agents*, v. *Hinton*, 92 Tenn. 188, 19 L. R. A. 289, 21 S. W. 321.

Under similar statutory provisions, either abolishing the rule of strict construction as to all statutes, or providing that it shall not apply to particular statutes, the rule of liberal construction was held to apply in giving a construction to criminal and penal statutes.

*Com.* v. *Davis*, 12 Bush, 240; *People* v. *Soto*, 49 Cal. 67; *Hankins* v. *People*, 106 Ill. 628; *Maxwell* v. *People*, 158 Ill. 248, 41 N. E. 995; *Peterson* v. *Currier*, 62 Ill. App. 163.

A similar charter provision has been referred to as requiring a liberal construction of a provision in the charter of Brown University, exempting its property from taxation.

*Brown University* v. *Granger*, 19 R. I. 704, 36 L. R. A. 847, 36 Atl. 720.

The rule of strict construction does not require that, if the language used "admits of two meanings," either one or the other of these two meanings "must be" adopted, or in any way change or override the other rules of construction, including the well-settled rule that, where a word admits of two meanings, the natural and ordinary meaning should be adopted, in the absence of other provisions showing a contrary intention.

Endlich, Interpretation of Statutes, §§ 337, 466; *United States* v. *Winn*, 3 Sumn. 209, Fed. Cas. No. 16,740; *United States* v. *Hartwell*, 6 Wall. 385, 18 L. ed. 830; *Meadowcroft* v. *People*, 163 Ill. 56, 35 L. R. A. 176, 45 N. E. 303.

It is proper to refer to other charters passed by the same legislature, as an aid in ascertaining the meaning it was intended the words used in the particular provision should have, and as illustrating the application of the rule.

*Vane* v. *Newcombe*, 132 U. S. 220, 33 L. ed. 310, 10 Sup. Ct. Rep. 60; 23 Am. & Eng. Enc. Law, title *Statutes*, p. 311; *Chase* v. *Lord*, 77 N. Y. 1; *Middleton* v. *Greeson*, 106 Ind. 18, 5 N. E. 755; *Levering* v. *Philadelphia, G. & N. R. Co.* 8 Watts & S. 459; *Reiche* v. *Smythe*, 13 Wall. 162, 20 L. ed. 566.

In giving a construction to a statute, it should be construed so as best to promote and effectuate the policy and object of the act.

*United States* v. *Hartwell*, 6 Wall. 394, 18 L. ed. 832.

An exemption provision in the charter of a charitable corporation should be construed not narrowly, but in a fair and liberal sense, so as to promote the charitable objects for which the corporation was formed.

*Home of the Friendless* v. *Rouse*, 8 Wall. 430, 19 L. ed. 495; *Washington University* v. *Rouse*, 8 Wall. 439, 19 L. ed. 498.

The Constitution in force in Illinois at the date of the act—that of 1848—provided that "no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title." Under this provision the title was a part of the act.

*Cohn* v. *People*, 149 Ill. 492, 23 L. R. A. 821, 37 N. E. 60.

The title may be resorted to as an aid in arriving at the legislative intention, in construing an act to which the rule of strict construction applies.

*Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550, 36 L. ed. 537, 12 Sup. Ct. Rep. 689; *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

*Messrs.* **Edwin W. Sims, Frank L. Shepard,** and **William F. Struckmann,**

submitted the cause for defendant in error:

Where there are two grounds for the judgment of a state court, only one of which involves a Federal question, and the other is broad enough to maintain the judgment sought to be reviewed, this court will not look into the Federal question, but will dismiss the writ of error.

*Bacon* v. *Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Beaupre* v. *Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *Rutland R. Co.* v. *Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Gillis* v. *Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Seneca Nation of Indians* v. *Christy*, 162 U. S. 283, 40 L. ed. 970, 16 Sup. Ct. Rep. 828.

The state court did not give effect to and enforce a new rule of exemption established by the revenue act of 1872. It was not necessary to determine whether the act of 1872 changed the rule of exemption; the state court did not pass on any such question.

*Knox* v. *Exchange Bank*, 12 Wall. 383, 20 L. ed. 415; *Mississippi & M. R. Co.* v. *Rock*, 4 Wall. 177, 18 L. ed. 381; *St. Paul, M. & M. R. Co.* v. *Todd County*, 142 U. S. 282, 35 L. ed. 1014, 12 Sup. Ct. Rep. 281; *Mississippi & M. R. Co.* v. *McClure*, 10 Wall. 511, 19 L. ed. 997.

All laws exempting property from taxation must be strictly construed. It is not to be presumed that the legislature intended to exempt property from taxation; that intention must appear affirmatively, and the exemption will be strictly construed.

*Wilmington & W. R. Co.* v. *Alsbrook*, 146 U. S. 279, 36 L. ed. 972, 13 Sup. Ct. Rep. 72; *Delaware Railroad Tax*, 18 Wall. 206, *sub nom. Minot* v. *Philadelphia, W. & B. R. Co.* 21 L. ed. 888; *Farrington* v. *Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Ohio L. Ins. & Trust Co.* v. *Debolt*, 16 How. 416, 14 L. ed. 997; *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 668, 29 L. ed. 771, 6 Sup. Ct. Rep. 625; *Providence Bank* v. *Billings*, 4 Pet. 514, 7 L. ed. 939; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 544, 9 L. ed. 823; *Binghamton Bridge*, 3 Wall. 51, *sub nom. Chenango Bridge Co.* v. *Binghamton Bridge Co.* 18 L. ed. 137; *Northwestern University* v. *Illinois*, 99 U. S. 309, 25 L. ed. 387; *First M. E. Church* v. *Chicago*, 26 Ill. 482; *Montgomery* v. *Wyman*, 130 Ill. 17, 22 N. E. 845; *Presbyterian Theological Seminary* v. *People*, 101 Ill. 578; *Re Swigert*, 123 Ill. 267, 14 N. E. 32.

The title of an act furnishes little aid in the construction of the provisions of the act itself, and can only be referred to when there is a doubt as to the meaning of the act itself; and when necessary to refer to the title, that fact of itself is sufficient to defeat the claim of exemption.

*Hedden* v. *Barney*, 5 Wall. 107, 18 L. ed. 518; *Yazoo & M. Valley R. Co.* v. *Thomas*, 132 U. S. 174, 33 L. ed. 302, 10 Sup. Ct. Rep. 68.

Mr. Justice Peckham, after making the foregoing statement of facts, delivered the opinion of the court:

The supreme court of Illinois, by its decision in this case, has but followed its prior decision upon the same question between these parties, reported in 174 Ill. 177, 51 N. E. 198, decided in 1898. It there held that the exemption was limited to property used in immediate connection with the seminary, and did not include such property as is involved in these cases, which was not property used in immediate connection with the seminary, but was other property separate and apart therefrom, and owned or rented or held by the seminary as an investment, the income from which was nevertheless used solely for school purposes.

The rule of construction followed by the supreme court of Illinois in construing this act exempting property from taxation is so well established by this and other courts as scarcely to need the citation of authorities. One or two, however, from this court may be given. *Tucker* v. *Ferguson*, 22 Wall. 527, 22 L. ed. 805; *New Orleans City & Lake R. Co.* v. *New Orleans*, 143 U. S. 192, 195, 26 L. ed. 121, 122, 12 Sup. Ct. Rep. 406; *Bank of Commerce* v. *Tennessee Use of Memphis*, 161 U. S. 134, 146, 40 L. ed. 645, 649, 16 Sup. Ct. Rep. 456.

The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim.

The reasoning of the supreme court of Illinois (174 Ill. 177, 51 N. E. 198), in refusing the exemption claimed, so far as relates to the property not connected with the seminary, is best stated in the language of the opinion of that court. After stating the rule of construction, as above mentioned, the court said (p. 181, N. E. p. 199):

"If, however, taking the express words of the act, and without extending their mean- [673] ing by implication, they may be held to include all property belonging or appertaining to the 'seminary' mentioned in the 2d section, or to include all the property belonging or appertaining to the corporation, and there is reasonable ground for doubt which was intended by the legislature, that doubt must be resolved in favor of the state. In other words, if the language is capable of a broad or more restricted meaning, the latter must be adopted. The 2d section of the charter mentioning certain property to be located in or near the city of Chicago, and which is denominated 'the seminary,' we think the words in the 5th section, 'said seminary,' refer to that particular property, and to so hold seems to do no more than to give the language of the two sections their literal and ordinarily understood meaning. To say, as is contended by appellee, that 'said seminary' was intended to mean the corporation is to extend the meaning of those words by implication, which is not permissible.

"It is said that the only entity mentioned in the charter capable of owning property is the corporation, and therefore it could not have been intended that property be-

longing or appertaining to the seminary was meant by § 5. We think this position is based upon a too limited meaning of the words 'belonging or appertaining,' as here used. Of course, if the language of § 5 had been that the property, of whatever kind or description, *owned* by the said seminary shall be forever free from all taxation, etc., or if, as counsel seem to assume, the words 'belonging or appertaining' here necessarily meant ownership of the property, then there would be force in this argument of counsel. It is undoubtedly true that the word 'belonging' may mean ownership, and very often does. But that is not its only meaning. Wester's International Dictionary defines it: '2. That which is connected with a principal or greater thing; an appendage, an appurtenance.' He also defines the word 'pertain' as meaning 'to belong or pertain, whether by right of nature, appointment, or custom; to relate, as "things pertaining to life."' Manifestly, the purpose of § 5 was to exempt property owned by the corporation, but it does not follow [674] that the intention was to include in *that exemption all property owned by it used for purposes of the school."

We think there is force in this reasoning, and we are disposed to concur in the result arrived at.

It is contended by counsel for plaintiff in error that the words "said seminary," contained in § 5 of the charter, referred to the corporation created by the act, and not to the school buildings and grounds, and that, therefore, the exemption necessarily exempted from taxation all the property against which the judgments below were rendered.

Here are two different constructions of the exemption clause, each of which might be maintained with some plausibility. That view which limits the range of the exemption to property used in immediate connection with the seminary might seem to many to be the correct one, while in the opinion of others the broader claim of total exemption would be the best founded. The judges of the supreme court of Illinois have unanimously taken the former view, while counsel for the plaintiff in error very strongly and very ably has taken and maintained the other. We can ourselves see that a construction either way would not be clearly erroneous, or, at any rate, either construction would not be so obviously erroneous as to leave no doubt upon the question. In such cases we think the rule as to the construction of statutes of exemption from taxation should be applied, and as there may be room for reasonable doubt whether a total or only a partial exemption was meant, the partial exemption should alone be recognized. Great weight ought also to be attached to the decision of a state court regarding questions of taxation or exemption therefrom under the Constitution or laws of its own state. As is said in *Wilson v. Standefer*, 184 U. S. 399, 412, 46 L. ed. 612, 618, 22 Sup. Ct. Rep. 384, 389:

"Especial respect should be had to such decisions when the dispute arises out of general laws of a state, regulating its exercise of the taxing power, or relating to the state's disposition of its public lands. In such cases it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the *tribunals whose special function is to [675] expound and interpret the state enactments."

We acknowledge and affirm the principle that this court in this class of cases must decide upon its own responsibility as to the existence and meaning of the contract, but in arriving at such meaning in a case like this, the decision of the state court is entitled to exercise marked influence upon the question this court is called upon to decide, and where it cannot be said that the decision is in itself unreasonable or in violation of the plain language of the statute, we ought, in cases engendering a fair doubt, to follow the state court in its interpretation of the statutes of its own state.

The case of *Northwestern University v. Illinois*, 99 U. S. 309, 25 L. ed. 387, is no authority for the construction contended for by the plaintiff in error. In that case the charter provided "that all property, of whatever kind or description, belonging to or owned by the said corporation, shall be forever free from taxation for any and all purposes." The difference between the two provisions is intrinsic and material. What is lacking in the case at bar is present in the case cited, namely, a provision exempting all the property "owned by said corporation." In the case before us it is the property "belonging or appertaining to said seminary," and the word "belonging" is construed by the supreme court as not synonymous with "owned by," nor is the word "seminary" regarded in this connection as the equivalent of the word "corporation."

But the plaintiff in error contends that however correct the construction adopted by the state courts might be if founded upon general rules of construction pertaining to claims for exemption from taxation, it is plainly erroneous under the provision of § 6 of the charter, providing that the act "shall be deemed a public act, and shall be construed liberally in all courts for the purposes therein expressed."

To adopt the construction contended for by the plaintiff in error would call for a reversal of the rules otherwise prevailing in and governing claims for exemption from taxation. But it is nevertheless urged that if in any way the language of exemption can by a liberal construction be said to cover the whole *property owned by the corpora- [676] tion, such construction must be adopted by reason of the provisions contained in § 6. We think this is claiming entirely too much for the language of that section.

As is therein stated, the act must be construed liberally for the purposes therein expressed. What are those purposes? In this respect the word "purposes" in § 6 is synonymous with the word "object" in § 2, as we think, and we find that the object or pur-

pose is stated in § 2, "to furnish instruction and the means of education to young men preparing for the gospel ministry, and the institution shall be equally open to all denominations of Christians for this purpose." It is for the accomplishment of this purpose or object that the act is to be liberally construed. If a question should arise regarding the meaning of the language "to furnish instruction or the means of education," and how far the words should be extended and what they should include, the words should be liberally construed as provided for in the 6th section, because to furnish instruction or the means of education is the expressed purpose or object of the act. So, in regard to the powers of the board of directors as provided for in the charter; those powers should be liberally construed for the furtherance of the object stated in the charter. To do so would not violate any well-settled rule of construction, and would nevertheless be sufficient in case of doubt to turn the decision in favor of a construction more liberal in its nature than might otherwise be properly adopted. But we do not think it was intended by the language of the 6th section to provide a complete overthrow of a canon of construction such as the one in question, which has obtained for so many years, and has been so universally and so strictly adopted and adhered to by the courts of the whole country. We again resort to the language of the opinion of the Illinois court for the presentation of its own reasons for the somewhat strict construction of the exemption clause adopted by it. After stating that it should not be presumed that the legislature intended to exempt property from taxation, but such intention must appear affirmatively, and it will be [677] strictly construed, and *that any ambiguities must operate against the parties who claim the exemption, the court (p. 181, N. E. p. 199) continued:

"That laws exempting property from taxation are generally subject to these rules of construction is not seriously questioned, but counsel for appellee say said rules do not apply here, because by § 6 of the charter it is provided that the act 'shall be construed liberally in all courts for the purposes therein expressed.' We do not think this language was intended to or could be held to change or qualify the general rules of construction applicable to the section under consideration. Here the very question to be determined is, What is the purpose expressed in that section? And to say that liberal rules of construction must, under § 6, be applied in favor of the contention that all property belonging or appertaining to the corporation is exempt would be to beg the whole question. In determining what purpose is expressed in the section, resort must necessarily be had to the general rules for considering such laws. When that purpose is ascertained, liberal rules of construction, if necessary, are to be resorted to, to give effect to such purpose. . . . We think this case turns upon whether or not the words 'said seminary,' used in the 5th clause, should be given the meaning of 'said corporation.' In our opinion the application of the rules of construction above referred to does not warrant such a construction."

This is not such an unnatural, strained, or unreasonable construction of the act as shows it to be erroneous, and while it might be otherwise construed so as to effect a total exemption, we are not prepared to hold that the state court so clearly erred as to call upon us to reverse its determination. We, therefore, adopt, though, we admit, with some hesitation, the views of the state court, which lead to an affirmance of the judgments.

*Affirmed.*

Mr. Justice **White**, with whom concur Mr. Justice **Brown** and Mr. Justice **Holmes**, dissenting:

The court, in stating the facts, refers to a previous opinion of *the supreme court of [678] the state of Illinois, announced in a case between the same parties, involving a question of law like unto that which arises on this record. In that case, however, the supreme court of Illinois but reversed and remanded for a new trial, and hence the judgment was not final and not susceptible of being brought to this court to test the issues involving the constitutional right under the contract. After the record in the previous case reached the trial court the case was not further pressed by the plaintiff for such length of time as to cause it, under the Illinois statute, to be in effect abandoned. The question here now for review is not, therefore, controlled by the thing adjudged arising from the previous judgment. The court does not now decide to the contrary, but the matter is referred to by me lest a misconception be caused by the mention made of the subject in the opinion of the court.

I do not dispute the elementary proposition that exemptions from taxation are *stricti juris*, that is, not to be extended by implication. This, however, does not imply that a contract exemption is to be disregarded, simply because it may be possible for a subtle mind to suggest a possible doubt as to the exemption, however conjectural may be the assumption on which the doubt is rested. Nor does the rule mean that, because it is deemed that a particular contract exemption was an unwise one for the public interest, therefore the meaning of the contract is to be disregarded by a court in order to relieve the public from the burdens arising from the obligations of the contract. The rule, as understood by me, is this only, that the language from which an exemption is claimed to arise is to receive a literal construction, and is not to be extended so as to embrace a right not within the clear meaning of the contract. I do not, moreover, dispute the principle that where the contract which is asserted to have been impaired arises from a state law, it is the duty of the court, in case of doubt as to the meaning of the contract, to adopt the construction given to it by the state court. This rule does not imply that because the state court has decided against the contract right,

therefore there is doubt and, hence, the resulting duty to affirm the action of the state court. If such were the case, the pow-[679]er of this court to review the action *of state courts concerning the alleged impairing of the obligations of a contract would be at an end wherever the contract took its origin in state law. The significance of the rule is this, that if, fairly considering the issue of contract arising from the state law and its alleged impairment, this court, in the exercise of its independent judgment, remains in doubt, the decision below construing the state law will be allowed to solve the doubt, and thus secure the affirmance of the judgment. The obligation on me as a member of the court is identical with that which rests on the court.

Coming to apply these rules to the case in hand, my mind has no doubt whatever as to the true meaning of the contract. Let me state what the contract is, in order to show why I do not doubt on the subject.

The 1st section of the act from which the contract arises creates a corporation for a religious and benevolent purpose, under the name of "The Board of Directors of the Chicago Theological Seminary." The 2d section provides as follows:

"That the seminary shall be located at or near the city of Chicago. The object shall be to furnish instruction and the means of education to young men preparing for the gospel ministry, and the institution shall be equally open to all denominations of Christians for this purpose."

The 3d section provides for the board of directors; the 4th relates to the powers of the board; and the 5th is as follows:

"That the property, of whatever kind or description, belonging or appertaining to said seminary, shall be forever free and exempt from all taxation for all purposes whatsoever."

The 6th section provides when the act shall take effect, and declares that it "shall be construed liberally in all courts for the purposes therein expressed." Does the exemption covered by the 5th section relate to the theological seminary, the corporation created by the act, or does it apply only to a building to be erected by the corporation? is the question at issue.

It is admitted that if the exemption ap-[680]plies to the theological *seminary, the contract has been impaired and the judgment should be reversed. It is now decided that the exemption relates only to the seminary, that is, to the buildings, and, therefore, the judgment is affirmed. Now, giving to the words of exemption their natural meaning, and construing them strictly, there does not seem to me to be a doubt that they relate to the theological seminary incorporated by the act, and referred to as such in its 1st section. My mind does not enable me to see what else the words can mean. If it was intended merely to exempt a building or buildings, language could have been employed which would have aptly conveyed such meaning. Instead of doing this, the language used in the act—as I understand it—excludes such construction, since it declares that the exemption shall relate to the property "belonging or appertaining to said seminary;" the word "belonging" clearly referring to the corporation created by the act and on whom was conferred the power to own and possess property. Emphasis is added to this view when the scope of the exemption is borne in mind; since it embraces, not a mere building or its accessories, but the property of whatever kind or description, thus describing and referring to the power to own and acquire property of every kind and description, real or personal, conferred on the theological seminary by the act. It is further to be observed, as throwing light upon the subject, that in the 4th section, immediately preceding the grant of the exemption, the particular building, or place of learning, to be constructed by the theological seminary is twice referred to as the institution, thus showing that the legislative mind had immediately before it when the exemption was granted the distinction between the theological seminary as a corporate entity to which the exemption was granted, and the institution to be constructed and supported by the theological seminary. I cannot, moreover, conceive that the words of the statute, immediately following the section granting the exemption, commanding that the provisions of the contract "shall be liberally construed in all courts for the purposes therein expressed," should have what seems to me their plain meaning disregarded, by causing them to refer, not to the act as a whole, *but to some[681] particular provision in it. I find nothing in the language which lends itself to such a view.

I therefore dissent.

I am authorized to say that Mr. Justice **Brown** and Mr. Justice **Holmes** concur in this dissent.

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INDIANA MANUFACTURING COMPANY, *Appt.*,
*v.*
ARMIN C. KOEHNE *et al.*

(See S. C. Reporter's ed. 681-691.)

*Equity—suit to enjoin collection of illegal tax—cloud on title—adequate remedy at law—multiplicity of suits—irreparable injury—equitable jurisdiction of Federal courts.*

1. An averment that an assessment upon the capital stock and franchises of a corporation constitutes a cloud upon title is not sufficient to sustain a bill in equity which seeks to enjoin the collection of such tax as illegal, where it contains no allegation that the corporation owns any real property.
2. The absence of an adequate remedy at law is not shown by an averment in a bill which seeks to enjoin the collection of a tax on property alleged to be exempt from taxation,

NOTE.—*As to injunction to restrain the collection of illegal taxes*—see note to Odlin v. Woodruff (Fla.) 22 L. R. A. 699.

that a portion of the tax is to be paid to the state of Indiana, which cannot be sued, where, under the general tax laws of that state, complainant might have had its objections to the assessment reviewed by a state board, and, if unsuccessful, might have paid the tax, and then, under Burns's (Ind.) Rev. Stat. 1894, §§ 7915, 7916, have filed a petition with the board of county commissioners to recover it back as "wrongfully" assessed, and, if still unsuccessful, might have appealed from the decision of such board to the courts.

3. The prevention of multiplicity of suits cannot successfully be invoked to sustain a suit in equity to enjoin the collection of an illegal tax, where complainant's remedy under the state statutes was to have its objections to the assessment reviewed by a state board, and, if unsuccessful, to pay the tax and file a petition with the board of county commissioners to have it refunded, and, if still unsuccessful, to appeal from the decision of such board to the courts.

4. Irreparable injury cannot be inferred as the result of the enforcement of an illegal tax, so as to sustain a suit in equity to enjoin its collection, where there is a plain and adequate remedy at law to recover the amount of the tax wrongfully assessed.

5. A Federal court is not vested with jurisdiction of a suit in equity to enjoin the collection of a state tax because the case is one arising under the Constitution and laws of the United States, within the meaning of the judiciary act of August 13, 1888 (25 Stat. at L. 433, chap. 866) § 1, unless there is apparent some ground of equitable jurisdiction recognised by the Federal courts.

[No. 177.]

*Argued October 24, 1902. Decided February 23, 1903.*

APPEAL from the Circuit Court of the United States for the District of Indiana to review a decree which dismissed a bill in a suit in equity to enjoin the collection of a state tax. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **Chester Bradford** argued the cause, and, with *Mr. F. Winter*, filed a brief for appellant:

United States courts have jurisdiction where Federal questions are involved.

*Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union L. S. L. & S. H. Co.* 12 Fed. 225; *Starin* v. *New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28.

Even in cases where the jurisdiction of a United States court depends only upon diverse citizenship of the parties, and no constitutional question is involved, its equitable jurisdiction cannot be ousted by the fact that a remedy at law may exist under state statutes.

*McConihay* v. *Wright*, 121 U. S. 201, 30 L. ed. 932, 7 Sup. Ct. Rep. 940.

Likewise, where other questions are involved, jurisdiction will be maintained.

*Nashville* v. *Cooper*, 6 Wall. 254, 18 L. ed. 853.

A suit in equity was not only a proper suit under the circumstances, but the only effective kind of suit which could be brought in the Federal court, to which complainant, with its Federal question, had the right to go.

*Watson* v. *Sutherland*, 5 Wall. 78, 18 L. ed. 582; *Boyce* v. *Grundy*, 3 Pet. 210, 7 L. ed. 655; *Payne* v. *Hook*, 7 Wall. 430, 19 L. ed. 262; 1 Gould & Tucker's Notes, p. 99; *English* v. *Smock*, 34 Ind. 124, 7 Am. Rep. 215; *Clark* v. *Jeffersonville, M. & I. R. Co.* 44 Ind. 261; *Thatcher* v. *Humble*, 67 Ind. 448; *Bishop* v. *Moorman*, 98 Ind. 4, 49 Am. Rep. 731; *Denny* v. *Denny*, 113 Ind. 26, 14 N. E. 59; *Champ* v. *Kendrick*, 130 Ind. 549, 30 N. E. 787; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 924.

The collection of an illegal tax can be enjoined notwithstanding the statutory remedies for the refunding of such taxes when paid.

*Hyland* v. *Brazil Block Coal Co.* 128 Ind. 335, 26 N. E. 672.

Injunction is a proper remedy in the courts of Indiana against a void tax.

*Stockman* v. *Robbins*, 80 Ind. 195; *Henry County* v. *Murphy*, 100 Ind. 573; *Jones* v. *Rushville Natural Gas Co.* 135 Ind. 595, 35 N. E. 390; *Senour* v. *Ruth*, 140 Ind. 318, 39 N. E. 946; *Senour* v. *Matchett*, 140 Ind. 636, 40 N. E. 122; *Hart* v. *Smith* (Ind.) 58 L. R. A. 949, 64 N. E. 661.

It would seem that a plaintiff who has a right to go into the Federal courts because of diversity of citizenship, or because a Federal question is involved, should be allowed the remedy of injunction whenever, under the facts stated in his bill, it would be sustained in the state courts.

The Federal court had equitable cognizance.

*Third Nat. Bank* v. *Stone*, 174 U. S. 432, 43 L. ed. 1035, 19 Sup. Ct. Rep. 759; *Louisville* v. *Third Nat. Bank*, 174 U. S. 435, 43 L. ed. 1037, 19 Sup. Ct. Rep. 874; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

A suit may be maintained in equity to secure an injunction, where a part of the taxes in controversy would be paid to the state, and thus become irrecoverable if paid.

*Foote* v. *Linck*, 5 McLean, 616, Fed. Cas. No. 4,913. See also *First Nat. Bank* v. *Douglas County*, 3 Dill. 298, Fed. Cas. No. 4,809; *Hersey* v. *Barron County*, 37 Wis. 75; *Marsh* v. *Clark County*, 42 Wis. 502; *Schettler* v. *Fort Howard*, 43 Wis. 48; *Goff* v. *Outagamie County*, 43 Wis. 55; *Salscheider* v. *Fort Howard*, 45 Wis. 519.

Injunction will lie to restrain the collection of a tax on personal property, where the enforcement of the tax would lead to a multiplicity of suits, or where the law authorizing the tax is illegal, or where there is no means of recovering back from the state taxes illegally assessed.

*City Nat. Bank* v. *Paducah*, 2 Flipp. 61, Fed. Cas. No. 2,743; *First Nat. Bank* v. *Douglas County*, 3 Dill. 298, Fed. Cas. No. 4,809.

*Mr.* **William L. Taylor** argued the cause, and, with *Messrs. Merrill Moores* and

*Cassius C. Hadley*, filed a brief for appellees:

The complainant has a plain, adequate legal remedy under the laws of the state of Indiana, and is not entitled to the interposition of a court of equity.

*Senour* v. *Matchett*, 140 Ind. 636, 40 N. E. 122; *Ogden* v. *Walker*, 59 Ind. 460; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Pittsburgh, C. C. & St. L. R. Co.* v. *West Virginia Bd. of Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; *Small* v. *Lawrenceburgh*, 128 Ind. 231, 27 N. E. 500; *Clement* v. *People*, 177 Ill. 144, 52 N. E. 382; *Kinley Mfg. Co.* v. *Kochersperger*, 174 Ill. 379, 51 N. E. 648; *Jones* v. *Rushville Natural Gas Co.* 135 Ind. 595, 35 N. E. 390.

If the state board should affirm the assessment made by the county board, the appellant should pay the taxes assessed, and then file a petition with the board of commissioners for recovery of the amount illegally assessed. The taxes here enjoined are the state, county, and city taxes. The statutes of the state of Indiana provide a complete system for the refunding of taxes that have been illegally assessed and collected, even after they have been distributed to the municipalities for which they were collected.

*Howard County* v. *Armstrong*, 91 Ind. 528; *Simonson* v. *West Harrison*, 5 Ind. App. 466, 32 N. E. 585; Dill. Mun. Corp. 941; *Pittsburgh, C. C. & St. L. R. Co.* v. *West Virginia Bd. of Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90.

The bill does not show that appellant is entitled to relief in a court of equity.

*Dows* v. *Chicago*, 11 Wall. 108, 20 L. ed. 65; *Hannewinkle* v. *Georgetown*, 15 Wall. 547, 21 L. ed. 231; *State Railroad Tax Cases*, 92 U. S. 575, *sub nom. Taylor* v. *Secor*, 23 L. ed. 669; *Milwaukee* v. *Koeffler*, 116 U. S. 219, 29 L. ed. 612, 6 Sup. Ct. Rep. 372; *Shelton* v. *Platt*, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Pittsburgh, C. C. & St. L. R. Co.* v. *West Virginia Bd. of Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; Cooley, Taxn. pp. 538, 543; *Pacific Exp. Co.* v. *Seibert*, 44 Fed. 310; *DuBois* v. *Lake County*, 10 Ind. App. 347, 37 N. E. 1056; *Shults* v. *Blackford County*, 20 Ind. 178; *State ex rel. Godfroy* v. *Miami County*, 63 Ind. 497; *Arkansas Bldg. & L. Asso.* v. *Madden*, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119; *Brewer* v. *Springfield*, 97 Mass. 152; *Hunnewell* v. *Charlestown*, 106 Mass. 350; *Van Cott* v. *Milwaukee County*, 18 Wis. 247; *Moores* v. *Smedley*, 6 Johns. Ch. 28; *Wells, F. & Co.* v. *Dayton*, 11 Nev. 161.

Mr. Justice **Peckham** delivered the opinion of the court:

The complainant herein has appealed from the decree of the circuit court of the United States for the district of Indiana, which dismissed its bill. It was a suit in equity to enjoin the collection of taxes. It appears that certain taxes had been assessed against the complainant, a corporation of Indiana, and process had issued for the collection thereof which included all the years from 1893 to 1898 (both years inclusive), and also for the year 1900; that such taxes, or the greater part of them, were (as averred) illegal, because they were, among other things, assessed pursuant to a law of the state of Indiana, upon the value of certain letters patent of the United States, for inventions owned by the corporation; that such state law was in violation of the Federal Constitution, and was therefore void; that the part of the taxes which complainant admitted to be legal it had paid, and notwithstanding such payment the tax officials were threatening to levy upon its property to collect the residue.

By reference to the general tax laws of Indiana of 1891 it will be seen that it is therein provided that each district assessor shall, commencing in April in each year, inquire of each person concerning his property, while as to corporations their officers are to deliver to the assessor a sworn statement of the property of such corporation in detail, and among the items to be reported is the "market value, or, if no market value, then the actual value, of the shares of stock" of the company. The statement made by the corporation to the assessor is by him delivered to the county auditor, who in turn delivers it to a board of review, which values and assesses the capital stock and all franchises and other property of the company. This board of review makes the original assessment. The corporation so assessed, or any taxpayer, may appeal from the assessment upon the corporation, to the state board of tax commissioners. *(Tax law of [683] 1891, § 125, as amended by the act of 1895, p. 79.) Upon such appeal the state board decides as to the assessment, and may, if it decides that the property is assessable, make such an assessment, increasing or reducing it, as it may decide proper, and the auditor then certifies such changes in valuation made by the state board to the several counties, and provision is made for the collection of the same by the proper officials. By the act of 1853 (Ind. Rev. Stat. ed. 1881, §§ 5813, 5814; Ind. Rev. Stat. ed. 1894, §§ 7915, 7916) provision is made that any person or corporation may appear before the board of commissioners of any county and establish by proper proof that such person or corporation has paid taxes which were wrongfully assessed against him or it, and it is thereby made the duty of the board to order the amount so proved to have been paid, to be refunded to the payer from the county treasury so far as the same was assessed and paid for county taxes. Where a portion of the amount so wrongfully assessed and paid shall have been paid for state purposes, and shall have been paid into the state treasury, it is made the duty of the board to certify to the auditor of the state the amount so proved to have been wrongfully paid, and the auditor is directed to audit the same as a claim against the

treasury, and the treasurer of the state is directed to pay the same out of any moneys not otherwise appropriated.

The further steps to be taken in case the authorities refuse, upon such application, to pay over the taxes wrongfully assessed, are adverted to hereafter.

The bill states that defendant Koehne is the treasurer of Marion county, where these taxes were assessed, and he is by law also the treasurer of the city of Indianapolis, and as the treasurer of the county of Marion and the city of Indianapolis he collects for them all taxes, and makes distribution thereof, and also collects all taxes due the state from Marion county, and in fact he collected all taxes assessed for all purposes against appellant. There is no other treasurer of the city of Indianapolis, and the money for that city collected by tax remains in the hands of the county treasurer of the county of Marion until it is expended; the county treasurer thus retain-[684]ing all taxes *in his hands belonging both to the county of Marion and the city of Indianapolis until those taxes are properly expended.

Other averments were contained in the bill, but none material to the case as we view it, and upon all the facts complainant comes into a court of equity for the purpose of enjoining the collection of the alleged illegal portion of these taxes which had been imposed on the letters patent mentioned, and it was claimed by the complainants that, excluding the value of such patents, the shares had no value above the indebtedness of the corporation, and therefore it was wholly exempt, or exempt with the exception of a very small sum, from taxation, and that sum it had paid.

The foundation of this appeal to equity, as averred by complainant, was (1) on the ground that the assessment constitutes a cloud upon title; (2) that there is no adequate remedy at law; (3) that a multiplicity of suits is avoided; and (4) that it prevents irreparable injury to complainant.

It has long been the settled doctrine of the Federal courts that the mere illegality of a tax, or the mere fact that a law upon which the tax is founded is unconstitutional, does not entitle a party to relief by injunction against proceedings under the law, but it must appear that the party has no adequate remedy by the ordinary processes of the law, or that the case falls under some other recognized head of equity jurisdiction, such as multiplicity of suits, irreparable injury, etc. See *Cruickshank* v. *Bidwell*, 176 U. S. 73, 80, 44 L. ed. 377, 380, 20 Sup. Ct. Rep. 280, where many of the authorities upon this subject are collected in the opinion which was delivered by Mr. Chief Justice Fuller. See also *Pittsburgh, C. C. & St. L. R. Co.* v. *West Virginia Bd. of Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90, where Mr. Justice Gray dealt with the subject quite fully. We must judge the case at bar under the rules laid down by the authorities cited.

We take the grounds in the order above stated.

(1.) In regard to the averment that the assessment constitutes a cloud upon title.

It is the ordinary case of an assessment upon the value of the capital stock of a corporation and its franchises. Our attention has not been called to any statute which makes the *assessment upon the shares a[685] lien upon the real estate of a corporation, and if it were such lien, there is no averment that the company owned any real estate; hence, no cloud upon its title is made apparent, even if there could be a cloud cast upon the real estate merely by reason of an ordinary assessment, such as is made in this case. There is nothing in the objection.

(2.) There is the averment that the complainant is without any adequate remedy at law, and one of the grounds for such averment is stated in the bill as follows:

"And your orator further shows unto your honors that the defendant Armin C. Koehne is the treasurer of Marion county, Indiana, whose duty it is as such treasurer, under the laws of the state of Indiana, to receive and collect taxes for the said state of Indiana, and also for Marion county in said state, and also for the city of Indianapolis within said county, and also for the school board of the city of Indianapolis, Indiana. That a large proportion of the amounts received and collected by the said defendant as treasurer, as aforesaid, are for and on account of and for the benefit of the state of Indiana, a sovereign state, and one of the United States, and that under the Constitution and laws no suit can be maintained against the state of Indiana. That it is a part of the duty of the said defendant Armin C. Koehne, as aforesaid, to pay over into the treasury of the state of Indiana a large portion of the amounts so received and collected by him as taxes, and, therefore, that if said amounts are so collected and received and paid over, they will become mixed with the moneys of the said state, and thus be beyond reach of any process of this or any court, and irrecoverable, and that great and irreparable injury will result to your orator if such unlawful collection and paying over as aforesaid be not prevented."

The averment that a portion of the tax is to be paid to the state of Indiana, and that the state cannot be sued, is answered by the remedy provided by the law of Indiana for such a case. Under that law the complainant was bound in the first place to appeal from the decision of the board of review, which included the letters patent, in the value of the shares of stock of the corporation. Such appeal would, by the provision of the *statute, be taken to the state[686] board of tax commissioners, and if that board affirmed the decision of the board of review the corporation could pay the tax and immediately file a petition with the board of county commissioners to recover it back under the act of 1853, above referred to. An appeal is given from the refusal of that board to repay the tax. 3 Ind. Rev. Stat. 1894, § 7917; *Schultz* v. *Blackford County*, 20 Ind. 178; *State ex rel. Godfroy* v. *Miami*

*County*, 63 Ind. 497, 501. This appeal would be taken to the circuit court, and by the general law an appeal lies from that court to either the appellate court or the supreme court of the state, according to the amount involved.

The fact that a portion of the money raised by the tax might be for state purposes is not material under the provisions of the act of 1853, *supra*. The courts of Indiana have held that the filing of a petition with the board of commissioners under that act was in itself notice to the county, and if thereafter the money was paid over to the state or to the city, it was no defense; that when the board of commissioners received notice, the county became a trustee for the claimant, and in the event the money was awarded to him the county was bound to refund the same, and a payment by the county authorities after such notice, or the commencement of an action, to the state or town authorities, was at its own risk and peril. The taxpayer could not be required to pursue such funds into the hands of the parties to whom they were wrongfully distributed, and the fact that the taxes were voluntarily paid constituted no defense under the statute cited. *DuBois* v. *Lake County*, 10 Ind. App. 347, 37 N. E. 1056. It is also said in the above case that if the money had been paid over when the petition was filed, the statute provided that the commissioners should give the claimant a certificate to the state auditor for the repayment by the state treasurer, when taxes had been paid that were wrongfully assessed for state purposes. There was nothing, therefore, to prevent the complainant herein from paying the tax and immediately filing its petition with the board of county commissioners to have it refunded, and the payment to the state (if made) was immaterial and constituted no defense. The tax could be recovered back, notwithstanding the payment to the state.

[687] *It has been urged, however, that the act of 1853 was not broad enough, inasmuch as it required that the taxes should have been wrongfully assessed, and that mere illegality would not be sufficient in order to recover under the statute, citing *Howard County* v. *Armstrong*, 91 Ind. 528. That case simply held that where property was legally taxable, and the tax assessed was justly and equitably due, if through some irregularity or default it had not been legally assessed, it could not be said to have been "wrongfully" assessed within the meaning of the statute of 1853, and recoverable back under that statute; but that very case shows that if property which was not taxable was assessed and the money paid, such assessment was "wrongful" within the statute of 1853, being made upon property not liable to taxation, and therefore it could not be said that any tax so assessed was justly or equitably due.

In this case, if the complainant be right in its averment that the letters patent owned by it are property exempt from taxation by or under state authority, then such property is "wrongfully" assessed within that statute, and proceedings could be taken to recover back the tax so paid, upon complying with the provisions of the law of Indiana. *Donch* v. *Lake County*, 4 Ind. App. 374, 30 N. E. 204, decided in 1891, subsequently to the decision in 91 Ind. 528. *DuBois* v. *Lake County*, 4 Ind. App. 138, 30 N. E. 206, and again reported, reaffirming the same doctrine, in 10 Ind. App. 347, 37 N. E. 1056; *Newsom* v. *Bartholomew County*, 92 Ind. 229; *Pulaski County* v. *Senn*, 117 Ind. 410, 20 N. E. 276.

Complainant could set forth in its petition to the county commissioners its claim under the Federal Constitution for the exemption of the letters patent owned by it from taxation, and it could make the same claim if the board refused to admit it, in its action in the circuit court and on an appeal from an adverse decision in that court to either the appellate court or the supreme court of the state, and if either court to which the appeal was taken and before which the question was raised decided it adversely to the complainant, a writ of error would lie from this court, and the subject could be reviewed and finally decided here. There is no doubt, therefore, of the adequacy of the remedy at law, provided the act of 1853 is in force.

*It is argued that the act of 1853 is re- [688]
pealed by the general tax act of 1891 under which these assessments were made.

There is no specific repeal of the statute contained in the general tax act, and repeals by implication are concededly not favored. It would have to appear that the two acts were inconsistent with each other, or that the act of 1891 was a complete system in itself, and was really meant to cover the cases, and the method of recovery which was to be pursued, in matters of wrongful taxation, and to exclude all remedy except such as that act provided. This, we think, cannot be maintained.

And again, the act is contained in the edition of the Revised Statutes of Indiana, of the revision of 1894, by Burns, and is reproduced therein as §§ 7915 and 7916, and it is not stated in that edition that there had been any claim that those sections, constituting the act of 1853, had ever been repealed, but, on the contrary, the act is treated as a valid and subsisting part of the Revised Statutes of the state. The sections are also cited in *Donch* v. *Lake County*, 4 Ind. App. 374, 30 N. E. 204, as §§ 5813 and 5814 of the edition of the Revised Statutes of 1891. See also *DuBois* v. *Lake County*, that they had since been repealed by the act of 1891. See also *DuBois* v. *Lake County*, 4 Ind. App. 138, 30 N. E. 206. True, the questions discussed in these cases arose prior to the passage of the general tax act of 1891, but these decisions were made subsequently to the passage of that act, and the sections were not referred to in any of

those opinions as if they had been repealed by the general tax act, and were only applicable to cases happening before the passage of that act.

We see nothing in *Hart* v. *Smith*, recently decided by the supreme court of Indiana and reported in 64 N. E. 661, to support the claim of the repeal of the act of 1853. It was there held that, upon the mere matter of a valuation of the shares of the stock, the decision of the state board of tax commissioners was not reviewable by the court. Upon which counsel argues that, "if we could go before the county commissioners with a claim after the state board had passed upon it, then inevitably we could also go to the circuit court of Marion county, and thence to the appellate or supreme court of the state, according to the amount [689] involved. Therefore, if the supreme *court 'has no power to review' the decisions of the state board of tax commissioners, then the county commissioners have no power to begin a course of proceedings which must inevitably, at its conclusion, come to a tribunal which has declared that it 'has no power to review,'" and it is therefore urged that if the court has no power to review this determination of the tax commissioners, it is because the act of 1853 has been repealed. But the decision of the tax commissioners upon a mere question of judgment as to the value of shares of stock is a decision of a question of fact upon which the judgment of the board would be final, even if the act of 1853 were not repealed. In that very case, however, the court did review a decision of the board as to valuation when it appeared that, in arriving at such decision, the board included property, as part of the value of the shares, which the law did not permit to be taxed, and an assessment for valuation thus arrived at was held illegal, and as it could not be determined how much of the total assessment depended upon the valuation of the property not taxable, the court held the whole assessment illegal, and gave judgment accordingly. We are not convinced that the act of 1853 has been repealed, and, the remedy thereby provided being sufficient, we hold complainant had an adequate remedy at law.

(3.) The further ground of jurisdiction in equity, that it prevents a multiplicity of suits, cannot be sustained.

The remedy provided by the state of Indiana is in truth but one proceeding, and all the complainant had to do in order to avail itself of such remedy was to appear before the board of review when the assessment was first made and object to it, and, if its objections were overruled, then to appeal to the state board, and, if that board also overruled the objection, then to pay the tax. The proceeding thereafter is one suit, commenced by application to the board of county commissioners to recover the tax wrongfully assessed, and, if the claim were refused, then the party might go into the circuit court, and, if refused again, it had the further right of appeal, and, if still refused, it then had the right of review by writ of error from this court, if any Federal question had been decided against it. The right to come into a Federal court and invoke its *equitable jurisdiction in order to avoid the [690] remedy thus provided by the state cannot, under these facts, be founded upon the alleged prevention of a multiplicity of suits. The claim on such ground is without foundation.

(4.) Nor is there any irreparable injury as averred.

There is a general averment that to enforce the tax by distraint and sale of complainant's property would result in irreparable injury, but there is no fact stated from which it could be inferred that irreparable injury would be likely to result from such enforcement, and where a plain and adequate remedy to recover the amount is given by statute no such irreparable injury can be inferred. Some averment of specific facts must be made from which the court can see that irreparable injury would be a natural and probable result. Nothing of the sort is shown here. Indeed, the averment of irreparable injury seems to be founded upon the other averment, that if the tax got into its treasury the state could not be sued to recover it back, and hence the necessity of appealing to equity. But the answer to that has already been given by referring to the act of 1853, which fully provides for such contingency.

The claim is also made that complainant had the right, under § 1 of the act of 1888 (25 Stat. at L. 433, chap. 866), amending the act of 1875, to resort to the Federal court on the ground that the case arose under the Constitution or laws of the United States, inasmuch as it was claimed that under such Constitution the letters patent were not taxable by or under state authority. But the right to resort to a Federal court as a court of equity must be founded upon some ground of equitable jurisdiction recognized by the Federal courts, and when, as here, no such ground appears, jurisdiction in equity cannot be maintained.

Whether the value of letters patent is in any way taxable by or under state authority, we have no occasion to now decide, because the question is not before us. We simply show a plain and adequate remedy at law, after paying the tax, to recover it back, in an action or proceeding where the question as to the exemption of this kind of property from taxation can be raised, *and [691] if not admitted by the state court, it can be reviewed here on writ of error.

We see no ground for interfering with the judgment of the court below, and *it is therefore affirmed.*

JAMES L. HYATT, as Chief of Police of the City of Albany, N. Y., *Plff. in Err.*,
*v.*
PEOPLE OF THE STATE OF NEW YORK on the Relation of CHARLES E. CORKRAN.

(See S. C. Reporter's ed. 691-719.)

*Extradition—conclusiveness of governor's warrant—review on habeas corpus—fugitive from justice—necessity of presence in demanding state.*

1. An extradition warrant issued by the governor of a state is but prima facie sufficient to hold the accused; and it is open to him to show on habeas corpus, by admissions or by other conclusive evidence, that the charge upon which his extradition is demanded assumes his absence from the demanding state at the time the crime was, if ever, committed.
2. A stipulation that a person sought to be extradited was not within the demanding state on the date specified in the indictment as the time of the commission of the crime charged is an admission that he was not within the state when the crime was, if ever, committed, where there is no claim of any error in the date named in the indictment.
3. One who was not within a state when the crime of larceny or false pretense was, if ever, committed therein, cannot be deemed a "fugitive from justice" within the meaning of U. S. Rev. Stat. § 5278 (U. S. Comp. Stat. 1901, p. 3597), providing for the interstate extradition of a fugitive from justice on demand of the executive of the state from which he has fled.
4. One who comes into a state on business for a single day, eight days after the alleged commission of a crime therein, and months before an indictment is found against him for such offense, does not, by his departure from the state after the conclusion of his business, become a "fugitive from justice" within the meaning of U. S. Rev. Stat. § 5278 (U. S. Comp. Stat. 1901, p. 3597), providing for the interstate extradition of a fugitive from justice on demand of the executive of the state from which he has fled.

[No. 492.]

*Argued January 6, 7, 1903. Decided February 23, 1903.*

IN ERROR to the Court of Appeals of the State of New York to review a judgment discharging on habeas corpus a person held under a warrant issued in extradition proceedings by the governor of that State. *Affirmed.*

See same case below, 172 N. Y. 176, 64 N. E. 825.

Statement by Mr. Justice **Peckham:**

This proceeding by habeas corpus was commenced by the relator, defendant in error, to obtain his discharge from imprisonment by the plaintiff in error, the chief of police in the city of Albany, state of New York, who held the relator by means of a warrant issued in extradition proceedings by the governor of New York. The justice of the supreme court of New York, to whom the petition for the writ was addressed, and also, upon appeal, the appellate division of the supreme court of New York, refused to grant the relator's discharge, but the court of appeals reversed their orders and discharged him. 172 N. Y. 176, 64 N. E. 825. A writ of error has been taken from this court to review the latter judgment.

*The relator stated in his petition for the [692] writ that he was arrested and detained by virtue of a warrant by the governor of New York, granted on a requisition from the governor of Tennessee, reciting that relator had been indicted in that state for the crime of grand larceny and false pretenses, and that he was a fugitive from the justice of that state; that the warrant under which he was held showed that the crimes with which he was charged were committed in Tennessee, and the relator stated that nowhere did it

NOTE.—*As to what papers are necessary to obtain the surrender of a fugitive from another state*—see note to *Ex parte* Hart (C. C. App. 4th C.) 28 L. R. A. 801.

*On the question who are fugitives subject to extradition*—see note to State v. Hall (N. C.) 28 L. R. A. 289.

*The necessity, for extradition purposes, of the actual presence of the accused in the demanding state.*

A person cannot be a fugitive from justice, for the purpose of interstate extradition, unless he was in the demanding state when the crime was committed. *Re* Jackson, 2 Flipp. 183, Fed. Cas. No. 7,125; *Ex parte* McKean, 3 Hughes, 23, Fed. Cas. No. 8,848; *Ex parte* Smith, 3 McLean, 121, Fed. Cas. No. 12,968; State v. Jackson, 1 L. R. A. 370, 36 Fed. 258; United States v. Fowkes, 49 Fed. 50; Hartman v. Aveline, 63 Ind. 344, 30 Am. Rep. 217; *Ex parte* Knowles, 16 Ky. L. Rep. 263; *Re* Fetter, 23 N. J. L. 311, 57 Am. Dec. 382; *Re* Heyward, 1 Sandf. 701; *Re* Mitchell, 4 N. Y. Crim. Rep. 596.

And a merely constructive presence in the demanding state at the time of the alleged commission of the offense is not sufficient to render the accused a fugitive from justice. Jones v. Leonard, 50 Iowa, 106, 32 Am. Rep. 116; Wilcox v. Nolze, 34 Ohio St. 520; *Re* Mohr, 73 Ala. 503, 49 Am. Rep. 63; State v. Hall, 115 N. C. 811, 28 L. R. A. 289, 20 S. E. 729; *Re* Lyon, 24 Wash. L. Rep. 679.

But one who, after setting in motion the machinery which results in the crime, departs from the state before the consummation of the offense is a fugitive from justice. *Re* Cook, 49 Fed. 833; *Re* Sultan, 115 N. C. 57, 28 L. R. A. 294, 20 S. E. 375.

The effect of visits to the demanding state subsequent to the commission of the crime was considered in *Ex parte* Knowles, 17 Ky. L. Rep. 588, and the conclusion reached was that by again leaving the state the accused thereby became a fugitive from justice. And there are intimations to the same effect in *Re* Mohr, 73 Ala. 503, 49 Am. Rep. 63, *supra*, and State v. Hall, 115 N. C. 811, 28 L. R. A. 289, 20 S. E. 375, *supra*.

The Supreme Court of the United States takes the opposite view in HYATT v. PEOPLE *ex rel.* CORKRAN, saying that, if the accused was not in the demanding state when the crime was committed, "a subsequent going there and coming away is not a flight."

For other cases on the question who are fugitives subject to extradition see note to State v. Hall (N. C.) 28 L. R. A. 289.

appear in the papers that he was personally present within the state of Tennessee at the time the alleged crimes were stated to have been committed; that the governor had no jurisdiction to issue his warrant, in that it did not appear before him that the relator was a fugitive from the justice of the state of Tennessee, or had fled therefrom; that it did not appear that there was any evidence that relator was personally or continuously present in Tennessee when the crimes were alleged to have been committed; that it appeared on the face of the indictments accompanying the requisition that no crime under the laws of Tennessee was charged or had been committed. Upon this petition the writ was issued and served.

The return of the plaintiff in error, the chief of police, was to the effect that the relator was held by virtue of a warrant of the governor of New York, and a copy of it was annexed.

The governor's warrant reads as follows:

State of New York, }
Executive Chamber. }

The governor of the state of New York to the chief of police, Albany, N. Y., and the sheriffs, undersheriffs and other officers of and in the several cities and counties of this state authorized by subdivision 1 of section 827 of the Code of Criminal Procedure to execute this warrant:

It having been represented to me by the governor of the state of Tennessee that Charles E. Corkran stands charged in that state with having committed therein, in the county of Davidson, the crimes of larceny and false pretenses, which the said governor certifies to be crimes, under the laws of the said state, and that the said Charles E. [693] Corkran has fled therefrom *and taken refuge in the state of New York; and the said governor of the state of Tennessee having, pursuant to the Constitution and laws of the United States, demanded of me that I cause the said Charles E. Corkran to be arrested and delivered to Vernon Sharpe, who is duly authorized to receive him into his custody and convey him back to the said state of Tennessee; which said demand is accompanied by copies of indictment and other documents duly certified by the said governor of the state of Tennessee to be authentic and duly authenticated and charging the said Charles E. Corkran with having committed the said crimes and fled from the said state and taken refuge in the state of New York;

You are hereby required to arrest and secure the said Charles E. Corkran wherever he may be found within this state and thereafter and after compliance with the requirements of section 827 of the Code of Criminal Procedure to deliver him into the custody of the said Vernon Sharpe, to be taken back to the said state from which he fled, pursuant to the said requisition; and also to return this warrant and make return to the executive chamber within thirty days from the date hereof of all your proceedings had thereunder, and of the facts and circumstances relating thereto.

Given under my seal and the privy seal of the state, at the capitol in the city of Albany, this 13th day of March, in the year of our Lord one thousand nine hundred and two.

[L. S.] B. B. Odell, Jr.
By the Governor: James G. Graham,
Secretary to the Governor.

No other paper was returned by the chief of police bearing upon his right to detain the relator. Upon the filing of the return the relator traversed it in an affidavit, in which he denied that he had committed either the crime of larceny or false pretenses, or any other crime, in the state of Tennessee. He denied that he was within the state of Tennessee at the times mentioned in the indictment upon which the requisition of the governor was issued; he alleged that he had read the indictments before the governor of the state of New York, upon which *the warrant of arrest was issued, and [694] that they charged him with the commission of the crime of larceny and false pretenses on the 20th and 30th days of April, the 8th day of May, and the 17th and the 24th days of June, 1901. The relator in his affidavit also asserted that he was not in the state of Tennessee at any time in the months of March, April, May, or June, 1901, or at any time for more than a year prior to the month of March, 1901, and he denied that he had fled from the state of Tennessee, or that he was a fugitive from the justice of that state. He further therein stated that he had heard read the papers accompanying the requisition of the governor of Tennessee to the governor of New York, and that those papers did not contain any evidence or proof that he had been in the state of Tennessee at any stated time since the 26th and 27th days of May, 1899, and they contained no evidence or proof that he was in the state of Tennessee on any day in any of the months set forth in the indictments when the crime or crimes were alleged to have been committed.

Upon the hearing the following paper, signed by the respective attorneys for the parties, was filed:

"It is conceded that the relator was not within the state of Tennessee between the 1st day of May, 1899, and the 1st day of July, 1901. It is also conceded that the relator was in the state of Tennessee on the 2d day of July, 1901."

There is also another stipulation in the record, signed by the attorneys, and reading as follows:

"The following additional facts are hereby conceded, and the same shall be incorporated in the appeal record herein, as a part thereof, and shall constitute a part of the record upon which the appellate division may hear and determine the appeal herein; *i. e.*,—

"It is hereby stipulated by and between the parties to the above entitled special proceeding that three indictments were attached to the requisition papers sent by the

governor of the state of Tennessee to the governor of the state of New York for the extradition of Charles E. Corkran; that each of the said indictments was found on the 26th day of February, 1902, and that the alleged crimes were charged in said in-
[695] dictments to *have been committed on the 1st day of May, 1901, on the 8th day of May, 1901, and on the 24th day of June, 1901, respectively."

Upon the hearing before the judge on March 17, 1902, the relator was sworn without objection, and testified that he had been living in the state of New York for the past fourteen months; that his residence when at home was in Lutherville, Maryland; that he was in the city of Nashville, in the state of Tennessee, on July 2, 1901, and (under objection as immaterial) had gone there on business connected with a lumber company in which he was a heavy stockholder; that he arrived in the city on July 2, in the morning, and left about half-past seven in the evening of the same day, and while there he notified the Union Bank & Trust Company (the subsequent prosecutor herein) that the resignation of the president of the lumber company had been demanded and would probably be accepted that day. After such notification, and on the same day, the resignation was obtained, and the Union Bank & Trust Company was notified thereof by the relator before leaving the city on the evening of that day; that he passed through the city of Nashville on the 16th or 17th of July thereafter on his way to Chattanooga, but did not stop at Nashville at that time, and had not been in the state of Tennessee since the 16th day of July, 1901, at the time he went to Chattanooga; that he had never lived in the state of Tennessee, and had not been in that state between the 26th or 27th of May, 1899, and the 2d day of July, 1901.

Upon this state of facts the judge, before whom the hearing was had, dismissed the writ and remanded the relator to the custody of the defendant Hyatt, as chief of police. This order was affirmed without any opinion by the appellate division of the supreme court, but, as stated, it was reversed by the court of appeals and the relator discharged.

*Mr.* **J. Murray Downs** argued the cause, and, with *Mr. Robert G. Scherer*, filed a brief for plaintiff in error:

The warrant of the governor is conclusive as to every fact stated in this case, because there is no denial of any of the facts stated in it.

*Ex parte Dawson*, 28 C. C. A. 354, 49 U. S. App. 674, 83 Fed. 307; *People ex rel. Jourdan* v. *Donohue*, 84 N. Y. 438.

The Constitution and laws of Congress provide for interstate rendition of fugitives, even in cases where the party charged was not actually present in the demanding state at the time the crime was committed.

*Streep* v. *United States*, 160 U. S. 128, 40 L. ed. 365, 16 Sup. Ct. Rep. 244; *Roberts* v. *Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291; *Re Cook*, 49 Fed. 833, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40; *Reg.* v. *Jacobi*, 46 L. T. N. S. 595n.

The court should not indulge in a fine grammatical criticism of the preposition "from" in the Constitution, in order to defeat the manifest intention of the provision, and bring about a condition which would make the states asylums for fugitive criminals of other states.

*Griffith* v. *Bogert*, 18 How. 163, 15 L. ed. 310. See also 14 Am. & Eng. Enc. Law, p. 553.

Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended.

*M'Cullouch* v. *Maryland*, 4 Wheat. 414, 4 L. ed. 603.

The constitutional provision should be given a broad construction.

*Kentucky* v. *Dennison*, 24 How. 66, 16 L. ed. 717; *Martin* v. *Hunter*, 1 Wheat. 326, 4 L. ed. 102.

The uniform tendency of the decisions has been to place the doctrine of interstate rendition on the broadest possible basis.

*Mahon* v. *Justice*, 127 U. S. 715, 32 L. ed. 288, 8 Sup. Ct. Rep. 1204; *Lascelles* v. *Georgia*, 148 U. S. 542, 37 L. ed. 551, 13 Sup. Ct. Rep. 687; *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148; *Gibbons* v. *Ogden*, 9 Wheat. 188, 6 L. ed. 68.

The constitutional provision should not be weakened and made only half effective by a narrow construction of the phrase "from which."

*Re Palliser*, 136 U. S. 265, 34 L. ed. 517, 10 Sup. Ct. Rep. 1034; 2 Story, Const. § 1809.

One offending against the laws of the United States may be sent to any part of the country.

*Horner* v. *United States*, 143 U. S. 207, 36 L. ed. 126, 12 Sup. Ct. Rep. 407; *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034.

And when the offense is against the state laws, the criminal should be surrendered.

The courts of the United States have steadily refused to inquire into the means by which a person is brought within the jurisdiction for trial and punishment.

*Re Johnson*, 167 U. S. 120, 42 L. ed. 103, 17 Sup. Ct. Rep. 735; *Ker* v. *Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; *Lascelles* v. *Georgia*, 148 U. S. 542, 37 L. ed. 551, 13 Sup. Ct. Rep. 687.

Tennessee is the state having jurisdiction of the crime.

*Adams* v. *People*, 1 N. Y. 173; *State* v. *Grady*, 34 Conn. 118; *Com.* v. *White*, 123 Mass. 430, 25 Am. Rep. 116; *Com.* v. *Smith*, 93 Mass. 243; *Lindsey* v. *State*, 38 Ohio St. 507; *United States* v. *Davis*, 2 Sumn. 482, Fed. Cas. No. 14,932; *Reg.* v. *Garrett*, 22 Eng. Law & Eq. 611; *King* v. *Brisac*, 4 East, 164; *State* v. *Chapin*, 17 Ark. 565, 65

Am. Dec. 452; *State* v. *Morrow*, 40 S. C. 221, 18 S. E. 853; *Noyes* v. *State*, 41 N. J. L. 418; *Simpson* v. *State*, 92 Ga. 41, 22 L. R. A. 248, 17 S. E. 984; *Hatfield* v. *Com.* 11 Ky. L. Rep. 468, 12 S. W. 309; *Re Palliser*, 136 U. S. 257, 34 L. ed. 514, 10 Sup. Ct. Rep. 1034.

*Mr.* **William S. Bryan, Jr.**, argued the cause, and, with *Mr A. de R. Sappington*, filed a brief for defendant in error:

Whether the decision of the governor of the asylum state shall be final on the question as to whether the person sought to be extradited was in fact a fugitive from the justice of the demanding state is a question proper to be determined by the courts of that state.

*Cook* v. *Hart*, 146 U. S. 193, 36 L. ed. 939, 13 Sup. Ct. Rep. 40.

In New York such inquiry is open to the courts of that state on habeas corpus.

*People ex rel. Lawrence* v. *Brady*, 56 N. Y. 182.

The view of the court of appeals of New York, that the recitals in the warrant of the governor are only prima facie, and are liable to be rebutted by proof on habeas corpus, is the prevailing view.

*Re Tod*, 12 S. D. 386, 47 L. R. A. 566, 81 N. W. 637; *Re Cook*, 49 Fed. 823; *Ex parte Hart*, 28 L. R. A. 801, 11 C. C. A. 165, 22 U. S. App. 22, 63 Fed. 260; *Work* v. *Corrington*, 34 Ohio St. 64, 32 Am. Rep. 345; *Re Manchester*, 5 Cal. 237; 15 Am. & Eng. Enc. Law, 2d ed. 205.

The accused must have been physically present in the demanding state at the time when the assumed crime is alleged to have been committed.

*Wilcox* v. *Nolze*, 34 Ohio St. 520; *Re Manchester*, 5 Cal. 237; *Jones* v. *Leonard*, 50 Iowa, 106, 32 Am. Rep. 116; *Re Tod*, 12 S. D. 386, 47 L. R. A. 566, 81 N. W. 637; *Re Mohr*, 73 Ala. 503, 49 Am. Rep. 63; *Re Fetter*, 23 N. J. L. 311, 57 Am. Dec. 382; *Re Voorhees*, 32 N. J. L. 150; *Hartman* v. *Aveline*, 63 Ind. 345, 30 Am. Rep. 217; *Ex parte Knowles*, 16 Ky. L. Rep. 263; *Re Greenough*, 31 Vt. 279; *Kingsbury's Case*, 106 Mass. 223; *Re Heyward*, 1 Sandf. 701; *State* v. *Hall*, 115 N. C. 811, 28 L. R. A. 289, 20 S. E. 729; 2 Moore, Extradition, § 581; Spear, Extradition, pp. 397, 499; 7 Am. & Eng. Enc. Law, 1st ed. p. 646, note 1; 12 Am. & Eng. Enc. Law, 2d ed. p. 603, note 3; *Re Jackson*, 2 Flipp. 183, Fed. Cas. No. 7,125; *Ex parte Smith*, 3 McLean, 121, Fed. Cas. No. 12,968; *Ex parte McKean*, 3 Hughes, 25, Fed. Cas. No. 8,848; *United States* v. *Fowkes*, 49 Fed. 52; *Tennessee* v. *Jackson*, 1 L. R. A. 370, 36 Fed. 258; *Re White*, 5 C. C. A. 29, 14 U. S. App. 84, 55 Fed. 54; *Ex parte Reggel*, 114 U. S. 651, 29 L. ed. 253, 5 Sup. Ct. Rep. 1148; *Roberts* v. *Reilly*, 116 U. S. 97, 29 L. ed. 549, 6 Sup. Ct. Rep. 291.

The same interpretation of the constitutional provision was followed by the governor of Illinois in the attempt to extradite Mr. Storey, Editor of the Chicago Tribune, into Wisconsin.

3 Cent. L. J. 636.

And by the governor of Maryland in the case of Max Juhn, attempted to be extradited into New York.

2 Moore, Extradition, § 585.

And by the governor of New York in the case of Mitchell, attempted to be extradited into New Jersey.

4 N. Y. Crim. Rep. 596.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

By clause 2 of § 2 of article 4 of the Constitution of the United States it is provided:

"A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime."

It was held in *Kentucky* v. *Dennison*, 24 How. 66, 104, 16 L. ed. 717, 728, that this provision of the Constitution was not self-executing, and that it required the action of *Congress in that regard. Congress did act [709] by passing the statute approved February 12, 1793 (1 Stat. at L. 302, chap. 7). The substance of that act is reproduced in § 5278 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3597), as follows:

"Sec. 5278. Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found, or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand shall be paid by such state or territory."

The proceedings in this case were under this section, and the warrant issued by the governor was sufficient prima facie to justify the arrest of the relator and his delivery to the agent of the state of Tennessee. Certain facts, however, must appear before the governor has the right to issue his warrant. As was said in *Roberts* v. *Reilly*, 116 U. S. 80, 95, 29 L. ed. 544, 549, 6 Sup. Ct. Rep. 291, 300, it must appear to the governor, before he can lawfully comply with the demand for extradition, that the person demanded is substantially charged with a crime against the laws of the state from

whose justice he is alleged to have fled, by an indictment or an affidavit, etc., and that the person demanded is a fugitive from the justice of the state the executive authority of which makes the demand. It was also stated in the same case that the question whether the person demanded was substan-[710]tially charged *with a crime or not was a question of law and open upon the face of the papers to judicial inquiry upon application for a discharge under the writ of habeas corpus; that the question whether the person demanded was a fugitive from the justice of the state was a question of fact which the governor upon whom the demand was made must decide upon such evidence as he might deem satisfactory. How far his decision might be reviewed judicially in proceedings in habeas corpus, or whether it was conclusive or not, were, as stated, questions not settled by harmonious judicial decisions nor by any authoritative judgment of this court, and the opinion continues as follows:

"It is conceded that the determination of the fact by the executive of the state in issuing his warrant of arrest, upon a demand made on that ground, whether the writ contains a recital of an express finding to that effect or not, must be regarded as sufficient to justify the removal until the presumption in its favor is overthrown by contrary proof."

In *People ex rel. Lawrence* v. *Brady*, 56 N. Y. 182, it was held that the courts have jurisdiction to interfere by writ of habeas corpus, and to examine the grounds upon which an executive warrant for the apprehension of an alleged fugitive from justice from another state is issued, and, in case the papers are defective and insufficient, to discharge the prisoner.

In the case before us the New York court of appeals held that if upon the return to the writ of habeas corpus it is clearly shown that the relator is not a fugitive from justice, and there is no evidence from which a contrary view can be entertained, the court will discharge the person from imprisonment, but that mere evidence of an alibi, or evidence that the person demanded was not in the state as alleged, would not justify his discharge, where there was some evidence on the other side, as habeas corpus was not the proper proceeding to try the question of the guilt or innocence of the accused. And the court also held that the conceded facts showed the absence of the accused at the time when the crimes, if ever, were committed, and that the demand was in truth based upon the doctrine that a constructive presence of the accused in the [711]demanding state *at the time of the alleged commission of the crime was sufficient to authorize the demand for his surrender.

We are of opinion that the warrant of the governor is but prima facie sufficient to hold the accused, and that it is open to him to show by admissions, such as are herein produced, or by other conclusive evidence, that the charge upon which extradition is demanded assumes the absence of the accused person from the state at the time the crime was, if ever, committed. This is in accordance with the authorities in the states cited in the opinion of Judge Cullen in the New York court of appeals, and is, as we think, founded upon correct principles. *Robb* v. *Connolly*, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544, recognizing authority of states to act by habeas corpus in extradition proceedings.

If upon a question of fact, made before the governor, which he ought to decide, there were evidence *pro* and *con*, the courts might not be justified in reviewing the decision of the governor upon such question. In a case like that, where there was some evidence sustaining the finding, the courts might regard the decision of the governor as conclusive. But here, as we have the testimony of the relator (uncontradicted) and the stipulation of counsel as to what the facts were, we have the right, and it is our duty on such proof and concession, to say whether a case was made out within the Federal statute, justifying the action of the governor. It is upon the statute that the inquiry must rest.

In the case before us it is conceded that the relator was not in the state at the various times when it is alleged in the indictments the crimes were committed, nor until eight days after the time when the last one is alleged to have been committed. That the prosecution on the trial of such an indictment need not prove with exactness the commission of the crime at the very time alleged in the indictment is immaterial. The indictments in this case named certain dates as the times when the crimes were committed, and where in a proceeding like this there is no proof, or offer of proof, to show that the crimes were in truth committed on some other day than those named in the indictments, and that the dates therein named were erroneously stated, it is sufficient for the party charged to show that he was not in the *state at the times named in the in-[712] dictments; and when those facts are proved so that there is no dispute in regard to them, and there is no claim of any error in the dates named in the indictments, the facts so proved are sufficient to show that the person was not in the state when the crimes were, if ever, committed.

The New York court of appeals has construed the stipulation as conceding these facts, and we think that its construction of the stipulation is the correct one.

It is, however, contended that a person may be guilty of a larceny or false pretense within a state without being personally present in the state at the time. Therefore the indictments found were sufficient justification for the requisition and for the action of the governor of New York thereon. This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the state of Tennessee at the time of the commission of those acts for which he had been indicted, assuming that he committed them outside of the state.

The exercise of jurisdiction by a state to

make an act committed outside its borders a crime against the state is one thing, but to assert that the party committing such act comes under the Federal statute, and is to be delivered up as a fugitive from the justice of that state, is quite a different proposition.

The language of § 5278, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3597), provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the state which demands his surrender. It speaks of a demand by the executive authority of a state for the surrender of a person as a fugitive from justice, by the executive authority of a state *to which such person has fled*, and it provides that a copy of the indictment found, or affidavit made before a magistrate of any state, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the state or territory *from whence the person so charged has fled*, shall be produced, and it makes it the duty of the executive authority of the state *to which such person has fled* to cause [713] him to be arrested and secured. *Thus the person who is sought must be one who has fled from the demanding state, and he must have fled (not necessarily directly) to the state where he is found. It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect, interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the state at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a state, one who had not been in the state at the time when, if ever, the offense was committed, and who had not, therefore, in fact, fled therefrom.

In *Ex parte Reggel*, 114 U. S. 642, 651, 29 L. ed. 250, 253, 5 Sup. Ct. Rep. 1148, 1153, it was stated by Mr. Justice Harlan, in speaking for the court:

"The only question remaining to be considered relates to the alleged want of competent evidence before the governor of Utah at the time he issued the warrant of arrest to prove that the appellant was a fugitive from the justice of Pennsylvania. Undoubtedly the act of Congress did not impose upon the executive authority of the territory the duty of surrendering the appellant, unless it was made to appear, in some proper way, that he was a fugitive from justice. In other words, the appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding state at the time he is alleged to have committed the crime charged and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the territory was not required, *by the [714] act of Congress, to cause the arrest of appellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that act. Any other interpretation would lead to the conclusion that the mere requisition by the executive of the demanding state, accompanied by the copy of an indictment, or an affidavit before a magistrate, certified by him to be authentic, charging the accused with crime committed within her limits, imposes upon the executive of the state or territory where the accused is found the duty of surrendering him, although he may be satisfied, from incontestible proof, that the accused had, in fact, never been in the demanding state, and therefore could not be said to have fled from its justice. Upon the executive of the state in which the accused is found rests the responsibility of determining, in some legal mode, whether he is a fugitive from the justice of the demanding state. He does not fail in duty if he makes it a condition precedent to the surrender of the accused that it be shown to him, by competent proof, that the accused is, in fact, a fugitive from the justice of the demanding state."

To the same effect is *Roberts* v. *Reilly*, 116 U. S. 80, 29 L. ed. 544, 6 Sup. Ct. Rep. 291. In that case the issue was made about the presence of the party in the demanding state at the time the act was alleged to have been committed, and there was direct and positive proof before the governor of Georgia, upon whom the demand had been made, and there was no other evidence in the record which contradicted it. It was said (p. 97, L. ed. p. 549, Sup. Ct. Rep. p. 300):

"The appellant, in his affidavit, does not deny that he was in the state of New York about the date of the day laid in the indictment, when the offense is alleged to have been committed, and states, by way of inference only, that he was not in that state on that very day; and the fact that he has not been within the state since the finding of the indictment is irrelevant and immaterial."

It is clear that it was regarded by the court as essential that the person should have been in the state which demanded his surrender at the time of the commission of the offense alleged *in the affidavit or indict- [715] ment, and that it was a fact jurisdictional in its nature, without which he could not be proceeded against under the Federal statute.

*Cook* v. *Hart*, 146 U. S. 183, 36 L. ed. 934, 13 Sup. Ct. Rep. 40, decides nothing to the contrary. In that case the party was

arrested in Illinois on account of a crime which, it was alleged, had been committed by him in Wisconsin. He sued out a writ of habeas corpus in Illinois to test the legality of his arrest under the circumstances appearing in the case. Upon the hearing the court decided the arrest to be legal, and the party arrested acquiesced in this disposition of the case, and made no attempt to obtain a review of the judgment in a superior court. It was not until after his arrival in Wisconsin, whither he was taken by virtue of the warrant issued by the governor of Illinois, and after his trial had begun in Wisconsin, that he made application to the circuit court of the United States in Wisconsin to be released upon habeas corpus, upon the ground he had originally urged, that he was not a fugitive from justice within the meaning of the Constitution and laws of the United States. The court decided against him, holding that he had been properly surrendered. This court said that, assuming that the question might be jurisdictional when raised before the executive or the courts of the surrendering state, that it was presented in a somewhat different aspect after the person had been delivered to the agent of the demanding state, and had actually entered the territory of that state and was held under the process of its courts. And it was said that the authorities tended to support the theory that the executive warrant has spent its force when the accused has been delivered to the demanding state; that it is too late for him to object even to jurisdictional defects in his surrender, and that he was rightfully held under the process of the demanding state. Whether the claim made by the party brought to Wisconsin that he was illegally arrested in Illinois was well founded or not, this court did not feel called upon to consider, or to review the propriety of the decision of the court below, and this on the ground that it was proper to wait until the state court had finally acted upon the case, and then to require the accused to sue out his writ of [716] error from this court to *the highest state court where a decision could be had, instead of determining the question summarily on habeas corpus.

It is contended, however, that there are cases in this court which sustain the proposition maintained by the plaintiff in error herein, and *Kentucky* v. *Dennison*, 24 How. 66, 16 L. ed. 717, is referred to as authority. It is therein held that the words "treason, felony, or other crime," spoken of in the Constitution, included every offense forbidden and made punishable by the laws of the state where the offense is committed, and it is therefore argued that as an act committed outside its borders may, under certain circumstances, become a crime against the state, a person thus committing such an act comes within the meaning of the Constitution, and should be surrendered upon demand of the governor of the state whose law he is alleged to have violated.

On looking at that case it is seen that the facts were wholly different, and the court had no such case as the one before us in mind. The party against whom the demand was made had committed the crime, as alleged, within the state of Kentucky, and no question arose as to his liability to be returned to Kentucky for any act done by him outside its borders. The governor of Ohio, upon whom the demand was made, acting under the advice of his attorney general, refused to surrender the fugitive because the crime alleged was neither treason nor felony at common law, nor was it one which was regarded as a crime by the usages and laws of civilized nations, and the governor was advised that obviously a line must be somewhere drawn distinguishing offenses which did, from offenses which did not, fall within the scope of the power granted by the Constitution. It was in regard to this contention that this court held as stated. Mr. Chief Justice Taney, delivering the opinion of the court, said (p. 99, L. ed. p. 726):

"The words 'treason, felony, or other crime,' in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the state. The word 'crime' of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called 'misdemeanors,' as well as treason and *felony. 4 [717] Bl. Com. 5, 6, and note 3, Wendell's ed. But as the word 'crime' would have included treason and felony, without specially mentioning those offenses, it seems to be supposed that the natural and legal import of the word, by associating it with those offenses, must be restricted and confined to offenses already known to the common law and to the usage of nations, and regarded as offenses in every civilized community, and that they do not extend to acts made offenses by local statute, growing out of local circumstances, nor to offenses against ordinary police regulations. This is one of the grounds upon which the governor of Ohio refused to deliver Lago, under the advice of the attorney general of that state.

"But this inference is founded upon an obvious mistake as to the purposes for which the words 'treason and felony' were introduced. They were introduced for the purpose of guarding against any restriction of the word 'crime,' and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice.

. . . . . .

"This compact, ingrafted in the Constitution, included, and was intended to include, every offense made punishable by the law of the state in which it was committed, and that it gives the right to the executive authority of the state to demand the fugitive from the executive authority of the state in which he is found; that the right given to 'demand' implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the state to which the fugitive has fled."

The court, however, held that while it was

the duty of the executive authority of Ohio under the circumstances to deliver the person demanded, and that such duty was merely ministerial and the governor had no right to exercise any discretionary power as to the nature or character of the crime charged in the indictment, yet it was also held that the Federal courts had no means to compel the governor to perform the moral obligation of the state under the compact in [718] the Constitution, *and that the courts could not coerce the state executive or other state officer as such to perform any duty by act of Congress. On that ground the motion for a mandamus to compel the governor of Ohio to issue his warrant was refused. Nothing in that case can be regarded as any authority for the proposition contended for here. The case assumed the presence of the party in the state at the time of the alleged commission of the crime. The question was whether upon such assumption the executive of the state upon whom the demand was made could examine as to the character of the crime and refuse to deliver up, in his discretion.

To the same effect is *Ex parte Reggel*, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148. In that case the objection was made in the court of original jurisdiction that there could be no valid requisition based upon an indictment for an offense less than a felony. It was held that such view was erroneous, and *Kentucky* v. *Dennison*, 24 How. 66, 16 L. ed. 717, was cited in support of that proposition, yet it was in this very case of Reggel that the remarks already quoted were made, that the person demanded was entitled to insist upon proof that he was within the demanding state at the time that he is charged to have committed the crime, and subsequently withdrew therefrom to another jurisdiction, so that he could not be reached by the criminal process of the state where the act was committed.

Many state courts before whom the question has come have held that a merely constructive presence in the demanding state at the time of the alleged commission of the offense was not sufficient to render the person a fugitive from justice; that he must have been personally present within the state at the time of the alleged commission of the act, or else he could not be regarded as a fugitive from justice. Spear and also Moore on Extradition are to the same effect. Those authorities and text writers are referred to in the margin.†

[719] *In the case of *Re White*, 5 C. C. A. 29, 14 U. S. App. 84, 55 Fed. 54, 58, in the United States circuit court of appeals for the second circuit, it was said by Lacombe, circuit judge, that it was proper to inquire upon habeas corpus whether the prisoner was in fact within the demanding state when the alleged crime was committed, for if he were not it could not be properly held that he had fled from it.

The subsequent presence for one day (under the circumstances stated above) of the relator in the state of Tennessee, eight days after the alleged commission of the act, did not, when he left the state, render him a fugitive from justice within the meaning of the statute. There is no evidence or claim that he then committed any act which brought him within the criminal law of the state of Tennessee, or that he was indicted for any act then committed. The proof is uncontradicted that he went there on business, transacted it, and came away. The complaint was not made, nor the indictments found, until months after that time. His departure from the state after the conclusion of his business cannot be regarded as a fleeing from justice within the meaning of the statute. He must have been there when the crime was committed, as alleged, and if not, a subsequent going there and coming away is not a flight.

We are of opinion that, as the relator showed without contradiction and upon conceded facts that he was not within the state of Tennessee at the times stated in the indictments found in the Tennessee court, nor at any time when the acts were, if ever, committed, he was not a fugitive from justice within the meaning of the Federal statute upon that subject, and upon these facts the warrant of the governor of the state of New York was improperly issued, and *the judgment of the Court of Appeals of the state of New York* discharging the relator from imprisonment by reason of such warrant *must be affirmed.*

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*UNITED STATES, *Appt.*, [720]

*v.*

OFFICERS AND CREW OF THE U. S. S. MANGROVE. (No. 24.)

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OFFICERS AND ENLISTED MEN OF THE U. S. SHIPS NEW YORK, INDIANA, and WILMINGTON, *Appts.*,

*v.*

OFFICERS AND CREW OF THE U. S. S. MANGROVE. (No. 34.)†

(See S. C. Reporter's ed. 720-726.)

*Prize—distribution of prize money—vessels*

†Wilcox v. Nolze (1878) 34 Ohio St. 520, 524; Jones v. Leonard (1878) 50 Iowa, 106, 32 Am. Rep. 116; *Re* Mohr (1883) 73 Ala. 503, 514; *Re* Fetter (1852) 23 N. J. L. 311, 57 Am. Dec. 382; Hartman v. Aveline (1878) 63 Ind. 345, 30 Am. Rep. 217; *Ex parte* Knowles (1894) 16 Ky. L. Rep. 263; Kingsbury's Case (1870) 106 Mass. 223, 227; State v. Hall (1894) 115 N. C. 811, 28 L. R. A. 289, 20 S. E. 729; 2 Moore, Extradition, §§ 579, 581, 584; Spear, Extradition, 310 *et seq.*; Cooley, Const. Lim. 4th ed. 21, note 1; 3 Crim. Law Mag. 806 *et seq.*, published 1882.

†These cases are reported by the Official Reporter under the title of "The Mangrove Prize Money."

NOTE.—*As to what vessels are entitled to share in the distribution of prize money*—see note to United States v. Farragut, 22 L. ed. U. S. 879.

*within signal distance—relative force of captor and prize.*

1. A vessel of the United States navy was not "within signal distance" of another vessel making a capture, so as to be entitled to share in the distribution of the prize money under U. S. Rev. Stat. § 4632 (U. S. Comp. Stat. 1901, p. 3133), where the two vessels were from 12 to 15 miles apart, and the vessel making the capture was equipped with boat flags 3 feet by 4 in size, instead of the usual signal flags 8 feet by 11.
2. Naval vessels not within signal distance of a capture are not vessels "making the capture," within the meaning of U. S. Rev. Stat. § 4630 (U. S. Comp. Stat. 1901, p. 3132), and therefore cannot be taken into account in estimating the relative force of captor and prize, for the purpose of determining the proportion of the prize money to which the captor is entitled under that section, although their proximity may have induced the surrender of the prize to an inferior force.

[Nos. 24, 34.]

*Argued January 7, 8, 9, 1903. Decided February 23, 1903.*

APPEALS from the District Court of the United States for the Southern District of Florida to review a decree distributing the proceeds of a vessel condemned as a prize of war. *Affirmed.*

The facts are stated in the opinion.

*Assistant Attorney General* **Hoyt** argued the cause and filed a brief for the United States:

Those vessels whose presence and co-operation manifestly contributed to the result, because their support aided in intimidating the enemy and encouraging the friend, should be admitted to share.

*The Sparkler*, 1 Dodson Adm. 259; Story, Prize Courts; *The Forsigheid*, 3 C. Rob. 311; *The Harmonie*, 3 C. Rob. 319; *The Melanie*, 2 Dodson Adm. 122.

In the development of the law in England, the terms "sight" and "signal distance" were considered as practically interchangeable.

*Le Bon Aventure*, 1 Acton, 211.

If there was any "chase" here in the ordinary sense, the Indiana certainly took part in it.

*L'Amitie*, 6 C. Rob. 261.

"Within signal distance" is not essentially a narrower and stricter term than "in sight."

*The Anglia*, Blatchf. Prize Cas. 566, Fed. Cas. No. 391; *The Ella & Anna*, 2 Sprague, 267, Fed. Cas. No. 4,368; *The Cherokee*, 2 Sprague, 235, Fed. Cas. No. 2,640.

Participation in the capture, and the consequent right to share, establish necessarily the effective superiority of the capturing force.

*The Ironclad Atlanta*, 3 Wall. 425, *sub nom. The Weehawken* v. *The Atlanta*, 18 L. ed. 253.

*Mr.* **James H. Hayden** argued the cause, and, with *Mr. Joseph K. McCammon*, filed a brief for the New York:

A vessel which has taken no potential part in a capture shall nevertheless be treated as a joint captor, if her presence at or near the scene of action was a contributing cause of the surrender of the prize.

*The Ironclad Atlanta*, 3 Wall. 425, *sub nom. The Weehawken* v. *The Atlanta*, 18 L. ed. 253.

*Mr.* **William B. King** argued the cause, and, with *Mr. George A. King*, filed a brief for the Indiana and Wilmington:

The Mangrove's evidence was all interested.

*Re Santiago Bay*, 36 Ct. Cl. 203.

Affirmative testimony must outweigh the negative.

*Stitt* v. *Huidekoper*, 17 Wall. 394, 21 L. ed. 647.

*Messrs.* **Benjamin Micou** and **Hilary A. Herbert** argued the cause, and, with *Mr. Jefferson B. Browne*, filed a brief for the Mangrove:

For the purpose of computing relative force the vessels making the capture are alone to be considered.

*The Atlanta*, 2 Sprague, 251, Fed. Cas. No. 619; *The Cherokee*, 2 Sprague, 235, Fed. Cas. No. 2,640.

Mr. Justice **Holmes** delivered the opinion of the court:

These are appeals from a decree of the United States district court distributing the proceeds of the Spanish steamer Panama, condemned by an earlier decree as prize of war. 176 U. S. 535, 44 L. ed. 577, 20 Sup. Ct. Rep. 480. The district court awarded the whole net proceeds to the officers and crew of the United States steamer Mangrove, on the ground that the Mangrove was the sole capturing *vessel, that the prize was [721] of superior or equal force, and that no other vessel was within signal distance. U. S. Rev. Stat. § 4630 (U. S. Comp. Stat. 1901, p. 3132), repealed by act of March 3, 1899 (30 Stat. at L. 1007, chap. 413, § 13, § 4632, U. S. Comp. Stat. 1901, p. 3133). The United States appeals, contending that the Mangrove alone was of force superior to the Panama, and also that the Indiana, Wilmington, and New York were within signal distance, and that the Indiana at least was a joint captor, and that therefore, by § 4630, U. S. Comp. Stat. 1901, p. 3132, one half the proceeds should go to the United States. The Indiana appeals, taking the ground that the Mangrove was the sole captor and of force inferior to the Panama, but that the Indiana was within signal distance and in such condition as to be able to render effective aid if required, and therefore entitled to share in the prize by § 4632, U. S. Comp. Stat. 1901, p. 3133. The New York and the Wilmington appeal on like ground.

The case turns upon findings of fact, and the question is whether it is clear that the district court and the experienced naval prize commissioner were wrong. *The Grace Girdler*, 7 Wall. 196, 204, *sub nom. Lockwood* v. *The Grace Girdler*, 19 L. ed. 113, 116. But of course we do not leave out of sight the fact that much additional evidence

has been put in since the trial below. We take up first the case of the Indiana. Without discussing the details of the contradictory testimony, we will state the facts that seem to us proved.

At seven minutes after six in the evening of April 25, 1898, off Havana, the Panama, having been brought to by a shot across her bow and notice that she would be fired into if she did not stop, was boarded by Ensign Dayton from the Mangrove. At this moment the capture was complete. *The Grotius*, 9 Cranch, 368, 370, 3 L. ed. 762, 763. The Panama did not attempt, or, so far as appears, intend, resistance or escape. The captain was told that he was a prize, war having been declared between the United States and Spain, and he acquiesced. Thereafter the Panama proceeded, with Ensign Dayton on board, under orders from the Mangrove. Her colors were not hauled down, or a prize crew put aboard until later, but under the circumstances these facts seem to us controlled by others which we have mentioned. It may be added that the officers of the Mangrove seem to have considered it usual for prizes to fly their ensign until they were adjudicated by the prize [722] court, which would *account for their not ordering the flag lowered. Thirty-eight minutes later, at forty-five minutes after six, the Indiana, which had been approaching from an opposite direction, fired a shot across the bow of the Panama and sent a prize crew aboard. (We should remark in passing that this crew was subject to the orders of Ensign Dayton, the prize master, and seems to have been put aboard at the request of the Mangrove, which had not men enough to spare.) The officer who fired the gun says that he estimated the range at 4,500 yards, and that the shot being accurate, the distance from the Panama was about 4,800 yards. This was the estimate formed by the expert on the spot, at the time, for purposes of immediate action, when it was necessary to be accurate. Whatever it was, it was verified by the result of the shot, so that really the only question is whether it is remembered correctly, which there is no reason to doubt. It seems to us to outweigh all other estimates formed after the event by witnesses who had no similar duty. At this time the Mangrove was abreast or a little astern of the Panama.

The previous situations of the ships were as follows: All the United States vessels concerned in this cause were on blockade off Havana. At 4:30 P. M. the Indiana signaled the Mangrove and gave her orders to proceed to Key West after receiving mail. The Mangrove started for Key West before 5. At five or ten minutes after 5, and until 5:48, when her speed slackened, the Indiana went ahead at full speed toward the flagship New York, in an almost opposite direction from that taken by the Mangrove. At a quarter past 5 she sighted a strange vessel, which turned out to be the Panama, to the northeast. At 5:52 the flagship signaled "What colors does strange vessel carry?" and was answered at 5:55 "Cannot see." At about 6 the Indiana was turned toward the Panama and went at full speed, and later at best speed possible until 6:45, when she fired the shot and stopped. The Indiana when she turned at 6 did not attempt to signal the Mangrove, and five minutes earlier could not see the colors of the Panama, although the Spanish flag was three times the size of the Mangrove's signal flag. It appears from the steam log of the Indiana that a few *days later she made 10.- [723] 15 knots per hour for two consecutive hours. Taking the time during which the Indiana and Mangrove had been moving away from each other, and their probable speed, or, again, taking the distance at which the Indiana was from the Panama and Mangrove when she fired her shot, and the fact that she had been making for them at full speed for the greater part of forty-five minutes, while they, during a part of the same time, were sailing toward her at a rate of 8 knots, we think it probable, without going into nice calculations, that at 6 o'clock she must have been 12 or 15 miles away at the least, as was found by the district court. From 6, when she turned, to seven minutes past 6, when the Panama was taken, the Indiana cannot have got to full speed or gone far. The Panama had been stopped.

There is much testimony that the capture was seen from the Indiana, while the officers of the Mangrove say that the Indiana could not be seen by them. We do not attempt to determine precisely how much could be seen, or was seen, from the higher ship. That testimony must reconcile itself as best it may with the foregoing facts, which we deem not open to dispute. And on those facts we are of opinion that the Indiana was not within signal distance of the Mangrove when the capture took place. We agree with the counsel for the appellees that this view is confirmed by the log of the Indiana and by her claim as first filed, which indicates that at that time her rights were supposed to be founded on the shot fired by her, and the hauling down of the Panama's colors thereupon. It is unnecessary to advert to further confirmatory details.

We need not consider whether, in order to bring a claimant within signal distance, mutual communication must be possible, or whether it is enough if signals from the vessel making the capture could be seen by the claimant. Taking it the latter way, still the words "within signal distance" must be read in connection with the further words "under such circumstances and in such condition as to be able to render effective aid, if required." The whole sentence refers to the actual conditions of this particular case, not to an abstract objective criterion of ideal signal distance in general. See *The Ella & Anna*, 2 *Sprague, 267, 273, Fed. Cas. [724] No. 4,368. The Mangrove had no signal flags but boat flags, about 3 feet by 4, the usual signal flags being about 8 feet by 11. Under such circumstances we think it probably would be safe to assume 5 miles as an outside limit of signal distance in this instance, if the facts heretofore found by us

rendered it necessary to be so nice. It is argued, to be sure, that gun signals would have been possible. As to this suggestion we deem it enough to say that we see no reason to believe that it was a practical working possibility under the circumstances, and therefore need not consider whether this statute would be satisfied by anything less than the possibility of reading the ordinary day signals, in the case at bar.

The claims of the New York and the Wilmington fall with that of the Indiana. If she was not within signal distance of the Mangrove they were not, and, as we are about to show, can make no claim on the ground that the Indiana was a joint captor and that they were within signal distance of her.

A part of the argument for the United States also is disposed of by what we have said. If none of the other vessels were within signal distance of the Mangrove, none of them were "vessels making the capture" within the meaning of § 4630, U. S. Comp. Stat. 1901, p. 3132. The phrase must be taken to be used in that section in the same sense in which it is used in § 4632, U. S. Comp. Stat. 1901, p. 3133, where it is opposed to vessels within signal distance, and is defined as meaning "vessels present at and rendering actual assistance in the capture." It cannot be contended that vessels too far away to share in the prize as being within signal distance can share under the more immediate title of vessels making the capture, on the ground of some more remote contribution to the result. Vessels within signal distance and able to render effective aid are let in, it is true, presumably because they are taken to contribute to the result, but a more remote contribution is excluded. See *The Cherokee*, 2 Sprague, 235, Fed. Cas. No. 2,640; *The Atlanta*, 2 Sprague, 251, Fed. Cas. No. 619, 3 Wall. 425, *sub nom. The Weehawken* v. *The Atlanta*, 18 L. ed. 253; *The Ella & Anna*, 2 Sprague, 267, Fed. Cas. No. 4,368, and note.

It follows that these vessels cannot be taken into account in estimating the relative force of captor and prize. Undoubted-[725]ly *it is likely that the Panama must have known when it left New York that war and a blockade of Havana were probable, and when it was stopped by the Mangrove, whatever it saw or did not see, it may have conjectured that other vessels were not far off. But, as we have said, these less immediate influences are laid out of account by the act.

We may admit, with regard to the question just discussed and that to which we now address ourselves, that it is impossible not to feel that the prize law had in mind a different kind of case from this. To catch a blockade runner or a vessel not even informed of the blockade, in either case a vessel not expecting to fight and having shrewd ground to believe that to do so would be to bring down upon herself an overwhelming force, is not the desperate venture which the statute was framed to encourage. But some rather weak cases must fall within any law which is couched in general words. There is no denying that the Panama was of force superior to the Mangrove. She was of 1,432 tons register, with a crew of seventy-one. She had substantially what was required by her contract as a mail steamship with the Spanish government, *viz.*, 2 Hontoria 9 centimetre guns with 30 round of shot for each, 1 Maxim gun on the bridge, 2 signal guns, 20 Remington rifles, and 10 Mauser rifles, all with ammunition, also bayonets and swords. The Mangrove was a steel screw lighthouse tender of not more than 800 tons, with a crew of thirty men, and with 2 6-pound guns, and no small arms or cutlasses. The Panama also was the much faster boat of the two.

The Panama's armament was taken on board under contract with the Spanish government for her own defense, and was fit for hostile use. 176 U. S. 548, 549, 44 L. ed. 582, 583, 20 Sup. Ct. Rep. 480. We must assume that if the master had thought that there was a fair chance of success, he would have shown fight. The fact that he did not, and that he probably had made up his mind not to before he saw the Mangrove, and therefore was not ready for action at the moment, does not change the result. If we cannot take the blockading squadron or the battleship Indiana in account as part of the capturing force, we cannot *take them into[726] account as motives. If the master was a timid man, who would not have dared to fight under any circumstances, there would have been the same certainty of surrender to one who knew the whole situation, but the law would have looked only to the force, and would not have gone into psychology. It would not matter that, because of his timidity, the breech blocks of the guns were left stowed below. If he had the materials for resistance and the chance to use them, that is as far as the law would inquire. So here. As was said by Judge Sprague, we must "consider the means the vessels possessed, and not the use they made of them." *The Atlanta*, 2 Sprague, 251, 258, Fed. Cas. No. 619. The adventure of the Mangrove may not have been a brilliant event that will live in story, but it was sufficient to give its officers and crew the profit of the law. It is decided that the Panama was lawful prize, and the case does not fall within the class in which the United States takes half.

*Decree affirmed.*

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HOME LIFE INSURANCE COMPANY OF NEW YORK, *Plff. in Err.*,

*v.*

A. A. FISHER, as Executor of the Estate of Alexander Suter Maclean, Deceased.

(See S. C. Reporter's ed. 726-730.)

*Life insurance—warranties—appeal—harmless error.*

1. Declarations of an insured to the medical examiner for the insurance company are not made warranties by the provision of the ap-

plication that the applicant warrants that the statements in it "are true, full, and complete, . . . and are offered to the company, together with those contained in the declaration to the . . . medical examiner as a consideration for, and as the basis of, the contract."

2. A ruling in a suit on a policy of life insurance, sustaining demurrers to pleas of breach of warranty with respect to the insured's use of intoxicating liquors, is not prejudicial, even though erroneous, where the jury found for plaintiff under instructions that, if they found the insured's answers on that subject to be untrue, they should find for defendant.

[No. 121.]

*Submitted December 17, 1902. Decided February 23, 1903.*

IN ERROR to the Circuit Court of the United States for the Northern District of Florida to review a judgment for plaintiff in an action on a policy of life insurance. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **William A. Blount** submitted the cause for plaintiff in error:

A reversal will be directed unless it appears beyond doubt that the error complained of did not and could not have prejudiced the rights of the party.

*Vicksburg & M. R. Co.* v. *O'Brien*, 119 U. S. 103, 30 L. ed. 300, 7 Sup. Ct. Rep. 118.

The very charges relied upon as curing the error in sustaining the demurrer to the pleas show that they were inconsistent with themselves, and so misleading as to confuse the jury and prevent their arriving at an intelligent verdict. This furnished in itself a substantive ground for reversal.

*Bank of the Metropolis* v. *New England Bank*, 6 How. 212, 12 L. ed. 409.

*Messrs.* **John C. Avery** and **Richard R. McMahon** submitted the cause for defendant in error. *Mr. Benjamin C. Tunison* was with them on the brief:

No judgment should be reversed in a court of error when it is clear that the error could not have prejudiced, and did not prejudice, the right of the party against whom the ruling was made.

*Lancaster* v. *Collins*, 115 U. S. 222, 29 L. ed. 373, 6 Sup. Ct. Rep. 33.

Defendant is not prejudiced by the sustaining of a demurrer to a plea or answer, if he has other pleas or answers under which he could introduce any evidence that would have been admissible under that demurred to.

*Pollak* v. *Brush Electric Asso.* 128 U. S. 446, 32 L. ed. 474, 9 Sup. Ct. Rep. 119; *Hudmon* v. *Cuyas*, 6 C. C. A. 381, 13 U. S. App. 443, 57 Fed. 355.

Defendant is not injured by sustaining a demurrer to a cross bill, where it appears that the court treated the allegations thereof as before it, applied the evidence, and held that they were not sustained.

*Lloyd* v. *Preston*, 146 U. S. 630, 36 L. ed. 1111, 13 Sup. Ct. Rep. 131.

The sustaining of a demurrer to a valid plea is not reversible error, when another plea is admitted which includes all the matter alleged in the first plea, and lets in all the proofs sought to be introduced under the first plea.

*Hudmon* v. *Cuyas*, 6 C. C. A. 381, 13 U. S. App. 443, 57 Fed. 355.

Where an answer has been stricken out, but the defendant has been permitted to put in his evidence as if it remained, even if the order striking out the answer is erroneous, it is harmless.

*Nemaha County* v. *Frank*, 120 U. S. 41, 30 L. ed. 584, 7 Sup. Ct. Rep. 395.

Striking out pleas to the declaration is not prejudicial, where evidence competent under them would be equally competent under other pleas.

*Supreme Council C. K. of A.* v. *Fidelity & C. Co.* 11 C. C. A. 96, 22 U. S. App. 439, 63 Fed. 48.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action on a policy of life insurance, brought in the United States circuit court. The policy was taken out by one Maclean, the plaintiff's testator, on his own life. By a statute of Florida, if the plaintiff recovered, reasonable attorneys' fees were to be found by the jury and added to the judgment. Evidence was offered as to the proper fee, and was objected to on the ground that the statute was contrary to the 14th Amendment. The evidence was admitted subject to exception, the plaintiff got a verdict and judgment, and the case was brought here by writ of error.

In view of the decision in *Fidelity Mut. Life Asso.* v. *Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662, the assignment of error in the ruling just stated is not pressed. But although it was that on which the case came up and which gives us jurisdiction, other errors are assigned, which are relied upon and which we must consider. *Horner* v. *United States* (No. 2) 143 U. S. 570, 577, 36 L. ed. 266, 269, 12 Sup. Ct. Rep. 522.

The policy purports to be made "in consideration of the statements and agreements made in the application for this policy, which are hereby made a part of this contract." The application "warrants" that the statements in it "are true, full, and complete, . . . and are offered to the company, together with those contained in the declaration to the Home Life Insurance Company's medical examiner, as a consideration for, and as the basis of, the contract with said company." The application contained the following questions and answers: "*Q.* Do you drink wine, spirits, or malt liquors? *A.* Yes. *Q.* If so, which of these, and to what extent? *A.* Moderately. *Q.* Have you ever used them freely or to excess? *A.* No." The declaration to the medical examiner contained the following questions and answers: "*Q.* Do you drink wine, spirits, or malt liquors, daily or habitually? *A.* No habit of drinking liquors. *Q.* If so, which of these, and to what extent daily? Note.—State the daily amount. General terms, such as temperately, 'mod- [728]

erately,' 'occasionally,' will not be accepted, and will necessitate correspondence." The second of these questions was not answered. The defendant, with superfluous multiplicity of pleas, set up that these answers were warranties, and again, that they were material representations, and that they were false.

Demurrers to the pleas of breach of warranty and some pleas of false representation were sustained, mainly, we presume, on the authority of *Moulor* v. *American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466. So far as the declarations to the medical examiner are concerned, it will be seen that the word "warrant" does not extend to them. Grammatically, the meaning of the sentence, as it stands, is that the applicant warrants the statements in the application, and warrants that they are offered to the company, together with those in the declaration to the medical examiner, as the basis of the contract. If the sentence is taken a little more intelligently, we should assume that the word "they" has dropped out between "and" and "are offered," and that "warrant" does not govern that part of the clause. However read, the meaning is the same. With regard to the answer in the application, denying that the applicant ever had used spirits, etc., to excess, the strong language of the policy, making the application "part of the contract," affords ground for argument, at least, that the authority cited does not apply, and that this answer was warranted by the assured. But it is not necessary to decide that question in view of the trial and the subsequent ruling of the court.

The case went to trial on the 17th, 21st, 26th, and 27th pleas. The 17th set up the last-mentioned answer, denying the use of spirits freely or to excess, and averred that it was material, induced the issuing of the policy, and was false in that the applicant had a habit of using spirits freely. The 21st was similar, except that the falsity alleged was that the applicant [729] used spirits to excess. *The 26th set up the answers to the medical examiner; averred that the applicant did have a habit of drinking spirits; that the answer was material, and induced the making of the policy. The 27th plea was *non assumpsit*. Thus it will be seen that the facts relied on in the pleas held bad were in issue before the jury. This being so, it is questionable whether the plaintiff in error could complain, unless it could point out a mistaken instruction with regard to them at the trial. *Pollak* v. *Brush Electric Asso.* 128 U. S. 446, 452, 453, 32 L. ed. 474, 477, 9 Sup. Ct. Rep. 119; *Lloyd* v. *Preston*, 146 U. S. 630, 641, 36 L. ed. 1111, 1118, 13 Sup. Ct. Rep. 131; *Hudmon* v. *Cuyas*, 6 C. C. A. 381, 13 U. S. App. 443, 57 Fed. 355, 358, 360. Clearly, if, under proper instructions, the jury found the facts not to be as charged, the plaintiff in error suffered no wrong. That was what happened in this case.

The jury were instructed that, if they found "either one to be true, that before Maclean made application he drank liquors either freely or to excess, or at the time that he made the application he had a habit of drinking liquor," they were to find for the defendant, the declaration to the medical examiner thus being put upon the same footing as the application. The jury found for the plaintiff. Therefore, they must be taken to have found categorically that no one of the supposed facts was true, or, in other words, that all of the above recited answers were correct. If so, it does not matter whether they were warranties or not. There is a suggestion, to be sure, that in the latter case the defendant would have had to prove only the "literal" falsity of the statement, whereas in the other, proof of its substantial falsity was required. *Phœnix Mut. L. Ins. Co.* v. *Raddin*, 120 U. S. 183, 189, 30 L. ed. 644, 646, 7 Sup. Ct. Rep. 500. But the plain question of fact was put to the jury with no such niceties of discrimination. They found a plain answer, and the distinction comes too late now. It is said, also, that the charge in other parts did away with the requirement which we have quoted, and that, under the pleas of misrepresentation, the defendant had the burden of proving other facts. It does not appear to us that the requirement was done away with. On the contrary, it was reiterated. The burden of proving other facts was largely cut down by further instructions unnecessary to repeat, and *the burden [730] of proving them did the defendant no harm when the jury found as they did with regard to Maclean's drinking. The alleged warranty that he drank moderately was satisfied by the findings, apart from other answers to the point made with regard to that. We see no reason to assume that the defendant was taken by surprise by the rulings in its favor and put in less evidence than it would have put in had the demurrers been overruled.

We see no ground for reversing the judgment in the other instructions to the jury. Moreover, the other questions raised are made immaterial by what we have said.

*Judgment affirmed.*

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LOUISA V. KIDD, as Executrix of the Will of H. B. Tulane, Deceased, *Plff. in Err.*,

*v.*

STATE OF ALABAMA.

(See S. C. Reporter's ed. 730-733.)

*Constitutional law—equal protection of the laws—taxation of stock of foreign railroads—exemptions.*

The equal protection of the laws is not denied by the provisions of Ala. Code 1886, § 453, cl. 13, and Code 1896, § 3911, cl. 14, for

NOTE.—*As to the validity of class legislation*—see State v. Goodwill (W. Va.) 6 L. R. A. 621, and note; and State v. Loomis (Mo.) 21 L. R. A. 789, and note.

*As to constitutional equality of privileges, immunities, and protection*—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, and note.

**the taxation of railroad stock, because of the exemption of stock in domestic railroads and in others that list substantially all their property for taxation.**

[No. 158.]

*Submitted January 27, 1903. Decided February 23, 1903.*

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Circuit Court of Elmore County in favor of the State in a suit for taxes on stock in foreign railroads. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **W. A. Gunter** submitted the cause for plaintiff in error:

In the imposition of public burdens by way of taxation, and in other legislation by the state affecting the rights of citizens, there must be no discrimination as to persons or classes which is purely arbitrary, oppressive, or capricious, such as would be pure favoritism and a denial of the equal protection of the laws to the less favored persons or classes.

*Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 293, 42 L. ed. 1042, 18 Sup. Ct. Rep. 594; *Nicol* v. *Ames*, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

Classification must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

*Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *State* v. *Loomis*, 115 Mo. 307, 21 L. R. A. 789, 22 S. W. 350.

Shares in state banks and in national banks belong to the same class for taxation.

*State Bank* v. *Montgomery County Bd. of Revenue*, 91 Ala. 223, 8 So. 852.

It is equally clear that shares in railroads belong to the same class, though they are chartered by different states.

*Mr.* **Francis G. Caffey** submitted the cause for defendant in error. *Mr. John C. Breckinridge* was with him on the brief:

The state has the right to discriminate in forming classes for taxation, provided the basis of discrimination is reasonable in principle.

*American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Williams* v. *Fears*, 179 U. S. 270, 45 L. ed. 190, 21 Sup. Ct. Rep. 121; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Home Ins. Co.* v. *New York*, 134 U. S. 594, 33 L. ed. 1025, 12 Sup. Ct. Rep. 593; *Tullis* v. *Lake Erie & W. R. Co.* 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136.

There is no fixed test as to what basis of classification is reasonable. Each case must be considered for itself.

*Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533.

It is within the province of the state, as a part of its public policy, as an inducement to investment in shares of corporations organized or doing business and owning property within the state, to give an advantage to persons holding stock in such corporations.

*Pacific Exp. Co.* v. *Seibert*, 142 U. S. 352, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Corporate property of the railroad corporations here involved may not be taxed at all, and none of the stock in them be owned, in the states in which they do business and own property. If the laws of those states tax only shares of stock and such stock is taxed at the situs of its ownership, if the contention of plaintiff in error is upheld such shares would escape altogether any burden of taxation, either direct or indirect. The usual situs of taxation is the place of ownership.

*Kirtland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *State* v. *Kidd*, 125 Ala. 413, 28 So. 480.

Such a result would be contrary to the generally prevailing policy of restricting exemptions from taxation (*Sturges* v. *Carter*, 114 U. S. 521, 29 L. ed. 243, 5 Sup. Ct. Rep. 1014); and the adoption of a law which renders this impossible, as does the Alabama statute, may be said on that ground, to be founded on a reasonable basis.

The contention that value is the sole basis of taxation, and that all classification must be so made that equal values shall be equally taxed, flies in the face of repeated decisions of this court.

*Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721; *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Western U. Telcg. Co.* v. *Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345.

It is the general policy of the state to tax values equally, and to avoid double taxation so far as practicable.

*State* v. *Kidd*, 125 Ala. 421, 28 So. 480; 1 Desty, Taxn. 199.

In accomplishing this, however, the state looks only to its own tax laws, and regu-

lates them by its own theory of fairness, and does not consider the laws of other states.

*State* v. *Kidd*, 125 Ala. 413, 28 So. 480; *Bradley* v. *Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Dwight* v. *Boston*, 12 Allen, 316; *Bemis* v. *Boston*, 14 Allen, 366; *Dyer* v. *Osborne*, 11 R. I. 321, 23 Am. Rep. 460; 1 Desty. Taxn. 62, 63.

While this tax on stock is required in some instances, and authorized in others, to be paid directly by the corporation to avoid double taxation, if any part of the tax is paid by the shareholders the corporation is to that extent relieved.

*State* v. *Kidd*, 125 Ala. 413, 28 So. 480. See also *First Nat. Bank* v. *Kentucky*, 9 Wall. 360, 19 L. ed. 703.

The taxation on the excess in value of the capital stock above the tangible corporate property is not duplicate taxation, but a tax on the franchise.

*Hamilton Mfg. Co.* v. *Massachusetts*, 6 Wall. 632, 18 L. ed. 904; Cooley, Taxn. 2d ed. 230.

Notwithstanding there is a clear distinction between the shares in a corporation and its capital stock, yet for the purpose of taxation, so much are corporate property and stock identified that, in many states, it is held that to tax a corporation on its property and its stockholders on their shares in the same jurisdiction is double taxation.

*State* v. *Kidd*, 125 Ala. 432, 28 So. 480; *Gordon* v. *Baltimore*, 5 Gill. 231; *Baltimore* v. *Baltimore & O. R. Co.* 6 Gill. 288, 4 Am. Dec. 531; *American Bank* v. *Mumford*, 4 R. I. 478; *Providence Inst. for Savings* v. *Gardiner*, 4 R. I. 484; Cooley Taxn. 228, 229; Burroughs, Taxn. § 90; *Farrington* v. *Tennessee*, 95 U. S. 679, 24 L. ed. 558; *Sturges* v. *Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014.

Hence, in order that the state might carry out its policy of avoiding double taxation, and at the same time impose as nearly as practicable an equal burden of taxation according to values, it was necessary, in Alabama, where this view is held, to frame a statute such as the one here under discussion. Discrimination in classification is necessary in order to insure equality.

*Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 237, 33 L. ed. 895, 10 Sup. Ct. Rep. 533.

If stock of foreign corporations held by citizens should bear any share in the support of the state, this statute is the only mode in which the state can reach their shares for taxation.

*First Nat. Bank* v. *Kentucky*, 9 Wall. 361, 19 L. ed. 703.

The Alabama law does not in fact unjustly discriminate between owners of stock in foreign corporations which own and those which do not own property in the state; it taxes all, by either direct or indirect method, only according to its value.

*Shehane* v. *Bailey*, 110 Ala. 308, 20 So. 359; Cooley, Const. Lim. 6th ed. 196.

Under Ala. Code 1896, § 3911, only those foreign corporations which have some property in the state are taxable.

*State* v. *Kidd*, 125 Ala. 422, 28 So. 480.

*Messrs. A. A. Wiley, Gordon MacDonald,* and *John D. McNeel* also filed a brief for defendant in error:

Ala. Code 1886, § 451, should be construed to exempt from taxation the shares of stock in only those corporations that list all, or practically all, their property for taxation in this state.

*Sturges* v. *Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014.

This state knows that the property and franchises of corporations doing business in this state are taxed, and properly; but it knows nothing of the taxation of foreign corporations, and consequently cannot be affected by the action of any foreign state.

*Dwight* v. *Boston*, 12 Allen, 316.

There is an essential difference, so far as the purposes of taxation are concerned, between shares of stock in a corporation that pays taxes on its tangible property, and shares of stock in corporations that pay no tax on their corporate property.

*Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

It has been the policy of this government, not only to classify for purposes of taxation, but to exempt producers from the taxation of the methods employed by them to put their produce on the market.

*American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

And if there was an exemption here, it might well be sustained on the theory that the state favored investments in public utilities doing business within her borders, and thus contributing to her wealth. Such exemptions have been repeatedly sustained; they are not unreasonable.

*Mobile & G. R. Co.* v. *Peebles*, 47 Ala. 317; *South & North Ala. R. Co.* v. *Morris*, 65 Ala. 193; *State Bank* v. *Montgomery County Bd. of Revenue*, 91 Ala. 217, 8 So. 852.

There is nothing in the 14th Amendment to forbid the classification of property for the purposes of taxation. The rule of equality only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances.

*Barbier* v. *Connolly*, 113 U. S. 29, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Missouri P. R. Co.* v. *Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *Missouri* v. *Lewis*, 101 U. S. 22, *sub nom. Bowman* v. *Lewis*, 25 L. ed. 989; *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Giozza* v. *Tiernan*, 148 U. S. 657, 37 L. ed. 599, 13 Sup. Ct. Rep. 721.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for taxes brought by the state of Alabama against the executrix of the will of a citizen of Alabama. It appears on the record that the property in dispute is stock in *railroads incorporated in [731] other states than Alabama, and that the objection was taken seasonably by plea and by requests for instructions to the jury that the tax was unconstitutional under the 14th Amendment, because no similar tax was levied on the stock of domestic railroads or of foreign railroads doing business in that state. Demurrers to the pleas were sustained, there was a verdict for the plaintiff, and judgment, which latter was affirmed by the supreme court of the state without discussion, on the authority of its decision at an earlier stage (*State* v. *Kidd*, 125 Ala. 413, 28 So. 418), and the case is brought here by writ of error.

The statutes levying the tax in question are the Code of 1886, § 453, cl. 13, and the Code of 1896, § 3911, cl. 14. They are general clauses, which need not be set forth, as their effect is not disputed under the construction given to them by the supreme court of the state. The exemption by the Code of 1886 of stock in domestic railroads, and in others that list substantially all their property for taxation (*Sturges* v. *Carter*, 114 U. S. 511, 522, 29 L. ed. 240, 244, 5 Sup. Ct. Rep. 1014), is not denied, and while it is denied by the defendant in error that there is a similar exemption by the Code of 1896, for the purposes of decision we shall assume, without examination, that it is granted. *State* v. *Kidd*, 125 Ala. 413, 422, 28 So. 418. On this assumption the argument for the plaintiff in error is that if foreign stock is treated for purposes of taxation as present by fiction in the domicil, it must be treated as present also for purposes of protection; that the tax is a tax on values, and that net values of similar articles must be treated alike. It is said that you cannot look further back.

If the argument went further and denied the right to tax on fiction at all, and therefore denied the right to tax foreign stocks, it would seem to us to have more logical force, although we are far from implying that it would be unanswerable, or that it can be regarded as open. Very likely such taxes can be justified without the help of fiction. *Sturges* v. *Carter*, 114 U. S. 511, 29 L. ed. 240, 5 Sup. Ct. Rep. 1014; *Dwight* v. *Boston*, 12 Allen, 316; *Dyer* v. *Osborne*, 11 R. I. 321, 23 Am. Rep. 460. But the argument does not go to that extent, and, limited as it is, the proposition that the plaintiff in error is denied the equal protection of the laws for the reason which we [732] have stated *strikes us as wholly without force. We see nothing to prevent a state from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the state must tax the stock held within the state if it is to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock, it may take into account that the property and franchise of the corporation are untaxed, on the same ground that it might do the same thing with a domestic corporation. There is no rule that the state cannot look behind the present net values of different stocks. See *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43.

We say that the state in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the state in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the state of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far. *Coe* v. *Errol*, 116 U. S. 517, 524, 29 L. ed. 715, 718, 6 Sup. Ct. Rep. 475; *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Dyer* v. *Osborne*, 11 R. I. 321, 327, 23 Am. Rep. 460; Cooley, Taxn. 2d ed. 221n. One aspect of the problem was touched in the case of *Blackstone* v. *Miller*, at the present term, 188 U. S. 189, *ante*, 439, 23 Sup. Ct. Rep. 277. The state of Alabama is not bound to make its laws harmonize in principle with those of other states. If property is untaxed by its laws, then for the purpose of its laws the property is not taxed at all.

It is said that the state may not tax a man because by fiction his property is within the jurisdiction, and then discriminate against him upon the fact that it is without. The state does *nothing of the kind. [733] It adheres throughout to the fiction, if it be one, that the stock, the property of the plaintiff in error, is within the jurisdiction. There is no inconsistency in the state's recognizing at the same time that the property of the corporation, that which gives the plaintiff's stock its value, is taxed or untaxed, as the case may be. There is no inconsistency in recognizing that it is untaxed because it cannot be reached. Shares of stock may be within a state, and the property of the corporation outside it.

We need not repeat the commonplaces as to the large latitude allowed to the states for classification upon any reasonable basis. *Pacific Exp. Co.* v. *Seibert*, 142 U. S. 339, 351, 352, 35 L. ed. 1035, 1039, 3 Interst. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Gulf, C. & S. F. R. Co.* v. *Ellis*, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; *Nicol* v. *Ames*, 173 U. S. 509, 521, 43 L. ed. 786, 793, 19 Sup. Ct. Rep. 522; *Atchison*,

*T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *American Sugar Ref. Co.* v. *Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43. What is reasonable is a question of practical details, into which fiction cannot enter.

Practically, the law before us, in the broad aspect in which alone we are asked to consider it, seems to us to work out substantial justice and equality, if we leave on one side the probable taxation by other states, which does not affect the state of Alabama's rights.

*Judgment affirmed.*

Justices **Harlan** and **White** dissented.

NOTE.—No. 157. *Kidd* v. *Alabama*. This case was to abide the result of the foregoing.

*Judgment affirmed.*

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[734]*FOURTH NATIONAL BANK OF ST. LOUIS, First National Bank of New York, and Ford Harvey, *Appts.*,

*v.*

MORTON ALBAUGH, Receiver of the First National Bank of Emporia; F. C. Newman, Administrator of the Estate of C. S. Cross, Deceased, and William Martindale.

(See S. C. Reporter's ed. 734–738.)

*Appeal—limits of cross-examination—review of discretion of trial court—evidence—declarations—of trustee in assignment—admissibility as against third persons.*

1. The discretion of the trial court in permitting the cross-examination of a witness to be extended beyond the limits of his direct examination will not be reviewed on appeal.
2. Evidence of the declarations of a witness, introduced, not merely to contradict his testimony on cross-examination, but as evidence of the facts which he declares, are not inadmissible because the party offering such evidence may, by extending the cross-examination of the witness to such facts, have made him his own witness.
3. Evidence of the declarations of the trustee in several assignments executed by a bank president, that the earlier assignment was made to secure the bank generally for his assignor's liability to it, is admissible as against those claiming under the subsequent assignments, which were made for the purpose of enabling the trustee "to pay himself for any paper" on which he was liable with such assignor.

[No. 159.]

*Argued January 29, 30, 1903. Decided February 23, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Kansas in favor of defendant in a suit involving the application of the proceeds of assigned property. *Affirmed.*

See same case below, 46 C. C. A. 655, 107 Fed. 819.

The facts are stated in the opinion.

*Mr.* **T. F. Garver** argued the cause, and, with *Messrs. Frank Hagerman, J. B. Larimer*, and *C. N. Sterry*, filed a brief for appellants:

The action of the trial court in permitting the receiver to give evidence in chief by way of cross-examination was error.

*Philadelphia & T. R. Co.* v. *Stimpson*, 14 Pet. 448, 10 L. ed. 535; *Houghton* v. *Jones*, 1 Wall. 702, 17 L. ed. 503; *Wills* v. *Russell*, 100 U. S. 621, 25 L. ed. 607; *Clary* v. *Hardesville Brick Co.* 100 Fed. 915; *Mine & Smelter Supply Co.* v. *Parke & L. Co.* 47 C. C. A. 34, 107 Fed. 884; *Da Lee* v. *Blackburn*, 11 Kan. 190; *Sullivan* v. *New York, L. E. & W. R. Co.* 175 Pa. 361, 34 Atl. 798; *People ex rel. Phelps* v. *New York County Oyer & Terminer Ct.* 83 N. Y. 436; Greenl. Ev. 15th ed. ¶ 447.

Conceding that an abuse of discretion must be shown, to warrant the reversal of a case for the infraction of the rule by a trial court, such abuse of discretion is clearly established in the case at bar, under the facts in connection with the situation and knowledge of the parties.

*Tourtelotte* v. *Brown*, 1 Colo. App. 408, 29 Pac. 1310.

Martindale, in his testimony concerning this bill of sale of March 4th, should have been held to be the witness of the receiver, and not subject to impeachment by proof of contradictory statements.

1 Greenl. Ev. 15th ed. ¶ 442; 1 Wharton, Ev. 3d ed. § 549; Best, Ev. 14th Am. ed. § 645; *Becker* v. *Koch*, 104 N. Y. 394, 58 Am. Rep. 515, 10 N. E. 701; *Fairchild* v. *Bascomb*, 35 Vt. 398; 10 Enc. Pl. & Pr. 316, 317; *Ellicott* v. *Pearl*, 10 Pet. 412, 9 L. ed. 475; *Dravo* v. *Fabel*, 132 U. S. 487, 33 L. ed. 421, 10 Sup. Ct. Rep. 170.

This evidence of the statement of Martindale was, as to appellants, mere hearsay.

*The New Orleans*, 106 U. S. 13, *sub nom. Clark* v. *Weeks*, 27 L. ed. 96, 1 Sup. Ct. Rep. 90; *Winchester & P. Mfg. Co.* v. *Creary*, 116 U. S. 161, 29 L. ed. 591, 6 Sup. Ct. Rep. 369; *Marchand* v. *Griffon*, 140 U. S. 516, 35 L. ed. 527, 11 Sup. Ct. Rep. 834; *W. B. Grimes Dry Goods Co.* v. *Malcolm*, 164 U. S. 483, 41 L. ed. 524, 17 Sup. Ct. Rep. 158; Greenl. Ev. 15th ed. ¶¶ 98–115.

*Mr.* **Joseph R. Webster** argued the cause, and, with *Mr. J. Jay Buck*, filed a brief for appellees:

The limit of cross-examination is largely, if not wholly, in the discretion of the trial judge.

*Philadelphia & T. R. Co.* v. *Stimpson*, 14 Pet. 448, 10 L. ed. 535; *Johnston* v. *Jones*, 1 Black, 210, 17 L. ed. 117; *Hickory* v. *United States*, 151 U. S. 303, 38 L. ed. 170, 14 Sup. Ct. Rep. 334; *Wills* v. *Russell*, 100 U. S. 621, 25 L. ed. 607.

NOTE.—*As to the scope of cross-examination*—see note to Hobart v. Young (Vt.) 12 L. R. A. 693; and Rea v. Missouri, 21 L. ed. U. S. 707.

The assertion of a right to subrogation placed appellants in privity with Martindale, under whom they claimed, and rendered his admissions competent evidence against them.

Bouvier, Law Dict. l. v.; 1 Greenl. Ev. 16th ed. § 189.

Martindale was the sole witness by whom the facts could be proved. He was therefore a compulsory witness, and subject to impeachment.

1 Greenl. Ev. 16th ed. §§ 443, 444; *Cowden* v. *Reynolds*, 12 Serg. & R. 281; *Stockton* v. *Demuth*, 7 Watts, 39, 32 Am. Dec. 735; *Brown* v. *Bellows*, 4 Pick. 179; *Williams* v. *Walker*, 2 Rich. Eq. 291, 46 Am. Dec. 53; *Whitaker* v. *Salisbury*, 15 Pick. 534; *People* v. *Case*, 105 Mich. 92, 62 N. W. 1017; *Whitman* v. *Morey*, 63 N. H. 448, 2 Atl. 899; *Shorey* v. *Hussey*, 32 Me. 579; *Thornton* v. *Thornton*, 39 Vt. 122.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity brought to require the defendant Albaugh to apply a certain fund to payment of debts due to the Fourth National Bank of St. Louis from one Cross, of whose estate the defendant Newman is administrator, and from the defendant Martindale. By cross bill and intervening petitions the other appellants set up similar claims. The fund is the proceeds of property of Cross sold by agreement. The appellants claim under an alleged assignment of the property by Cross to Martindale as [735] trustee, dated July 15, 1898, and *another assignment to Martindale dated November 15, 1898. The former instrument contains the provision "the said Martindale . . . is to pay himself for any paper upon which he and I are mutually makers or indorsers." The debts due to the appellants were on paper of this description, and they claim the benefit of the security on this ground. The later assignment was given to Martindale, according to his testimony, also as security for similar liabilities. It needs no special mention.

The defendant Albaugh, as receiver of the First National Bank of Emporia, claims the fund under an earlier assignment to Martindale as trustee, dated March 4, 1898. Cross was president of this bank, and had been misusing its funds. Albaugh contends that this assignment was made for the purpose of securing the bank, and if that fact is established there will be nothing left for the appellants, assuming that otherwise they make out their case. Only Cross and Martindale were present when the assignment was delivered, and as Cross killed himself on November 16, 1888, Martindale alone could testify as to the delivery and purposes of the instrument. He was put on as a witness for the plaintiff, and on cross-examination testified to the delivery of the paper and by implication to the trust being in favor of the bank, but he limited it to a sum of $7,500, which amount he testified that Cross said he wanted to use in a particular manner. Exceptions were taken to the allowing the cross-examination to be extended to these facts. Subsequently other witnesses were allowed to testify, subject to exceptions, that at different times out of court Martindale had stated that the assignment of March 4 was made to secure the Emporia bank generally for Cross's liability to it. There was a decree for the defendant Albaugh in the circuit court, which was affirmed on appeal by the circuit court of appeals. 46 C. C. A. 655, 107 Fed. 819. An appeal then was allowed to this court.

The only error alleged which it is necessary to consider is the admission of the above evidence. Indeed, that is the only ground on which the appeal can be based. If that evidence was competent, and Martindale's declarations were believed, the receiver's case was proved. If it should have been excluded, *the decree would be hard to [736] support either on the other evidence to the same point, or on the suggestion that the appellants had not proved what the burden lay on them to prove.

So far as the cross-examination of Martindale goes, we see no occasion for revising the discretion of the court. *Wills* v. *Russell*, 100 U. S. 621, 626, 25 L. ed. 607, 608. Nor do we think the suggestion material that the defendant thereby made Martindale his own witness. The evidence of Martindale's declarations was put in, not merely to contradict what he said on the stand, but as evidence largely relied on to prove the facts which he declared.

It is said that as soon as the appellants' interest under the later assignment had vested, Martindale could do nothing to destroy it; that he could not release it, and that therefore he could not end it obliquely by a declaration. The conclusion does not follow from the premises, granting those premises for the purpose of argument, although they presuppose the rights of the appellants under the later instruments to be established. To destroy by release is one thing, to destroy in the sense of disproving or qualifying by proof is another. The latter is free to anyone who knows the facts. There is no doubt, of course, that Martindale had a right to testify to what he was shown to have declared, however bad it might be for the appellants. Therefore the only question is whether his declaration was some evidence as against them of facts which certainly might have been established by his oath.

If ever a declaration not made under oath is to be admitted against any other than the person making it, it should be admitted in this case. The declaration was obviously against interest. It was the only evidence in the nature of things that could be had, when Martindale haltingly denied the fact upon the stand. If we were to take it very nicely, it simply did away with a qualification engrafted by Martindale upon his testimony that the instrument was security for the bank, and made it easier to accept the principal fact without the qualification. The appellants say that they have a standing under the instrument independent of

Martindale. So no doubt they have for some purposes, if we follow the somewhat sweeping and undiscriminating notion of equity embodied in many decisions to be [737] found. *Nevertheless, they claim in Martindale's right as against the estate of Cross or any prior assignee. The fact that equity gives them a right to have the security applied does not enlarge or change the character of the security, and that was, as we have quoted, to enable Martindale "to pay himself for any paper" on which he was liable with Cross. The appellants get their rights from and through Martindale. Their right is only to have Martindale's right enforced as it was on July 15 or November 15. *Cunningham* v. *Macon & B. R. Co.* 156 U. S. 400, 419, 39 L. ed. 471, 476, 15 Sup. Ct. Rep. 361. It even was argued on this ground that it appeared from other evidence that Martindale had no equity as against the Emporia bank, and that therefore the decree could be upheld. But, as we have said, the evidence objected to was too important not to have had an influence on the decision, and therefore we confine ourselves to the consideration of that.

It may be urged that, even if the appellants get their rights by subrogation (and it is to be noticed that the only claim made in their pleadings is to be subrogated to the rights of Martindale), still their rights are independent when the subrogation is complete. In reply we fall back upon the distinction between admissions and an attempt to release the rights. The distinction was recognized in England in the case of a suit by a naked trustee. If he undertook fraudulently to release the cause of action and his release was pleaded, the plea would be ordered off the files. *Innell* v. *Newman*, 4 Barn. & Ald. 419. See *Payne* v. *Rogers*, 1 Dougl. 407; *Anonymous*, 1 Salk. 260; *Troeder* v. *Hyams*, 153 Mass. 536, 538, 27 N. E. 775. But his admissions were evidence for the defendant. *Bauerman* v. *Radenius*, 7 T. R. 663, *Craib* v. *D'Aeth*, 7 T. R. 670 note b. The analogy by no means is perfect, but it is sufficient. In these days, when the whole tendency of decisions and legislation is to enlarge the admissibility of hearsay where hearsay must be admitted or a failure of justice occur, we are not inclined to narrow the lines. The interest of Martindale continued, the appellants claim through it, and we are of opinion that, under the circumstances, admissions by Martindale contrary to that interest properly were let in. Cases of admissions by a trustee having no interest in the suit may stand on different ground.

*The decree is objected to as granting af- [738] firmative relief to Albaugh against his defendant Newman. As the appellants are dismissed out of court, the error, if it was one, does not concern them.

*Decree affirmed.*

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[739]*JOHN S. SWANN *et al.*, Trustees, etc., *Plaintiffs in Error*, *v.* STATE OF WEST VIRGINIA. [No. 68.]

In Error to the Supreme Court of Appeals of the State of West Virginia.

*Messrs. George E. Price* and *S. S. Green* for plaintiffs in error.

*Messrs. W. Mollohan, George W. McClintic, Alexander Dulin,* and *Murray Briggs,* for defendant in error.

January 26, 1903. Decree *affirmed* with costs, on the authority of *King* v. *Mullins,* 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925.

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THEODORE READ, *Plaintiff in Error*, *v.* MISSISSIPPI COUNTY. [No. 153.]

In Error to the Supreme Court of the State of Arkansas.

*Mr. Wm. H. Carroll* for plaintiff in error.

No counsel for defendant in error.

February 2, 1903. Judgment *affirmed* with costs, on the authority of *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54.

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WILLIAM E. HALE, Receiver, etc., *Petitioner*, *v.* JAMES A. HILLIKER. [No. 433.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. M. H. Boutelle, W. E. Hale,* and *A. L. Pincoffs* for petitioner.

*Messrs. Charles E. Patterson* and *Alpheus Bulkeley* for respondent.

January 19, 1903. *Denied.*

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RICHARD A. BURGET, *Petitioner*, *v.* HORACE R. ROBINSON. [No. 443.]

[740] Petition for a Writ of Certiorari *to the United States Circuit Court of Appeals for the First Circuit.

*Messrs. Jno. W. Corcoran* and *P. A. Collins* for petitioner.

*Messrs. Stiles W. Burr* and *John W. Sawe* for respondent.

January 19, 1903. *Denied.*

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STANDARD SEWING MACHINE COMPANY, *Petitioner*, *v.* ARTHUR M. LESLIE. [No. 546.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. Charles S. Holt* and *John Dane, Jr.,* for petitioner.

*Messrs. Charles K. Offield* and *Charles C. Linthicum* for respondent.

January 19, 1903. *Denied.*

HORACE M. DUPEE, *Petitioner*, *v.* CHICAGO HORSE SHOE COMPANY. [No. 548.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. Wm. M. Jones* and *Jas. E. Munroe* for petitioner.

*Mr. LeRoy D. Thomas* for respondent.

January 19, 1903. *Denied.*

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WASHINGTON NATIONAL BUILDING & LOAN ASSOCIATION, *Petitioner*, *v.* BERTHA L. FISKE AND HUSBAND. [No. 549.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

*Messrs. George E. Hamilton, M. J. Colbert, J. H. Ralston* and *F. L. Siddons* for petitioner.

*Messrs. D. W. Baker, M. D. Rosenberg* and *Alexander Wolf* for respondents.

January 26, 1903. *Denied.*

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SIMON ROTHSCHILD, *Petitioner*, *v.* MEMPHIS & CHARLESTON RAILROAD COMPANY *et al.* [No. 553.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. Heber J. May* for petitioner.

*Messrs. Francis Lynde Stetson, Fairfax Harrison,* and *F. P. Poston* for respondents.

January 26, 1903. *Denied.*

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*JAMES GALVIN, *Petitioner* *v.* CITY OF [741] GRAND RAPIDS. [No. 571.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Mr. Timothy E. Tarsney* for petitioner.

No counsel for respondent.

February 2, 1903. *Denied.*

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C. M. PATTERSON, *Petitioner*, *v.* R. M. WADE. [No. 551.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. John H. Mitchell* for petitioner.

*Mr. Joseph Simon* for respondent.

February 23, 1903. *Denied.*

ATLANTIC TRUST COMPANY, *Petitioner*, *v.* EDGAR C. CHAPMAN, Receiver, etc. [No. 557.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. Stanley W. Dexter, E. B. Whitney* and *J. J. Scrivner* for petitioner.

*Mr. Charles N. Fox* for respondent.

February 23, 1903. *Denied.*

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ROBERT B. WHALLEY, Master, etc., *Petitioner*, *v.* THOMAS TRAVERS *et al.* [No. 568.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. J. Parker Kirlin* for petitioner.

*Mr. W. C. Beecher* for respondents.

February 23, 1903. *Denied.*

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BUFFALO ELECTRIC CARRIAGE COMPANY, *Petitioner*, *v.* ELECTRIC STORAGE BATTERY COMPANY. [No. 576.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[742] *Messrs. Thomas* **A. Banning* and *Ephraim Banning* for petitioner.

*Mr. John R. Bennett* for respondent.

February 23, 1903. *Denied.*

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FRANK J. HEARNE, *Petitioner*, *v.* GERMAN INSURANCE COMPANY *et al.* [No. 593.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

*Messrs. Joseph K. McCammon* and *James H. Hayden* for petitioner.

*Messrs. Wm. S. Dalzell, Ernest L. Tustin,* and *J. H. Harrison* for respondents.

February 23, 1903. *Denied.*

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MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Petitioner v.* ELIZA MAUD HILL *et al.* [No. 518.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Messrs. John B. Allen, Julien T. Davies, Edward Lyman Short,* and *Frederic D. McKenney* for petitioner.

*Mr. S. Warburton* for respondents.

February 23, 1903. *Granted.*

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A. CHESEBROUGH *et al.*, Owners, etc., *Petitioners*, *v.* MATTHEW BRIDGES. [No. 567.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

*Mr. Milton Andros* for petitioners.

*Mr. A. H. Ricketts* for respondent.

February 23, 1903. *Granted.*

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UNITED STATES, *Plaintiff in Error*, *v.* S. P. SHOTTER COMPANY. [No. 146.]

In Error to the Circuit Court of the United States for the Southern District of Alabama.

*Messrs. Attorney General, Solicitor General Richards,* and *M. C. Burch* for *plaintiff in error. [743]

*Mr. John Ridout* for defendant in error.

January 19, 1903. *Dismissed* on motion of *Mr. Solicitor General Richards* for the plaintiff in error.

---

W. F. WYMAN, *Appellant*, *v.* VIRGILE HERARD [No. 154.]

Appeal from the Supreme Court of the Territory of Oklahoma.

*Mr. George Chandler* for appellant.

*Mr. John W. Shartel* for appellee.

January 22, 1903. *Dismissed* with costs, pursuant to the 10th rule.

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OLIVER AMES *et al.*, Trustees, *et al.*, *Plaintiffs in Error*, *v.* BOARD OF STREET COMMISSIONERS OF THE CITY OF BOSTON. [No. 243.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

*Mr. J. H. Benton, Jr.* for plaintiffs in error.

*Mr. Thos. M. Babson* for defendant in error.

February 24, 1903. *Dismissed*, per stipulation.

# CASES

ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

AT

OCTOBER TERM, 1902.

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Vol. 189.

# REFERENCE TABLE

OF SUCH CASES

## DECIDED IN U. S. SUPREME COURT,

## OCTOBER TERM, 1902,

AND REPORTED HEREIN,

## VOLUME 189,

AS ALSO APPEAR IN

## OFFICIAL REPORTER'S EDITION.

| Off. Rep. 189 U. S. | Title. | Herein. |
|---|---|---|
| 1–2 | Kennedy Mining & M. Co. v. Argonaut Min. Co.<br>Kennedy Mining & M. Co. v. Argonaut Min. Co. | 685 |
| 2–4 | " " | 686 |
| 4–5 | " " | 687 |
| 5–7 | " " | 688 |
| 7 | " " | 689 |
| 8–9 | Kokomo Fence Mach. Co. v. Kitselman | 689 |
| 9–11 | " " | 691 |
| 11–13 | " " | 692 |
| 13–16 | " " | 693 |
| 16–19 | " " | 694 |
| 19–21 | " " | 695 |
| 21–24 | " " | 696 |
| 24–25 | " " | 697 |
| 25 | Hennessy v. Richardson Drug Co. | 697 |
| 32–33 | " " | 697 |
| 33–35 | " " | 698 |
| 35 | Hennessy v. Moise<br>Hennessy v. May | 698 |
| 35 | Kirwan v. Murphy | 698 |
| 36–38 | " " | 699 |
| 38–40 | " " | 700 |
| 40–43 | " " | 701 |
| 52–53 | " " | 704 |
| 53–56 | " " | 705 |
| 56 | " " | 706 |
| 57–58 | Brill v. Peckham Motor, Truck & Wheel Co. | 706 |
| 58–60 | " " | 707 |
| 60–62 | " " | 708 |
| 62–64 | " " | 709 |
| 64–65 | Tennessee v. Condon | 709 |
| 65–67 | " " | 710 |
| 67–70 | " " | 711 |
| 70–71 | " " | 712 |
| 71 | Union & Planters' Bank v. Memphis<br>Union & Planters' Bank v. Memphis | 712 |
| 72–73 | Union & Planters' Bank v. Memphis<br>Union & Planters' Bank v. Memphis | 713 |
| 73–74 | " " | 714 |
| 74–76 | " " | 715 |
| 76 | Mexican C. R. Co. v. Duthie | 715 |
| 76–77 | " " | 716 |
| 77–78 | " " | 717 |
| 78–79 | Jaquith v. Alden | 717 |
| 79–82 | " " | 718 |
| 82–83 | " " | 719 |
| 83 | " " | 720 |
| 84 | Key, Re | 720 |
| 84–85 | " " | 721 |
| 86 | The Japanese Immigrant Case ("Yamataya v. Fisher") | 721 |
| 87 | " " | 722 |
| 87–88 | " " | 723 |
| 94–95 | " " | 723 |
| 95–98 | " " | 724 |
| 98–100 | " " | 725 |
| 100–102 | " " | 726 |
| 103 | Oregon & C. R. Co. v. United States | 726 |
| 103–104 | " " | 727 |
| 104–106 | " " | 728 |
| 106–109 | " " | 729 |
| 109–112 | " " | 730 |
| 112–114 | " " | 731 |
| 114–116 | " " | 732 |
| 116 | " " | 732 |
| 116–119 | " " | 733 |
| 119–121 | De Cambra v. Rogers | 734 |
| 121–122 | " " | 735 |
| 122–123 | Eastern Bldg. & L. Co. v. Williamson | 735 |
| 123–125 | " " | 736 |
| 125–126 | " " | 739 |
| 126–129 | " " | 740 |
| 129–130 | " " | 741 |
| 131 | Bell v. Commonwealth Title, Ins. & T. Co. | 741 |
| 131 | " " | 742 |

| Off. Rep. 189 U. S. | Title. | Here in. |
|---|---|---|
| 131–133 | Bell v. Commonwealth Title Ins. & T. Co. | 743 |
| 133–134 | " " | 744 |
| 135 | Fidelity & D. Co. v. L. Bucki & Son Lumber Co. | 744 |
| 135–136 | " " | 745 |
| 136–138 | " " | 749 |
| 138–141 | " " | 750 |
| 141–143 | " " | 751 |
| 143 | McClung v. Penny | 751 |
| 144–146 | " " | 753 |
| 146–147 | " " | 754 |
| 148 | Winchrenner v. Forney | 754 |
| 149–151 | " " | 755 |
| 150–152 | " " | 756 |
| 152–154 | " " | 757 |
| 154–155 | Sawyer v. Piper | 757 |
| 155–156 | " " | 758 |
| 156–158 | " " | 759 |
| 158–160 | Osceola, The | 760 |
| 168–170 | " | 762 |
| 170–173 | " | 763 |
| 173–175 | " | 764 |
| 175–177 | " | 765 |
| 177 | San Jose Land & W. Co. v. San Jose Ranche Co. | 765 |
| 178–179 | " " | 766 |
| 179–181 | " " | 768 |
| 181–184 | " " | 769 |
| 184–185 | " " | 770 |
| 185–187 | Roanoke, The | 770 |
| 187 | " | 771 |
| 192–194 | " | 772 |
| 194–196 | " | 773 |
| 196–199 | " | 774 |
| 199 | " | 775 |
| 199–200 | United States v. Nix<br>Nix v. United States | 775 |
| 200–202 | " " | 776 |
| 202–205 | " " | 777 |
| 205–206 | " " | 778 |
| 207–208 | Davis & F. Mfg. Co. v. Los Angeles | 778 |
| 208–209 | " " | 779 |
| 216–218 | " " | 780 |
| 218–220 | " " | 781 |
| 220–221 | " " | 782 |
| 221 | Nashua Sav. Bank v. Anglo-American Land Mortg. & A. Co. | 782 |
| 222 | " " | 783 |
| 227–229 | " " | 785 |
| 229–231 | " " | 786 |
| 231–232 | " " | 787 |
| 233–234 | Sena v. United States | 787 |
| 234 | " " | 788 |
| 234–236 | " " | 789 |
| 236–239 | " " | 790 |
| 239–241 | " " | 791 |
| 241–242 | " " | 792 |
| 242 | Rankin v. Fidelity Ins. T. & S. D. Co. | 792 |
| 243–245 | " " | 793 |
| 246–247 | " " | 794 |
| 247–249 | " " | 795 |
| 249–252 | " " | 796 |
| 252–254 | " " | 797 |
| 255 | Glidden v. Harrington | 798 |
| 256–257 | " " | 800 |
| 257–259 | " " | 801 |
| 259–260 | Glidden v. Harrington | 802 |
| 260–262 | Wiser v. Lawler | 802 |
| 262–263 | " " | 803 |
| 263–265 | " " | 807 |
| 265–268 | " " | 808 |
| 268–271 | " " | 809 |
| 271–273 | " " | 810 |
| 273–274 | " " | 811 |
| 274–276 | Missouri P. R. Co. v. United States | 811 |
| 276 | " " | 812 |
| 282–283 | " " | 813 |
| 283–285 | " " | 814 |
| 285–288 | " " | 815 |
| 288–290 | " " | 816 |
| 290–291 | " " | 817 |
| 292–293 | Potter v. Hall | 817 |
| 293–295 | " " | 818 |
| 295–297 | " " | 819 |
| 297–300 | " " | 820 |
| 300–301 | " " | 821 |
| 301 | Farmers' & M. Ins. Co. v. Dobney | 821 |
| 302–304 | " " | 825 |
| 304–306 | " " | 826 |
| 306 | Onondaga Nation v. Thatcher | 826 |
| 306–309 | " " | 827 |
| 309–311 | " " | 828 |
| 311 | Shurtleff v. United States | 828 |
| 311–313 | " " | 829 |
| 313–316 | " " | 831 |
| 316–318 | " " | 832 |
| 318–319 | " " | 833 |
| 319–320 | Sexton v. California | 833 |
| 320–323 | " " | 834 |
| 323–325 | " " | 835 |
| 325 | Foster v. Pryor | 835 |
| 325–328 | " " | 836 |
| 328–331 | " " | 837 |
| 331–333 | " " | 838 |
| 333–335 | " " | 839 |
| 335 | Finney v. Guy | 839 |
| 336–338 | " " | 840 |
| 338 | " " | 841 |
| 339–341 | " " | 843 |
| 341–343 | " " | 844 |
| 343–346 | " " | 845 |
| 346 | Thayer v. Spratt | 845 |
| 347–349 | " " | 846 |
| 349–350 | " " | 847 |
| 350–352 | " " | 848 |
| 352–354 | " " | 849 |
| 354 | Texas & P. R. Co. v. Carlin | 849 |
| 354–357 | " " | 850 |
| 357–358 | " " | 851 |
| 358–360 | " " | 852 |
| 360–363 | " " | 853 |
| 363 | " " | 854 |
| 363–365 | The Conemaugh ("Union Steamboat Co. v. Erie & W. Transp. Co.") | 854 |
| 365–366 | " | 855 |
| 366–367 | " | 856 |
| 367–370 | " | 857 |
| 370–379 | Zane v. Hamilton County | 858 |
| 379–382 | " " | 859 |
| 382–383 | " " | 860 |
| 383–385 | Detroit, F. W. & B. I. R. Co. v. Osborn | 860 |
| 385–386 | " " | 861 |

| Off. Rep. 169 U. S. | Title. | Here in. |
|---|---|---|
| 386–387 | Detroit, F. W. & B. I. R. Co. v. Osborn | 863 |
| 387–390 | " " | 864 |
| 390–391 | " " | 865 |
| 391–393 | United States v. Mission Rock Co. | 865 |
| 393–395 | " " | 866 |
| 403 | " " | 868 |
| 403–406 | " " | 869 |
| 406–408 | " " | 870 |
| 408 | Chattanooga Nat. Bldg. & L. Asso. v. Denson | 870 |
| 408–411 | " " | 871 |
| 411–413 | " " | 872 |
| 413–414 | " " | 873 |
| 414–416 | " " | 874 |
| 416–417 | " " | 875 |
| 417 | Gordon v. Randle | 875 |
| 417–419 | " " | 876 |
| 419–420 | " " | 877 |
| 420 | Pullman Co. v. Adams | 877 |
| 420–422 | " " | 878 |
| 422 | " " | 879 |
| 423 | National Bank & Loan Co. v. Petrie | 879 |
| 423–425 | " " | 880 |
| 425–426 | " " | 881 |
| 426 | National Bank & Loan Co. v. Carr | 881 |
| 426 | " " | 882 |
| 426 | Brownfield v. South Carolina | 882 |
| 427–429 | " " | 883 |
| 429 | Pardee v. Aldridge | 883 |
| 429–431 | " " | 885 |
| 431–433 | " " | 886 |
| 433–434 | " " | 887 |
| 434 | Knoxville Water Co. v. Knoxville | 887 |
| 435–436 | " " | 890 |
| 436–438 | " " | 891 |
| 438 | " " | 892 |
| 439 | San Diego Land & T. Co. v. Jasper | 892 |
| 439–440 | " " | 893 |
| 440–442 | " " | 894 |
| 442–445 | " " | 895 |
| 445–447 | " " | 896 |
| 447 | Southern P. R. Co. v. United States | 896 |

| Off. Rep. 169 U. S. | Title. | Here in. |
|---|---|---|
| 448 | Southern P. R. Co. v. United States | 898 |
| 448–451 | " " | 899 |
| 451–452 | " " | 900 |
| 453 | The Paquete Habana ("United States v. Spanish Smack Paquete Habana United States v. The Lola United States v. The Poder De Dios United States v. The Antonio Y Paco United States v. The Engracia United States v. The Severita United States v. The Antonio Suarez United States v. The Fernandito United States v. The Oriente United States v. The Espana United States v. The Cuatro De Settembre United States v. The Santiago Apostol") | 901 |
| 463–465 | " " | 903 |
| 465–468 | " " | 904 |
| 468 | Texas & P. R. Co. v. Behymer | 905 |
| 468–471 | " " | 906 |
| 471 | " " | 907 |
| 471–473 | United States v. Sweet | 907 |
| 473–474 | " " | 908 |
| 474 | United States v. Barnett | 908 |
| 474 | " " | 909 |
| 475 | Giles v. Harris | 909 |
| 482–483 | " " | 910 |
| 483–485 | " " | 911 |
| 485–488 | " " | 912 |
| 488–491 | " " | 913 |
| 491–493 | " " | 914 |
| 493–496 | " " | 915 |
| 496–498 | " " | 916 |
| 498–501 | " " | 917 |
| 501–503 | " " | 918 |
| 503–504 | " " | 919 |
| 505–517 | Memorandum Cases | 921–926 |

# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1902.

---

[1]*KENNEDY MINING & MILLING COMPANY, *Plff. in Err.*,
*v.*
ARGONAUT MINING COMPANY.
(No. 49)

KENNEDY MINING & MILLING COMPANY, *Plff. in Err.*,
*v.*
ARGONAUT MINING COMPANY.
(No. 58)

(See S. C. Reporter's ed. 1-7.)

*Error to state court—Federal question—mining claims—extralateral rights — estoppel.*

1. A Federal question reviewable in the Supreme Court of the United States is involved in a decision of a state court in favor of plaintiff in a controversy over the ownership of ore, in which defendant claimed that under the act of May 10, 1872 (17 Stat. at L. 91, chap. 152. §§ 2, 3), title thereto passed to it through its patent, instead of to plaintiff, because the end lines of the latter's patent were not parallel, plaintiff contending that its title was acquired under the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), which did not require parallelism of end lines.
2. One of two coterminous mining proprietors is estopped to assert that, because of the nonparallelism of the end lines of the other's claim, it did not carry extralateral rights defined by extending the common end line between the two surface locations, where such common line, described as crossing the lode, was established by the patent surveys as the result of an adverse proceeding in the Land Office, and a compromise agreement with respect thereto entered into by the immediate predecessors in title of such proprietors, who succeeded to the interests of their predecessors with a knowledge of the boundary line so determined.

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*On estoppel by agreement*—see note to Keokuk & W. R. Co. v. Scotland County Ct. 38 L. ed. U. S. 458.

[Nos. 49, 58.]

*Argued May 1, 1902. Ordered for reargument before full bench October 27, 1902. Reargued December 10, 11, 1902. Decided March 9, 1903.*

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of the trial court in favor of plaintiff in an action to recover damages for the taking of ore by defendant from land alleged to belong to the plaintiff. *Affirmed.*

See same case below, 131 Cal. 15, 63 Pac. 148.

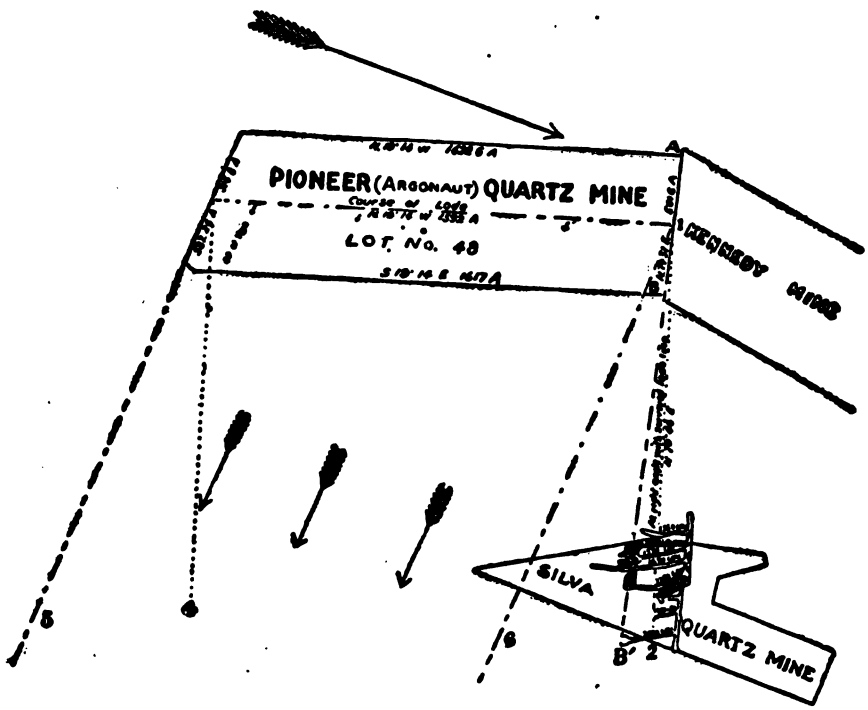
Statement by Mr. Chief Justice **Fuller**:

This was an action for damages for the value of ore alleged to have been taken by the Kennedy Mining & Milling Company from ground belonging to the Argonaut Mining Company, situated in Amador county, California. The Kennedy Mining & Milling Company denied taking any ore or gold-bearing rock which was the property of the Argonaut Mining Company, and averred that it was the owner of the vein or lode from which the rock was taken. The case was *submitted to the trial court on an [2] agreed statement of facts, and resulted in a judgment in plaintiff's favor, which judgment was affirmed by the supreme court of California. 131 Cal. 15, 63 Pac. 148. Writ of error was then allowed, and each party docketed the case in this court, but the record was only printed in No. 49.

The parties are coterminous mining pro-

prietors upon the same vein or lode, the top or apex of which passes through the Pioneer location, belonging to the Argonaut company, into the Kennedy location, belonging to the Kennedy Mining & Milling Company.

A certain map of the Pioneer and Kennedy mining claims was made part of the findings of fact, but the supreme court of California made use of a diagram simplified from that exhibit, which is as follows:




The common boundary is the line A–B, crossing the lode at the point marked 1 on [3]this diagram. The line A–B–B′ is *this end line produced indefinitely in the direction of the dip or downward course of the vein.

The Kennedy mine was entered, and payment made in November, 1871, and the patent was issued July 29, 1872.

The Pioneer was located under the law of 1866; on February 23, 1872, it was entered and paid for; and the patent was dated August 12, 1872.

During the pendency of the patent proceedings a conflict arose as to a segment of ground lying at the north end of the Pioneer, and at the south end of the Kennedy. This controversy was subsequently adjusted by an agreement between the then owners of the two properties. Both parties had sunk working shafts, the openings of which did not start at the apex, but each intersected the vein, and all the workings of both were on this vein. The vein on its downward course passed underneath the Silva mining claim belonging to the Kennedy Mining & Milling Company, located and patented on another vein, which had its apex within the Silva ground. This Silva ground was patented to the Kennedy Mining & Milling Company, February 6, 1893, and the patent recited an entry made in October, 1892.

The patent contained this reservation: "That the premises hereby granted, with the exception of the surface, may be entered by the proprietor of any other vein, lode, or ledge, the top or apex of which lies outside of the boundary of said granted premises, should the same in its dip be found to penetrate, intersect, or extend into said premises, for the purpose of extracting and removing the ore from such other vein, lode, or ledge."

The ore in dispute, although taken from the Pioneer-Kennedy vein, was south of the Kennedy south end boundary, as shown by its patent, and the Kennedy Mining & Milling Company did not assert any right to it by virtue of its ownership of the Kennedy mine. The ore, though taken from beneath the surface of the Silva location, was taken from the discovery lode of the Pioneer location, which was the only lode that had its apex within that location. It entered the location near the middle point of the southern end line, and ran northerly through the *location in a direction practically parallel[4] to the side lines, through the center of the northern end line.

Plaintiff in error admitted the ownership by the Argonaut Mining Company of the Pioneer mine, and that the lode had its

apex within its surface location, but denied that the quartz taken by it from that lode was within that location, on the ground that because of non-parallelism of the end lines of the Pioneer, it carried no extralateral rights; and that if the court could, as matter of law, construct for it parallel end lines, the southerly end line being the base line from which the location was projected, the parallel would be made by extending the northern end line in a direction parallel to the direction of the southerly end line.

The supreme court of California held that the Argonaut company was entitled to all the rights which would attach under the act of 1866, and to any additional rights which inured under the act of 1872; that the act of 1866 did not require parallel end lines, and the failure to so parallel them in the Pioneer location did not deprive that claim of extralateral rights; that the extralateral rights on lodes located under the act of 1866, where end lines were not parallel, were to be defined by drawing lines at right angles to the general course of the lode, at the extreme points of the lode within the location; that the contention of plaintiff in error, that because the description in the Pioneer patent commenced at the south end of the claim, and the south end line was first run, the inequalities arising through diverging end lines should be adjusted by drawing a produced line from 1 to 6 in the diagram, parallel to the produced south end line from 3 to 5 in the diagram, could not be sustained.

The ore bodies in controversy were south of the northern end line plane of the Pioneer as made by agreement the boundary line between it and the Kennedy mining claim, and also within the extralateral right planes constructed at right angles to the general course of the lode through the extreme points of the lode within the location.

The act of July 26, 1866 (14 Stat. at L. 251, chap. 262), provided that patentees thereunder should have "the right to follow [5]such vein *or lode with its dips, angles, and variations to any depth, although it may enter the land adjoining, which land adjoining shall be sold subject to this condition." [§ 2.]

The act of May 10, 1872 (17 Stat. at L. 91, chap. 152, §§ 2, 3), provided that the end lines of each claim should be parallel to each other, and that locators should have "the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of said surface locations: *Provided*, That their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges."

*Mr.* **John Garber** argued the cause, and, with *Messrs. John M. Wright* and *Byron Waters*, filed a brief for plaintiff in error:

The abandonment of a claim of title by one party does not confer title upon the other.

*Walrath* v. *Champion Min. Co.* 63 Fed. 552, 558; *Walrath* v. *Champion Min. Co.* 171 U. S. 293, 43 L. ed. 170, 18 Sup. Ct. Rep. 909.

The controversy prior to patent is of no weight whatever, as to any right arising under the patent, for one claim or the other.

*Del Monte Min. & Mill. Co.* v. *New York & L. C. Min. Co.* 66 Fed. 213; *Doe* v. *Waterloo Min. Co.* 54 Fed. 935.

The defendant was a stranger to the compromise.

*Messrs. John M. Wright* and *Byron Waters* also filed a brief in opposition to the motion to dismiss or affirm:

A case is presented, plainly within the jurisdiction of this court by writ of error to the supreme court of the state of California, when measured by every test that has been prescribed by the Constitution, by Congress, and by this court.

*Matthews* v. *Zane*, 4 Cranch. 382, 2 L. ed. 654; *Cohen* v. *Virginia*, 6 Wheat. 379, 5 L. ed. 285; *Osborn* v. *Bank of United States*, 9 Wheat. 821, 6 L. ed. 224; *Ross* v. *Doe ex dem. Barland*, 1 Pet. 662, 7 L. ed. 305; *Kissell* v. *St. Louis Public Schools*, 18 How. 19–28, 15 L. ed. 324–328; *Starin* v. *New York*, 115 U. S. 248, 29 L. ed. 388, 6 Sup. Ct. Rep. 28; *De Lamar's Nevada Gold Min. Co.* v. *Nesbitt*, 177 U. S. 528, 44 L. ed. 874, 20 Sup. Ct. Rep. 715.

Where, as in this case, the question necessarily involved is one of the construction to be placed upon a statute of the United States, no necessity exists that such Federal question should be affirmatively set out as such upon the record.

*Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *Columbia Water Power Co.* v. *Columbia Electric Street R. Light & P. Co.* 172 U. S. 488, 43 L. ed. 525, 19 Sup. Ct. Rep. 247.

Under the established practice of this court, there is ample "color" in support of our claim of the existence of a Federal question, which warrants consideration upon the merits after a hearing in regular order.

*Millingar* v. *Hartupee*, 6 Wall. 258, 18 L. ed. 829; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79–93, 35 L. ed. 943–948, 12 Sup. Ct. Rep. 142; *Hamblin* v. *Western Land Co.* 147 U. S. 532, 37 L. ed. 268, 13 Sup. Ct. Rep. 353; *Douglas* v. *Wallace*, 161 U. S. 348, 40 L. ed. 728, 16 Sup. Ct. Rep. 485.

*Messrs.* **John M. Wright** and **John Garber** argued the cause for plaintiff in error on reargument.

*Mr.* **Curtis H. Lindley** argued the cause,

and, with *Messrs. Henry Eickhoff* and *W. J. McGee*, filed a brief for defendant in error:

When two several mining companies agree upon a boundary line between the two companies, and subsequently other parties purchase the several interests of the two companies, with a knowledge of the boundary line so fixed, both parties are concluded by it, and are estopped from denying the line.

*McGee* v. *Stone*, 9 Cal. 600.

*Messrs. Curtis H. Lindley* and *Henry Eickhoff* also filed a brief in support of the motion to dismiss or affirm:

The mere allegation of ownership of the mine and vein, and the trespass thereon, although the necessary inference is that title was derived through some act of Congress, does not suggest a Federal question.

*Shoshone Min. Co.* v. *Rutter*, 177 U. S. 505, 507, 44 L. ed. 865, 20 Sup. Ct. Rep. 726.

The reception by the trial court of immaterial and incompetent evidence in no sense involves a Federal question of which this court will take cognizance.

*Dower* v. *Richards*, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452. Quoting from *Mackay* v. *Dillon*, 4 How. 421, 447, 11 L. ed. 1038, 1050.

Section 709 of the Revised Statutes points out the cases in which the judgment or decree of the highest court of a state in which a decision could be had may be reviewed by the Supreme Court of the United States.

*McKenna* v. *Simpson*, 129 U. S. 506, 510, 36 L. ed. 772, 773, 9 Sup. Ct. Rep. 365.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Plaintiff in error contended in the courts below that, by force of §§ 2 and 3 of the act of Congress of May 10, 1872, title to the ore in question passed to it through its patent to the Silva mine, and did not pass to the Pioneer through its patent, because the end lines of the latter were not parallel to each other.

The defendant in error contended that its title was not acquired under the act of 1872, but under the act of July 26, 1866, which did not require parallelism of end lines.

In these circumstances it is held by a majority of the court that a Federal question was so presented that we have jurisdiction.

[6] * It was stated in the agreed statement of facts that the Kennedy Mining Company on October 13, 1870, filed its application for patent in the United States land office at Sacramento, California, and that a diagram of the premises for which patent was applied for was posted in that land office October 15, 1870; that on January 13, 1871, the Pioneer Gold & Silver Mining Company, the immediate predecessor in title of the Argonaut company, filed its application for patent in the same land office, and a diagram of the ground it claimed, and for which patent was sought, was posted in the office of the register of the land office, and upon the claim; that there was a surface conflict as to area claimed by the respective applicants for patent, as shown by the proceedings in the land office, the conflict occurring on the northern end of the Pioneer mine as applied for, and the southern end of the Kennedy mine as applied for; that on said January 13, the register and receiver of the land office made and entered an order in respect of the adverse claim of the Pioneer, directing proceedings in the case of the Kennedy mining company to be suspended so far as affecting the piece or parcel of land described in the order; that on February 20, 1871, the Pioneer Gold & Silver Mining Company and the Kennedy Mining Company entered into a compromise agreement, in which each of the parties withdrew from their applications their claim to a certain portion of the surface ground in dispute; and which provided that "the dividing line between the claims of the respective companies shall be one drawn at right angles with the general course of the lode or lead, and surface ground thereto appurtenant, and at the point hereinbefore designated." The line thus agreed upon was the line from A to B in the foregoing diagram. Thereafter surveys for the patent for the Kennedy mine and for the Pioneer mine were duly made, and patent was issued to the Kennedy Mining Company, July 29, 1872, and to the Pioneer Gold & Silver Mining Company, August 12, 1872. The Argonaut company became the owner of the Pioneer mine, July 3, 1893, by a deed from the Pioneer Gold & Silver Mining Company, and the Kennedy Mining & Milling Company became the owner of the Kennedy mine by conveyance from the Kennedy Mining Company, *dated December [7] 25, 1886; and the Kennedy Mining & Milling Company became the owner of the Silva quartz mine, February 6, 1893, by a patent issued to it on that day, which recited that that company on February 13, 1892, duly entered and paid for the mining claim or premises known as the Silva quartz lode mining claim.

It thus appears that a common end line was established by the patent surveys, which described this line as crossing the lode, and that the Kennedy Mining & Milling Company purchased with the knowledge that this was a common boundary established as such by the patents many years prior to its purchase. The common boundary A B, crossing the lode, was fixed as the result of an adverse proceeding in the land office, and the agreement entered into with respect thereof was as set forth in the agreed statement of facts.

We think, then, that the Kennedy Mining & Milling Company is estopped from asserting any right to the ore body in dispute, which it was also agreed was extracted by the Kennedy Mining & Milling Company from the vein south of the vertical plane drawn through the line A B produced in the direction B′, and which was the same vein which had its top or apex in the Kennedy quartz mine, and in the Pioneer quartz mine, and was continuous from the apex of both properties downward to the lowest depths. The boundary line agreed on fixed

the rights of the parties in length on the lode, and so involved the extralateral right as between them.

The Argonaut Mining Company and the Kennedy Mining & Milling Company succeeded to the interests of the Pioneer company and the original Kennedy company, with a knowledge of the boundary line so determined, and both parties were concluded by it and the results following therefrom. *Richmond Min. Co.* v. *Eureka Min. Co.* 103 U. S. 839, 846, 26 L. ed. 557, 560.

Apart from the questions discussed by the supreme court of California, we are of opinion that the judgment must be affirmed on the foregoing ground.

*Judgment affirmed.*

Mr. Justice **White** and Mr. Justice **McKenna** dissented.

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[8]*KOKOMO FENCE MACHINE COMPANY

*v.*

ALVA L. KITSELMAN and Davis M. Kitselman.

(See S. C. Reporter's ed. 8-25.)

*Patents—wire-fabric machines—pioneer invention—infringement — presumption of difference from grant of patent.*

1. The Kitselman patent, No. 356,322, for an improvement in wire-fabric machines cannot be regarded as embodying a pioneer invention of a field machine for weaving wire-fencing fabric, in view of prior patents for stationary machines for weaving such fabric and for field machines for making wire-and-picket fence, and of the rejection of the claim for a pioneer field machine by the Patent Office, with the acquiescence of the patentee, who thereupon withdrew such claim; and the claims of such patent must therefore be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements of different construction and arrangement.
2. There is a presumption, from the grant of separate letters patent for two improvements on a prior art, that there is a substantial difference between the inventions.
3. No infringement of either the Kitselman patent, No. 356,322, the Davisson patent, No. 289,507, or the Connor patent, No. 357,067, for improvements in wire-fabric machines, or of the Pope patent, No. 505,607, for wire-fabric machines, results from the manufacture, under the Whitney patent, No. 502,025, of wire-fence machines which are substantially differentiated from those manufactured under the earlier patents, none of which embody pioneer invention.

[No. 148.]

NOTE.—*On the construction of patents*—see notes to Royer v. Coupe, 36 L. ed. U. S. 1073; and Dashiell v. Grosvenor, 40 L. ed. U. S. 1025.

*On what constitutes infringement of patent*—see notes to Royer v. Coupe, 36 L. ed. U. S. 1073; and Dashiell v. Grosvenor, 40 L. ed. U. S. 1025.

*Argued January 22, 1903. Decided March 23, 1903.*

ON WRIT and Cross Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a decree which reversed a decree of the Circuit Court for the District of Indiana dismissing a bill to restrain the infringement of certain patents. *Reversed;* decree of Circuit Court Affirmed.

See same case below, 47 C. C. A. 538, 108 Fed. 632.

Statement by Mr. Chief Justice **Fuller:**

This was a suit in the circuit court of the United States for the district of Indiana for infringement of claims 1, 2, 3, 9, 10, 11, 15, and 20 of letters patent No. 356,322, issued January 18, 1887, to Alva L. Kitselman and Davis M. Kitselman for an improvement in wire-fabric machines; of claims 1 and 2 of letters patent No. 289,507, issued December 4, 1883, to W. J. Davisson for an improved machine for making wire fabrics; of claims 2, 3, and 4 of letters patent No. 357,067, issued February 1, 1887, to Theodore M. Connor for improvement in machines for forming netted wire fabrics; and of claims 1 and 10 of letters patent No. 505,607, issued September 26, 1893, to John C. Pope, for wire-fabric machines.

Defendants denied patentable novelty of each of the patents, and also denied infringement, and alleged that they constructed their wire fabrics as licensees under and pursuant to letters patent No. 502,025, issued to W. D. Whitney December 24, 1895, for improvements in wire-fabric machines.

The cause was heard by District Judge Baker, who held *that the claims of the four [9] patents sued on were for specific constructions which defendants did not use, and that there was no infringement of either of the letters patent, and dismissed the bill. The case was carried to the United States circuit court of appeals for the seventh circuit, and that court, one of its members dissenting, reversed the decree, and held that the defendants had infringed the first, second, eleventh, and fifteenth claims of the patent issued to the Kitselmans. 47 C. C. A. 538, 108 Fed. 632.

The writ of certiorari was granted on the petition of the Kokomo fence company, and afterwards the cross writ on the petition of the Kitselmans. The machine company alleged error in the judgment of the court of appeals sustaining and finding infringement of the Kitselman patent, and the Kitselmans alleged error in that court in not sustaining and finding infringement of the Davisson, Connor, and Pope patents.

*Mr.* **Thomas A. Banning** argued the cause, and, with *Messrs. Ephraim Banning* and *C. C. Shirley*, filed a brief for the Kokomo Fence Machine Company:

Even if the Kitselman patent be a pioneer patent, it cannot cover every combination of devices for producing the same thing.

*Westinghouse* v. *Boyden Power Brake Co.*

170 U. S. 509, 42 L. ed. 1148, 18 Sup. Ct. Rep. 707.

Where a party makes a claim for a mechanism broadly, and such claim is rejected upon references, and he acquiesces in the rejection and withdraws his claim in order to get his patent, he is thereafter forever precluded from putting a construction upon the claims allowed him which would make them mean the same thing, or substantially the same thing, as the claim which he has once presented and afterwards withdrawn.

*Morgan Envelope Co.* v. *Albany Perforated Wrapping Paper Co.* 152 U. S. 429, 38 L. ed. 502, 14 Sup. Ct. Rep. 627.

Where the defendants justify under a patent, the issuance of such patent to them raises a presumption in their favor.

*Corning* v. *Burden*, 15 How. 271, 14 L. ed. 691; *Miller* v. *Eagle Mfg. Co.* 151 U. S. 208, 38 L. ed. 131, 14 Sup. Ct. Rep. 310; *Boyd* v. *Janesville Hay Tool Co.* 158 U. S. 261, 39 L. ed. 973, 15 Sup. Ct. Rep. 837.

*Mr.* **Robert H. Parkinson** argued the cause and filed a brief for the Kitselmans:

The claims of the patent are, if consistent with their terms, to be construed so as to protect the patentee in the substance of his invention, and a defendant who has appropriated the invention by disguising it under changes of form, or by substituting equivalents for some of its elements, cannot escape liability by reason of such disguises; nor can the patent be limited or defeated by showing how earlier machines built and operated upon a different plan might have been converted into the machine of the patent,—especially so where such conversion involves a rejection of the plan of construction and operation inherent in such old machines, and the adoption of a distinct plan borrowed from the complainant's patent.

*Consolidated Safety Valve Co.* v. *Crosby Steam Gauge Valve Co.* 113 U. S. 157, 28 L. ed. 939, 5 Sup. Ct. Rep. 513; *Morley Sewing Mach. Co.* v. *Lancaster*, 129 U. S. 263, 32 L. ed. 715, 9 Sup. Ct. Rep. 299; *Royer* v. *Schultz Belting Co.* 135 U. S. 319, 34 L. ed. 214, 10 Sup. Ct. Rep. 833; *Ives* v. *Hamilton*, 92 U. S. 426, 23 L. ed. 494; *Blake* v. *Robertson*, 94 U. S. 728, 24 L. ed. 245; *Cochrane* v. *Deener*, 94 U. S. 780, 24 L. ed. 139; *Union Paper-Bag Mach. Co.* v. *Murphy*, 97 U. S. 120, 24 L. ed. 935; *Sessions* v. *Romadka*, 145 U. S. 29, 36 L. ed. 609, 12 Sup. Ct. Rep. 799; *Hoyt* v. *Horne*, 145 U. S. 302, 36 L. ed. 713, 12 Sup. Ct. Rep. 922; *Westinghouse* v. *Boyden Brake Co.* 170 U. S. 571, 42 L. ed. 1148, 18 Sup. Ct. Rep. 707; *Clough* v. *Gilbert & B. Mfg. Co.* 106 U. S. 166, 27 L. ed. 134, 1 Sup. Ct. Rep. 188; *Blake* v. *Robertson*, 94 U. S. 728, 24 L. ed. 245; *Hoyt* v. *Horne*, 145 U. S. 302, 36 L. ed. 713, 12 Sup. Ct. Rep. 922; *McCormick Harvesting Mach. Co.* v. *C. Aultman & Co.* 16 C. C. A. 259, 37 U. S. App. 299, 69 Fed. 371; *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 38 L. ed. 103, 14 Sup. Ct. Rep. 295; *Du Bois* v. *Kirk*, 158 U. S. 58, 39 L. ed. 895, 15 Sup. Ct. Rep. 729; *Hobbs* v. *Beach*, 180 U. S. 383, 45 L. ed. 586, 21 Sup. Ct. Rep. 409; *Busch* v. *Jones*, 184 U. S. 598, 46 L. ed. 707, 22 Sup. Ct. Rep. 511.

By "known equivalent" the authorities do not mean solely a device which, in its peculiarities of structure, was known at the time, but include any which possesses a character known to be an equivalent for the character of the element for which it was substituted, or which performs a similar office in the patented combination.

1 Robinson, Patents, § 248.

The substitution, for elements of a combination claim, of subsequently patented improvements which serve the same purpose in that combination, does not escape such claim, even though the improvements are themselves the subject of valid patents, and are composed of a different number of parts, some of them endowed with additional capacity and having material advantages over the elements for which they have been substituted.

*Clough* v. *Gilbert & B. Mfg. Co.* 106 U. S. 166, 27 L. ed. 134, 1 Sup. Ct. Rep. 188; *Clough* v. *Gilbert & B. Mfg.* Co. 106 U. S. 178, 27 L. ed. 138, 1 Sup. Ct. Rep. 198; *Wilcox & G. Sewing-Mach. Co.* v. *Merrow Mach. Co.* 35 C. C. A. 269, 60 U. S. App. 451, 93 Fed. 206.

In substantially all the cases the defendant's machine, though found to infringe, was made under patents owned or controlled by the defendant; and in many of these cases the court recognized defendant's patent as adding materially to the value of the machine. These subordinate patents, in many cases, embrace the combinations held to infringe, and greatly improve them.

*Hobbs* v. *Beach*, 180 U. S. 383, 398, 45 L. ed. 586, 594, 21 Sup. Ct. Rep. 409; *Du Bois* v. *Kirk*, 158 U. S. 58, 63, 39 L. ed. 895, 898, 15 Sup. Ct. Rep. 729; *Consolidated Safety Valve Co.* v. *Crosby Steam Gauge & Valve Co.* 113 U. S. 157, 167, 28 L. ed. 939, 942, 5 Sup. Ct. Rep. 513; *Morley Sewing Mach. Co.* v. *Lancaster*, 129 U. S. 263, 265, 32 L. ed. 715, 716, 9 Sup. Ct. Rep. 299; *Royer* v. *Schultz Belting Co.* 135 U. S. 319, 34 L. ed. 214, 10 Sup. Ct. Rep. 833, 28 Fed. 851; *Blake* v. *Robertson*, 94 U. S. 728, 733, 24 L. ed. 247; *Cochrane* v. *Deener*, 94 U. S. 780, 782, 24 L. ed. 139, 140; *Hoyt* v. *Horne*, 145 U. S. 302, 309, 36 L. ed. 713, 12 Sup. Ct. Rep. 716; *Union Paper-Bag Mach. Co.* v. *Murphy*, 97 U. S. 120, 24 L. ed. 935; *Clough* v. *Gilbert & B. Mfg. Co.* 106 U. S. 166, 27 L. ed. 134, 1 Sup. Ct. Rep. 188; *Keystone Mfg. Co.* v. *Adams*, 151 U. S. 139, 145, 38 L. ed. 103, 104, 14 Sup. Ct. Rep. 295; *McCormick Harvesting Mach. Co.* v. *C. Aultman & Co.* 16 C. C. A. 259, 37 U. S. App. 292, 69 Fed. 371; *Crown Cork & Seal Co.* v. *Aluminum Stopper Co.* 48 C. C. A. 72, 108 Fed. 845.

Where defendant has offered expert evidence concerning alleged anticipations, patents not referred to in such expert evidence are not entitled to consideration.

*Miller* v. *Smith*, 5 Fed. 359, 363 (Clifford, C. J.); *Waterman* v. *Shipman*, 5 C. C. A. 371, 14 U. S. App. 312, 55 Fed. 982, 987.

Nor can patents issued after complainants' invention be considered.

*Bates* v. *Coe*, 98 U. S. 31, 33, 34, 25 L. ed.

63, 69; *Kearney* v. *Lehigh Valley R. Co.* 32 Fed. 320.

Defendants' machine contains all the elements expressed in the claims in suit, and the fact that such claims were allowed after canvassing the subject, as was done pending the application, indicates perhaps more clearly the ultimate conviction of the office that the patentee was entitled to all they embrace than if the application had been allowed in the exact terms in which it was originally submitted.

*Reece Button-Hole Mach. Co.* v. *Globe Button-Hole Mach. Co.* 10 C. C. A. 194, 21 U. S. App. 244, 61 Fed. 958; *McCormick Harvesting Mach. Co.* v. *C. Aultman, M. & Co.* 169 U. S. 606, 42 L. ed. 875, 18 Sup. Ct. Rep. 443.

In most of the cases where the courts have sustained patents after considering the question of novelty or patentability, the approaches in the prior art have been very much closer than those to be found in the present case.

*Clough* v. *Gilbert & B. Mfg. Co.* 106 U. S. 166, 27 L. ed. 134, 1 Sup. Ct. Rep. 188; *Consolidated Safety Valve Co.* v. *Crosby Steam Gauge & Valve Co.* 113 U. S. 157, 28 L. ed. 939, 5 Sup. Ct. Rep. 513; *Re Barbed Wire Patent*, 143 U. S. 275, *sub nom. Washburn & M. Mfg. Co.* v. *Beats 'Em All Barbed Wire Co.* 36 L. ed. 154, 12 Sup. Ct. Rep. 443; *Goodyear* v. *Day*, 2 Wall. Jr. 283, Fed. Cas. No. 5,569; *Western Electric Co.* v. *La Rue*, 139 U. S. 601. 35 L. ed. 294, 11 Sup. Ct. Rep. 670; *Topliff* v. *Topliff*, 145 U. S. 156, 36 L. ed. 658, 12 Sup. Ct. Rep. 825; *C. & A. Potts Co.* v. *Creager*, 155 U. S. 597, 39 L. ed. 275, 15 Sup. Ct. Rep. 194; *Krementz* v. *S. Cottle Co.* 148 U. S. 556, 37 L. ed. 558, 13 Sup. Ct. Rep. 719; *Wooster* v. *Blake*, 8 Fed. 429; *Atlantic Giant Powder Co.* v. *Parker*, 16 Blatchf. 281, Fed. Cas. No. 625; *Seymour* v. *Osborne*, 11 Wall. 516, 20 L. ed. 33; *Imhaeuser* v. *Buerk*, 101 U. S. 647, 25 L. ed. 945; *Parks* v. *Booth*, 102 U. S. 96, 26 L. ed. 54; *Du Bois* v. *Kirk*, 158 U. S. 58, 39 L. ed. 895, 15 Sup. Ct. Rep. 729; *Hobbs* v. *Beach*, 180 U. S. 383, 45 L. ed. 586, 21 Sup. Ct. Rep. 409; *Busch* v. *Jones*, 184 U. S. 598, 46 L. ed. 707, 22 Sup. Ct. Rep. 511; *Carnegie Steel Co.* v. *Cambria Iron Co.* 185 U. S. 403, 46 L. ed. 968, 22 Sup. Ct. Rep. 698.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The circuit court was of opinion that neither of complainants' patents was a pioneer invention; that they were all merely improvements on the prior art, and to be construed in that light; that complainants could not be treated on the basis that they or their assignors were the first to make a portable machine for weaving wire fencing fabric in the field, which claim had been distinctly made by complainants, rejected by the Patent Office, and the claim thereupon withdrawn. In its judgment, complainants and defendants contended as to infringement on an equal field, the presumption of the validity of complainants' patents being met by the presumption of the validity of the patent to Whitney. And, taking up complainants' patents *seriatim*, the circuit court held that the differences between their machines and defendants' machine were not *mere colorable invasions by [10] the latter, and that the identity of means and of operation essential to infringement were lacking.

The circuit court of appeals concurred with the circuit court that the case turned upon the question whether the patents sued on embodied a pioneer invention; that if complainants' invention was not of a primary character, a substantial departure from the machines of the prior art, defendants' machine was so sufficiently differentiated that the claim of infringement could not be maintained; while, on the other hand, if complainants' patents "were the first to give to the world a workable, portable machine for weaving wire fences in the field,—a machine distinctly creating a new product,—and aptly embody in their specifications and claims the mechanical arrangements that bring about such a result, the decree below is erroneous."

The opinion was preceded by an extended statement of facts. which gave the specifications of the Davisson patent of December 4, 1883, and certain of the accompanying figures, together with the second and third claims, alleged to be infringed; also "the pertinent drawings and specifications of the Kitselman patent," and the claims alleged to be infringed, which were as follows:

"1. In a wire-fabric machine, a series of sectional twisters, each of which comprises a central section for carrying a warp wire, and having rotary movement imparted thereto, and the shifting sections for carrying the weft wire, and receiving rotary motion from the central section to form the twist, substantially as and for the purpose herein described.

"2. In a wire-fabric machine, the combination of a series of sectional twisters geared together for simultaneous rotation, and each comprising a central portion movable only on its axis and side portions capable of a compound movement,—that of rotation on their axes,—and of a shifting longitudinal movement, substantially as described, for the purpose set forth."

"9. In a wire-fabric machine, the series of sectional twisters, comprising the central and side sections, the central section of each twister being geared to the twister adjacent thereto for simultaneous operation, substantially as described, for the purpose set forth.

*"10. In a wire-fabric machine, the com- [11] bination of a series of twisters geared directly together for simultaneous operation, and each comprising a central section and the side section, each side section carrying a spool or reel for the wire, substantially as described, for the purpose set forth.

"11. In a wire-fabric machine, a series of twisters connected for simultaneous operation, and each consisting of a central section and the side section, in combination with the spools carried by the side sections, the central section of each twister being

provided with a longitudinal opening for the passage therethrough of the warp wire, substantially as described."

"15. In a wire-fabric machine, the combination of a series of rotary twisters geared directly together for simultaneous operation, each twister having a central section capable of rotary movement only, and two side sections which are capable of a shifting movement independently of the central section in opposite directions simultaneously, whereby the said shifting sections of one twister are adjusted to register with the central sections of twisters on opposite sides of the same, substantially as described, for the purpose set forth."

"20. In a wire-fabric machine, a series of sectional twisters, each comprising a central section, the central sections being geared together to be simultaneously rotated on their axes, and the shifting side sections adapted to align with the central sections to be rotated therewith, substantially as described, for the purpose set forth."

The drawings and specifications of the Connor and Pope patents were not set out because unnecessary in the view taken of the case. Both these patents were issued subsequently to the Kitselman patent.

The drawings and specifications of the patent to Whitney of December 24, 1895, were then given.

The statement further set forth "the essential drawings and specifications of letters patent No. 10,743, granted John Nesmith April 4, 1854, and referred to in the opinion as most adequately representing one branch of the prior art," namely, as stated by the court, loom machines by which wire netting was made in the factory, and then [12] transferred to the field; and *also figure 2 of the drawings of the Middaugh and Wilcox patent of December 23, 1884, that patent being regarded as "the best example of the second branch of the prior art," field machines which constructed the fence *in situ*.

The statement is given in full, with eleven pages of drawings, in the report of the case, 47 C. C. A. 538, 108 Fed. 632.

The Kitselman and Pope patents described portable machines. The Davisson and Connor patents described stationary machines. The Kitselman and Pope patents were intended to be operated by hand. And the Davisson and Connor patents were intended to be operated by power. But the essentials of the mechanism were not dependent upon the circumstance of their being embodied in either a stationary or a portable machine, or in a power or a hand machine. Complainants' leading expert testified that "the essentials of the invention described in the several claims here in suit are not dependent on their use in a stationary or portable machine, or in a power or hand machine, or upon their capacity to weave a fabric in which slats may or may not be used, or upon their capacity to weave a fabric of any special size of mesh."

In the specification of the Kitselman patent the inventor said: "The primary object I have in view in my invention is to provide a simple and easily operated machine of the class named which can be adapted for use in the open field or other place for the construction of fences, as well as a stationary or fixed machine for the manufacture of wire fabric." And also: "I may either construct a portable machine as shown in the accompanying drawings, to work in the open field or other place, or dispose the parts in a horizontal instead of a vertical position, and mount the same on suitable bearings and legs to provide a stationary machine for indoor use."

The Middaugh and Wilcox patent of December 23, 1884, was a patent for a "portable fence machine," described in the claims as "a portable machine for constructing wire-and-picket fences," and "a portable fencing machine." Longitudinal pairs of wires were intertwisted with vertical slats inserted between the twists, the wires passing through tubes or spindles in the frame of the machine, which moved along the wires as the fence was formed.

*In the Kitselman specifications and draw- [13] ings, plans of picket and slat fencing and of the common form of wood fence held together by wires, as made by that machine, were shown. The Middaugh and Wilcox machine made wire-and-picket fence. The Kitselman machine made diamond mesh, and wire-and-picket, fence. But the diamond mesh fabric was old, as shown, not only in the Davisson patent, but in many others antedating those in suit, as, for instance, that of Nesmith of April 4, 1854.

The diamond mesh fabric had been woven while the machine was in a standing position. The Middaugh and Wilcox patent made wire-and-picket fence in the field. Kitselman converted the stationary into a portable machine by setting it on end and mounting it on a truck; and he converted the portable machine, as he himself says, by disposing the parts "in a horizontal instead of a vertical position," and mounting "the same on suitable bearings to provide a stationary machine for indoor use." The mechanism and operation were the same. Whatever its merits, it was not in itself primary invention to mount a machine for making diamond mesh fencing on a truck, and use it in the field, as the old machine had been used to make wire-and-picket fences. The getting up and walking was not new, though the machine may have gone at a better gait and made a better fence.

When Kitselman made his original application, his nineteenth claim read: "In a wire-fabric machine, the combination of a track, a carrying frame geared to the track and having the twisting devices and the reels, and pawl and ratchet mechanism for feeding the frame and its devices, substantially as described, for the purpose set forth." This claim was rejected by the Patent Office on reference to the Fultz patent of May 13, 1884, and the Watson patent of July 21, 1885.

Fultz's was a patent for "an upright machine for making or weaving fence composed of wire and pickets, and may be used, movably, along the line where the fence is to be made, or stationary."

Watson's was a patent for a wire-fence machine, the invention relating "to that class of fence machines in which the pickets and wires are bound together and the fence put up in one operation."

[14] *Kitselman acquiesced in the rejection and withdrew his nineteenth original claim, and cannot now reasonably claim a construction which would protect his machine as a pioneer field machine.

The first, second, eleventh, and fifteenth claims of the Kitselman patent were held by the circuit court of appeals to be infringed. We repeat these claims as follows:

"1. In a wire-fabric machine, a series of sectional twisters, each of which comprises a central section for carrying a warp wire, and having rotary movement imparted thereto, and the shifting sections for carrying the weft wire, and receiving rotary motion from the central section to form the twist, substantially as and for the purpose herein described.

"2. In a wire-fabric machine, the combination of a series of sectional twisters geared together for simultaneous rotation, and each comprising a central portion movable only on its axis and side portions capable of a compound movement,—that of rotation on their axes,—and of a shifting longitudinal movement, substantially as described, for the purpose set forth."

"11. In a wire-fabric machine, a series of twisters connected for simultaneous operation and each consisting of a central section and the side section, in combination with the spools carried by the side sections, the central section of each twister being provided with a longitudinal opening for the passage therethrough of the warp wire, substantially as described."

"15. In a wire-fabric machine, the combination of a series of rotary twisters geared directly together for simultaneous operation, each twister having a central section capable of rotary movement only, and two side sections which are capable of a shifting movement independently of the central section in opposite directions simultaneously, whereby the said shifting sections of one twister are adjusted to register with the central sections of twisters on opposite sides of the same, substantially as described, for the purpose set forth."

It is obvious, as said by complainants' expert, "that the terms 'sectional twisters,' 'twisters,' and 'rotary twisters,' used in the several claims under consideration, refer to the same three-part twister devices."

[15] *In Kitselman's original application, the first claim called for "a series of sectional twisters geared directly together;" the second, for "a series of sectional twisters capable of sliding movement with relation to each other and geared for simultaneous rotation;" the third, for "the series of sectional twisters comprising the central hub section and the two side sections disposed on opposite sides of the central section, the hub section being stationary, while the side sections are capable of shifting movement;" the fourth, for "the series of sectional twisters, each of which comprises a longitudinally immovable section and two sections which have longitudinal movement;" the fifth, for "the series of sectional twisters, each of which comprises the central portion carrying the warp-wires and the shifting side sections which carry the weft-wires."

The first and second claims were rejected, and thereupon erased, and others substituted, which were likewise rejected (the Nesmith patent of 1854 being cited), were withdrawn, and the numbers of original claims 3, 4, and 5 were changed to 1, 2, and 3. The latter were then rejected on reference to the Smith British printed publication of 1876, withdrawn, and claim 1 as it now stands submitted. That publication, which was a provisional specification, described a two-part twister, and added: "Or I divide the twisting wheels into three parts, my extra wire passing through the central division, and the two side segments travel to and fro to form the twist, leaving the central division in position with my supplementary wire therein maintained."

The two substituted claims above mentioned as rejected on reference to Nesmith, and withdrawn, read as follows:

"1. In a wire-fabric machine, a series of rotary twisters geared directly together for simultaneous rotation, and each having two sections which are capable of a sliding movement, substantially as described, for the purpose set forth.

"2. In a wire-fabric machine, the combination of a series of rotary twisters geared directly together, substantially as described, for the purpose set forth."

The Nesmith patent described a machine comprising two separate but simultaneously operating parts, termed in the *patent the [16] "feeder" and the "twister." It was a loom machine, so called, and adapted to produce the wire netting and wrap it about suitable rolls. The feeder was a complete device for supporting the warp wires, and supporting, rotating, and shifting the woof wires, provided with a take-up roll mounted on the front end of the "twister." It comprised a rectangular frame, together with operating mechanism supported thereon. At the front and rear were five gears in successive engagement, and means were provided for simultaneously rotating both series.

The specification stated that the border wires of the netting were placed on reels supported on the frame of the machine, and these passed through holes drilled in the center of the outside gears; and also showed that the gears, other than the outermost ones, were perforated for the passage of wires in case it was desired to make a narrower fabric. Each of the outside gears was formed with two opposite radial slots, extending inward from the margin sufficient to form recesses which received the ends of spool-carrying frames, each carrying a woof-wire spool, the front end of each frame being seated in the marginal slot of one of the gears, and the rear end in the corresponding slot of the corresponding gear. When all the gears on their spindles or hubs were so adjusted as to bring the slots into the same horizontal line any

spool carrier might be transferred from its supporting gears to the gears next adjacent to those which supported its front and rear ends. When the spool carriers of the machine were arranged in pairs on the alternate gears the rotation of all the gears rotated each pair of spool carriers about a common axis, and when the two spool carriers on one pair of gears were shifted in opposite directions to the two pairs of gears on the opposite sides of the pair previously forming the support of the spool carriers a remating of the spool carriers was effected, and the next rotation of the gears rotated each newly formed pair of spool carriers about a common axis coincident with the axis of the supporting gears. As a means of transferring the spool carriers, the machine was provided with "shippers," together with means for sliding them vertically, one of the "shippers" being [17] adapted to transfer *the spool carriers in one direction and the other being adapted to transfer them in an opposite direction or back to their position. Each of the shippers consisted in a series of wedges supported in a suitable frame and having inclined faces adapted to impinge upon the side faces of the end portion of the spool-carrying frames, the corresponding faces of the wedges being oppositely inclined in order to impart to them the reverse movement.

There were in effect five rotating centers, each gear in the front series with the corresponding gear in the rear series acting as a single rotating part or center. The number of spool carriers was one less than the number of centers in use, the number of rotating centers being five and the number of spool carriers being four. In the rotation of the centers the two outermost centers would each support a single spool carrier, and the central rotating center would support two spool carriers. The rotation of the gears when the spools had the first arrangement would wrap the outer woof wires about the marginal warp wires and intertwist the other two warp wires at the center of the machine; and the rotation of the gears after the spool carriers had been shifted to the second and fourth rotating centers intertwisted the first and second wires in front of the second center and the third and fourth wires in front of the fourth center. The repetition of this operation formed the fabric.

The circuit court of appeals pointed out that in the Davisson patent the supplemental mechanism of Nesmith was dispensed with, and that the diamond mesh was made by a shifting of the reels instead of the wires.

In respect of the differences between Davisson and Kitselman, the court stated:

"The spindles of the Davisson machine were arranged vertically, had, with reference to the Davisson machine, a longitudinal movement, and were alternately forced forward and withdrawn from the plane of operation by means of a shifting device that was necessarily bulky and impracticable for field use. The Kitselman spindles were horizontally placed; had no *longitudinal or [18] lateral movement; and were confined permanently to the plane of their rotation. In the Davisson machine, as in the Kitselman, the spindle, with its reels, acts as the twisting agent, the spindle forming the rotator; but in the Davisson machine the spindle, where the warp wire emerges from its hollow center, stands well back from the reels, thus allowing the warp wire to go unsupported to the plane of operation; while in the Kitselman machine the spindle extends clear forward to the twisting zone, to which it carries, through its hollow center, the warp wire fully supported against side pulls. In the Davisson machine the spool carriers are transferred to their adjacent spindles by means of an apparatus previously described as involving a longitudinal and transverse motion. Kitselman effects the transfer of his spool carriers by shifting the one to the spindle above the spindle with which it has just operated, and the other to the spindle below; this shifting being brought about by a longitudinal motion only, thus eliminating the necessity of a transverse motion.

"In the Davisson invention a simple gear is set behind each spindle, but none of these gears engage each other, so that, when the spool carriers are shifted to adjacent spindles and cross-heads at each successive twist, they are revolved about a practically new center. Kitselman provided each twister at its central section with a spur gear of sufficient diameter to engage the gears of the adjacent twisters, and by this means imparted a simultaneous motion to the whole series of twisters. The gear arrangement of the Davisson machine tends to twist the opposing carriers out of alignment, subjects the central wire to certain deflection, and pulls the woof wires somewhat from their intended direction. In the Kitselman machine the pull, incident to the twisting operation, is constantly equalized, the central portions of the twisters offsetting each other in the plane in which the strain comes.

"These distinctions are, to a certain extent, subsidiary, but nevertheless important."

In view of what passed in the Patent Office, and the state of the art, we cannot regard the Kitselman patent as a pioneer *patent, but think its claims must be limit- [19] ed in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements of different construction and arrangement.

Passing, then, to the question of infringement, we avail ourselves of the description of the Kitselman patent by defendants' expert as sufficiently comprehensive to enable us to indicate our views on that question. He says:

"The Kitselman machine has a frame made up of three vertical rigidly connected members forming respectively the front and rear walls of the frame and an intermediate

wall somewhat nearer to the rear member than to the front. The front and intermediate members of the frame may each be made of two parallel bars, or may be each a single bar having a vertical slotted center; and the rear member may be either open or solid, as may be desired. . . . A series of rotatable horizontal hollow spindles are mounted in suitable bearings in the rear and intermediate members of the frame, and are provided with gears in successive engagement with each other, each gear being rigidly fastened on its spindle, so that the rotation of the gear must rotate the spindle. One of the gears of the series is provided with a bevel gear rigidly fastened to it, and this gear is in engagement with a beveled pinion mounted on a crank shaft, the crank shaft in turn being provided with a suitable crank and handle for its rotation and for the consequent rotation of all the gears of the series.

"Each of the rotatable spindles is formed with a flat forward extension in the form of a skeleton frame made up of two transverse members and two longitudinal members, the whole being formed in a single piece and being of such length that the transverse members of each flat extension lie respectively, one just in rear of the front member of the frame, and the other just in front of the intermediate member of the frame. These forward extensions, which are supported by and rotate with the shafts, have their respective axes coincident with the axes of the hollow shafts; and the two transverse members of each of the forward extensions are centrally bored, in line with the bore of the corresponding shaft, so that [20] warp wires may pass in *horizontal lines through the rotatable shafts and their forward extensions. The machine is provided with a series of spool carriers, each of which may carry a woof-wire spool; and each of these spool carriers is a single-piece casting of the same length as the forward extension on each of the shafts. Each such casting consists of a flat longitudinal member adapted to lie side by side with the flat longitudinal bars of any one of the forward extensions of the rotatable spindles, and two segmental heads or ends each adapted to lie with its flat side against the corresponding transverse member of any one of the forward extensions of the rotating spindle. The segmental heads of the spool-carrier castings are of such dimensions that when two of the castings are placed on opposite sides of any one of the forward extensions of the rotatable spindles, the two segments and the intermediate transverse member of the spindle extension between them form a complete circle at either end of the compound three-part structure made up of the spindle extension and the two spool-carrier castings. Each of the spool-carrier castings is adapted to receive and support a woof wire; and it is evident that if two of the castings, with their spools, be held at any time in fixed connection with one of the spindle extensions between them, the rotation of the spindle and its extension must rotate the spool-carrier castings and their spools. The segments at the ends of each spool-carrier casting are similar; but only one of them is perforated for the passage of the woof wire from the spool; and this segment is, in use, made the front end of the spool carrier. It is clear that the rotation of any given spindle and its extension, with two spool carriers lying on opposite sides of the extension and in connection therewith, must intertwist the woof wires from the two spools, at a point in front of the front end of the spindle extension; and it is further evident that if the machine is to make the diamond-mesh fabric, means must be provided for shifting the spool carriers to and fro between the adjacent spindle extensions or rotating centers which effect the rotation of the spool carriers.

"For the purpose of holding the spool-carrier frames temporarily in registration or engagement with the rotating spindle *ex- [21] tensions, and for the further purpose of shifting the spool carriers, in order to remate the woof wires, the machine is provided with two vertically reciprocating guides or shifters, one on either side of the vertical plane of the axes of the spindles and their extensions. Each of these guides is made up of two rigidly connected vertical bars, one just in rear of the front member of the frame, and the other just in front of the intermediate member of the frame, each of the bars being provided with a series of castings, extending inward toward the central plane of the machine, and each terminating at its inner end in a re-entrant segmental curve adapted to conform to the segmental margin of any one of the heads of the carrier frames or castings. These castings lie in the planes of the segmental heads of the carrier frame; and when the two guides or shifters on opposite sides of the machine are so adjusted that their castings are directly opposite each other, the curved edges of any two opposite castings are arcs of a common circle, and will practically inclose and hold in working relation, as a complete circle, the two segmental carrier frame heads lying between them, together with their interposed transverse member of the spindle extension. The consequence is that the carrier frames may be arranged in pairs on the alternate spindle extensions of the machine, and held in place by the curved edges of the castings on the guides or shifters, the two curved edges of any opposite pair of such castings forming a circular guide adapted to hold the three parts of the corresponding circle of the twister in proper relation to each other while they are rotated; and when the parts are thus arranged, the rotation of the spindle must evidently effect the rotation of the three-part twisters with their spools, and thereby intertwist the wires from the two spools carried by each spindle extension. Furthermore, the guides on the two opposite sides of the machine are connected by a walking-beam at the upper end of the frame, so that as one of them moves upward, the other must move downward to an equal extent; and a lever is provided for effecting this opposite reciprocation of the two guides

or shifters. Before each such movement of the guides or shifters, the twisters are all rotated into such positions [22]that their flat central members *(the forward extensions of the spindles) are in the central vertical plane of the machine, the plane faces of the spool-carrier castings being likewise, of course, in vertical planes. When the parts are in this relation, the opposite vertical movement of the two guides or shifters must evidently carry the spool carriers at one side of the center of the machine downward, and those at the opposite side upward; and the shifters are given sufficient movement to transfer each spool carrier from one spindle to the one next above or below it. It will be understood that in the use of this machine, as in that of any of the others under consideration, only the alternate spindles are provided with spools during any given rotation of the parts, the intermediate spindles being empty. By means of the operation of the guides or shifters just described, the spool carriers, in the intervals between the periods of rotation, are transferred each time from the full spindles to the empty ones, and this transfer, as in all other machines, remates the wires and effects the formation of the diamond mesh."

Defendants' machine as described in the Whitney patent of December 24, 1895, consisted of a vertical upright bar or support; a series of horizontal tubes set rigidly therein; a series of intermeshing gears mounted and rotating on the tubes, and provided with two projecting studs at the opposite sides of their centers; a set of plates loosely journaled on the tubes, and connected to and rotating with the intermeshing gears, and provided with two projecting spring pins at opposite sides of their centers, a small distance from the forward projecting studs on the gears; a set of spool carriers, each mounted on a plate having inclined notches at the diagonal corners on one side, and inclined grooves at the opposite diagonal corners on the other side, so that when one side of the plate is inserted between a gear and its plate one of the studs may pass along a groove on one side, and a spring pin or stud pass into and catch against the notch on the opposite side, and thus retain and support the spool carrier, as long as the parts are rotated in the same direction; spools for the woof wires mounted in the spool carriers, and means for imparting rotation to the intermeshing gears. To transfer the spool car- [23]riers the parts are rotated until the *carriers are between the stationary spindles, when the direction of rotation is reversed. This causes a pin and stud on the adjacent gear to enter the empty or unoccupied groove in the carrier plate, and to lift it out of connection with the gear plate with which it had been rotating, and to carry it around in its new relation as long as rotation is continued in that direction. To shift it again to bring it into relation with another gear and plate, the direction of rotation is again reversed.

Considering the complainants and Whitney as alike having improved on the prior art, the question is whether the specific improvements of the one actionably invaded the domain of the other. The presumption from the grant of the letters patent is that there was a substantial difference between the inventions.

The circuit court found these differences between the two machines: That in the Kitselman machine the spool carriers were shifted from one section to another by sliding them in a straight path; that all the spool carriers at one side of the spindles were attached together and moved from one section to another by means of a common bar; that the spindles were fastened to the pinions and rotated with them; that the spool carriers were shifted from one section to another by a hand lever provided for that purpose; that the spool carriers were required to be supported at both ends; that the spool carriers could readily be taken out, turned end for end, and reinstated in place again; that the hollow spindle could not be made stationary without destroying the capacity to operate; that the segmental ends of the side sections of the twisters made, with the lateral end pieces of the central sections, wheels at both ends of the twisters, resting in supports, permitting their rotation; and that the spool carriers could not be transferred except when the parts had been brought to a position of rest and the pinions were stationary.

That, on the other hand, in defendants' machine, the spool carriers rotated through a curvilinear path; that the spool carriers were each separate from, and moved independently of, the others; that the spindles were fastened to the frame and had the pinions loosely mounted on them, and not rotating with the spindles; that the spool carriers were shifted without any *lever by re- [24]versing the direction of the rotation of the crank; that they were only required to be supported at one end, and could not be taken out, turned end for end, and reinserted; that the spool carriers could be made rotative instead of stationary; that the ends of the central spindles and the spool carriers formed no wheels, and were received in no bearings; and that the spool carriers could only be transferred when they were rotated. Finally, that the spool carriers in the two machines were so different and mounted and operated in such different ways that they could not be interchanged or transferred from one to the other without reorganization.

We perceive no reason to decline acceptance of these findings of the circuit court, and agree with that court in the conclusion that the machines lack that identity of means and identity of operation which must be combined with identity of result to constitute infringement.

As we have before stated, the circuit court of appeals concurred with the circuit court that, unless the patents sued on embodied a pioneer invention, the defendants' machine was so differentiated from either of the others that the charge of infringement could not be maintained. The circuit

court held all complainants' patents to be only improvements on the prior art, and dismissed the bill on the ground of non-infringement.

The circuit court of appeals held that the Kitselman patent was entitled to be treated as embodying primary invention, and to such liberal construction as brought defendants' machine within it. The decree of the circuit court was therefore reversed because, in the opinion of the circuit court of appeals, certain claims of the Kitselman patent were infringed.

For the reasons given in treating of the Kitselman patent we think that none of complainants' patents embodied primary invention, and we concur with both the courts below that, this being so, the differences in means and operation between defendants' machine and the others were such that there was no infringement.

It does not seem necessary for us to enumerate these differences in respect of the other three patents. This was well done in the circuit court, and the circuit court of [25] appeals accepted *the view of that court as to the absence of infringement if primary invention did not exist. We are content with that conclusion.

*Decree of the Circuit Court of Appeals reversed;* decree of the Circuit Court affirmed, and mandate to that court accordingly.

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JAMES HENNESSY, Maurice Hennessy, Armand Castellon, and Emanuel Castaigne, *Appts.*,

*v.*

RICHARDSON DRUG COMPANY.

(See S. C. Reporter's ed. 25-35.)

*Jurisdiction of circuit court—diverse citizenship—citizens of foreign states—sufficiency of allegation.*

Complainants' description of themselves, in a bill in a suit against a citizen of Nebraska, as "all of Cognac in France, and citizens of the Republic of France," is sufficient, without any averment of alienage, to bring the suit within the provisions of 25 Stat. at L. 433, chap. 866, conferring original jurisdiction upon circuit courts of the United States of all suits in which there is "a controversy between citizens of a state and foreign states, citizens, or subjects."

[No. 203.]

*Argued and submitted March 12, 1903. Decided March 23, 1903.*

APPEAL from the Circuit Court of the United States for the District of Nebraska to review a decree which dismissed for want of jurisdiction a suit by citizens of the Republic of France against a citizen of the state of Nebraska to restrain the infringement of a trademark. *Reversed* and remanded for rehearing on the merits.

The facts are stated in the opinion.

*Mr.* **Adolph L. Pincoffs** argued the cause, and, with *Messrs. James L. Hopkins* and *Richard S. Horton*, filed a brief for appellants:

All persons born in the allegiance of the King are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens.

*United States* v. *Wong Kim Ark*, 169 U. S. 649, 662, 664, 42 L. ed. 890, 895, 896, 18 Sup. Ct. Rep. 456; *United States* v. *Rhodes*, 1 Abb. U. S. 28, Fed. Cas. No. 16,151.

The term "citizen," in our law, is precisely analogous to the term "subject," in the common law; and the change of phraseology has entirely resulted from the change of government. The sovereignty has been transposed from one man to the collective body of the people, and a subject of the King is now a citizen of the state.

*United States* v. *Wong Kim Ark*, 169 U. S. 649, 662, 664, 42 L. ed. 890, 895, 896, 18 Sup. Ct. Rep. 456; *State* v. *Manuel*, 20 N. C. 144 (4 Dev. & B. L. 20).

The word "or" may be changed to "and," in interpreting a statute, only where the word used would lead to absurd results and would be clearly contrary to the intention of the Leglislature.

Endlich Interpretation of Statutes, § 305.

*Mr.* **Charles F. Tuttle** submitted the cause for appellee:

The jurisdictional facts as to the alienage of complainants and their alleged partnership are not properly pleaded.

*Stuart* v. *Easton*, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a bill alleging that complainants were "all of Cognac *in France, and [33] citizens of the Republic of France," and that defendant was a citizen of Nebraska, and a resident of the judicial district thereof; that complainants owned and employed a certain trademark for Hennessy brandy (which they produced, bottled, and sold), of a value exceeding $2,000, which trademark had been properly registered in the Patent Office under the act of Congress of March 3, 1881 [21 Stat. at L. 502, chap. 138, U. S. Comp. Stat. 1901, p. 3401]; and that defendant was selling an imitation "Hennessy brandy," using facsimiles of complainants' trade name, devices, and labels. Injunction, profits, and damages were prayed for.

The case was brought to issue, heard on pleadings and proofs, and dismissed, it being held that the court had no jurisdiction, because "complainants' citizenship or alienage is not alleged, as required;" and also that the case was with defendant on the merits.

The decree stated, among other things: "And the court finds that neither the bill, nor the bill as amended, nor the evidence, shows the citizenship of complainants, or any of them, so as to confer jurisdiction up-

NOTE.—*As to sufficiency of averments of citizenship to show jurisdiction in Federal courts*—see note to Shipp v. Williams, 10 C. C. A. 261.

on this court. And the court further finds with and for the defendants and against the complainants on the evidence, and that the bill as amended is without equity. And, for both and all the reasons hereinbefore recited," the bill was dismissed.

The court then granted a certificate in these words: "It is certified that the question of jurisdiction referred to in the opinion was passed upon, but that the case was also determined upon its merits. The question of jurisdiction set forth in the opinion filed herein, together with the question of the merits of the case, is hereby certified to the Supreme Court, all of which are shown by the decree and the opinion."

An appeal was taken directly to this court under the first of the classes of cases enumerated in § 5 of the judiciary act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), and we are shut up to the consideration of the question of jurisdiction alone. We do not understand that the amount in controversy was treated below as having any bearing in respect of that question. The act of March 3, 1881, provides for jurisdiction "without regard to the amount in controversy," and [34] the averment here was that the *value of the trademark exceeded $2,000. The point, however, was not relied on, and we confine ourselves to the question of jurisdiction as dependent on citizenship.

By the Constitution the judicial power of the United States extends to controversies between citizens of a state "and foreign states, citizens, or subjects." And by statute, circuit courts of the United States have original cognizance of all suits of a civil nature, at common law or in equity, in which there is "a controversy between citizens of a state and foreign states, citizens, or subjects." 25 Stat. at L. 433, chap. 866.

In *Stuart* v. *Easton*, 156 U. S. 46, 39 L. ed. 341, 15 Sup. Ct. Rep. 268, it was held that by the description of plaintiff as "a citizen of London, England," the fact that he was a subject of the British Crown was not made affirmatively to appear as required; but, in the case at bar, complainants described themselves as "all of Cognac in France, and citizens of the Republic of France," and this was sufficient.

No averment of alienage was necessary. It is true that by § 6 of the judiciary act of March 3, 1891, the judgments and decrees of the circuit courts of appeals were made final in cases, among others, in which the jurisdiction was dependent entirely on the opposite parties to the suit or controversy being citizens of different states, or "aliens and citizens of the United States." But the word "aliens" as there used embraces subjects or citizens of foreign countries, and not merely persons resident in this country, who owe allegiance to another. And the language of the Constitution and of the act determining the jurisdiction of the circuit courts is explicit.

In *Chisholm* v. *Georgia*, 2 Dall. 419, 456, 1 L. ed. 440, 456, Mr. Justice Wilson said that under the Constitution of the United States "there are citizens, but no subjects. 'Citizen of the United States.' 'Citizens of another state.' 'Citizens of different states.' 'A state or citizen thereof.' The term 'subject' occurs, indeed, once in the instrument; but to mark the contrast strongly, the epithet 'foreign' is prefixed."

The supreme court of North Carolina, in *State* v. *Manuel*, 20 N. C. (4 Dev. & B. L.) 20, 26 (quoted in *United States* v. *Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456), said: "The term 'citizen,' as understood in our law, is precisely analogous to the term 'subject' in the common *law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people; and he who before was a 'subject of the King' is now 'a citizen of the state.'" [35]

In that view, the people of France are properly described as citizens of that Republic.

As complainants were citizens of a foreign state, and defendant was a citizen of Nebraska, as affirmatively appeared from the pleadings, no issue of fact arising in that regard, the circuit court had jurisdiction.

*Decree reversed*, and cause remanded for rehearing on the merits.

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JAMES HENNESSY *et al.*, *Appts.*,
*v.*
WALTER MOISE *et al.* (No. 204)

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JAMES HENNESSY *et al.*, *Appts.*,
*v.*
CARRIE MAY *et al.* (No. 205)

(See S. C. Reporter's ed. 35.)

Mr. Chief Justice **Fuller**:

These cases must take the same course as that just decided, and *the same decrees will be entered.*

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P. H. KIRWAN, as United States Surveyor General for the District of Minnesota, and Thomas H. Croswell, *Appts.*,
*v.*
SIMON J. MURPHY, George O. Robinson, Elisha A. Flinn, and Temple E. Dorr.

(See S. C. Reporter's ed. 35-56.)

*Equitable jurisdiction—irreparable injury—multiplicity of suits—interference with executive administration.*

NOTE.—*On the scope of equitable jurisdiction*—see notes to Fuller v. Detroit F. & M. Ins. Co. (C. C. N. D. Ill.) 1 L. R. A. 801; and Corinth v. Locke (Vt.) 11 L. R. A. 207.

*On the jurisdiction of equity where remedy at law exists*—see notes to Meldrum v. Meldrum (Colo.) 11 L. R. A. 65; Delaware, L. & W. R. Co. v. Central Stockyards & T. Co. (N. J. Eq.) 6 L. R. A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

1. The prevention of irreparable injury and of a multiplicity of suits cannot be invoked as grounds for equitable relief against a threatened survey, under direction of the Land Department, of lands to which complainants assert title, but which the Department claims to be unsurveyed public lands of the United States, where such survey can be made without material injury to the soil or timber, and the persons directly interested in such survey are not made parties, are not numerous, and assert separate and independent rights.
2. The courts cannot interfere with the executive administration of the Land Department by enjoining, at the instance of persons claiming to be the owners of the land, a survey, under the direction of such Department, of certain lands lying between an alleged meander line and the actual waters of a lake, which are claimed by the Department to be unsurveyed public lands of the United States.

[No. 161.]

*Argued January 30, February 2, 1903. Decided April 6, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Minnesota perpetually enjoining a survey, under the direction of the Land Department, of certain lands claimed by it to be unsurveyed public lands of the United States. *Reversed* and remanded to the Circuit Court, with directions to dismiss the bill.

See same case below, 48 C. C. A. 399, 109 Fed. 354.

Statement by Mr. Chief Justice **Fuller:**

Murphy and others filed their bill of complaint in the United States circuit court for the district of Minnesota against Kirwan, as United States surveyor general for that district, and Thomas H. Croswell, as deputy surveyor, to enjoin them from surveying, by direction of the Commissioner of the General Land Office, certain lands claimed by the Land Department to be unsurveyed public lands of the United States.

Complainants alleged that they owned lots 1, 2, and 3 of section 2; lots 1 and 2 of section 3; lots 1 and 8 and parts of lots 6 and 7 of section 4; and certain described parts of sections 9, 10, and 11, in township 57 north, range 17 west, 4th principal meridian, Minnesota, deriving title thereto through mesne conveyances and patents from the government; that the land was surveyed by Henry S. Howe in June, 1876, and records of the survey and field notes were approved by the surveyor general August 7, 1876, and a plat therefrom was by him duly made and submitted to the Commissioner of the General Land Office; that complaint was filed against the accuracy and good faith of the survey, which the Commissioner dismissed, and June 11, 1879, approved the survey and plat, which were duly filed and are the only survey and plat of the township ever made or adopted by the government, and according to them the government sold and disposed of all the land in the township; that the survey, field notes, and plat were incorrect, and did not accurately show the location and subdivisions of the land and water of the township, for that Cedar Island lake is smaller than delineated, and several of the complainants' fractional lots are larger, and others are smaller, than shown on the plat; that complainants purchased said lands for value as extending to the lake upon an estimate of the timber thereon, without knowledge *of [37] the inaccuracy or fraud of the survey; that the principal consideration inducing such purchase was that the land bordered on the lake and they owned other timber lands, the timber from which could be brought to market by floating through the lake and its outlet down the St. Louis river, then the only means of transport; that in 1892 five certain settlers, knowing complainants' rights and claims, petitioned for a survey of said lands, which the surveyor general recommended to the Commissioner of the General Land Office should be allowed, but the petition was disallowed, whereupon, on appeal to the Secretary of the Interior, such proceedings were thereafter had that in October, 1895, the Commissioner of the General Land Office directed the United States surveyor general of the district of Minnesota to make a resurvey, which order was ratified and confirmed in November, 1896; that the contract for the resurvey of said land had been let by the surveyor general to Croswell, and the survey was about to commence.

The bill averred that "by a new survey of said lands your orators will be put to great and vexatious litigation in making proof of their title in actions against parties who are wholly irresponsible; that a very large amount of the timber standing as aforesaid on the land of your orators and owned by them will be destroyed in the making of such proposed survey, and the remainder thereof exposed to damage by fire by reason of said resurvey, and your orators will be thereby irreparably injured."

The prayer was that the "surveyor general, his agents, attorneys, solicitors, and servants may be restrained by the order and injunction of this honorable court from entering into any contract for the survey of the lands herein described, or from surveying the same, or from taking any action for a survey of said lands or any part thereof, and that boundaries of said lands of your orators may be defined and set out in the decree and order of this honorable court, and that all necessary direction may be given them for that purpose and to establish the boundaries of said lands, and that your orators may be protected in the use and enjoyment of such lands so owned by them as aforesaid, extending to and including the shores of said Cedar Island *lake and to the center of said lake, and [38] that said defendant and his successors in office may be perpetually enjoined from letting said contract for the survey of said land or any part thereof, and from surveying the same or any part thereof, and that your

orators may have such other and further relief as to this court may seem meet."

Argument was had on the application for a temporary injunction, and the matter taken under advisement, whereupon defendants filed their joint answer to the bill.

Defendants admitted the making of a contract of survey of the unsurveyed lands in these sections lying between Howe's purported meander line and Cedar Island lake; that in 1876 a contract was made with Howe for the survey of the township, and that he returned the field notes of a pretended survey, from which a plat was made and approved; but defendants averred that Howe surveyed only the exterior lines of the township, and in fact made no subdivision thereof, nor surveyed the lands within it; that his field notes were false, fraudulent, and fictitious, and the plat made therefrom was false and incorrect; they admitted that the survey and plat were approved by the Commissioner of the General Land Office after complaint to him of its inaccuracy, but not until after withdrawal of the charge of inaccuracy by the person making it. They admitted that an exhibit attached to the bill was a true copy of such approved plat; they denied that all of the lands were disposed of by the government, and alleged that about 1,200 acres in these sections were never disposed of and were still unsurveyed, lying between Cedar Island lake and the lots described, all of which unsurveyed land is the land referred to, and is, by the plat made from Howe's field notes, indicated as part of Cedar Island lake; they allege that no lots conveyed to the complainants were smaller than shown on the plats; that the true relative size of the lake to that shown in the plat was that shown on an exhibit attached, and that the land beween the lake and the boundary line of the fractional lots was 1,200 acres of unsurveyed government land as referred to; defendants denied the good faith of complainants, and alleged complainants' full participation in the contest proceedings resulting in the decision and order for the [39] survey *of these lands, and that the Commissioner and the Secretary of the Interior had full jurisdiction to pass on the question, and to make the decision and order. The answer denied that the timber on complainants' land would be destroyed or damaged in making such survey, and denied every averment of the bill except as in the answer averred or denied.

The circuit court granted the preliminary injunction, and its order was affirmed by the circuit court of appeals for the eighth circuit. 28 C. C. A. 348, 49 U. S. App. 658, 83 Fed. 275. An appeal was taken to this court and dismissed. 170 U. S. 205, 42 L. ed. 1009, 18 Sup. Ct. Rep. 592.

The cause then went to final hearing, and the circuit court found the facts as follows:

"1. On or about April 26, 1876, a contract for the survey of all lands in township 57 north, of range 17 west, in St. Louis county, Minnesota, was made by the government of the United States with one Henry S. Howe, as a deputy surveyor of the United States, and thereafter said Howe made and filed what purported to be field notes of a survey of said township, from which a purported official plat of said township was thereafter made and approved by the surveyor general of the United States for the district of Minnesota and by the Commissioner of the General Land Office, of which plat Exhibit A, attached to the bill of complainants, is a substantially correct copy.

"2. There is no evidence, nor any marks upon the ground, to indicate that any actual survey of said township 57 was ever made by said Howe, as required by his said contract, and by the rules and regulations of the General Land Office, or at all, beyond the running and due marking of the exterior boundary lines of said township, where the section, quarter, and other posts and markings established by him are and always have been clear, distinct, and readily found and traced. There is no evidence on the ground that section lines were ever run by him in or across said township, or section corner posts or quarter posts ever located or set by him, except a corner post at the northwest corner of section thirty-six (36) and a quarter post in the western line of said section thirty-six (36), and there is no evidence that witness trees were ever blazed or marked by him.

*"3. Cedar Island lake is a navigable, [40] deep, and permanent body of water, fed principally by springs, having an area of about nine hundred (900) acres, instead of about eighteen hundred (1,800) acres as described in the field notes of Howe and shown on said official plat of said township. Instead of the shores of said lake being low and swampy as stated in said field notes, the banks are generally high and sloping lands, suitable for agriculture, extending around the lake, and support a good growth of pine and other forest trees large enough for lumbering, such as will not grow in water. The condition was the same in 1876, and no material part of the land surrounding the lake is accretion. Southerly and westerly of said Cedar Island lake are five other deep, navigable, and permanent lakes in the same township, none of which are shown by the field notes of Howe's survey or upon said government official plat of said township, and all of which have, since the making of said official plat, been sold and patented by the government as land according to said plat.

"4. There is no evidence upon the ground that any meander line of said Cedar Island lake was ever surveyed by said Howe, or any meander posts placed by him about said lake, except one where the north line of said township encounters said lake. And the outlet of said lake is at a different place from that described in said field notes and shown upon said official plat. After the making of the said survey and plat and before its approval, complaints touching the

accuracy thereof were made to the Commissioner of the General Land Office, but, on the withdrawal of such complaints, the said survey and plat were approved.

"5. The land lying between the actual water line of said Cedar Island lake and the meander line of that lake, as delineated on said official plat of said township, comprises the land in controversy in this suit, and is the same land directed to be surveyed by the Commissioner of the General Land Office and referred to in the surveyor's contract, which is attached as Exhibit A to the answer in this suit, being therein described as 'the public lands situate in secs. 2, 3, 4, 9, 10, and 11, in township No. 57 N., R. 17 W., of the 4th principal meridian, lying *between the old meander boundary of Cedar Island lake, as given by the original field notes of Henry S. Howe, U. S. deputy surveyor, approved by the surveyor general of Minnesota, Aug. 19, 1876, and the shore line of said Cedar Island lake.' [41]

"6. Prior to the commencement of this suit the United States has sold, and by its patents has conveyed to the purchaser, according to said official plat made from said Howe survey, all the land in said township 57, as the same appeared upon said plat; to which plat all of said patents expressly refer; it being then and still the only government plat of said township.

"7. The complainants are the grantees and owners by mesne conveyances from the patentees of the record title to the following-described fractional lots in said township, to wit: Lots one (1), two (2), and three (3), in section two (2); lots one (1) and two (2), in section three (3); lots one (1) and eight (8), and portions of lots three (3), five (5), and six (6), in section four (4); lots one (1), two (2), three (3), and four (4), in section nine (9); lots one (1), two (2), three (3), and four (4), in section ten (10); and lot three (3) in section eleven (11),—being the same lands which are more particularly described in complainants' bill; and each of which fractional lots appear and are represented on said official plat as bounded by and upon said Cedar Island lake.

"8. So far as appears, none of the patentees of said lands had any notice or knowledge of any fraud or misconduct on the part of said Howe in or about the making of said survey and field notes, and all were purchasers in good faith of said lands.

"9. Complainants purchased said fractional lots of land of the patentees or their grantees for the pine timber thereon, and the convenience of landing the same in the said Cedar Island lake, to be driven to the place of manufacture; and before such purchase, in the year 1883, caused said lands to be explored and examined by an experienced timber estimator, who, in making such examination, used, as is customary in such cases, a copy of said official plat of said township, which did not have upon it any statement of the acreage or amount of *land in any of the subdivisions; and who [42] reported to the complainants his estimate of the amount of pine timber on said lands, and the general character of said land, and the riparian character thereof as bounded upon said Cedar Island lake; but did not discover or report any fraud or error in the survey of said township, or any error or mistake in the said official plat. And the said complainants purchased, paid for, and took conveyances of said lands in good faith, and without any notice or knowledge of any such fraud, error, or mistake.

"10. The other permanent lakes in said township, not shown upon such official plat, but appearing thereon as land, and since sold and patented by the government as land according to such official plat, include areas equal to the area of said Cedar Island lake; and portions of such lakes were purchased by complainants as land with their other purchases in said township.

"11. The survey sought to be restrained in this suit was ordered by the Commissioner of the General Land Office, upon the direction of the Secretary of the Interior, in a proceeding instituted by certain settlers upon the land in controversy; of which proceedings the complainants had due notice, and in which they appeared." [103 Fed. 104.]

And the circuit court decreed:

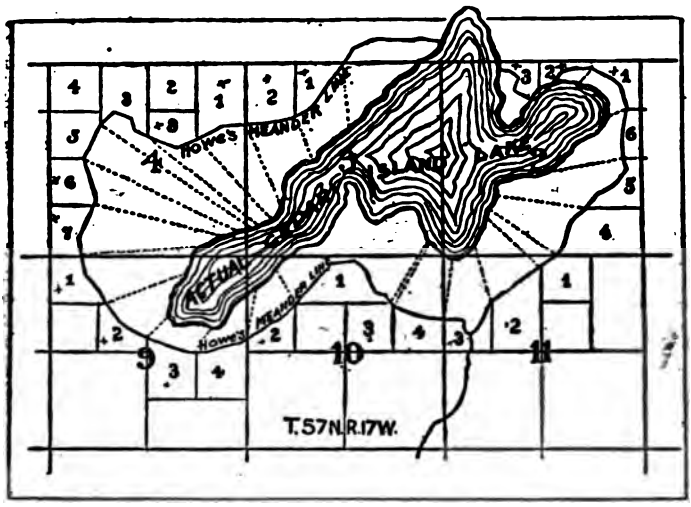
"That the complainants are the grantees and owners, by mesne conveyances from the patentees, of the title of record and, in fact, to the following-described fractional lots, situate in township fifty-seven (57) north, range seventeen (17) west, in the county of St. Louis, state of Minnesota, to wit:" [Here follows description of lots.] "being the same lands which are more particularly described in the complainants' bill of complaint herein; and that said above-described fractional lots extend to, and are bounded by and upon, the actual waters of Cedar Island lake.

"It is further ordered, adjudged, and decreed that the defendants have no jurisdiction or authority to meddle with said lands, or to make the survey complained of in the bill of complaint herein; and

"It is further ordered, adjudged, and decreed that the injunction *heretofore issued [43] in this cause be, and the same is hereby, made perpetual; and that the said defendants and their successors, representatives, and assigns be, and they are hereby, severally and perpetually restrained and enjoined from surveying, or causing to be surveyed, the lands hereinbefore described, or any part thereof." And for costs.

Appeal was then taken to the circuit court of appeals and the decree affirmed. 48 C. C. A. 399, 109 Fed. 354. Thereupon the case was brought to this court.

The following drawing, taken from petitioners' brief, sufficiently illustrates the situation:




*Assistant Attorney General* **Van Devanter** argued the cause, and, with *Mr. Joseph R. Webster*, filed a brief for appellants:

Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.

*New York Guaranty & Indemnity Co.* v. *Memphis Water Co.* 107 U. S. 205, 27 L. ed. 484, 2 Sup. Ct. Rep. 279; *Whitehead* v. *Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Buzard* v. *Houston*, 119 U. S. 351, 30 L. ed. 453, 7 Sup. Ct. Rep. 249.

The rule is jurisdictional to relief in equity, and enforced in repeated decisions. It is enforced by the court *sua sponte*, though not raised by the pleadings or briefs of counsel.

*Hayward* v. *Andrews*, 106 U. S. 672, 27 L. ed. 271, 1 Sup. Ct. Rep. 544; *Parker* v. *Winnipiseogee Lake Cotton & Woolen Co.* 2 Black, 545, 17 L. ed. 333; *Fussell* v. *Gregg*, 113 U. S. 551, 28 L. ed. 994, 5 Sup. Ct. Rep. 631; *Smith* v. *Bourbon County*, 127 U. S. 105, 111, 32 L. ed. 73, 77, 8 Sup. Ct. Rep. 1043; *Russell* v. *Clark*, 7 Cranch, 69, 3 L. ed. 271; *Dowe* v. *Chicago*, 11 Wall. 108, 20 L. ed. 65.

Facts must be distinctly averred which show that apprehension of irreparable injury is well founded.

*Russell* v. *Clark*, 7 Cranch, 69, 3 L. ed. 271; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 44 L. ed. 377, 20 Sup. Ct. Rep. 280; *Watson* v. *Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Goodell* v. *Lassen*, 69 Ill. 145; *McHenry* v. *Jewett*, 90 N. Y. 58; *Branch Turnp. Co.* v. *Yuba County*, 13 Cal. 190; *Jerome* v. *Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484; *Spofford* v. *Bangor & B. R. Co.* 66 Me. 51.

This suit cannot be maintained upon the ground of threatened trespass.

*Citizens Coach Co.* v. *Camden Horse R. Co.* 29 N. J. Eq. 299; *Litchfield* v. *Richards*, 9 Wall. 575, 19 L. ed. 681.

A bill of peace will not lie against independent trespassers.

Adams, Eq. 200, 6th Am. ed. 408.

The jurisdiction of equity to prevent a multiplicity of suits is not of itself and alone an independent source or ground of jurisdiction, and will not create a jurisdiction in equity, where there is not a prior existing cause of action.

Pom. Eq. Jur. §§ 181, 250.

The danger of judicial proceedings is not an injury justifying judicial proceedings. To entitle a party to maintain a bill of peace, it must be clear that there is a right claimed which affects many persons, and that a suitable number of parties in interest are before the court; for if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed, for it cannot conclude any persons but the very defendants.

Story, Eq. § 856.

There is a defect of parties to the bill regarded as a bill of peace.

*Litchfield* v. *Richards*, 9 Wall. 575, 19 L. ed. 681.

A decree on such a bill could operate only *in personam* and *inter partes*, nowise affecting the rights of those not parties to the suit.

*Craig* v. *Leitensdorfer*, 123 U. S. 189, *sub nom. Downs* v. *Hubbard*, 31 L. ed. 114, 8 Sup. Ct. Rep. 85; *Pope* v. *Melone*, 2 A. K. Marsh. 239; *Wolfe* v. *Burke*, 56 N. Y. 115; *Poyer* v. *Des Plaines*, 123 Ill. 111, 13 N. E. 819.

A bill of peace is addressed to the sound discretion of the court, and will not be entertained unless it appears that there is a practical necessity for the court to prevent vexatious litigation.

*Fellows* v. *Spaulding*, 141 Mass. 89, 6 N. E. 548.

This bill discloses that the parties are not numerous; that if complainants have legal title, they also have complete legal remedy, and that the adverse rights asserted are separate and distinct, and not common. Such facts are fatal to the bill.

*Hapgood* v. *Hewitt*, 119 U. S. 227, 30 L.

ed. 370, 7 Sup. Ct. Rep. 193; *Grand Chute* v. *Winegar*, 15 Wall. 355, 21 L. ed. 170.

The suit necessarily involves questions of administration belonging to the executive department of government, with which the courts, either of law or equity, will not interfere.

*Gaines* v. *Thompson*, 7 Wall. 347, 19 L. ed. 62; *Cox* v. *McGarrahan*, 9 Wall. 298, 19 L. ed. 579; *Brown* v. *Hitchcock*, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; *Litchfield* v. *Richards*, 9 Wall. 575, 19 L. ed. 681; *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 44 L. ed. 377, 20 Sup. Ct. Rep. 280.

The officers of the Land Department are by law made a special tribunal for administration of the public lands, and their jurisdiction is exclusive, and will not be interfered with by the courts.

*Litchfield* v. *Richards*, 9 Wall. 575, 19 L. ed. 681.

Appellees participated in the proceedings before the Land Department leading up to the order for survey, and are thereby concluded as to all questions of fact and as to all further administrative proceedings of the Land Department.

*Brown* v. *Hitchcock*, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; *Quinby* v. *Conlan*, 104 U. S. 420, 26 L. ed. 800; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389.

*Messrs.* **M. H. Stanford** and **Benton Hanchett** argued the cause and filed a brief for appellees:

With the issue of the patent, all jurisdiction and authority of the Land Department over the land terminates. After the issue of the patent, the matter becomes subject to inquiry only in the courts by judicial proceeding instituted to vacate the patent.

*United States* v. *Stone*, 2 Wall. 525, 17 L. ed. 765; *Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848; *United States* v. *Schurz*, 102 U. S. 378, 26 L. ed. 167; *Bicknell* v. *Comstock*, 113 U. S. 149, 28 L. ed. 962, 5 Sup. Ct. Rep. 399; *Iron Silver Min. Co.* v. *Campbell*, 135 U. S. 286, 34 L. ed. 155, 10 Sup. Ct. Rep. 765; *Davis* v. *Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; *Williams* v. *United States*, 138 U. S. 514, 34 L. ed. 1026, 11 Sup. Ct. Rep. 454; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 42 L. ed. 592, 18 Sup. Ct. Rep. 208.

Courts have power to protect the private rights of a party who has purchased in good faith from the government, against the interference or appropriation of corrective surveys made by the department subsequent to such disposition or sale.

*Cragin* v. *Powell*, 128 U. S. 691, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; *Mullan* v. *United States*, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041; *Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848; *United States* v. *Schurz*, 102 U. S. 378, 26 L. ed. 167; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Davis* v. *Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628.

The defendants, in making the survey ordered, propose to exercise an unlawful control over this land. They justify their action on the sole ground that they are subordinate officers of the Interior Department of the United States, and are acting under and by virtue of the authority and order of their superior officers. This alone is sufficient to justify the decree.

*Caldwell* v. *Robinson*, 59 Fed. 653; *La Chapelle* v. *Bubb*, 69 Fed. 481; *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Louisiana Bd. of Liquidation* v. *McComb*, 92 U. S. 531, 23 L. ed. 623; *Allen* v. *Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; *Belknap* v. *Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; *Davis* v. *Gray*, 16 Wall. 203, 21 L. ed. 447; *People ex rel. Negus* v. *Dwyer*, 90 N. Y. 402; *Morgan* v. *Binghamton*, 102 N. Y. 500, 7 N. E. 424; *Dainese* v. *Cooke*, 91 U. S. 580, 23 L. ed. 251; *United States* v. *Lee*, 106 U. S. 244, 27 L. ed. 190, 1 Sup. Ct. Rep. 240; *Scott* v. *Donald*, 165 U. S. 107, 41 L. ed. 648, 17 Sup. Ct. Rep. 262.

The act sought to be enjoined in this suit is a ministerial act.

*Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Decatur* v. *Paulding*, 14 Pet. 497, 10 L. ed. 559; *Kendall* v. *Stokes*, 3 How. 87, 11 L. ed. 506; *Brashear* v. *Mason*, 6 How. 92, 12 L. ed. 357; *Reeside* v. *Walker*, 11 How. 272, 13 L. ed. 693; *Holloway* v. *Whiteley*, 4 Wall. 522, 18 L. ed. 335; *United States ex rel. Tucker* v. *Seaman*, 17 How. 225, 15 L. ed. 226; *United States ex rel. Goodrich* v. *Guthrie*, 17 How. 284, 15 L. ed. 102; *United States* v. *Edmunds*, 5 Wall. 563, 18 L. ed. 692; *Gaines* v. *Thompson*, 7 Wall. 347, 19 L. ed. 62; *Cox* v. *McGarrahan*, 9 Wall. 298, 19 L. ed. 579; *United States* v. *Schurz*, 102 U. S. 378, 26 L. ed. 167; *Butterworth* v. *United States*, 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12.

This suit is not brought against the defendants because they are officers and agents, but by reason of their acts as individuals. And the court is not ousted of its jurisdiction because they assert authority as such officers and agents. To make out their defense they must show that their authority is sufficient in law to protect them.

*Mitchell* v. *Harmony*, 13 How. 115, 14 L. ed. 75; *Bates* v. *Clark*, 95 U. S. 204, 24 L. ed. 471; *Meigs* v. *M'Clung*, 9 Cranch, 11, 3 L. ed. 639; *United States* v. *Lee*, 106 U. S. 210, 27 L. ed. 178, 1 Sup. Ct. Rep. 240; *Wilcox* v. *Jackson ex dem. M'Connel*, 13 Pet. 498, 10 L. ed. 264; *Brown* v. *Huger*, 21 How. 305, 16 L. ed. 125; *Grisar* v. *M*

*Dowell*, 6 Wall. 363, 18 L. ed. 863; *Noble* v. *Union River Logging Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; Beach, Inj. §§ 1373–4–9; *Belknap* v. *Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443; *Stanley* v. *Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 452, 27 L. ed. 994, 3 Sup. Ct. Rep. 292, 609; *Virginia Coupon Cases*, 114 U. S. 287, *sub nom. Poindexter* v. *Greenhow*, 29 L. ed. 192, 5 Sup. Ct. Rep. 903, 962.

This is a case which calls for the equitable interference of this court.

*English* v. *Foxall*, 2 Pet. 595, 7 L. ed. 531; *Tayloe* v. *Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *Texas* v. *Hardenberg*, 10 Wall. 68, 19 L. ed. 839; *Jones* v. *Van Doren*, 130 U. S. 684, 32 L. ed. 1077, 9 Sup. Ct. Rep. 685; *Landis* v. *Olds*, 9 Min. 90, Gil. 79; *Gerdtzen* v. *Cockrell*, 52 Minn. 509, 55 N. W. 58; *Huyck* v. *Graham*, 82 Mich. 353, 46 N. W. 781; Story, Eq. Pl. 42; 1 Garland & R. Federal Practice, 266.

Equity has jurisdiction to prevent a cloud from being cast on plaintiff's title by restraining the consummation of proceedings which would result in creating a cloud.

17 Enc. of Pl. & Prac. 288; *Conkey* v. *Dike*, 17 Minn. 457, Gil. 434; *Huntington* v. *Central* P. R. Co. 2 Sawy. 503, Fed. Cas. No. 6,911; *Sneathen* v. *Sneathen*, 104 Mo. 201, 16 S. W. 497; *Chapman* v. *Brewer*, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; *Lyon* v. *Alley*, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; *Redmond* v. *Packenham*, 66 Ill. 434; *Frederick* v. *Ewrig*, 82 Ill. 363; *Rawson* v. *Fox*, 65 Ill. 200; *Morris Canal & Bkg. Co.* v. *Jersey City*, 12 N. J. Eq. 227; *King* v. *Townshend*, 141 N. Y. 358, 36 N. E. 513.

Equity will always interfere to prevent clouds from being cast upon a title, and will interfere to restrain a defendant from proceeding in an illegal act which, if completed, will necessarily cast a cloud upon that title and naturally diminish its value.

*De Witt* v. *Van Schoyk*, 110 N. Y. 7, 17 N. E. 425; *Conrad* v. *Smith*, 32 Mich. 429.

Where there is no complete and adequate remedy at law, equity will assume jurisdiction of a bill to quiet title or prevent a cloud.

*Lyon* v. *Alley*, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; *Chapman* v. *Brewer*, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; *Phelps* v. *Harris*, 101 U. S. 370, 25 L. ed. 855.

*Mr. S. D. Luckett* also filed a brief for appellees:

The mere fact that an executive officer must to some extent construe the law and exercise judgment before proceeding to do a ministerial act does not prevent parties who may be injured by his proposed action from resorting to a court of equity to have such action enjoined, if in fact it is without warrant of law.

*Roberts* v. *United States*, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 396; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, *ante*, 90, 23 Sup. Ct. Rep. 33.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The bill prayed for injunction and the establishment of the boundaries of complainants' lands. The decree granted a perpetual injunction, and, describing the fractional lots, adjudged that they "extend to and are bounded by and upon the actual waters of Cedar Island lake." The deflection of the lines required by the decree is indicated on the diagram.

Sections 2395, 2396, and 2397 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1471, 1473), specify the manner of making surveys of public lands, and prescribe the rules by which the form and boundaries of the tracts are determined. In this case no survey was in fact made, no meander line was in fact run, and no body of water in fact *existed near the false meander line in- [53] dicated. The line purporting to delimit the lake was from one mile to a quarter of a mile from the lake, and ran over high agricultural land, covered with ancient trees, which could not have grown in water. The theory of the decree is that the government is estopped by the pretended survey and plat to deny that these lots were bounded by the lake.

The Land Department must necessarily consider and determine what are public lands, what lands have been surveyed, what are to be surveyed, what have been disposed of, what remain to be disposed of, and what are reserved. The Department has held that the land lying between the alleged meander line and the lake, some 1,200 acres, is government land, and has ordered it to be surveyed. *Re Burns*, 20 Land Dec. 28, 295, 23 Land Dec. 430. The execution of that order was restrained by the preliminary injunction herein, and that has been made perpetual by the decree.

We are confronted on the threshold with two objections to the maintenance of this bill; namely, the want of jurisdiction in equity, and the want of jurisdiction thus to interfere with executive administration.

Equity jurisdiction was invoked on the ground of lack of adequate remedy at law, in that irreparable injury in the destruction of timber and exposure to fire by the survey, and multiplicity of suits, were threatened.

In our opinion complainants failed to make out a case of liability to irreparable injury. The township was resurveyed by a county surveyor in 1893; defendant Croswell has made surveys in the township, locating the actual meanders of the lake; and he testified that this survey could be made by him "without any material injury to the soil or timber;" and that he would not "have to cut very much valuable timber." If complainants, as owners of the 859.38 acres contained in their fractional lots, became, through that ownership, owners of the 1,202 acres lying between those lots and the lake, the proposed survey would be but

a fugitive and temporary trespass, lacking the elements of irreparable mischief, and of such long continuance as to become a nuisance.

[54] *And bills of peace will not lie where the legal remedy is otherwise adequate, and where the persons directly interested are not made parties, are not numerous, and assert separate and independent rights. *Hale* v. *Allison*, 188 U. S. 56, *ante*, 380, 23 Sup. Ct. Rep. 244; *Cruickshank* v. *Bidwell*, 176 U. S. 73, 44 L. ed. 377, 20 Sup. Ct. Rep. 280.

But, in the next place, was the circuit court justified in thus arresting the action of the Land Department in proceeding with a survey under the circumstances? In other words, Can the Land Department be stayed in the discharge of a duty, not ministerial, but involving the exercise of judgment and discretion, on the ground that its jurisdiction has been lost by estoppel? We do not think so, and hold that complainants' contention that they are entitled to bound upon the lake involves a legal right, which cannot be properly passed on until after the Department has acted.

Having participated in the proceedings before the Department, complainants, after survey was ordered, obtained this injunction against further administrative action, on the ground of absolute want of power, and not of error in its exercise.

The administration of the public lands is vested in the Land Department, and its power in that regard cannot be devested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. *Whiteside* v. *United States*, 93 U. S. 247, 23 L. ed. 882; *Moffat* v. *United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10; *Hume* v. *United States*, 132 U. S. 406, 414, 33 L. ed. 393, 396, 10 Sup. Ct. Rep. 134. The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the Land Department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action. *Brown* v. *Hitchcock*, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485.

In *Litchfield* v. *The Register & Receiver*, 9 Wall. 575, *sub nom. Litchfield* v. *Richards*, 19 L. ed. 681, Litchfield sought an injunction to restrain the register and receiver of the United States land office at Fort Dodge, Iowa, from entertaining and acting upon applications made to them to prove pre-emptions to certain lands which lay [55] within the *land district for which they were respectively register and receiver. The bill averred that complainant was the legal owner of the lands; that they were not public lands, and were in no manner subject to sale or pre-emption by the government or its officers. The bill was dismissed for want of jurisdiction in equity, and this court affirmed the decree. Mr. Justice Miller said: "The principle has been so repeatedly decided in this court, that the judiciary cannot interfere, either by mandamus or injunction, with executive officers such as the respondents here, in the discharge of their official duties, unless those duties are of a character purely ministerial, and involving no exercise of judgment or discretion, that it would seem to be useless to repeat it here." *Gaines* v. *Thompson*, 7 Wall. 347, 19 L. ed. 62; *The Secretary* v. *McGarrahan*, 9 Wall. 298, *sub nom. Cox* v. *United States ex rel. McGarrahan*, 19 L. ed. 579.

It was held that the fact that complainant asserted himself to be the owner of the tract of land which the officers were treating as public lands did not take the case out of that rule, where it was the duty of these officers to determine, upon all the facts before them, whether the land was open to pre-emption or sale; and, further, that if the court could entertain jurisdiction, the persons asserting the right of pre-emption would be necessary parties to the suit.

Mr. Justice Miller further said: "After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the Land Department finally decides in his favor, he is not injured. If they give patents to the applicants for pre-emption, the courts can then, in an appropriate proceeding, determine who has the better title or right."

And: "It appears on its face, that the register and receiver have no real interest in the matter, but that persons not named are asserting before them the legal right to pre-empt these lands. These persons are the real parties whose interests are to be affected, and whose claim of right is adverse to plaintiff. If the court should hear the case, and enjoin perpetually the register and receiver from entertaining their applications, they have no further remedy. That is the initial point of establishing *their right, and in this mode a valuable [56] and recognized right may be wholly defeated and destroyed, without the possibility of a hearing on the part of the party interested. This is not a case in which the land officers represent these claimants. They have no such duty to perform."

The case has been frequently cited, and in, among others, *Carrick* v. *Lamar*, 116 U. S. 423, *sub nom. United States ex rel. Carrick* v. *Lamar*, 29 L. ed. 677, 6 Sup. Ct. Rep. 424,—an application to the supreme court of the District of Columbia for a mandamus to the Secretary of the Interior to order the survey of an island in the Mississippi river, opposite the city of St. Louis, by an alleged settler thereon, who averred that he had applied to the Department for a survey of the island, so that it might be brought into the market, and that, on the hearing of the application, the city contended that the island had been surveyed and set apart to it, under certain acts of Congress, which he de-

nied, because, as he insisted, the island surveyed was then located above this island. The court refused to grant the writ, and its judgment was affirmed, this court holding that the question how far the title of the city to the island was affected by its being carried down river by the action of the current required consideration and judgment on the part of the Secretary.

*Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271, is not to the contrary, for that was a case where the executive department had confessedly finally acted, and then attempted to resume jurisdiction, and an injunction was sustained. But the government raised no point as to the form of the remedy; deprivation of a vested legal right of property, acquired before any suggestion that it could be taken away, was threatened; and it appeared that the only remedy was through equity interposition. *Cruickshank* v. *Bidwell*, 176 U. S. 73, 80, 44 L. ed. 377, 380, 20 Sup. Ct. Rep. 280. In this case, whether the lands lying between the alleged meander line and the lake were public lands or not was for the Land Department to determine in the first instance; and, if error was committed, this is not the way to correct it.

In our judgment the circuit court should not have taken jurisdiction, and therefore the—

*Decree of the Circuit Court of Appeals is reversed;* the decree of the Circuit Court is also reversed, and the cause remanded to that court, with a direction to dismiss the bill.

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[57]*JOHN A. BRILL and J. G. Brill Company, *Petitioners*,

*v.*

PECKHAM MOTOR TRUCK & WHEEL COMPANY *et al.*

(See S. C. Reporter's ed. 57-64.)

*Appeal—dismissal of bill on appeal from preliminary injunction.*

The circuit court of appeals in reversing an order of a circuit court granting upon *ex parte* affidavits a preliminary injunction in a suit for the infringement of a patent should not dismiss the bill, where complainants apparently had no opportunity, previous to the hearing in the lower court, to inspect the affidavits filed by defendants, and was granted no leave to rebut them.

[No. 181.]

*Argued March 2, 3, 1903. Decided April 6, 1903.*

NOTE.—*As to the effect, in the circuit court of appeals, of previous adjudications as to the validity and construction of patents*—see notes to National Cash Register Co. v. American Cash Register Co. 3 C. C. A. 565; Thompson-Houston Electric Co. v. Hoosick R. Co. 27 C. C. A. 427; and United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 484.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed an order of the Circuit Court for the Southern District of New York granting a preliminary injunction in a suit for the infringement of a patent, and remanded the cause to that court, with instructions to dismiss the bill. *Reversed*, and remanded to the Circuit Court for final hearing.

See same case below, 47 C. C. A. 315, 108 Fed. 267, 49 C. C. A. 87, 110 Fed. 377.

Statement by Mr. Chief Justice **Fuller**:

This was a bill in equity filed in the circuit court of the United States for the southern district of New York by John A. Brill and the J. G. Brill Company against the Peckham Motor Truck & Wheel Company and others, praying for injunction and accounting for infringement of letters patent No. 478,218, for an improvement in car trucks, issued July 5, 1892.

The J. G. Brill Company was a manufacturer of street cars and trucks at Philadelphia, and the Peckham Motor Truck & Wheel Company was a manufacturer of trucks at Kingston, New York.

The bill was filed October 15, 1900, and a motion for preliminary injunction on behalf of complainants on claims 1 and 2 of the patent in suit was heard by Judge Lacombe on October 26, 1900, on affidavits previously served by complainants, including the record of an adjudication in the circuit court in the case of *Brill* v. *Third Ave. R. Co.* in which the opinion of Judge Shipman was filed July 9, 1900. 103 Fed. 289.

Defendants filed affidavits at the hearing, which had been sworn to October 25 and 26, and which complainants had apparently had no opportunity to inspect before the argument. These affidavits set up two patents (Manier, of August 27, 1889, *No. 409,993[58] and Peckham, of January 21, 1890, No. 419,-876), which had also been before Judge Shipman in the prior case, and defendants contended, in view of these two patents, that the two claims in controversy must be limited in their scope, and that there had been no infringement of the claims as thus limited. Judge Lacombe held that, as there was no prior patent before him which had not been before Judge Shipman, and as the combination, which Judge Shipman described as the gist of the invention, was undoubtedly in defendants' structures, complainants were entitled to a restraining order under "well-settled rules of practice." 105 Fed. 626. The preliminary injunction was therefore granted. From this interlocutory order defendants took an appeal to the circuit court of appeals for the second circuit, and on a hearing there the order granting the preliminary injunction was reversed, and the cause remanded to the circuit court with instructions to dismiss the bill with costs. 47 C. C. A. 315, 108 Fed. 267. A petition was filed for a rehearing, and denied. 49 C. C. A. 87, 110 Fed. 377. This writ of certiorari was then granted. 183 U. S. 698, 46 L. ed. 395, 22 Sup. Ct. Rep. 946.

*Messrs.* **Francis Rawle** and **Frederick P. Fish** argued the cause, and, with *Mr. Joseph L. Levy*, filed a brief for petitioners:

The rule in the *Mast-Foos Case* will not be applied unless it appears that the entire merits are before the court of appeals, that the complainant has fully proved all the facts which are relevant in support of the bill of complaint, and that no fact alleged on behalf of the defendant is disputed.

*Mast, F. & Co.* v. *Stover Mfg. Co.* 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708; *Gardt* v. *Brown*, 113 Ill. 475, 55 Am. Rep. 434; *Green* v. *Mills*, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852; *Knoxville* v. *Africa*, 23 C. C. A. 252, 47 U. S. App. 74, 246, 77 Fed. 501; *Electric Vehicle Co.* v. *Winton Motor-Carriage Co.* 104 Fed. 814.

"Sufficient weight" was not given to the rule of comity by the court below.

*Mast, F. & Co.* v. *Stover Mfg. Co.* 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708; *Consolidated Fastener Co.* v. *Hays*, 41 C. C. A. 142, 100 Fed. 984; *Electric Mfg. Co.* v. *Edison Electric Light Co.* 10 C. C. A. 106, 18 U. S. App. 637, 61 Fed. 834.

On appeal from an order granting a preliminary injunction, the circuit court of appeals will consider only whether the lower court exercised a reasonable discretion in granting an injunction.

*Loew Filter Co.* v. *German-American Filter Co.* 47 C. C. A. 94, 107 Fed. 949; *Bissell Carpet-Sweeper Co.* v. *Goshen Sweeper Co.* 19 C. C. A. 25, 43 U. S. App. 47, 72 Fed. 545; *Stearns-Roger Mfg. Co.* v. *Brown*, 52 C. C. A. 559, 114 Fed. 939; *Southern P. Co.* v. *Earl*, 27 C. C. A. 185, 48 U. S. App. 716, 82 Fed. 690.

The prior adjudication, not being the subject of the appeal, is entitled to the same weight in the circuit court of appeals which it should have had in the circuit court.

*Consolidated Fastener Co.* v. *Littauer*, 28 C. C. A. 133, 51 U. S. App. 653, 84 Fed. 164; *Duplex Printing-Press Co.* v. *Campbell Printing Press & Mfg. Co.* 16 C. C. A. 220, 37 U. S. App. 250, 69 Fed. 250; *American Paper Pail & Box Co.* v. *National Folding Box & Paper Co.* 2 C. C. A. 165, 1 U. S. App. 283, 51 Fed. 229; *Heaton-Peninsular Button-Fastener Co.* v. *Elliott Button-Fastener Co.* 58 Fed. 220.

*Messrs.* **William A. Megrath** and **Charles H. Duell** argued the cause and filed a brief for respondents:

The circuit court of appeals was justified in dismissing the bill of complaint.

*Mast, F. & Co.* v. *Stover Mfg. Co.* 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708.

*Mr. Henry P. Wells* filed a brief in opposition to the petition for certiorari.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The circuit court for the southern district of New York, Shipman, J., presiding, in July, 1900, entered a decree in the case of *Brill* v. *Third Ave. R. Co.*, adjudging the letters patent to George M. Brill of July 5, 1892, No. 478,218, for improvements in car trucks, as to claims 1, 2, 9, 10, 11, 12, 14, and 27 thereof, to be good and valid, and that defendant, as the purchaser of 181 trucks of the Bemis Car Box Company, had infringed the exclusive rights of complainant thereunder; and for injunction, accounting, and *recovery of damages. And a final [59] decree was entered in the cause October 1, 1900. This bill was filed October 15, 1900, in the same court, against another truck building company, and a motion for preliminary injunction was heard in that court before Lacombe, J., and sustained on the strength of the previous adjudication. The patent related to the construction of nonpivotal electric street railway trucks, and the invention was intended to remedy oscillation.

Judge Lacombe, in ordering the preliminary injunction, said:

"The only question presented is whether defendant's structure infringes. That involves the construction of the claims declared on, and, for the purposes of this motion, the construction already adopted by this court on final hearing in the *Third Ave. Case*, 103 Fed. 289, should be followed; for there is no prior patent, no prior use, proved here, which was not before Judge Shipman. It is true that in that case the defendant's device was a much closer copy than the one now under consideration, containing, as it did, the feature that the spiral springs came first into play, and the further feature of depending caps, in which the leaves of the elliptical springs play vertically. But the court most carefully indicates that the leading feature of the invention lies outside of these details; that the 'gist of the invention consists in combining with the frames of the truck and the spiral springs other springs, *viz.*, elliptical springs, between the car body and the extensions of the independent frame,' the object being to break the rhythm of the springs, and thus do away with the galloping or rocking motion. The defendant here insists that there is no rhythm broken, indeed, that there is no rhythm to break,—and that the combination of the quotation does not do away with the galloping motion. On those points, however, this court should follow the earlier decision. There are additional rods, and also spirals, below the frame, which apparently in defendant's structure do their share in eliminating galloping; but the combination which Judge Shipman described as the gist of the invention is undoubtedly in defendant's structure, and, under well-settled rules of practice, complainant is entitled to a restraining order until final hearing."

*The rule of practice for one member of [60] a court to regard the prior decision of another, in cases of this kind, as to be followed until otherwise authoritatively adjudicated, seems to be justified in the orderly conduct of proceedings, and the circuit court of appeals did not hold that the circuit court had improvidently exercised its discretion in granting the preliminary injunction in accordance with its own prior decision and decree, which decree was not the subject of the appeal. But the court

proceeded to dispose of the case upon its merits as one in which it was apparent complainant could not ultimately prevail, and relied on *Mast, F. & Co.* v. *Stover Mfg. Co.* 177 U. S. 485, 44 L. ed. 856, 20 Sup. Ct. Rep. 708, as authorizing the pursuit of that course.

It was contended there that the circuit court of appeals for the seventh circuit erred in refusing to follow the opinion of the circuit court of appeals for the eighth circuit in respect of the validity and scope of a patent, and in reversing the order of the circuit court, which, on the ground of comity, had done so, and we held that the obligation was not imperative, but that the circuit court of appeals for the seventh circuit was at liberty to exercise its own judgment.

In doing so the court of appeals directed the dismissal of the bill, before answer filed or proofs taken, on an appeal from an order granting a temporary injunction, and its action in that regard was a principal question discussed in this court.

It should be observed that in that case complainant was served with defendant's affidavits before the argument below, and was permitted to put in rebuttal affidavits. The merits of the case were fully before the court, and the patent in suit related to the use in a windmill of an old and simple mechanical device for the purpose of converting a rotary into a reciprocating motion. It was held that the case fell within the rule sometimes applied where there is no dispute upon the facts, and there appears to be no reasonable possibility that complainant may succeed. But this court took care to define the class of cases in which that might be done, and, speaking through Mr. Justice Brown, said:

"Does this doctrine apply to a case where a temporary injunction is granted *pendente* [61] *lite* upon affidavits and immediately *upon the filing of a bill? We are of opinion that this must be determined from the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because, under the particular circumstances of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused,—then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if the patent manifestly fail to disclose a patentable novelty in the invention,—we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed. Ordinarily, if the case involve a question of fact, as of anticipation or infringement, we think the parties are entitled to put in their evidence in the manner prescribed by the rules of this court for taking testimony in equity causes. But if there be nothing in the affidavits tending to throw a doubt upon the existence or date of the anticipating devices, and giving them their proper effect, they establish the invalidity of the patent; or, if no question be made regarding the identity of the alleged infringing device, and it appear clear that such device is not an infringement, and no suggestion be made of further proofs upon the subject,—we think the court should not only overrule the order for the injunction, but dismiss the bill."

In the present case the notice of the motion for preliminary injunction was returnable October 19, and due service of complainant's affidavits was made; the hearing was adjourned to October 26 on defendants' application; and on that day defendants' affidavits were presented and the hearing proceeded, complainants not having been afforded previous opportunity to inspect these affidavits, and not being granted leave to rebut them.

The record does not show that leave was asked, but, if so, it would naturally be denied because, in the opinion of the circuit court, its previous decision necessarily required the granting of the preliminary injunction. In any view, the effect was that complainants, although they were prepared to go on with the *motion they had made, [62] were subjected on appeal to the same consequences as if the preliminary hearing had been a final one.

Complainants, if the case had been retained for final hearing, could have cross-examined defendants' *ex parte* witnesses as to the actual construction of defendants' various trucks containing the combination of spiral and elliptical springs of the patent in suit; the actual operation of defendants' devices; whether defendants' devices in fact infringed claims 1 and 2 of complainants' patent if limited; or claims 9, 10, 11, and 14 thereof; or whether the devices of the Peckham patent, No. 410,876, were in fact incapable of practicable use, or were ever in fact used; and could have introduced evidence on these subjects, as, also, on the question whether complainants' invention antedated the Peckham and Manier patents; to establish the utility and value and adoption and use of the combination of claims 1 and 2; and that defendants' trucks were not "radically different, both in construction and mode of operation, from that of the patent in suit," as alleged by defendants' counsel to have been shown by the experiments set up in defendants' affidavits.

Those experiments were performed by respondents and their experts between the filing of the bill and the hearing of the motion, some eleven days, and counsel say that "these experiments would seem to demonstrate conclusively that Peckham's elliptic springs do not perform the function claimed for the elliptic springs in the patent in suit. Indeed, as far as galloping goes, their introduction into the Peckham truck is demonstrated to be a positive disadvantage; and the only beneficial function they can perform,—the only reason for their continued use all these years,—is that stated by the respondents, *i. e.*, to prevent the lateral swaying of the car body."

This is said in support of the contention, on which counsel lay great stress in this court, that respondents lessen oscillation by the use of an underlying tension spring, and use elliptical springs merely for bracing the car body.

Counsel also say "that all of these matters in reference to the functions of the springs, and whether they operated according [63] *to the theories of the petitioners or the belief of the respondents; and, incidentally, whether respondents' trucks did really embody the alleged invention of the patent in suit,—were susceptible of absolute, practical demonstration."

Clearly, complainants were entitled to test these experiments by cross-examination, and to introduce evidence on their part as to the operation of the springs.

If Judge Shipman's definition of claims 1 and 2 was correct, no question of infringement would arise, but the court of appeals held that his interpretation was incorrect, and on reference to Manier, No. 409,993, and Peckham, No. 419,876, that the claims, as they read and as Judge Shipman construed them, must be limited. Yet it is admitted by counsel that the date of the conception of the invention of the patent in suit was prior to the dates of both the patents of Manier and Peckham; but it is argued that the inventor was not sufficiently diligent in reducing his invention to practice. If the matter of delay were of importance, as assumed, it was open to the inventor to explain the reason of the delay, if any, and complainants were entitled to make proof of such explanation.

Again, in respect of "the actual operation of defendants' devices as compared with the devices of the patents in suit," and "the question whether defendants' devices do, in fact, infringe claims 1 and 2, if said claims are to be limited as held by the court below," respondents' counsel contend that this issue was tendered by respondents and decided by the circuit court of appeals, and that the case ought not to be "reopened" to permit petitioners to introduce additional proofs. The difficulty is, however, that the issue was only tendered on the preliminary application, and the hearing was not in itself a final hearing. If complainants in every case must understand that a motion for preliminary injunction requires the same showing as on final hearing, very few motions of that sort would be made.

We think the case comes within the exceptions pointed out in the Mast, Foos, & Company decision, and are impressed with the conviction that complainants have not had their day in court, and that it ought to [64] be accorded them. At *the same time we do not wish to go into the case so far as to indicate any opinion as to the proper construction of claims 1 and 2 or on the question of infringement. There should be a hearing below after the case is made ripe for it, unaffected by any intimations from us.

The situation, then, is this: The order for a preliminary injunction was reversed as part of the decree directing the dismissal of the bill, and not independently of the grounds on which that conclusion rested. But the court of appeals had the power to vacate the preliminary injunction, and had only this been done, an appeal to this court could not have been taken, nor would a certiorari ordinarily have been granted in such circumstances.

Considering the peculiar attitude in which the case is presented, we prefer not to discuss the question how far the appellate courts are justified in reversing orders of the circuit courts granting preliminary injunctions, when their discretion has not been improperly exercised, and the order will be—

*Decree of the Circuit Court of Appeals reversed*, and cause remanded to the Circuit Court with a direction to proceed to final hearing in due course; the latter court being left at liberty to deal with the preliminary injunction as it otherwise might but for this decree.

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STATE OF TENNESSEE on the Relation of G. L. MALONEY *et al.*, *Plffs. in Err.*,

*v.*

STEPHEN P. CONDON, T. T. McMillan, James Rich, and H. C. Anderson.

(See S. C. Reporter's ed. 64-71.)

*Error to state court—academic case.*

A writ of error to review the judgment of a state court in an action for usurpation of public office, instituted under Shannon's (Tenn.) Code 1896, §§ 5165 *et seq.*, on the relation of persons superseded therein by a legislative act challenged as unconstitutional, will be dismissed where the terms of office of all the parties to the suit, both relators and defendants, have expired.

[No. 209.]

*Argued March 12, 13, 1903. Decided April 6, 1903.*

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment which affirmed decrees of the chancellor and the Court of Chancery Appeals dismissing a bill in an action for usurpation of office. *Dismissed.*

See same case below, 108 Tenn. 82, 65 S. W. 871.

Statement by Mr. Chief Justice **Fuller:**

*This was a bill filed in the chancery court [65] of Knox county, Tennessee, under the statute in that behalf, in the name of the state, "on the information of" T. A. Rambo and G. L. Maloney, G. H. Strong, S. L. England, Sam Vance, J. F. C. Harrell, and R. L. Peters against Stephen P. Condon, T. T. McMil-

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

lan, and James Rich, and H. C. Anderson, representing "that at the January Term, 1898, G. H. Strong and T. A. Rambo were duly and legally elected by the county court of Knox county, Tennessee, members of the pike commission of Knox county for the term of four years, which would make their terms of office expire in January, 1902, and G. L. Maloney, who is the judge of Knox county, Tennessee, is by operation of the law, *ex officio* chairman of said commission. The said Sam Vance and J. F. C. Harrell were duly elected members of the said workhouse commission by the said county court of Knox county, Tennessee, at its January Term, 1901, which would make their terms of office expire in 1903. The said S. L. England and I. N. White were duly elected workhouse commissioners of Knox county, Tennessee, at its January Term, 1900, which would make their terms of office expire in 1902, and the said G. L. Maloney as judge of the county is *ex officio* chairman of the said commission. The said R. L. Peters was elected superintendent of the workhouse in January, 1898, which would make his term of office expire in January, 1902. All of said officers were duly and legally elected, and inducted into their respective offices, and assumed the duties thereof, and up to the time of the qualification of defendants, to wit, on March 2, 1901, continued to perform the duties and exercise the functions and receive the emoluments pertaining to said offices."

The bill then averred that, on February 8, 1901, an act of the general assembly of the state of Tennessee was approved by the governor, and went into effect, entitled: "An Act to Create a Board of Public Road Commissioners, to Regulate the Laying Out and Working of Public Roads in this State, in Counties Having a Population of Not Less than 70,000 and Not More than 90,000, under the Federal Census of the Year 1900, or any Subsequent Federal Census, and to [66] Provide a Method for the Management *and Control of County Workhouses in Counties Coming under the Provisions of this Act."

That, in pursuance of the act, the governor of Tennessee, on February 16, 1901, appointed Stephen P. Condon, James Rich, and T. T. McMillan as the board of public road commissioners; that Condon was appointed superintendent of public roads, and the other two associate members of the road commission; that the governor had issued to defendants commissions as such public road commissioners; and that they gave bond and qualified March 2, 1901, "and are now attempting to perform the duties of the said offices."

That defendants had in fact ousted the pike commissioners, the workhouse commissioners, and superintendent from their respective positions, and deprived them of their privileges and powers; and that H. C. Anderson had been elected by defendants manager of the workhouse.

Complainants further represented that the act of February 8, 1901, was in plain violation of the Constitution of the state of Tennessee; illegal, null, and void; and "not effective to deprive the said parties of the several offices aforesaid, to which they were regularly elected, or of the rights, powers, privileges, and emoluments thereof," and that defendants "are unlawfully holding and exercising said offices of public road commissioners and superintendent of roads and associate members, and that they are usurpers of said offices."

The prayer was (1) for process; (2) "that the said defendants may be enjoined from holding the said offices of public road commissioners, or superintendent of public roads, or associate members of said road commission, or manager of the workhouse, or from exercising any of the powers and rights which the said act of February 8, 1901, attempts to confer upon them, and that they may be enjoined from receiving any of the emoluments appertaining to the said offices under and by virtue of the said unconstitutional and void act, and that upon final hearing said injunction may be made perpetual;" (3) that the defendants be required to execute a bond to indemnify and hold harmless; (4) "that upon final hearing a decree may be rendered declaring that the said act of February 8, 1901, *is uncon- [67] stitutional, null, and void, and that the same confers no right upon the defendants, and that the defendants are not entitled to exercise any of the powers and privileges therein contained, or to enjoy any of the rights and emoluments therein given to them, and that they be required to surrender same and turn over all the powers, property, and privileges thereof to the rightful owners aforesaid;" (5) and for general relief.

On March 21, 1901, an application for injunction was denied, and on March 23d the bill was amended by striking out the third clause of the prayer. Defendants filed a demurrer March 29, 1901, which, on the next day, was sustained and the bill dismissed. The case was then carried to the court of chancery appeals, and it was there contended, on errors assigned, that the act of February 8, 1901, was invalid because in violation of the 14th Amendment to the Constitution of the United States, as well as of the state Constitution. The court of chancery appeals affirmed the judgment of the chancellor, August 29, 1901, and an appeal was prosecuted to the supreme court of the state, where it was again alleged, in the assignment of errors, that the act in question was in violation of the state Constitution and of the 14th Amendment. The supreme court held, on November 15, 1901, that the statute was not in violation of either, and affirmed the decrees of the chancellor and of the court of chancery appeals. 108 Tenn. 82, 65 S. W. 871. Thereupon a writ of error was sued out from this court, and the record was filed and the cause docketed December 10, 1901. No motion was made to advance the case, and it came on for argument and was argued March 12 and 13, 1903.

*Mr.* **G. W. Pickle** argued the cause, and, with *Mr. J. W. Green* and *Messrs. Pickle & Turner*, filed a brief for plaintiffs in error.

*Mr.* **Joshua W. Caldwell** argued the cause, and, with *Mr. Charles T. Cates, Jr.*, filed a brief for defendants in error:

This action is essentially a personal or private one.

*State ex rel. Johnson* v. *Campbell*, 8 Lea, 76; *Scott* v. *Johnson*, 5 Heisk. 614.

When the relator seeks by information, not only to oust respondent, but also to establish his own right to the office, he must show both his interest in and title to the office.

High, Extr. Legal Rem. 3d Ed. § 360 citing *State ex rel. Kempf* v. *Boal*, 46 Mo. 528; *Andrews* v. *State*, 69 Miss. 740, 13 So. 853.

Ordinarily it would seem to be a sufficient objection that the case is one in which the court cannot give judgment of ouster, even should the relator succeed.

High, Extr. Legal Rem. 3d Ed. § 644.

The state is not in any real sense a party to a suit of this kind.

*Miller* v. *New York*, 12 Wall. 159, 20 L. ed. 259.

This suit must abate.

*United States* v. *Boutwell*, 17 Wall. 604, 21 L. ed. 721.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

[68] *This was a proceeding under provisions of the Code of Tennessee, authorizing a bill in equity to be filed "whenever any person unlawfully holds or exercises any public office or franchise within this state." Shannon's (Tenn.) Code 1896, § 5165, cl. 1; § 5167.

By sections 5168 and 5179 it is provided that the suit may be brought "by the attorney general for the district or county, when directed so to do by the general assembly, or by the governor and attorney general of the state concurring" or "on the information of any person, upon such person giving security for the costs," when the attorney general for the district or county may institute the proceeding without direction. *State ex rel. Johnson* v. *Campbell*, 8 Lea, 74, 75.

Such was this suit, which was not brought by direction of the general assembly, or of the governor and attorney general of the state, but was instituted at the instance of persons superseded in public office by an act of the general assembly (approved by the governor and carried into effect by him) which they charged was unconstitutional. Acts 1901, chap. 8.

The question of constitutionality had been raised in an application for mandatory injunction to compel the county judge to approve the bonds of the persons appointed commissioners under the act, the writ had been awarded and obeyed, and the decree was affirmed and the act sustained by the supreme court at the same time that the decree in this case, subsequently brought, was affirmed. *Condon* v. *Maloney*, 108 Tenn. 82, 65 S. W. 871. But the supreme court also ruled in the prior case that as the writ had been obeyed it had spent its force, so that, even if they differed with the chancellor as to the use of the particular process,—an objection therein urged,—a reversal of his decree "could not undo what had been done," and to enter it "would be an idle ceremony."

In the circumstances this case assumed the aspect of a civil contest between individuals, and not of a prerogative writ to correct usurpation of office.

Sections 5175, 5176, 5177, and 5180 are as follows:

"5175. Whenever the action is brought against a person for usurping an office, in addition to the other allegations, the *name [69] of the person rightfully entitled to the office, with a statement of his right thereto, may be added, and the trial should, if practicable, determine the right of the contesting parties.

"5176. If judgment is rendered in favor of such claimant, the court may order the defendant to deliver to him, upon his qualifying as required by law, all books and papers belonging to the office in his (defendant's) custody, or under his control, and such claimant may thereupon proceed to exercise the functions of the office.

"5177. Such claimant, in this event, may also, at any time within one year thereafter, bring suit against the defendant, and recover the damages he has sustained by reason of the act of the defendant."

"5180. When a defendant, whether a natural person or a corporation, is adjudged guilty of usurping, unlawfully holding, or exercising any office or franchise, judgment shall be rendered that such defendant be excluded from the office or franchise, and that he pay the costs."

In *State ex rel. Curry* v. *Wright*, 5 Heisk. 612, it was held that the bond given in case of appeal in an action for usurpation of office need be only for costs, and the court, after referring to §§ 5176, 5177, and 5180 (by the prior numbers), said:

"These provisions are specific and clear that the matter in contest to be decided is the usurpation of the office or franchise; and the judgment, exclusion from that office or franchise; and the money judgment to be given is for costs, and the damages, if any have accrued, are provided for in another suit to be brought within a year after the judgment.

"The provision, 'that the suit will be conducted as other suits in equity,' only means that it shall be conducted as such a suit to the attainment of the results above indicated, but cannot be held to include an inquiry into the damages sustained."

The present case was argued March 12 and 13, and it appears on the face of the bill that the terms of office of all the relators, except the county judge, expired before that day. And this was true as to him, because we find, by reference to *articles 6 [70] and 7 of the Constitution of Tennessee, and *State ex rel. Rambo* v. *Maloney*, 92 Tenn.

62, 20 S. W. 419, that his then term of office as county judge terminated in 1902.

As to the defendants, the bill shows that defendant Anderson was merely a subordinate appointee of his codefendants, and that they had been appointed by the governor commissioners under the act of February 8, 1901. That act provided for the appointment of three commissioners, to "hold their offices until the next general election of county officers, when their successors shall be elected by the people, and every two (2) years thereafter said offices shall be filled by popular election." The next general election of county officers referred to was held, according to § 1154 of the Code, in August, 1902. So that these commissioners were appointed to serve until that date, and their temporary commissions then terminated.

We cannot assume that relators, who were originally elected by the county court, would hold over, and manifestly, the provisional title of defendants has determined. It follows that the relief as prayed cannot now be granted.

There are cases in quo warranto in which judgment of ouster has been entered, although the term of the person lawfully entitled had expired, and also where informations have been retained, when the statute provided for fine or damages; but here the proceeding cannot now be maintained as on behalf of the public; and, considered, as counsel insists it should be, as merely a contest between two sets of officials, and not between the state and its officials, the state courts would be at liberty to treat it as abated, and the mere matter of costs cannot be availed of to sustain jurisdiction. See *Boring* v. *Griffith*, 1 Heisk. 457, 461; *State* v. *McConnell*, 3 Lea, 332; *Williamson County* v. *Perkins* (Tenn. Ch. App.) 39 S. W. 347; *State ex rel. Robinson* v. *Lindsay*, 103 Tenn. 635, 53 S. W. 950.

Doubtless, the question of the validity of the act of 1901 is of importance, but it has been upheld by the highest judicial tribunal of the state of Tennessee as consistent with the state Constitution, and it affects only the citizens of that state.

If we were to hold that the act could be subjected to the test of the 14th Amend-
[71] ment, and that it could not stand that *test, we should do nothing more than reverse the decree below and remand the cause, and, as such a judgment would be ineffectual, we must decline to intimate any opinion on the subject.

"The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." Mr. Justice Gray, *Mills* v. *Green*, 159 U. S. 651, 653, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 133.

We think this writ of error comes within the rule thus declared, and it is therefore *dismissed without costs to either party.*

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UNION & PLANTERS' BANK OF MEMPHIS, *Appt.*,
*v.*
CITY OF MEMPHIS and John H. Alsup, Trustee. (No. 67)

UNION & PLANTERS' BANK OF MEMPHIS, *Appt.*,
*v.*
CITY OF MEMPHIS. (No. 221)

(See S. C. Reporter's ed. 71-76.)

*Jurisdiction of circuit court of appeals—effect of state judgment as res judicata—question of local law.*

1. A decree of the circuit court of appeals affirming a judgment of a circuit court in a cause in which the latter's jurisdiction depended on the sole ground that the cause of action arose under the Federal Constitution will, on appeal to the Supreme Court of the United States, be reversed for the lack of jurisdiction in the circuit court of appeals to review the circuit court judgment.
2. A judgment of a state court sustaining the exemption claimed by a bank, under its charter, from municipal taxation on its capital stock, which, under the local law of the state, is only *res judicata* in respect to the identical taxes litigated in the suit, can be accorded no greater efficacy in the Federal courts.

[Nos. 67, 221.]

*Submitted March 20, 1903. Decided April 13, 1903.*

APPEAL from the Circuit Court of the United States for the Western District of Tennessee to review a judgment denying the claim of a bank to exemption from

NOTE.—*On the jurisdiction of the circuit court of appeals*—see notes to Lau Ow Bew v. United States, 1 C. C. A. 6; Salmon v. Mills, 13 C. C. A. 374; and United States Freehold Land & Emigration Co. v. Gallegos, 32 C. C. A. 475.

*On conclusiveness of judgments generally*—see notes to Sharon v. Terry (C. C. N. D. Cal.) 1 L. R. A. 572; Bollong v. Schuyler Nat. Bank (Neb.) 3 L. R. A. 142; Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 577; Morrill v. Morrill (Or.) 11 L. R. A. 155; Bank of United States v. Beverly, 11 L. ed. U. S. 76; The Johnson Steel Street R. Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

*As to conclusiveness and effect of judgments as between Federal and state courts*—see notes to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; and Union & P. Bank v. Memphis, 49 C. C. A. 468.

municipal taxes under its charter. *Affirmed.*

Also an appeal from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Tennessee denying the claim of a bank to exemption from municipal taxes under its charter. *Reversed*, with directions to dismiss the appeal from, and writ of error to, the Circuit Court.

See case number 221 below, 49 C. C. A. 455, 111 Fed. 561.

Statement by Mr. Chief Justice **Fuller:**

The Union & Planters' Bank of Memphis was incorporated under a charter granted by the general assembly of the state of Tennessee in 1858, which contained the following provision: "That said company shall pay an annual tax of ½ of 1 per cent on each share of stock subscribed, which shall be in lieu of all other taxes." The corporation was located in the city of Memphis, Shelby county, Tennessee, and that city, pursuant to an act of the legislature of Tennessee, assessed an ad valorem tax for the year 1899, for municipal purposes, on the capital stock of the bank. The bank thereupon filed its bill in the circuit court of the United States for the western division of the western district of Tennessee, in which it was alleged that the law under which the assessment was made impaired the obligation of the contract created by the above-quoted clause of the charter. The bill further averred that in a former litigation between the bank and the city, wherein it was sought to enforce a municipal assessment of taxes on the capital stock of the bank for the years 1888, 1889, and 1890, it was adjudged by the supreme court of Tennessee that, by the provision aforesaid, the capital stock of the corporation was exempt from all general taxation. The record and judgment in that suit were set out in full, and pleaded as a final judicial determination of the bank's exemption from the payment of ad valorem taxes on its capital stock; and it was averred that the judgment so pleaded was based on the identical claim of exemption now asserted, and on identically the same facts and conditions under which this assessment was made.

The prayer was that the assessment be canceled, and complainant be declared to be exempt from the payment to the city of ad valorem taxes on its capital stock.

73] *Defendants demurred, and the demurrer was sustained and the bill dismissed, November 6, 1900, whereupon complainant prayed and perfected an appeal to, and also took a writ of error from, the United States circuit court of appeals for the sixth circuit, and the case was docketed there on or about November 27, 1900.

On February 11, 1901, complainant prayed, and was granted an appeal from the decree of the circuit court directly to this court, the record was filed here, March 23, 1901, and the case is now No. 67.

The case in the circuit court of appeals was heard June 10, 1901, and the decree below was affirmed October 21, 1901. 49 C. C. A. 455, 111 Fed. 561. Thereupon complainant, appellant in that court, prosecuted an appeal from its decree to this court, and the case was docketed here January 13, 1902, and is now No. 221.

Both cases were submitted, as one case, on printed briefs.

*Mr.* **William H. Carroll** submitted the cause for appellant. *Mr. Tim E. Cooper* was with him on the brief:

The mere fact that the demand in this case is for a tax for one year, and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.

*Bank of Kentucky* v. *Stone*, 88 Fed. 383; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905.

The Tennessee cases hold that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, that that matter is forever concluded between the parties and their privies, where the judgment is final.

*Estill* v. *Taul*, 2 Yerg. 467, 24 Am. Dec. 498; *Gray* v. *Faris*, 7 Yerg. 161; *King* v. *Vaughn*, 8 Yerg. 59, 29 Am. Dec. 104; *Hodges* v. *Bauchman*, 8 Yerg. 186; *Elrod* v. *Lancaster*, 2 Head, 574, 75 Am. Dec. 749; *Warwick* v. *Underwood*, 3 Head, 238, 75 Am. Dec. 767; *Brewster* v. *Galloway*, 4 Lea, 567; *McClanahan* v. *Stovall*, 6 Lea, 505; *Roper* v. *Rowlett*, 7 Lea, 321; *Parkes* v. *Clift*, 9 Lea, 524; *Peak* v. *Ligon*, 10 Yerg. 469; *Westbrook* v. *Thompson*, 104 Tenn. 363, 58 S. W. 223; *Sale* v. *Eichberg*, 105 Tenn. 333, 52 L. R. A. 894, 59 S. W. 1020.

Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions.

*Southern P. R. Co.* v. *United States*, 168 U. S. 5, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *Forsyth* v. *Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665.

*Mr.* **Luke E. Wright** submitted the cause for appellee. *Mr. John H. Watkins* was with him on the brief:

The precise point involved herein having been determined by both this court and the state court, there is no longer any Federal or other question as to the taxability of appellant's capital stock as contradistinguished from the shares of stock.

*Shelby County* v. *Union & P. Bank*, 161 U. S. 150, 40 L. ed. 652, 16 Sup. Ct. Rep. 558; *Union & P. Bank* v. *Memphis*, 101 Tenn. 168, 46 S. W. 557.

There is such a well-defined and unbroken line of decisions in Tennessee that judgments and decrees in tax cases are limited to the taxes actually involved that, as a

local question, that proposition is no longer debatable.

*State* v. *Bank of Commerce*, 95 Tenn. 221, 31 S. W. 993; *Union & P. Bank* v. *Memphis*, 101 Tenn. 167, 46 S. W. 557; *Buchanan* v. *Springer* (Tenn. Ch. App.) 35 S. W. 774.

The local law as to the effect of tax judgments will be followed by this court in cases involving the construction of a state statute or a former state judgment.

*Bergman* v. *Bly*, 13 C. C. A. 319, 27 U. S. App. 650, 66 Fed. 43; *Lavin* v. *Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 650; *Shelby* v. *Guy*, 11 Wheat. 367, 6 L. ed. 496; *Green* v. *Neal*, 6 Pet. 299, 8 L. ed. 402; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 166, 36 L. ed. 928, 13 Sup. Ct. Rep. 54; *Fidelity Ins. & S. D. Co.* v. *Shenandoah Iron Co.* 42 Fed. 376; *Tioga R. Co.* v. *Blossburg & C. R. Co.* 20 Wall. 137, 22 L. ed. 331; *Union Nat. Bank* v. *Bank of Kansas City*, 136 U. S. 235, 34 L. ed. 346, 10 Sup. Ct. Rep. 1013; *Leighton* v. *Young*, 18 L. R. A. 266, 3 C. C. A. 176, 10 U. S. App. 298, 52 Fed. 439; *Sanford* v. *Poe*, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546; *Bauserman* v. *Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Thompson* v. *Searcy County*, 6 C. C. A. 674, 12 U. S. App. 618, 57 Fed. 1030; *Luther* v. *Borden*, 7 How. 1, 12 L. ed. 581; *Lavin* v. *Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 641; *Christy* v. *Pridgeon*, 4 Wall. 196, 18 L. ed. 322; *Leffingwell* v. *Warren*, 2 Black, 603, 17 L. ed. 262; *Sioux City Terminal R. & Ware-house Co.* v. *Trust Co. of N. A.* 27 C. C. A. 73, 49 U. S. App. 523, 82 Fed. 124; *Hill* v. *Hite*, 29 C. C. A. 549, 56 U. S. App. 403, 85 Fed. 268; *Union P. R. Co.* v. *Reed*, 25 C. C. A. 389, 49 U. S. App. 233, 80 Fed. 234; *Rice* v. *Adler-Goldman Commission Co.* 18 C. C. A. 15, 36 U. S. App. 266, 71 Fed. 151; *Hodgdon* v. *Burleigh*, 4 Fed. 121; *Duden* v. *Maloy*, 43 Fed. 407; *Sutherland-Innes Co.* v. *Evart*, 30 C. C. A. 305, 58 U. S. App. 335, 86 Fed. 597.

The rule of decision in Tennessee upon the question of *res judicata* constitutes a property rule, as well as its decisions upon its statute laws, which rule of decision the Federal courts have repeatedly announced they will follow.

*Franklin County Ct.* v. *Louisville & N. R. Co.* 84 Ky. 65; *Olcott* v. *Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382.

The present law, as announced by this court and the supreme court of Tennessee, is controlling in this case.

*Lavin* v. *Emigrant Industrial Sav. Bank*, 18 Blatchf. 1, 1 Fed. 650; *Tomes* v. *Barney*, 35 Fed. 115; *Bank of Kentucky* v. *Stone*, 88 Fed. 397; *Bauserman* v. *Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Miller* v. *Swann*, 150 U. S. 132, *sub nom. Miller* v. *Anderson*, 37 L. ed. 1028, 14 Sup. Ct. Rep. 52; *Baltimore Traction Co.* v. *Baltimore Belt R. Co.* 151 U. S. 137, 38 L. ed. 102, 14 Sup. Ct. Rep. 294; *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *First Nat. Bank* v. *Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; *Wilson* v. *North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *Missouri P. R. Co.* v. *Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Merchants' & Mfrs. Nat. Bank* v. *Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Diversity of citizenship did not exist, and the jurisdiction of the circuit court rested solely on the ground that the cause of action arose under the Constitution of the United States. The appeal lay directly to this court under § 5 of the judiciary act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 547), and not to the circuit court of appeals. *American Sugar Ref. Co.* v. *New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646. Nevertheless, an appeal having been prosecuted to the latter court, and having there gone to decree, an appeal was allowed to this court because the judgment was not made final in that court by § 6 of the act. But the case being here, and the jurisdiction of the circuit court having *depended [74] on the sole ground that it arose under the Constitution, we are constrained to reverse the decree of the circuit court of appeals, not on the merits, but by reason of the want of jurisdiction in that court. If this were not so, the right to two appeals would exist in every similar case, notwithstanding, as we have repeatedly held, that such was not the intention of the act. *Robinson* v. *Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; *Loeb* v. *Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *American Sugar Ref. Co.* v. *New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

In *Pullman's Palace Car Co.* v. *Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808, an appeal was taken to this court and also to the circuit court of appeals, and a motion was made in each court to dismiss the appeal, whereupon, by reason of the circumstances, we granted a writ of certiorari, and brought up the record from the latter court before it had proceeded to decree. The question as to which was the correct route to reach this court became immaterial, and we disposed of the case on its merits. But in the present case the circuit court of appeals went to decree, and we are obliged to deal with the appeal therefrom, in doing which the jurisdiction of that court necessarily comes under review.

The questions on the merits are, however, presented for disposition on the direct appeal from the circuit court.

In *Shelby County* v. *Union & Planters' Bank* (1895) 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558, it was decided that the capital stock of the bank was not exempt from ad valorem taxation by the pro-

vision of the charter in question, and was liable to be taxed as the state might determine. *Bank of Commerce* v. *Tennessee use of Memphis*, 161 U. S. 134, 40 L. ed. 645, 16 Sup. Ct. Rep. 456.

But the bank objects that, notwithstanding this court has thus held that the exemption asserted does not exist, it must, nevertheless, be recognized in this case as existing, because it was so determined by the judgment pleaded as *res judicata*. The judgment thus relied on as a bar to this assessment is reported in *Memphis* v. *Union & Planters' Bank* (1892) 91 Tenn. 546, 19 S. W. 758, which involved the assessment of municipal taxes for the years 1887 to 1891 inclusive, on the capital stock of the bank, and a privilege tax for the years 1889, 1890, [75] and 1891. *The supreme court of Tennessee there held, in deference to the supposed scope of the decisions of this court in *Farrington* v. *Tennessee* (1877) 95 U. S. 679, 24 L. ed. 558, and in *Bank of Commerce* v. *Tennessee* (1881) 104 U. S. 493, 26 L. ed. 810, that the bank was exempted by the charter from being assessed by the state, county, or municipality for any taxes except as specified.

In *Union & Planters' Bank* v. *Memphis* (1898) 101 Tenn. 154, 46 S. W. 557, the conclusion announced in *Shelby County* v. *Union & Planters' Bank*, 161 U. S. 149, 40 L. ed. 650, 16 Sup. Ct. Rep. 558, was followed, and it was held to be the settled rule in Tennessee that the plea of *res judicata* is only applicable to the taxes actually in litigation, and is not conclusive in respect to taxes assessed for other and subsequent years. *State* v. *Bank of Commerce*, 95 Tenn. 231, 31 S. W. 993.

As the judgment relied on as *res judicata* was not so regarded in *Shelby County* v. *Union & Planters' Bank*, it could not be properly so regarded in the present case; but, apart from that, it is enough that in Tennessee the doctrine of *res judicata* is not applicable to taxes for years other than those under consideration in the particular case, inasmuch as what effect a judgment of a state court shall have as *res judicata* is a question of state or local law, and the taxes involved in this suit are taxes for years other than those involved in the prior adjudication. *Phœnix F. & M. Ins. Co.* v. *Tennessee*, 161 U. S. 174, 40 L. ed. 660, 16 Sup. Ct. Rep. 471.

In *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905, referred to by appellant's counsel, no claim was made that the judgment relied on would not have been *res judicata* in the state courts, and attention was particularly called to the fact that the rule in Louisiana was in accord with the conception of *res judicata* expounded in that case.

As the judgment pleaded had no force or effect in the Tennessee state courts other than as a bar to the identical taxes litigated in the suit, the courts of the United States can accord it no greater efficacy. *Cooper* v. *Newell*, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506; *Metcalf* v. *Watertown*, 153 U. S. 671, 38 L. ed. 861, 14 Sup. Ct. Rep. 947; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 108 U. S. 18, 27 L. ed. 636, 1 Sup. Ct. Rep. 614, 617; Rev. Stat. § 905 (U. S. Comp. Stat. 1901, p. 677).

The litigation over the alleged exemption has been protracted, and many decisions have been rendered in this court and in the highest tribunal of Tennessee in respect of it. They are *reviewed by Lurton, J., in the [76] circuit court of appeals, 49 C. C. A. 455, 111 Fed. 561.

*Decree of the Circuit Court in No. 67 affirmed.*

*Decree of the Circuit Court of Appeals in No. 221 reversed,* with a direction to dismiss the appeal and writ of error.

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MEXICAN CENTRAL RAILWAY COMPANY (Limited), *Plff. in Err.*,
v.
J. M. DUTHIE.

(See S. C. Reporter's ed. 76-78.)

*Pleading—amendment after verdict and judgment.*

An amendment of plaintiff's petition, after verdict and judgment thereon, with no further proceedings taken, by inserting the words, "and is a citizen of said state and of the United States of America," after the allegation therein that "plaintiff resides in El Paso, in El Paso county, state of Texas," may be allowed by a circuit court of the United States, under U. S. Rev. Stat. § 964 (U. S. Comp. Stat. 1901, p. 697), giving the trial court the right at any time to permit either of the parties to amend any defect in process or pleadings, upon such conditions as it shall prescribe.

[No. 336.]

*Submitted March 23, 1903. Decided April 13, 1903.*

IN ERROR to the Circuit Court of the United States for the Western District of Texas wherein is certified the question of that court's jurisdiction to permit an amendment to the petition after verdict and judgment, and to retain the judgment after such amendment. *Judgment affirmed.*

The facts are stated in the opinion.

*Messrs.* **Aldis B. Browne, Alexander Britton,** and **Eben Richards** submitted the cause for plaintiff in error:

The verdict found upon pleadings which are substantially defective is itself defective, and judgment entered thereon is void.

*Garland* v. *Davis*, 4 How. 131, 11 L. ed. 907; *Barnes* v. *Williams*, 11 Wheat. 415, 6 L. ed. 508.

After the verdict and judgment entered thereon, the trial court should not have allowed plaintiff to amend his pleadings by inserting the necessary jurisdictional averments therein, without first setting aside the verdict and judgment and granting a new trial.

*Smith* v. *Jackson ex dem. Allyn*, 1 Paine, 486, Fed. Cas. No. 13,065; *Robertson* v. *Cease*, 97 U. S. 646, 24 L. ed. 1057; *Halsted* v. *Buster*, 119 U. S. 341, 30 L. ed. 462, 7 Sup. Ct. Rep. 276; *Chapman* v. *Barney*, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; *Denny* v. *Pironi*, 141 U. S. 121, 35 L. ed. 657, 11 Sup. Ct. Rep. 966; *Cooper* v. *Newell*, 155 U. S. 532, 39 L. ed. 249, 15 Sup. Ct. Rep. 355. See also *Brown* v. *Keene*, 8 Pet. 112, 8 L. ed. 885; *Continental L. Ins. Co.* v. *Rhoads*, 119 U. S. 237, 30 L. ed. 380, 7 Sup. Ct. Rep. 193; *Menard* v. *Goggan*, 121 U. S. 253, 30 L. ed. 914, 7 Sup. Ct. Rep. 873; *Wolfe* v. *Hartford L. & Annuity Ins. Co.* 148 U. S. 389, 37 L. ed. 493, 13 Sup. Ct. Rep. 602; *Horne* v. *George H. Hammond Co.* 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167; *Bargh* v. *Page*, 4 McLean, 10, Fed. Cas. No. 980.

By the practice conformity act of June 1, 1872, U. S. Rev. Stat. § 914, the specific provisions of the state statutes in this respect are controlling.

*Glenn* v. *Sumner*, 132 U. S. 152, 33 L. ed. 301, 10 Sup. Ct. Rep. 41; *Henderson* v. *Louisville & N. R. Co.* 123 U. S. 61, 31 L. ed. 92, 8 Sup. Ct. Rep. 60; *Phillips & C. Constr. Co.* v. *Seymour*, 91 U. S. 646, 23 L. ed. 341; *Atlantic & P. R. Co.* v. *Laird*, 164 U. S. 393, 41 L. ed. 485, 17 Sup. Ct. Rep. 120; *Mack* v. *Porter*, 18 C. C. A. 527, 25 U. S. App. 595, 72 Fed. 236. See also *People's Sav. Bank & Trust Co.* v. *Batchelder Egg Case Co.* 2 C. C. A. 126, 4 U. S. App. 603, 51 Fed. 130; *Post* v. *Wise Twp.* 101 Fed. 204; *Wolf* v. *Cook*, 40 Fed. 432.

Amendments to pleadings under the Texas statute and practice are not allowable after verdict and judgment, except that, after arrest of judgment or new trial granted, the court may allow such amendment as if no trial had been had or judgment reached.

*Petty* v. *Lang*, 81 Tex. 238, 16 S. W. 999; *Heflin* v. *Burns*, 70 Tex. 347, 8 S. W. 48; *Missouri P. R. Co.* v. *Howe*, 4 Tex. App. Civ. Cas. (Willson) § 197, p. 296.

*Mr.* **Leigh Clark** submitted the cause for defendant in error:

Judgments are under the control of the court where entered, until the close of the term.

1 Black, Judgm. § 153.

Mere matters of procedure, such as the granting or refusing motions for new trial, and questions respecting amendments to the pleadings, are purely discretionary matters for the consideration of the trial court; and unless there has been gross abuse of that discretion they are not reviewable in this court on writ of error.

*Mexican C. R. Co.* v. *Pinkney*, 149 U. S. 201, 37 L. ed. 702, 13 Sup. Ct. Rep. 859; *Chapman* v. *Barney*, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; *Chirac* v. *Reinicker*, 11 Wheat. 302, 6 L. ed. 479; *Murphy* v. *Stewart*, 2 How. 284, 11 L. ed. 269; *Spencer* v. *Lapsley*, 20 How. 264, 15 L. ed. 902.

And when such amendment is permitted, the court must, in its discretion, determine whether any submission which had been made ought to be vacated.

*Bamberger* v. *Terry*, 103 U. S. 40, 26 L. ed. 317.

Certain amendments will be permitted at any stage of the case, so as to bring in an essential party or to aver citizenship.

*Fisher* v. *Rutherford*, Baldw. 188, Fed. Cas. No. 4,823; *Hilliard* v. *Brevoort*, 4 McLean, 24, Fed. Cas. No. 6,505.

The trial court did not err in permitting the plaintiff to amend his original and first amended original petitions in said cause, after judgment rendered, at the same term of court.

*The Tremola Patent*, 23 Wall. 518, *sub nom. Tremaine* v. *Hitchcock*, 23 L. ed. 97; *Maddox* v. *Thorn*, 8 C. C. A. 574, 23 U. S. App. 189, 60 Fed. 217; *Fitchburg R. Co.* v. *Nichols*, 29 C. C. A. 464, 50 U. S. App. 280, 85 Fed. 869.

Where the laws of the state and those of the United States conflict, the laws of the latter govern.

Cooley, Const. L. p. 32; *Phelps* v. *Oaks*, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714; *Southern P. Co.* v. *Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 23 L. ed. 898.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Duthie brought suit for the recovery of damages for personal injuries in the circuit court of the United States for the western district of Texas against the Mexican Central Railway Company, Limited, and in his original complaint averred that he "resides in El Paso, in El Paso county, state of Texas, *in the western district of said [77] state," and that defendant was a citizen of the state of Massachusetts. The cause was tried before a jury, and resulted in a verdict and judgment thereon April 10, 1902. The record shows "that no further proceedings were had in said cause after the entry of said judgment until, to wit, the 17th day of April, 1902, on which day plaintiff filed his motion asking leave to amend his petition," to the effect "that leave be granted him to now amend his said original and first amended petition by inserting therein the following: 'And is a citizen of said state and of the United States of America,' after the allegation made in said pleading 'that plaintiff resides in El Paso, in El Paso county, state of Texas.'" In support of the motion plaintiff stated under oath "that he is now and was at the date of the filing of his original petition herein, and was on the 22d day of July, 1901, the date of his injuries, a bona fide citizen of the United States of America and of the state of Texas." The court granted leave to so amend, and defendant excepted. Thereupon defendant applied to the court to certify to this court the question of jurisdiction to amend, and to retain the judgment after such amendment, and a certificate was accordingly granted.

If the complaint or petition had remained as it was originally framed, and the case had then been carried to the circuit court

of appeals, that court would have been constrained to reverse the judgment and remand the cause for a new trial, with leave to amend. *Metcalf* v. *Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Horne* v. *George H. Hammond Co.* 155 U. S. 393, 39 L. ed. 197, 15 Sup. Ct. Rep. 167.

But plaintiff, discovering the defect in the averment before the case had passed from the jurisdiction of the circuit court, applied and obtained leave to amend, and made the amendment. So that the only question is whether the circuit court had power to allow the amendment.

By § 954 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 697) it was provided that the trial court might "at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe;" and since the trial court in the present case still had control of the record, it had jurisdiction to act, and [78] we may *add that we do not perceive that there was any abuse of discretion in permitting the amendment in the circumstances disclosed. *Mexican C. R. Co.* v. *Pinkney*, 149 U. S. 201, 37 L. ed. 702, 13 Sup. Ct. Rep. 859; *The Tremolo Patent*, 23 Wall. 518, *sub nom. Tremaine* v. *Hitchcock*, 23 L. ed. 97. If the statutes of Texas forbade such an amendment, the law of the United States must govern. *Phelps* v. *Oaks*, 117 U. S. 236, 29 L. ed. 888, 6 Sup. Ct. Rep. 714; *Southern P. Co.* v. *Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44.

The suggestion that defendant was cut off from trying the fact as to plaintiff's citizenship is without merit. The record does not disclose that defendant sought to contest plaintiff's affidavit, and for aught that appears the fact may have been conceded.

*Judgment affirmed.*

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HENRY J. JAQUITH, Trustee, *Appt.*,
*v.*
G. EDWIN ALDEN.

(See S. C. Reporter's ed. 78-84.)

*Bankruptcy—preferences by payments for goods sold after insolvency.*

Payments by the vendees on a running account for goods which were sold and delivered after they had become insolvent, when received by the vendor in the regular course of business and without idea or intention on his part of obtaining a preference thereby, are not, though made within four months before the petition in bankruptcy was filed for such vendees, preferences within the meaning of the bankruptcy act of 1898, § 60 (30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445), which must be surrendered, under § 57*g*, before the vendor's claim for the balance due can be allowed.

[No. 516.]

*Submitted January 12, 1903. Decided April 27, 1903.*

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a judgment which affirmed a decree of the District Court for the District of Massachusetts reversing a judgment of a referee who had disallowed a claim in bankruptcy unless certain payments were surrendered as preferences, and allowing the claim. *Affirmed.*

See same case below, 118 Fed. 270.

Statement by Mr. Chief Justice **Fuller:**

F. N. Woodward *et al.* filed their petition in bankruptcy, and were adjudicated bankrupts November 26, 1901. They had become insolvent August 15, and on that day were not indebted to G. Edwin Alden, who afterwards, in ignorance of the insolvency, made sales to Woodward *et al.*, and received payments from them therefor in the regular course of business, and without any idea or [79] intention on the part of Alden of obtaining a preference thereby, the sales and payments being as follows:

*Sales.*

| | | | |
|---|---|---|---|
| Aug. 17, 1901. | Rubber | $289 | 46 |
| 28, " | " | 657 | 89 |
| Sept. 30, " | " | 644 | 28 |
| Oct. 18, " | " | 535 | 09 |
| Oct. 18, " | Cartage | | 50 |
| 31, " | Asbestine | 10 | 40 |

*Payments.*

| | |
|---|---|
| Sept. 4, 1901. Payment of bill Aug. 17 | $289 46 |
| Sept. 28, 1901. Payment of bill Aug. 28 | 657 89 |
| Oct. 29, 1901. Payment of bill Sept. 30 | 644 28 |

The merchandise sold Woodward *et al.* was manufactured by them, and the result of the transactions was to increase their estate in value. Alden petitioned to be allowed to prove his claim of $546.89.

The referee disallowed the claim unless at least the amount of $633.88 was surrendered to the estate. The district judge reversed the judgment of the referee and allowed the claim, and the decree of the district court was affirmed by the circuit court of appeals (118 Fed. 270) on the authority of *Dickson* v. *Wyman*, 55 L. R. A. 349, 49 C. C. A. 574, 111 Fed. 726. Thereupon an appeal to this court was allowed and a certificate granted under § 25, *b*, 2.

*Mr.* **Harry J. Jaquith** submitted the cause *in propria persona* for appellant:

The record shows a preference under the bankruptcy act, which the appellee should surrender.

*Pirie* v. *Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906.

A new credit paid for in full cannot be set off to reduce the preference.

*Peterson* v. *Nash Bros.* 55 L. R. A. 344, 50 C. C. A. 260, 112 Fed. 311; *Kahn* v. *Cone Export & Commission Co.* 53 C. C. A. 92, 115 Fed. 290; *Kimball* v. *E. A. Rosenham Co.* 52 C. C. A. 33, 114 Fed. 85; *P. S. Morey Mercantile Co.* v. *Schiffer*, 52 C. C. A. 249,

114 Fed. 447; *Gans* v. *Ellison*, 52 C. C. A. 366, 114 Fed. 734; *McNair* v. *McIntyre*, 51 C. C. A. 89, 113 Fed. 113.

*Mr.* **Eugene M. Johnson** submitted the cause for appellee. *Messrs. Arthur T. Johnson* and *Alonzo R. Weed* were with him on the brief:

The object of the bankruptcy act, so far as the creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt; not among some of the creditors, but among all of them; which object could not be secured if there were no provisions against preferences.

*Pirie* v. *Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906; *Wilson* v. *City Bank*, 17 Wall. 473, 21 L. ed. 723; *Toof* v. *Martin*, 13 Wall. 40, 20 L. ed. 481.

The plain object and policy of an insolvency law is to require a debtor, as soon as he has reason to believe himself insolvent and before he has frittered away his property, to put himself and his assets at once into the hands of the law, with the view to making an equal distribution of it among his creditors.

*Fernald* v. *Gay*, 12 Cush. 596.

From the moment of actual insolvency all creditors become entitled to share *pro rata* in the estate.

*Re Knost*, 1 N. B. N. 403.

A preference is an advantage secured by the creditor,—the obtaining by the creditor of more than his share of the estate which the bankrupt had upon the date of the occurrence of insolvency.

*Re Hapgood*, 2 Low. Dec. 200, Fed. Cas. No. 6,044.

The plain purpose of the provisions for the surrender of innocent preferences before proof, and the recovery of fraudulent preferences, is to restore, as far as practicable, the conditions as they existed at the time of actual insolvency.

Lowell, Bankruptcy, chap. 5.

Every payment made by an insolvent debtor to his creditor, within four months of the filing of the petition, is not necessarily a preference, unless, taking all the transactions between the parties into account, the payments, or some of them, enable the creditor to obtain a greater percentage of his debt than other creditors of the same class.

*Dickson* v. *Wyman*, 55 L. R. A. 349, 49 C. C. A. 574, 111 Fed. 726; *Kimball* v. *E. A. Rosenham Co.* 52 C. C. A. 33, 114 Fed. 85; *P. S. Morey Mercantile Co.* v. *Schiffer*, 52 C. C. A. 249, 114 Fed. 447; *Gans* v. *Ellison*, 52 C. C. A. 366, 114 Fed. 734; *Swarts* v. *Fourth Nat. Bank*, 54 C. C. A. 387, 117 Fed. 1; *Swarts* v. *Siegel*, 54 C. C. A. 399, 117 Fed. 13.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The facts found established that on August 15 the aggregate *of the property of the [80] bankrupts was not, at a fair valuation, sufficient in amount to pay their debts, but that Alden was ignorant of this, and, in good faith and in the regular course of business, sold material to the bankrupts, and received payment therefor several times between August 15 and November 26, when the petition was filed, on which day the amount of $546.89 for material delivered shortly before had not been paid. All the material so sold to them was manufactured by the bankrupts, and increased their estate in value.

The question is whether the payments made to Alden (or either of them) were preferences within § 60 of the bankruptcy act of 1898 [30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445], which must be surrendered, under § 57*g*, before his claim could be allowed.

Provisions of the act bearing on the subject are given below.†

*In *Pirie* v. *Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906, [81] the circuit court of appeals for the seventh circuit had affirmed an order of the district court for the northern district of Illinois, rejecting a claim of Carson, Pirie, & Company against the estate of Frank Brothers, bankrupts, and the case was then brought to this court on findings of fact and conclusions of law of the circuit court of appeals, made and filed "pursuant to the requirements of subdivision 3, rule 36 of General Orders in Bankruptcy." The first three of the findings were as follows:

"First. That on February 11, 1899, August Frank, Joseph Frank, and Louis Frank, trading as Frank Brothers, were duly adjudged bankrupts.

"Second. That for a long time prior thereto appellants carried on dealings with the said bankrupt firm, said dealings consisting of a sale by said appellants to said Frank Brothers of goods, wares, and merchandise amounting to the total sum of $4,403.77.

"Third. That said appellants, in the regular and ordinary *course of business, and [82] within four months prior to the adjudication in bankruptcy herein, did collect and receive from said bankrupts as partial payment of said account for such goods, wares, and merchandise so sold and delivered to

†"Sec. 1*a*. The words and phrases used in this act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows: . . . (9) 'creditor' shall include anyone who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy; (10) 'date of bankruptcy,' or 'time of bankruptcy,' or 'commencement of proceedings,' or 'bankruptcy,' with reference to time, shall mean the date when the petition was filed; (11) 'debt' shall include any debt, demand, or claim provable in bankruptcy; . . . (15) a person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

"Sec. 3*a*. Acts of bankruptcy by a person shall consist of his having (1) conveyed, transferred, concealed, or removed, or permitted to

said Frank Brothers, the sum of $1,336.79, leaving a balance due, owing and unpaid, amounting to $3,093.98."

It was further found that, at the time this payment was made, Frank Brothers were hopelessly insolvent, to their knowledge; but that Carson, Pirie, & Company had no knowledge of such insolvency, nor had reasonable cause to believe that it existed; nor did they have reasonable cause to believe that the bankrupts, by the payment, intended thereby to give a preference; and that they had refused to surrender to the trustee the amount of the payment made to them by the bankrupts, as a condition of the allowance of their claim. Upon the facts the circuit court of appeals concluded, as matter of law, that the payment made "at the time and in the manner above shown" constituted a preference; and that, by reason of the failure and refusal of Carson, Pirie, & Company to surrender the preference, they were not entitled to prove their claim.

The judgment below was affirmed by this court, and it was held that a payment of money was a transfer of property, and when made on an antecedent debt by an insolvent was a preference within § 60*a*, although the creditor was ignorant of the insolvency, and had no reasonable cause to believe that a preference was intended. The estate of the insolvent, as it existed at the date of the insolvency, was diminished by the payment, and the creditor who received it was enabled to obtain a greater percentage of his debt than any other of the creditors of the same class.

In the present case all the rubber was sold and delivered after the bankrupts' property had actually become insufficient to pay their debts, and their estate was increased in value thereby to an amount in excess of the payments made. The account was a running account, and the effect of the payments was to keep it alive by the extension of new credits, with the net result of a gain to the estate of $546.89, and a loss to the seller of that amount, less such dividends as the estate might pay.* In these circumstances the[83] payments were no more preferences than if the purchases had been for cash, and, as parts of one continuous bona fide transaction, the law does not demand the segregation of the purchases into independent items so as to create distinct pre-existing debts, thereby putting the seller in the same class as creditors already so situated, and impressing payments with the character of the acquisition of a greater percentage of a total indebtedness thus made up.

We do not think the slight variation in the dates of sales and payments affords sufficient ground for the distinction put forward by counsel between the payments of September 4 and 28 and the payment of October 29 (which he concedes should be upheld) in their relation to the rubber furnished August 17 and 28 and September 30. All the material was sold and delivered after August 15, and neither of the items can properly be singled out as constituting outstanding indebtedness, payment of which operated as a preference.

The facts as found in *Pirie* v. *Chicago Title & T. Co.* were so entirely different from those existing here that this case is not controlled by that. In view of similar vital differences it has been held by the circuit court of appeals for the first circuit (*Dickson* v. *Wyman*, 55 L. R. A. 349, 49 C. C. A. 574, 111 Fed. 726), second circuit (*Re Sagor*, 9 Am. Bankr. Rep. 361), third circuit (*Gaas* v. *Ellison*, 52 C. C. A. 366, 114 Fed. 734), eighth circuit (*Kimball* v. *Rosenham Co.* 52 C. C. A. 33, 114 Fed. 85), that payments on a running account, where new sales succeed payments, and the net result is to increase the value of the estate, do not constitute preferential transfers under § 60*a*.

*Judgment affirmed.*

Mr. Justice **White** and Mr. Justice **McKenna**, not being able to concur in the rea-

be concealed or removed, any part of his property with intent to hinder, delay, or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having, at least five days before a sale or final disposition of any property affected by such preference, vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground."

"Sec. 60*a*. A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"*b*. If a bankrupt shall have given a preference within four months before the filing of a petition, or after the filing of the petition and before the adjudication, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property, or its value from such person.

"*c*. If a creditor has been preferred, and afterwards, in good faith, gives the debtor further credit, without security of any kind, for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him."

"Sec. 57*g*. The claims of creditors who have received preferences shall not be allowed unless such creditors shall surrender their preferences."

"Sec. 68*a*. In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor, the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

sons by which the court, in the opinion just announced, distinguishes this case from that of *Pirie* v. *Chicago Title & T. Co.*, and deeming the latter case controlling in this, dissent.

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[84]**Re* JAMES S. BARTON KEY, *Petitioner.*

(See S. C. Reporter's ed. 84, 85.)

*Mandamus—to review dismissal of appeal for want of jurisdiction.*

A writ of mandamus will not lie to compel the court of appeals of the District of Columbia to reinstate an appeal from the supreme court of the District, in an action originally brought before a justice of the peace, where such appeal was dismissed by the court of appeals for want of jurisdiction, although the decree of dismissal cannot be reviewed on appeal or writ of error.

[No. 13, Original.]

*Argued April 6, 1903. Decided April 27, 1903.*

RULE entered on a petition for a writ of mandamus to compel the Court of Appeals of the District of Columbia to reinstate an appeal from the Supreme Court of that District. *Discharged* and petition dismissed.

The facts are stated in the opinion.

*Mr.* **Frederic D. McKenney** argued the cause, and, with *Messrs. Henry Blair* and *John Spalding Flannery*, filed a brief for petitioner:

Where the court below, from a mistaken view of the law as to its jurisdiction, dismisses a case properly cognizable by it, mandamus is the proper remedy to compel it to reinstate the case and proceed to final judgment. A writ of error or appeal does not lie, for the appellate court has nothing to review where the inferior court has not decided the case, but has refused to hear it.

*Ex parte Russell*, 13 Wall. 664, 20 L. ed. 632; *Knickerbocker Ins. Co.* v. *Comstock*, 16 Wall. 258, 21 L. ed. 493; *Ex parte Parker*, 120 U. S. 737, 30 L. ed. 818, 7 Sup. Ct. Rep. 767; 131 U. S. 221, 33 L. ed. 123, 9 Sup. Ct. Rep. 708; *Re Atlantic City R. Co.* 164 U. S. 635, 41 L. ed. 580, 17 Sup. Ct. Rep. 208; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Re Connaway*, 178 U. S. 421, 44 L. ed. 1134, 20 Sup. Ct. Rep. 951.

Mandamus lies to compel a court to grant an appeal where the relator is entitled thereto.

*Ex parte Jordan*, 94 U. S. 248, 24 L. ed. 123; *Ex parte Zellner*, 9 Wall. 244, 19 L. ed. 665; *Vigo's Case*, 21 Wall. 648, 22 L. ed. 690; *United States* v. *Gomez*, 3 Wall. 752, 18 L. ed. 212; *Ex parte South & North Ala. R. Co.* 95 U. S. 221, 24 L. ed. 355.

The primary rule of statutory construction is, of course, to give effect to the intention of the legislature.

*Rodgers* v. *United States*, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582.

Where provisions of one section are irreconcilable with the provisions of another section, the last words stand, and others which cannot stand with them go to the ground.

*Powers* v. *Barney*, 5 Blatchf. 203, Fed. Cas. No. 11,361; *State* v. *Hall*, 5 S. C. N. S. 120; *Elliott* v. *Lochnane*, 1 Kan. 135; *Ryan* v. *State*, 5 Neb. 276; *Gibbons* v. *Brittenum*, 56 Miss. 232; *Packer* v. *Sunbury & E. R. Co.* 19 Pa. 211; *Brown* v. *Philadelphia County*, 21 Pa. 37; *Southwark Bank* v. *Com.* 26 Pa. 446; Bacon, Abridgment, tit. *Statutes*, D; *Ex parte Ray*, 45 Ala. 15; *Harrington* v. *Rochester Trustees*, 10 Wend. 547; *Commercial Bank* v. *Chambers*, 8 Smedes & M. 9; *Quick* v. *White-Water Twp.* 7 Ind. 570; *Albertson* v. *State*, 9 Neb. 429, 2 N. W. 742, 892; *Sams* v. *King*, 18 Fla. 557; *Branagan* v. *Dulaney*, 8 Colo. 408, 8 Pac. 669; *Gee* v. *Thompson*, 11 La. Ann. 657; *Peet* v. *Nalle*, 30 La. Ann. 949; *Hamilton* v. *Buxton*, 6 Ark. 24.

In the absence of an express repeal, the later expression of the legislative will operates as a repeal of the earlier expression, either where the two expressions are dirctly repugnant, or where the later expression covers the whole subject of the earlier one, and embraces new provisions which plainly show that it was intended as a substitute therefor.

*United States* v. *Tynen*, 11 Wall. 88, 20 L. ed. 153; *Daviess* v. *Fairbairn*, 3 How. 636, 11 L. ed. 760; *Norris* v. *Crocker*, 13 How. 429, 14 L. ed. 210; *King* v. *Cornell*, 106 U. S. 395, 27 L. ed. 60, 1 Sup. Ct. Rep. 312.

*Mr.* **William C. Prentiss** argued the cause and filed a brief for respondents:

The power of this court to issue writs of mandamus to inferior courts is only incidental to the exercise of its appellate jurisdiction.

*Kendall* v. *United States*, 12 Pet. 524, 9 L. ed. 1181; *Ex parte Bradstreet*, 7 Pet. 634, 8 L. ed. 810; *Re Atlantic City R. Co.* 164 U. S. 633, 41 L. ed. 579, 17 Sup. Ct. Rep. 208; *Knickerbocker Ins. Co.* v. *Comstock*, 16 Wall. 258, 21 L. ed. 493; *Ex parte Russell*, 13 Wall. 664, 20 L. ed. 632.

As no Federal question within the meaning of D. C. Code, § 223, is presented, and the amount involved is too small to come to this court by writ of error, mandamus will not lie.

*Re Burdett*, 127 U. S. 771, 32 L. ed. 321, 8 Sup. Ct. Rep. 1394.

The last-clause rule is not sound or established by authority.

*St. Clements* v. *St. Andrew*, 6 Mod. 287; *Atty. Gen.* v. *Chelsea Water Works*, Fitz-

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NOTE.—*As to when mandamus is the proper remedy*—see notes to United States *ex rel.* International Contracting Co. v. La Mont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie (W. Va.) 3 L. R. A. 54; Burnsville Turnp. Co. v. State (Ind.) 3 L. R. A. 265; State *ex rel.* Charleston, C. & C. R. Co. v. Whitesides (S. C.) 3 L. R. A. 777; and *Ex parte* Hurn (Ala.) 13 L. R. A. 120.

*On mandamus in aid of appeal*—see note to Lewis v. Baltimore & L. R. Co. 10 C. C. A. 450.

gibbons, 195; 1 Kent Com. 462; *Farmers' Bank* v. *Hale*, 59 N. Y. 59; Bishop, Written Laws, §§ 63-65; Sutherland, Stat. Constr. §§ 220-221; *State ex rel. Atty. Gen.* v. *Heidorn*, 74 Mo. 410; *Sams* v. *King*, 18 Fla. 557; *State ex rel. Wilson* v. *Williams*, 8 Ind. 191.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

William F. Roberts brought an action against J. S. Barton Key and James P. Scott, in February, 1901, before a justice of the peace of the District of Columbia, and recovered judgment for $196.30; whereupon Key and Scott carried the case by appeal to the supreme court of the District of Columbia, giving an undertaking on appeal with the United States Fidelity & Guaranty Company as surety. The case was tried in the District supreme court, and resulted in a judgment in favor of Scott and against Key and the guaranty company. From this judgment Key alone prosecuted an appeal to the court of appeals of the District of Columbia, without summons and severance or any equivalent. Roberts moved to dismiss [85] on two *grounds: (1) The want of parties (*Mason* v. *United States*, 136 U. S. 581, 34 L. ed. 545, 10 Sup. Ct. Rep. 1062; *Hardee* v. *Wilson*, 146 U. S. 179, 36 L. ed. 933, 13 Sup. Ct. Rep. 39); (2) that the court of appeals had no jurisdiction on appeal from the judgment of the court below in such cases.

The court of appeals had held in *Groff* v. *Miller*, 30 Wash. L. Rep. 434, that such an appeal could not be maintained, and accordingly dismissed the appeal in this case on the second ground. Id. 436. Key then applied to this court for leave to file a petition for mandamus requiring the court of appeals to reinstate the appeal and proceed to a hearing and determination of the same on the merits. Leave was granted, and due return has been made to a rule entered on the petition thereupon filed.

The case could not have been brought here on appeal or writ of error. Code District of Columbia, § 233. And no application for certiorari was made under § 234. Act of March 3, 1901 (31 Stat. at L. 1189, chap. 854).

The controversy in respect of appeals to the court of appeals from judgments in the supreme court of the District in cases appealed from justices of the peace, raised under §§ 82 and 226 of the act of 1901, was not only disposed of by the court of appeals in *Groff* v. *Miller*, but determined by the repeal of § 82 by the act of June 30, 1902. 32 Stat. at L. chap. 1329.

The writ of mandamus cannot be used to perform the office of an appeal or writ of error, and does not lie to review a final judgment or decree sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. It is not granted in doubtful cases, or where there is another adequate remedy, and whether it shall go or not usually rests in the sound discretion of the court. If sometimes demandable *ex debito justitiæ*, it is certainly not on a record like this. *American Consir. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 379, 37 L. ed. 489, 13 Sup. Ct. Rep. 758; *Re Rice*, 155 U. S. 403, 39 L. ed. 201, 15 Sup. Ct. Rep. 149; High, Extr. Legal Rem. 3d ed. § 9.

Tested by these well-settled principles, *the rule must be discharged and the petition dismissed.*

So ordered.

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## *KAORU YAMATAYA, *Appt.*, [86]
*v.*
## THOMAS M. FISHER, Immigrant and Chinese Inspector.†

(See S. C. Reporter's ed. 86-102.)

*Aliens—exclusion of paupers—effect of treaty with Japan—deportation after entry—review by habeas corpus.*

1. Japanese subjects who are "paupers or persons likely to become a public charge," and are therefore forbidden to enter the United States by the immigration act of March 3, 1891 (26 Stat. at L. 1085, chap. 551, U. S. Comp. Stat. 1901, p. 1294), are not given such right of entry by the provision of the treaty of March 21, 1895, with Japan, that the citizens or subjects of each of the two countries shall have "full liberty to enter, travel, or reside in any part of the territories of the other country,"—especially since such treaty expressly excepts from its operation any ordinance or regulation relating to "police and public security."
2. Aliens of the excluded class are not protected from deportation by the executive officers of the government, because they have effected an entry into the United States, in view of the power given the Secretary of the Treasury by the act of October 19, 1888, chap. 1210 (25 Stat. at L. 566, U. S. Comp. Stat. 1901, p. 1294), if satisfied that an immigrant has been allowed to land contrary to law, to cause his deportation at any time within a year after the landing, which power was again substantially conferred by the provision of the act of March 3, 1891, chap. 551, § 11, that an alien immigrant may be sent out of the country, "as provided by law," at any time within a year after his illegal entry into the United States.
3. Executive officers of the United States government were not invested, by the provisions

†This case is reported by the Official Reporter under the title of "The Japanese Immigrant Case."

NOTE.—*On treaty guaranties to aliens*—see note to Gandolfo v. Hartman (C. C. S. D. Cal.) 16 L. R. A. 277.

*On the jurisdiction of the United States courts on habeas corpus*—see *Re* Reinits (C. C. S. D. N. Y.) 4 L. R. A. 236, and note. See also notes to State *ex rel.* Cochran v. Winters (Kan.) 10 L. R. A. 616; *Re* Huse, 25 C. C. A. 4; and Tinsley v. Anderson, 43 L. ed. U. S. 91.

*As to questions reviewable by habeas corpus*—see notes to State v. Jackson (D. C. E. D. Tenn.) 1 L. R. A. 373; Bion's Appeal (Conn.) 11 L. R. A. 694; United States v. Hamilton, 1 L. ed. U. S. 490; *Ex parte Carll*, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; and Pearce v. Texas, 39 L. ed. U. S. 164.

of the acts of October 19, 1888, chap. 1210, and March 3, 1891, chap. 551, for the deportation of aliens of excluded classes within a year after their illegal entry, with the power arbitrarily to deport an alien who has entered the country and has become subject in all respects to its jurisdiction and a part of its population, without giving him an opportunity to be heard upon the question involving his right to be and remain in the United States.

4. Federal courts will not intervene by habeas corpus to prevent the deportation by the executive officers of the government, under the authority of the acts of October 19, 1888, chap. 1210, and March 3, 1891, chap. 551, of an alien found to be one of the excluded class where such alien had notice, though not a formal one, of the investigation instituted for the purpose of ascertaining whether she was legally in the United States, and was not denied an opportunity to be heard, although she pleads a want of knowledge of the English language preventing her from understanding the nature and import of the questions propounded to her, and that the investigation made was a "pretended" one, and that she did not at the time know that it had reference to her deportation.

[No. 171.]

*Argued February 24, 1903. Decided April 6, 1903.*

ON APPEAL from the District Court of the United States for the District of Washington to review a decree dismissing a writ of habeas corpus to inquire into the detention of an alien immigrant under a warrant from the Secretary of the Treasury requiring her deportation. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **Vere Goldthwaite** argued the cause, and *Messrs. Harold Preston* and *Walter A. Keene* filed a brief for appellant:

The word "person," as used in the Constitution, includes aliens as well as citizens.

*Re Ah Fong*, 3 Sawy. 144, Fed. Cas. No. 102; *Re Parrott*, 6 Sawy. 349, 1 Fed. 481; *Ho Ah Kow* v. *Nunan*, 5 Sawy. 552, Fed. Cas. No. 6,546; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

No principle is more firmly imbedded in our jurisprudence than the one which asserts that before a person can be deprived of any of his rights he must be given his day in court.

*Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Hovey* v. *Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; *McVeigh* v. *United States*, 11 Wall. 259, 20 L. ed. 80; *Charles* v. *Marion*, 98 Fed. 166; *Greene* v. *Briggs*, 1 Curt. C. C. 311, Fed. Cas. No. 5,764; *Scott* v. *Toledo*, 1 L. R. A. 688, 36 Fed. 385; *Railroad Tax Cases*, 8 Sawy. 238, 13 Fed. 722; *Meyers* v. *Shields*, 61 Fed. 713; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; 2 Kent Com. 13; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

Appellant has, so far as any questions involved in this appeal are concerned, the same rights as an American citizen.

*Yick Wo* v. *Hopkins*, 118 U. S. 369, 30 L. ed. 226, 6 Sup. Ct. Rep. 1064.

*Assistant Attorney General* **Hoyt** argued the cause and filed a brief for appellee:

An alien landing surreptitiously may, within a year, be arrested and deported by the Secretary of the Treasury without judicial proceedings before a court.

*United States* v. *Yamasaka*, 40 C. C. A. 454, 100 Fed. 404.

The ministerial officer has been clothed with the authority to determine and act, and this court has in numerous cases decided that the executive determination is final.

*Nishimura Ekin* v. *United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Wong Wing* v. *United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Fok Yung Yo* v. *United States*, 185 U. S. 296, 46 L. ed. 917, 22 Sup. Ct. Rep. 686.

The presumption is that the result is proper.

*Lee Lung* v. *Patterson*, 186 U. S. 168, 46 L. ed. 1108, 22 Sup. Ct. Rep. 795.

Mr. Justice **Harlan** delivered the opinion of the court:

*This case presents some questions arising [87] under the act of Congress relating to the exclusion of certain classes of alien immigrants.

On the 11th day of July, 1901, appellant, a subject of Japan, landed at the port of Seattle, Washington; and on or about July 15th, 1901, the appellee, an immigrant inspector of the United States, having instituted an investigation into the circumstances of her entering the United States, decided that she came here in violation of law, in that she was a pauper and a person likely to become a public charge,—aliens of that class being excluded altogether from this country by the act of March 3d, 1891 (26 Stat. at L. 1085, chap. 551, U. S. Comp. Stat. 1901, p. 1294).

The evidence obtained by the inspector was transmitted to the Secretary of the Treasury, who, under date of July 23d, 1901, issued a warrant addressed to the immigrant inspector at Seattle, reciting that the appellant had come into the United States contrary to the provisions of the above act of 1891, and ordering that she be taken into custody and returned to Japan at the expense of the vessel importing her.

The inspector being about to execute this warrant, an application was presented in behalf of the appellant to the district court of the United States for the district of Washington, northern division, for a writ of habeas corpus. The application alleged that the imprisonment of the petitioner was unlawful, and that she did not come here in violation of the act of 1891, or of any other law of the United States relating to the exclusion of aliens.

The writ having been issued, a return was made by the inspector, stating that he had found upon due investigation and the admissions of the appellant that she was a pauper and a person likely to become a public charge, and had "surreptitiously, clandestinely, unlawfully, and without any authority come into the United States;" that, "in pursuance of said testimony, admissions of the petitioner, Kaoru Yamataya, evidence, facts, and circumstances," he had decided that she had no right to be within the territory of the United States, and was a proper person for deportation; all which he reported to the proper officers of the gov-
88 ernment, who confirmed his decision, *and thereupon the Secretary of the Treasury issued his warrant, requiring the deportation of the appellant. That warrant was produced and made part of the return.

The return of the inspector was traversed, the traverse admitting that the inspector had investigated the case of the petitioner, and had made a finding that she had illegally come into this country, but alleging that the investigation was a "pretended" and an inadequate one; that she did not understand the English language, and did not know at the time that such investigation was with a view to her deportation from the country; and that the investigation was carried on without her having the assistance of counsel or friends, or an opportunity to show that she was not a pauper or likely to become a public charge. The traverse alleged that the petitioner was not in the United States in violation of law.

A demurrer to the traverse was sustained, the writ of habeas corpus was dismissed, and the appellant was remanded to the custody of the inspector. From that order the present appeal was prosecuted.

It will conduce to a clear understanding of the questions to be determined if we recall certain legislation of Congress relating to the exclusion of aliens from the United States, and to the treaty of 1894 between Japan and the United States.

By the deficiency appropriation act of October 19th, 1888, chap. 1210, it was provided that the act of February 23d, 1887, chap. 220, amendatory of the act prohibiting the importation and immigration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia (24 Stat. at L. 414, U. S. Comp. Stat. 1901, p. 1290), be so amended "as to authorize the Secretary of the Treasury, in case he shall be satisfied that an immigrant has been allowed to land contrary to the prohibition of that law, to cause such immigrant, within the period of one year after landing or entry, to be taken into custody and returned to the country from whence he came, at the expense of the owner of the importing vessel, or, if he entered from an adjoining country, at the expense of the person previously contracting for the services." 25 Stat. at L. 566 (U. S. Comp. Stat. 1901, p. 1294).

By the 1st section of the act of Congress of March 3d, 1891, chap. 551, amendatory of the various acts relating to immigration and importation of aliens under contract or agreement to perform labor, it was provided: "That the following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers, or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any person whose ticket or passage is paid for with the money of another or who is assisted by others to come, unless it is affirmatively and satisfactorily shown, on *special inquiry, [95] that such person does not belong to one of the foregoing excluded classes, or to the class of contract laborers excluded by the act of February twenty-sixth, eighteen hundred and eighty-five [23 Stat. at L. 332, chap. 164, U. S. Comp. Stat. 1901, p. 1290]. . . ." 26 Stat. at L. 1084 (U. S. Comp. Stat. 1901, p. 1294).

By the 8th section of that act it was provided: "That upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. . . . The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record. During such inspection, after temporary removal, the superintendent shall cause such aliens to be properly housed, fed, and cared for, and also, in his discretion, such as are delayed in proceeding to their destination after inspection. All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers, and any such officer or agent or person in charge of such vessel who shall, either knowingly or negligently, land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor and punished by a

fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment." 26 Stat. at L. 1085 (U. S. Comp. Stat. 1901, p. 1298).

[96] *By the 10th section it is provided that "all aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in."

The 11th section of the same act provided: "That any alien who shall come into the United States in violation of law may be returned as by law provided, at any time within one year thereafter, at the expense of the person or persons, vessel, transportation company, or corporation bringing such alien into the United States, and, if that cannot be done, then at the expense of the United States: and any alien who becomes a public charge within one year after his arrival in the United States, from causes existing prior to his landing therein, shall be deemed to have come in violation of law, and shall be returned as aforesaid." 26 Stat. at L. 1086 (U. S. Comp. Stat. 1901, p. 1299).

In the sundry civil appropriation act of August 18th, 1894, chap. 301, was the following provision: "In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury." 28 Stat. at L. 372, 390 (U. S. Comp. Stat. 1901, p. 1303).

Then came the treaty between the United States and the Empire of Japan, concluded November 23d, 1894, and proclaimed March 21st, 1895, and which, by its terms, was to go into operation July 17th, 1899. By the 1st article of that treaty it was provided: "The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property." 29 Stat. at L. 848. But by the 2d article it was declared: "It is, however, understood that the stipulations contained in this and the preceding article do not in any way affect the laws, ordinances, and regulations with regard to trade, the immigration of laborers, police and public security, which are in force or which may hereafter be enacted in either of the two countries." 29 Stat. at L. 849.

1. From the above acts of Congress it ap-
[97] pears that among *the aliens forbidden to enter the United States are those, of whatever country, who are "paupers or persons likely to become a public charge." We are of opinion that aliens of that class have not been given by the treaty with Japan full liberty to enter or reside in the United States; for that instrument expressly excepts from its operation any ordinance or regulation relating to "police and public security." A statute excluding paupers or persons likely to become a public charge is manifestly one of police and public security. Aside from that specific exception, we should not be inclined to hold that the provision in the treaty with Japan, that the citizens or subjects of each of the two counties should have "full liberty to enter, travel, or reside in any part of the territories of the other contracting party," has any reference to that class, in either country, who, from their habits or condition, are ordinarily or properly the object of police regulations designed to protect the general public against contact with dangerous or improper persons.

2. The constitutionality of the legislation in question, in its general aspects, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention,— are principles firmly established by the decisions of this court. *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967; *Wong Wing* v. *United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *Fok Yung Yo* v. *United States*, 185 U. S. 296, 305, 46 L. ed. 917, 921, 22 Sup. Ct. Rep. 686, 690.

In *Nishimura Ekiu's Case* the court said: "The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed *acts forbidding the [98] immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs, and to inspectors acting under their authority." After observing that Congress, if it saw fit, could authorize the courts to investigate and ascertain the facts on which depended the right of the alien to land, this court proceeded: "But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers; and in such a case, as in all others in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. *Martin* v. *Mott*, 12 Wheat. 19, 31, 6 L. ed. 537, 541;

*Philadelphia & T. R. Co.* v. *Stimpson*, 14 Pet. 448, 458, 10 L. ed. 535, 540; *Benson* v. *McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; *Re Oteiza y Cortes*, 136 U. S. 330, *sub nom. Oteiza y Cortes* v. *Jacobus*, 34 L. ed. 464, 10 Sup. Ct. Rep. 1031. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. *Den ex dem. Murray* v. *Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Hilton* v. *Merritt*, 110 U. S. 97, 28 L. ed. 83, 3 Sup. Ct. Rep. 548."

In *Lem Moon Sing's Case* it was said: "The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications." And in *Fok Yung Yo's Case*, the latest one in this court, it was said: "Congressional action has placed the final determination of the right of admission [99] in executive officers, without judicial *intervention, and this has been for many years the recognized and declared policy of the country."

What was the extent of the authority of the executive officers of the government over the petitioner after she landed? As has been seen, the Secretary of the Treasury, under the above act of October 19th, 1888, chap. 1210, was authorized, within one year after an alien of the excluded class entered the country, to cause him to be taken into custody and returned to the country whence he came. Substantially the same power was conferred by the act of March 3d, 1891, chap. 551, by the 11th section of which it is provided that the alien immigrant may be sent out of the country, "as provided by law," at any time within the year after his illegally coming into the United States. Taking all its enactments together, it is clear that Congress did not intend that the mere admission of an alien, or his mere entering the country, should place him at all times thereafter entirely beyond the control or authority of the executive officers of the government. On the contrary, if the Secretary of the Treasury became satisfied that the immigrant had been allowed to land contrary to the prohibition of that law, then he could at any time within a year after the landing cause the immigrant to be taken into custody and deported. The immigrant must be taken to have entered subject to the condition that he might be sent out of the country by order of the proper executive officer if, within a year, he was found to have been wrongfully admitted into, or had illegally entered, the United States. These were substantially the views expressed by the circuit court of appeals for the ninth circuit in *United States* v. *Yamasaka*, 40 C. C. A. 454, 100 Fed. 404.

It is contended, however, that in respect of an alien who has already landed it is consistent with the acts of Congress that he may be deported without previous notice of any purpose to deport him, and without any opportunity on his part to show by competent evidence before the executive officers charged with the execution of the acts of Congress, that he is not here in violation of law; that the deportation of an alien without provision for such a notice and for an opportunity to be heard *was inconsistent [100] with the due process of law required by the 5th Amendment of the Constitution.

Leaving on one side the question whether an alien can rightfully invoke the due process clause of the Constitution who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed, we have to say that the rigid construction of the acts of Congress suggested by the appellant are not justified. Those acts do not necessarily exclude opportunity to the immigrant to be heard, when such opportunity is of right. It was held in *Den ex dem. Murray* v. *Hoboken Land & Improv. Co.* 18 How. 272, 280, 281, 283, 15 L. ed. 372, 376, 377, that "though 'due process of law' generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer and a trial according to some settled course of judicial proceedings, . . . yet this is not universally true:" and "that though, generally, both public and private wrongs are redressed through judicial action, there are more summary extra-judicial remedies for both." Hence, it was decided in that case to be consistent with due process of law for Congress to provide summary means to compel revenue officers — and, in case of default, their sureties — to pay such balances of the public money as might be in their hands. Now, it has been settled that the power to exclude or expel aliens belonged to the political department of the government, and that the order of an executive officer invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depended, was "due process of law, and no other tribunal, unless expressly authorized to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency." *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 659, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 713, 37 L. ed. 905, 913, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing* v. *United States*, 158 U. S. 538, 547, 39 L. ed. 1082, 1085, 15 Sup. Ct. Rep. 967. But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may

disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the Con-
[101] stitution. *One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends,— not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.

This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution. An act of Congress must be taken to be constitutional unless the contrary plainly and palpably appears. The words here used do not require an interpretation that would invest executive or administrative officers with the absolute, arbitrary power implied in the contention of the appellant. Besides, the record now before us shows that the appellant had notice, although not a formal one, of the investigation instituted for the purpose of ascertaining whether she was illegally in this country. The traverse to the return made by the immigration inspector shows upon its face that she was before that officer pending the investigation of her right to be in the United States, and made answers to questions propounded to her. It is true that she pleads a want of knowledge of our language; that she did not understand the nature and import of the questions propounded to her; that the investigation made was a "pre-
[102] tended" *one; and that she did not, at the time, know that the investigation had reference to her being deported from the country. These considerations cannot justify the intervention of the courts. They could have been presented to the officer having primary control of such a case, as well as upon an appeal to the Secretary of the Treasury, who had power to order another investigation if that course was demanded by law or by the ends of justice. It is not to be assumed that either would have refused a second or fuller investigation, if a proper application and showing for one had been made by or for the appellant. Whether further investigation should have been ordered was for the officers charged with the execution of the statutes to determine. Their action in that regard is not subject to judicial review. Suffice it to say, it does not appear that appellant was denied an opportunity to be heard. And as no appeal was taken to the Secretary from the decision of the immigration inspector, that decision was final and conclusive. If the appellant's want of knowledge of the English language put her at some disadvantage in the investigation conducted by that officer, that was her misfortune, and constitutes no reason, under the acts of Congress, or under any rule of law, for the intervention of the court by habeas corpus. We perceive no ground for such intervention,— none for the contention that due process of law was denied to appellant.

*The judgment is affirmed.*

Mr. Justice **Brewer** and Mr. Justice **Peckham** dissented.

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## *OREGON & CALIFORNIA RAILROAD [103] COMPANY, *Appt.*,
## *v.*
## UNITED STATES.

(See S. C. Reporter's ed. 103-116.)

*Railroad land grants — withdrawal of indemnity lands in advance of selection — occupancy in good faith.*

1. The Secretary of the Interior was not authorized, upon the mere acceptance of the map of definite location, to withdraw from the operation of the settlement laws any lands within the indemnity limits of the grant made to the California & Oregon Railroad Company by the act of July 25, 1866, chap. 242 (14 Stat. at L. 289), which provided for the selection of lands within such limits in lieu of any within the place limits which should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, and empowered the Secretary of the Interior, upon the filing of the map of the survey, to withdraw from sale "public lands herein granted on each side of said railroad, so far as located and within the limits before specified."
2. No interest in any specific sections of land within the indemnity limits of the grant made by the act of July 25, 1866, chap. 242, to the California & Oregon Railroad Company, could be acquired by that company in advance of their actual and approved selection to supply deficiencies in the place limits.
3. The selection of lands within the indemnity limits of the grant made by the act of July 25, 1866, chap. 242, to the California & Oregon Railroad Company to supply deficiencies in the place limits, cannot defeat or destroy the rights of a settler under that act arising from a previous bona fide occupancy with the intention of perfecting title under the

NOTE—*As to land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

homestead laws as soon as the land should be surveyed.

4. The rights of one who has settled in good faith on an odd-numbered section within the indemnity limits of the grant by the act of July 25, 1866, chap. 242, to the California & Oregon Railroad Company prior to their selection by that company to supply deficiencies in the place limits, cannot be affected by the fact, subsequently appearing, that all the odd-numbered sections within such indemnity limits were needed to supply deficiencies in the place limits.

[No. 186.]

*Argued March 4, 1903. Decided April 6, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Oregon canceling a patent issued to the Oregon & California Railroad Company. *Affirmed.*

See same case below, 48 C. C. A. 520, 109 Fed. 514.

The facts are stated in the opinion.

*Mr.* **Maxwell Evarts** argued the cause and filed a brief for appellant:

The mere occupancy of public land creates no right therein as against the United States, and the land still remains part of the public domain and subject to disposal by the government.

*The Yosemite Valley Case*, 15 Wall. 77, *sub nom. Hutchings* v. *Low*, 21 L. ed. 82; *Lansdale* v. *Daniels*, 100 U. S. 113, 25 L. ed. 587; *Sparks* v. *Pierce*, 115 U. S. 408, 29 L. ed. 428, 6 Sup. Ct. Rep. 102.

Relative rights of a railroad under its land grant and an individual are determined, and determined only, by the question as to which one first filed record evidence of a claim.

*Tarpey* v. *Madsen*, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849.

The fact and date of occupancy are unimportant in determining conflicting claims of an individual and a railroad company to lands within a railroad grant.

*Ibid.; Northern P. R. Co.* v. *Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98; *Whitney* v. *Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796; *Buxton* v. *Traver*, 130 U. S. 232, 32 L. ed. 920, 9 Sup. Ct. Rep. 509.

Under the ordinary principles of equity the right of the railroad to the patent for this land, being first in point of time, whether as to its record title or as to its original inception, should be held to be superior to the right thereto of the individual occupants.

*Shepley* v. *Cowan*, 91 U. S. 330, 23 L. ed. 424.

As between an occupant of the public lands and a railroad claiming indemnity lands under a grant from the government, that one is to be preferred who first obtains record evidence of his claim.

*United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13.

The relative rights of two railroads claiming the same land within the indemnity limits of their respective grants are determined by the question as to which has first acquired the record evidence of its claim.

*St. Paul & S. C. R. Co.* v. *Winona & St. P. R. Co.* 112 U. S. 720, 28 L. ed. 872, 5 Sup. Ct. Rep. 334.

Indemnity lands are appropriated to the grant without selection, when they are insufficient to supply the deficiencies in the place limits.

*St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 35 L. ed. 77, 11 Sup. Ct. Rep. 389.

The bill should be dismissed upon the ground that the United States cannot bring suit to cancel this patent, for the reason that the outcome of the suit would simply be to benefit one of two claimants to the land, and would not subserve any interest of the government.

*United States* v. *Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; *United States* v. *San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850.

*Mr.* **Charles W. Russell** argued the cause and filed a brief for appellee:

Lands within the indemnity limits remained open to homestead and pre-emption without regard to whether a sufficient amount would be left for the company or not.

*Southern P. R. Co.* v. *Bell*, 183 U. S. 689, 46 L. ed. 390, 22 Sup. Ct. Rep. 232.

Settlement before definite location, where no declaratory statement could be filed, takes land out of the place grant if stated, after definite location, in the declaratory statement as occurring prior to such definite location.

*Tarpey* v. *Madsen*, 178 U. S. 215, 44 L. ed. 1042, 20 Sup. Ct. Rep. 849.

Settlement of unsurveyed place lands in 1881, prior to definite location in 1884, there being a survey and application to file in 1893, long after definite location, gave the settler the land.

*Nelson* v. *Northern P. R. Co.* 188 U. S. 108, *ante*, 406, 23 Sup. Ct. Rep. 302.

Mr. Justice **Harlan** delivered the opinion of the court:

By the act of Congress of March 3d, 1887, chap. 376, it was provided *that if, at the [104] completion of the adjustments of land grants thereby directed to be made, or sooner, it appeared that lands had been from any cause erroneously certified or patented to or for any company claiming by, through, or under grant from the United States to aid in the construction of a railroad, it should be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and, if the company did not reconvey within ninety days after demand made, it should thereupon be the duty of the Attorney General to com-

mence and prosecute in the proper courts the necessary proceedings to cancel the patents, certification, or other evidence of title theretofore issued for the lands, and to restore the title thereof to the United States. 24 Stat. at L. 556 (U. S. Comp. Stat. 1901, p. 1595).

In *United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 360, 380, 382, 35 L. ed. 766, 773, 774, 12 Sup. Ct. Rep. 13, 21, which was an action brought by the United States after the passage of the above statute to have certain patents for land canceled, this court, after observing that as to some of the lands the United States appeared to have a direct interest in them, said: "As to others, it is under an obligation to claimants under the homestead and pre-emption laws to undo the wrong alleged to have been done by its officers, in violation of law, by removing the cloud cast upon its title by the patents in question, and thereby enable it to properly administer these lands, and to give clear title to those whose rights, under those laws, may be superior to those of the railway company. A suit, therefore, to obtain a decree annulling the patents in question, so far as it is proper to do so, was required by the duty the government owed, as well to the public as to the individuals who acquired rights which the patents, if allowed to stand, may defeat or embarrass." Reference was made in that case to *United States* v. *San Jacinto Tin Co.* 125 U. S. 273, 286, 31 L. ed. 747, 752, 8 Sup. Ct. Rep. 850, in which it was held that the United States could sue to set aside a patent improperly issued, where it appeared that there was an obligation on the part of the United States to the public, or to any individual, or where it had any interest of its own; also, to *United States* v. *Beebe*, 127 U. S. 338, 342, 32 L. ed. 121, 123, 8 Sup. Ct. Rep. 1083, in [105] which it was *held that patents procured by fraud could be canceled at the suit of the United States, where that was necessary to be done in order that it might fulfil its obligations to others. The court then observed: "These principles equally apply where patents have been issued by mistake, and they are specially applicable where, as in the present case, a multiplicity of suits, each one depending upon the same facts and upon the same questions of law, can be avoided, and where a comprehensive decree, covering all contested rights, would accomplish the substantial ends of justice." See also *United States* v. *Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261.

In this state of the law, the present suit was brought by the United States against the Oregon & California Railroad Company in order to obtain a decree canceling certain patents for lands which, it was alleged, had been illegally, and by mistake, issued in the name of the United States to that company, which succeeded to the rights of the Oregon Central Railroad Company.

The case was heard upon a stipulation as to evidence, from which the following facts appear:

By the act of Congress of July 25th, 1866, chap. 242, 14 Stat. at L. 239, the California & Oregon Railroad Company, and such company organized under the laws of Oregon as the legislature of the latter state designated, were authorized to locate, construct, and maintain a railroad and telegraph line between Portland, Oregon, and the Central Pacific Railroad Company in California.

For the purpose of aiding in the construction of that line, Congress granted to those companies, their successors and assigns, every alternate odd-numbered section of public lands, not mineral, to the amount of twenty sections per mile (ten on each side) of the railroad line. But the act provided that when any of the alternate sections or parts of sections should be found "to have been granted, sold, reserved, *occupied by homestead settlers*, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections designated by odd numbers, as aforesaid, nearest *to, and not more than 10 miles be- [106] yond the limits of, said *first-named* alternate sections; and as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than 60 continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein *granted* on each side of said railroad, so far as located and within the limits before specified. . . . Settlers under the provisions of the homestead act who comply with the terms and requirements of said act shall be entitled, within the limits of said grant, to patents for an amount not exceeding 80 acres of the land so reserved by the United States, anything in this act to the contrary notwithstanding."

The Oregon Central Railroad Company was designated by the Oregon legislature as the company organized under the laws of Oregon, entitled to receive the granted lands in Oregon, and the benefits and privileges of the above act of 1866.

Prior to October, 1869, that company definitely fixed on the ground and surveyed the first section of the railroad in Oregon. That section extended from Portland to Jefferson, and comprised not less than 60 continuous miles from the northern terminus of the road; and on October 25th, 1869, the company filed in the office of the Secretary of the Interior, and on January 29th, 1870, the Secretary duly accepted and approved, a map of the survey and definite location of that section.

During the year 1869 and the months of January and February, 1870, the company definitely fixed on the ground and surveyed the second section of its road, which section comprised not less than 124 continuous miles from Jefferson; and on March 26th, 1870, filed in the office of the Secretary, and on March 29th, 1870, that officer accepted and approved, a map of the survey and definite location of that section.

On the 7th of April, 1870, the Commis-

sioner of the General Land Office, under the direction of the Secretary of the Interior, withdrew all the odd-numbered sections of land lying within 30 miles on each side of the railroad (as shown on the map of survey and definite location, filed with the Secretary on March 26th, 1870) from sale or [107] location, pre-emption or homestead *entry; and that withdrawal remained continuously thereafter in force, except so far as, if at all, it was affected by an order of the Secretary made August 15th, 1887, revoking the order of April 7th, 1870, as to the odd-numbered sections lying within the *indemnity* limits of the grant made in 1866, and declaring the odd-numbered sections lying within such *indemnity* limits to be restored to the public domain, subject to pre-emption and homestead entry, as well as to the provisions of the above grant. The lands so withdrawn April 7th, 1870, were within the jurisdiction of the district local land office at Roseburg, and notice of such withdrawal was received at that office on April 25th, 1870.

During the years 1868 and 1869, and prior to December the 25th, 1869, the Oregon Central Railroad Company constructed and fully equipped the first 20 miles of the railroad contemplated by the act of 1866, commencing at Portland and extending along the line shown upon the map filed in the office of the Secretary of the Interior on October the 29th, 1869. And in the years 1869 and 1870, and prior to September the 1st, 1870, the above two companies fully equipped the second 20 miles of the railroad, commencing at the end of the first constructed 20 miles and extending along the line shown on the map to a point distant 40 miles from the commencment of the railroad at Portland,—a portion of the second 20 miles having been constructed by the Oregon Central Railroad Company, the remainder by the defendant.

The whole line of railroad contemplated by the act of 1866, commencing at the end of the second constructed 20 miles, was constructed by the defendant company during the years 1870, 1871, and 1872; and prior to December the 4th, 1872, the entire line from Portland to Roseburg was continuously operated for all the purposes contemplated by Congress.

Commissioners were appointed by the President to examine the railroad as constructed from Portland to Roseburg. That duty was performed, and they reported to the President, under oath, that the railroad between those points had been completed and equipped in all respects as required, and was ready for the service contemplated by [108] the act of 1866. Those reports were *duly accepted and approved by the President. The report as to the seventh, eighth, and ninth sections, including the last 78 miles of the road from Portland to Roseburg, was made on July 10th, 1878, and the next day was accepted and approved.

The remaining part of the road in Oregon, extending from Roseburg to the southern boundary of that state, was constructed, fully equipped, and made ready by the defendant company during the years 1878 to 1889, inclusive, and all prior to the year 1900. It was duly examined by commissioners, who reported thereon, and their reports were accepted and approved.

All the lands described in the bill of complaint are distant more than 20 miles from, but lie within 30 miles on one side of, the road extending from Jefferson to Roseburg, shown on the map filed March 26th, 1870; and they were all included and embraced by the withdrawal made by the Secretary on the 7th of April, 1870.

No part or portion of the lands described in the bill of complaint are mineral lands, nor are they included by any exception or reservation from the indemnity land grant in Oregon, made by the act of 1866, except so far as, if at all, they were excepted or reserved therefrom by reason of the settlements and facts hereinafter to be referred to.

On August 16th, 1892, all the lands described in the bill were free and clear for selection by the defendant company as part and parcel of the *indemnity* lands granted by the act of Congress, except so far as, if at all, they were excepted or reserved by those settlements and facts.

On the 16th of August, 1892, and the 19th of October, 1892, the defendant company filed with the register and receiver of the United States land office at Roseburg its several lists selecting the lands in question as indemnity lands in lieu of lands of equal area, parts of odd-numbered sections within the primary limits of the grant made in 1866 and otherwise disposed of by the United States prior to the passage of that act. Those lists were accompanied by the fees, costs, and charges required by law, and in all respects conformed to the directions, rules, regulations, and requirements of the Secretary of the Interior and of the Commissioner *of [109] the General Land Office. They were severally approved and certified by the register and receiver, and the defendant company had not then, nor has it subsequently, selected or received lands in lieu of those therein described as the basis of selections by it made, other than the lands so selected by said lists.

In the following years the following persons, each being a duly qualified entryman under the homestead laws of the United States, settled upon the lands respectively claimed for them in this suit, to wit: 1869, Louis [Charles] Heller; 1878, J. R. Peters; 1878, John Sapp; 1882, George C. Peck; 1883, Uriah W. Wren; 1885, Baxter W. Jenkins; 1885, Charles E. Barton; 1888, Joseph A. Cox; 1889, Charles W. Seeley; 1889, John W. Carey; 1890, F. W. Huddleston; 1890, Alfred R. Young; 1890, Abraham M. Peck. Each person made his settlement with the intention of making a homestead entry of the lands, whenever that could be done under the acts of Congress. After the date of settlement each settler continuously resided and made improvements upon his land in the way of a dwelling house, barn,

outhouses, fencing, clearing, and planting of trees. And on October 27th, 1892, within ninety days after the official plat of the survey of the lands was filed in the United States land office at Roseburg, each settler, in good faith, filed a formal application in the land office for a homestead entry of and for the lands upon which he settled and improved and upon which he continuously resided after the date of his first occupancy.

On the 20th of February, 1893, the Commissioner of the Land Office and the Secretary of the Interior having approved the selections made by the railroad company, a patent was issued, conveying to it all the lands in dispute. But when the company's lists were approved, neither the Commissioner nor the Secretary had any knowledge of the adverse claims of the above settlers to the lands upon which they respectively resided, and which the United States now claims for them.

On the 27th day of October, 1893, the land grant made by the act of 1866 being still unadjusted, the Commissioner of the Land Office demanded of the railroad company a reconveyance of the lands covered by the [110] patent of 1893, upon the ground *that the patent to it had been erroneously issued. The company refused to reconvey, and claims to be the owner of such lands. Hence the present suit to have that patent canceled.

The circuit court, upon final hearing, found the equities of the case to be with the United States, and a decree was entered, canceling the patent issued to the Oregon & California Railroad Company. That decree was affirmed by the circuit court of appeals.

1. Some of the questions referred to in argument as bearing upon the issues presented by the record have been determined by decisions of this court rendered since this litigation commenced.

In *Hewitt* v. *Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309, which related to the grant of lands made to the Northern Pacific Railroad Company by the act of July 2d, 1864, chap. 217 (13 Stat. at L. 365), this court accepted the construction of that act as adopted and adhered to by the Land Department, and held that the Secretary of the Interior had no power, simply upon the *definite location* of the Northern Pacific Railroad, to withdraw from the operation of the pre-emption and homestead laws lands within the *indemnity* limits of the road as defined by Congress. *Northern P. R. Co.* v. *Miller*, 7 Land Dec. 100, 125; *Northern P. R. Co.* v. *Davis*, 19 Land Dec. 87, 90. In the present case, the line of the railroad, opposite to which are the lands here in dispute, was definitely located in 1870, while (with the exception of one tract, about which the railroad company makes no question) the lands in dispute were not settled upon until after that year. We have seen that, upon acceptance of the map of definite location, the Secretary of the Interior, according to the stipulated facts, made an order (which was duly received at the local land office) withdrawing all the odd-numbered sections within 30 miles on each side of the road shown on the map of survey and definite location, from sale or location, pre-emption or homestead entry. That withdrawal included the odd-numbered sections in the indemnity limits, within which the lands in dispute were situated. We hold on the authority of *Hewitt* v. *Schultz* that it was beyond the power of the Secretary to make such an order in respect of lands within the indemnity *limits [111] of the grant made by the act of 1866. The reasoning in that case, touching this proposition, applies to the case now before us. In 1887 the Secretary, as if to remove the apparent obstacle placed in the way of pre-emption and homestead settlers created by the order of 1870, made an order revoking the previous one of withdrawal so far as it related to indemnity limits, and declaring the odd-numbered sections lying within the entire indemnity limits of the grant restored to the public domain and subject to pre-emption and homestead entry, as well as to the provisions of the act of 1866. We need not discuss here the question of the power of the Secretary of the Interior to revoke an order of withdrawal once legally made and notice thereof given at the local land office. It is sufficient to say that the railroad company did not, by the order of 1870, relating to lands within the indemnity limits, acquire an interest in any particular odd-numbered sections within those limits; nor did that order prevent the bona fide occupancy by settlers of odd-numbered sections *within such limits* up to the time of the approval of selections made by the railroad company of lieu lands to supply any deficit in the place limits.

In *Nelson* v. *Northern P. R. Co.*, decided at the present term of the court [188 U. S. 108, *ante*, 406, 23 Sup. Ct. Rep. 302], it was held that the act of 1864, making a land grant to the Northern Pacific Railroad Company, and the act of May 14th, 1880, chap. 89, for the relief of settlers on the public lands, recognized the right at any time prior to definite location to settle upon the unsurveyed public lands embraced by the grant of 1864, notwithstanding there was, at the time, in existence an order of withdrawal, based only upon a map of general route not issued pursuant to any express direction of Congress; provided such settlement was accompanied by residence on the land, in good faith, with the intention on the part of the settler to avail himself of the benefits of the homestead law as soon as the lands were surveyed. This decision rested mainly on the ground that Congress intended by the act of 1864 to protect the rights of bona fide settlers acquired before the railroad company had, by an accepted map of definite location, obtained a vested interest in particular odd-numbered sections granted.

*These principles are applicable to the [112] present case if, as contended by the United States, the railroad company did not acquire, and could not have acquired, an interest in specific sections of lands within

the *indemnity* limits before their actual and approved selection, under the direction of the Secretary, prior to the date of occupancy by the respective settlers.

2. We have seen, from the stipulated facts, that it was not until 1892 that the railroad company made its selection of lands within the indemnity limits, to supply deficiencies in its place or granted limits. But this occurred after each one of the entrymen whose rights the government is now seeking to protect had made his settlement with the intention to follow it up by a bona fide entry under the homestead laws. In other words, the lands were "occupied by homestead settlers" (to use the words of the granting act of 1866) at the time they were selected by the railroad company. Now, it has long been settled that while a railroad company, after its definite location, acquires an interest in the odd-numbered sections within its place or granted limits,—which interest relates back to the date of the granting act,—the rule is otherwise as to lands within indemnity limits. As to lands of the latter class, the company acquires no interest in any specific sections until a selection is made with the approval of the Land Department; and then its right relates to the date of the selection. And nothing stands in the way of a disposition of indemnity lands, prior to selection, as Congress may choose to make. In *Ryan* v. *Central P. R. Co.* 99 U. S. 382, 25 L. ed. 305, which was a contest as to lands within the indemnity limits, this court said: "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose." And the reason given was that "when the road was located and the maps were made, the right of the company to the odd sections first named became *ipso facto* fixed and absolute. With respect to the 'lieu lands,' as they are called, the right was only a float, and attached to no specific tracts until the selection was acutally made in the manner prescribed." In *St. Paul & S. C. R. Co.* v. *Winona & St. P. R. Co.* 112 U. S. 720, 731, 28 L. ed. 872, 876. 5 Sup. Ct. Rep. 334, 340, [113]*the court, referring to this principle, said: "The reason of this is that, as no vested right can attach to the lands in place—the odd-numbered sections within 6 miles on each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so, in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections or parts of sections within the primary limits have been lost by sale or preemption. It may be still longer before a selection is made to supply this loss." After observing that twenty years expired in that case after the location of the road before any selection of lieu lands was made, the court added: "Was there a vested right in this company, during all this time, to have, not only these lands, but all the other odd sections within the 20-mile limits on each side of the line of the road, await its pleasure? Had the settlers in that populous region no right to buy of the government because the company might choose to take them, or might, after all this delay, find out that they were necessary to make up deficiencies in other quarters? How long were such lands to be withheld from market, and withdrawn from taxation, or forbidden to cultivation?" To the same effect are the following cases: *Grinnell* v. *Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456; *Cedar Rapids & M. River R. Co.* v. *Herring*, 110 U. S. 27, 28 L. ed. 56, 3 Sup. Ct. Rep. 485; *Kansas P. R. Co.* v. *Atchison, T. & S. F. R. Co.* 112 U. S. 414, 421, 28 L. ed. 794, 797, 5 Sup. Ct. Rep. 208; *Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.* 117 U. S. 406, 408, 29 L. ed. 928, 929, 6 Sup. Ct. Rep. 790; *Barney* v. *Winona & St. P. R. Co.* 117 U. S. 228, 232, 29 L. ed. 858, 860, 6 Sup. Ct. Rep. 654; *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 508, 513, 33 L. ed. 687, 693, 10 Sup. Ct. Rep. 341; *Nelson* v. *Northern P. R. Co.* 188 U. S. 108, *ante*, 302, 23 Sup. Ct. Rep. 302. Having regard to the adjudged cases, it is to be taken as established that, unless otherwise expressly declared by Congress, no right of the railroad company attaches or can attach to specific lands within indemnity limits until there is a selection under the direction, or with the approval, of the Secretary.

3. But it is contended that, as the selection by the company (except as to the tract which was occupied in 1869, before any *se- [114] lection by the company of lieu lands) was prior to the application by the respective settlers for entry under the homestead laws, its right to the lands in question was superior to that asserted by the settlers. This view is completely met by the fact that the settler, by prior occupancy in good faith, could avail himself of the homestead acts whenever, by an official survey, the way is opened by the government for him to do so, and by the fact that, within ninety days after these lands were surveyed, he filed in the proper office his application to enter them under the homestead laws of the United States. He moved with due diligence to protect and perfect the right acquired by his occupancy of the land with the intention to avail himself of the benefit of those laws. That right was not to be affected or impaired by the fact that the lands were not surveyed at the date of occupancy. *Nelson* v. *Northern P. R. Co.* 188 U. S. 108, *ante*, 406, 23 Sup. Ct. Rep. 302; *Ard* v. *Brandon*, 156 U. S. 537, 543, 39 L. ed. 524, 526, 15 Sup. Ct. Rep. 406, 409; *Tarpey* v. *Madsen*, 178 U. S. 215, 219, 44 L. ed. 1042, 1044, 20 Sup. Ct. Rep. 849, 850. In the *Ard Case* the court said: "The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. If he does all that the statute prescribes as the

condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon the application." In the *Tarpey Case* it was said that "the right of one who has actually occupied [public lands], with an intent to make a homestead or pre-emption entry, cannot be defeated by the mere lack of a place in which to make a record of his intent;" that if a settler was in possession before definite location, "with a view of entering it as a homestead or pre-emption claim, and was simply deprived of his ability to make his entry or declaratory statement by the lack of a local land office, he could, undoubtedly, when such office was established, have made his entry or declaratory statement in such way as to protect his rights." So, if the condition of the lands, being unsurveyed, prevents the making, by a bona fide occupant, of a proper application of record to enter them under the homestead laws, his rights will not be lost, if, after the lands [115] are surveyed, *he applied in due time to enter the lands under those laws. And such has been held to be the object and effect of the act of May 14th, 1880, chap. 89, 21 Stat. at L. 140 (U. S. Comp. Stat. 1901, p. 1392). We could not otherwise adjudge in this case without holding that the mere selection of the lands by the railroad company displaced or destroyed the rights of a bona fide settler arising from previous occupancy with the intention of making the required homestead entry whenever he was permitted to do so. We cannot so hold. We adjudge that the rights which bona fide occupancy gave to the settler under the act of 1866 are not defeated by a mere selection afterwards of the lands by the railroad company,—the settler having, after the lands were surveyed, promptly taken the necessary steps to protect his rights under the homestead laws. And in such case, the entry made under those laws relates back to the date of settlement on the lands. It was so substantially held in *Nelson* v. *Northern P. R. Co.* 188 U. S. 108, *ante*, 406, 23 Sup. Ct. Rep. 302.

4. It is also said that all the lands within the indemnity limits were required to supply the deficit in place limits arising from the disposition, prior to definite location, by sale and otherwise, of lands within the granted limits. But the extent to which lieu lands could be required to supply such deficit in place lands could not be properly or legally determined until there was an adjustment of the grant of lands in respect of place limits. In any event, no such adjustment having taken place prior to the date of the settler's bona fide occupancy, his rights, based upon such occupancy, would not be affected by the fact, subsequently appearing, in whatever way, that all the odd-numbered sections within the indemnity limits were needed to supply deficiencies in place limits. At the time the settler went upon the land, in good faith, to make it his home and to perfect his title under the homestead laws, there was nothing of record that stood in the way of his right to occupy the lands and to remain thereon until he could perfect his title by formal entry under the homestead laws.

Other points were made in the argument of the case, but they need not be specially noticed, as what we have said requires, *in [116] dependently of those points, an affirmance of the decree of the Circuit Court and the Circuit Court of Appeals.

*The decree is affirmed.*

Mr. Justice **Brewer** and Mr. Justice **McKenna** took no part in the decision of this case.

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OREGON & CALIFORNIA RAILROAD,
*Appt.,*
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 116-119.)

*Railroad land grants—land within indemnity limits—occupancy in advance of selection—effect of delay to make survey.*

Delay upon the part of the Commissioner of the Land Office in making the survey called for with all "convenient speed" by the act of May 4, 1870, chap. 69 (16 Stat. at L. 94), granting land in aid of railroad construction, cannot defeat the rights of a settler attaching under that act in virtue of his bona fide occupancy of lands within the indemnity limits of such grant in advance of their selection to supply a deficiency in the place limits, with the intention of perfecting his title under the homestead laws as soon as the lands should be surveyed.

[No. 187.]

*Argued March 4, 1903. Decided April 6, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree of the Circuit Court for the District of Oregon canceling a patent issued to the Oregon & California Railroad Company. *Affirmed.*

See same case below, 48 C. C. A. 520, 109 Fed. 514.

The facts are stated in the opinion.

*Mr.* **Maxwell Evarts** argued the cause and filed a brief for appellant.

*Mr.* **Charles W. Russell** argued the cause and filed a brief for appellee.

For contentions of counsel see their briefs as reported in *Oregon & C. R. Co.* v. *United States, ante*, 726.

Mr. Justice **Harlan** delivered the opinion of the court:

The controlling question in this case is whether the United States, in 1893, erroneously issued to the Oregon & California Railroad Company, which succeeded to the rights

NOTE.—*As to land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

of the Oregon Central Railroad Company, a patent for certain lands in Oregon.

These lands are without the place and [117] within the indemnity *limits of the grant made by the act of Congress of May 4th, 1870, chap. 69, granting lands to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville, in the state of Oregon. 16 Stat. at L. 94. The provisions of this act were substantially the same as those of the act of July 25th, 1866 (14 Stat. at L. 239, chap. 242), referred to in *Oregon & C. R. Co.* v. *United States*, case No. 186, just decided [189 U. S. 103, *ante*, 726, 23 Sup. Ct. Rep. 615], except that the act of 1870 contains a provision not found in the act of 1866, to wit: "That the Commissioner of the General Land Office shall cause the lands along the line of the said railroad to be surveyed with all convenient speed."

The line of the proposed road was definitely fixed, and a plat thereof filed in the office of the Secretary of the Interior.

On the 16th day of February, 1872, the first 20 miles of the contemplated railroad were completed from Portland to a point near Forest Grove, in Oregon, and on the 23d of June, 1876, the road to the Yamhill river, near McMinnville, was completed, but it has never been constructed to Astoria, Oregon.

The final plat and survey of the township, in which the lands in dispute are situated, was not filed and approved until July 27th, 1893; and on that day the company's list of selections of lands, which included the lands in question, was duly approved.

Prior to the year 1893, to wit, on the 12th day of January, 1891, Joseph H. Elison, a duly qualified entryman under the laws of the United States, settled upon the lands in dispute with the intention in good faith of "homesteading the same," and since that date he has continuously resided upon, cultivated, and improved them; and within ninety days from the date of the filing of the township plat of survey he made application for "filing a homestead" covering these lands.

The selections by the company having been approved by the Land Department, a patent was issued to the Oregon & California Railroad Company on October 15th, 1895. But it was issued without any knowledge at the time on the part of the Secretary or the General Land Office of the adverse claim of Elison, arising from his occupancy of the land.

For the reasons stated in the opinion just [118] delivered in case *No. 186, we hold that, in virtue of Elison's bona fide settlement upon the lands in dispute in 1891, with the intention, whenever the way was open by a survey, to enter the lands under the homestead laws, his rights were superior to those acquired, or that could have been acquired, by the railroad company under any selection by it of indemnity lands, made after the date of such settlement. The company's selection did not displace or defeat the right which the settler acquired by his settlement, made previously in good faith, with the intention to avail himself of the benefits of the homestead laws within due time after the lands were surveyed.

The railroad company rests its claim to have a superior right to these lands on the ground, in part, of long delay by the Commissioner of the Land Office in having them surveyed, although it frequently requested the survey to be made. There is nothing of substance in this contention. The statute, it is true, required the lands to be surveyed with all "convenient speed." But the question as to the precise time the lands should be surveyed was exclusively for the Land Office to determine; and it was to be determined with reference to all the facts and circumstances connected with the surveying of the public lands under the direction of the Land Department. We cannot say from the record that the Land Office, in the matter of the surveying of the particular lands here in dispute, did not act with convenient speed. Besides, the railroad company accepted the grant of Congress subject to the possibility of delay in the surveying, as well as to the power of the Land Office to determine when the lands should be surveyed. The action or nonaction of the Land Department in such a matter cannot be controlled by the judiciary, unless, perhaps, in a case in which it appeared, beyond question, that its refusal to order the survey was merely arbitrary and without any real excuse. It may be that in such a case the Commissioner could be compelled by judicial process to discharge the duty imposed upon him by statute. But upon that point we need not express a decided opinion, for no such case is presented by the record before us. The allegation in the defendant's plea is simply that the Commissioner neglected to perform his duty in the matter of the surveying. But the *facts con- [119] stituting such alleged neglect are not stated. Besides, we may observe that since the right of the settler attached in virtue of his bona fide occupancy of these lands before the railroad company made its selection, that right could not be displaced by reason of any delay or negligence upon the part of the Commissioner to cause a survey of the lands. The act contains no provision that requires a contrary view. The court must determine the rights of the settler according to the facts as they existed at the time his occupancy in good faith began. The statute does not otherwise declare. In that view, as already suggested, the settler's right was superior to any right acquired by the company, after the date of his occupancy, in virtue of its selection of these lands to supply a deficiency in the place limits.

Upon the authority of the case just decided, *the decree of the Circuit Court of Appeals must be affirmed.*

And it is so ordered.

Mr. Justice **Brewer** and Mr. Justice **McKenna** took no part in the decision of this case.

MANUEL S. DE CAMBRA, *Plff. in Err.*,
*v.*
HANNAH ROGERS and Frank J. Rogers.

(See S. C. Reporter's ed. 119-122.)

*Decisions of Land Department—conclusiveness on courts.*

1. A decision of the Land Department upon questions of fact is conclusive on the courts.
2. Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the Land Department, nor as to the methods by which he reached his determination.

[No. 170.]

*Argued and submitted February 24, 1903. Decided March 16, 1903.*

IN ERROR to the Supreme Court of the State of California to review a judgment of the Superior Court of Alameda County in favor of plaintiffs in an action in ejectment. *Affirmed.*

See same case below, 132 Cal. 502, 60 Pac. 863, 64 Pac. 894.

Statement by Mr. Justice **Brewer:**

On April 28, 1897, Hannah Rogers and Frank J. Rogers, holders of the legal title [120]to a tract of land in Alameda county, *commenced in the superior court of that county an action in ejectment against Manuel S. De Cambra and others. The defendants answered with a general denial, and, as authorized by the practice in California, De Cambra filed a cross-complaint in equity, alleging that the plaintiffs had obtained the legal title wrongfully and held it in trust for him, and prayed a decree quieting his title to the land. A demurrer to this cross-complaint was sustained, and upon a trial of the action a judgment was rendered in favor of the plaintiffs, which judgment was affirmed by the supreme court of California (132 Cal. 502, 60 Pac. 863, 64 Pac. 894), and thereupon this writ of error was sued out.

*Mr.* **J. C. Bates** submitted the cause for plaintiff in error.

*Mr.* **Franklin H. Mackey** argued the cause and filed a brief for defendants in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The only question presented arises on the demurrer to the cross-complaint. That cross-complaint averred that in 1867 De Cambra purchased from one Hewett Steele the premises in controversy, with other adjoining lands, all of which were inclosed with fences and well-known exterior boundaries; that he entered into actual possession thereof, and has ever since continuously resided thereon; that in 1871 he sold an undivided half interest in the tract to Enos J. Rogers, the husband of Hannah and the father of Frank J. Rogers; that at that time the land was supposed to be a portion of a Mexican grant, and was within its exterior boundaries; that on August 10, 1878, the final official survey disclosed that there were more than 3 leagues of land within the exterior boundaries of said grant, and thereupon a part thereof, including the land in controversy, was restored by the United States to the public domain; that De Cambra and Rogers, who were brothers-in-law, agreed upon a division of the land excluded from the grant and restored to the public domain, De Cambra to take one portion, and that the tract in controversy, and Rogers the other; that *thereupon they went to [121] the local land office to file their applications for entry; that De Cambra, being unable to read or write, and understanding the English language very imperfectly, trusted to Rogers to prepare the pre-emption papers; that Rogers knowingly and fraudulently prepared the papers so as to make De Cambra an applicant for land upon which there was no dwelling house or other improvement, and only a small part of which was in his possession, and three fourths of which was thoroughly worthless, Rogers himself filing a pre-emption claim for the land which it had been agreed should be entered by De Cambra, the land which was his homestead and upon which his improvements had been made; that De Cambra did not discover this until December 29, 1883; that thereupon he made the proper application at the land office for this land; that a contest ensued, which was finally decided by the Secretary of the Interior in favor of Rogers, and the land patented to the plaintiffs, his widow and son. The cross-complaint further averred that although the decision apparently rendered by the Secretary of the Interior was signed by him, yet in fact for want of time and opportunity the Secretary had not read or heard read the evidence in the contested case, and simply signed his name to a report prepared by one of the clerks in the department.

This cross-complaint states no question of law decided in these contest proceedings in the Land Department adversely to De Cambra. Indeed, the grounds of the decision are not disclosed. There is no copy of the testimony given on the contest. It appears that De Cambra offered testimony showing his qualifications, settlement, occupation, etc., and it is stated that some evidence was given in support of the Rogers application. It is alleged that the land officers came to their conclusion "by the misconstruction of the evidence submitted to them and the misapplication of the law to the evidence, and in violation of the just and equitable rights and claims of Manuel S. De Cambra." For all that appears, the officers may have found the facts to be just

NOTE—*On the conclusiveness and effect of the decisions of Land Department*—see notes to Hartman v. Warren, 22 C. C. A. 38; and Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 344.

the contrary to the averments in the cross-complaint; and if they misapplied any rule of law to the testimony we are not advised [12] of the rule they misapplied, or how they misapplied it. As it appears affirmatively that, before the contest, De Cambra was informed of the nature of the wrongs he alleges were perpetrated upon him by Rogers, it may be presumed that evidence was offered by both parties upon that question, and that it was decided adversely to his contention. Under those circumstances, nothing is shown except an ordinary contest between two applicants for pre-emption, in which the land officers upon the testimony decided in favor of one and against the other. But it is well settled that the decision of the Land Department upon questions of fact is conclusive in the courts. *Burfenning* v. *Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018, and cases cited; *Johnson* v. *Drew*, 171 U. S. 93, 99, 43 L. ed. 88, 90, 18 Sup. Ct. Rep. 800; *Gardner* v. *Bonestell*, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399.

It is hardly necessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided, or as to the methods by which he reached his determination.

These are the only Federal questions presented, and their decision was unquestionably correct.

*The judgment of the Supreme Court of California is affirmed.*

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EASTERN BUILDING & LOAN ASSOCIATION OF SYRACUSE, New York, *Plff. in Err.*,

*v.*

BRIGHT WILLIAMSON.

(See S. C. Reporter's ed. 122-130.)

*Constitutional law—full faith and credit—judicial construction—building and loan associations—contract to mature stock in specified time—ultra vires—when available as defense.*

1. The decision of a state court with reference to the effect which the charter and by-laws of a foreign building and loan association and the statutes of the state of its incorporation, together with the decisions of the courts of that state thereon, have upon the absolute promise of such association to mature its shares in a specified time, can involve no denial of the full faith and credit which, by U. S. Const. art. 4, § 1, must be given by the courts of each state to the public acts, records and judicial proceedings of other states.
2. An absolute promise by a building and loan association to mature its shares in a specified time is not changed to a conditional one dependent upon the success of the enterprise, by the shareholder's agreement, as expressed in the certificate of stock, to pay a specified monthly instalment on each share until it matures or is withdrawn, and the provision of the by-laws, accepted by him, that such instalments shall be paid until each share is fully paid.
3. The defense that an absolute promise, contained in a certificate of stock issued by a building and loan association incorporated under the laws of the state of New York, to mature its shares in a specified time, was *ultra vires* the corporation, is not available in an action on such promise by a shareholder who has in good faith fully performed his part of the contract.
4. The undertaking of a building and loan association to mature certain shares of its stock in a specified time is not affected by the fact that the holder of such shares obtained a loan from the association on the security of his shares after the by-laws of the corporation had been amended to provide that its stock should mature and be payable when the dues paid thereon, with the apportioned profits, equaled the par value thereof.

[No. 152.]

*Argued January 28, 1903. Decided March 23, 1903.*

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a judgment of the Circuit Court of Darlington County in favor of plaintiff in an action to recover the face value of shares of stock in a building and loan association. *Affirmed.*

See same case below, 62 S. C. 390, 38 S. E. 616.

Statement by Mr. Justice **Brewer:**

This action was commenced on January 12, 1898, in the circuit court of Darlington county, South Carolina, by Bright Williamson against the Eastern Building & Loan Association of Syracuse, New York, to recover the face value of twenty-five shares of stock in the defendant association, less a sum theretofore borrowed by the plaintiff from the association. Judgment in his favor for the full amount claimed was rendered in the trial, affirmed by the supreme court of the state (62 S. C. 390, 38 S. E. 616), and thence brought here on this writ of error.

The case is similar to that of the same plaintiff in error v. *Ebaugh*, 185 U. S. 114, 46 L. ed. 830, 22 Sup. Ct. Rep. 566. Here, as there, the stock certificates contained an absolute promise to pay "the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof." Here, as there, circulars

NOTE.—*As to full faith and credit to be given to state records and judicial proceedings*—see Lindley v. O'Reilly (N. J. L.) 1 L. R. A. 79, and note; Cummington v. Belchertown (Mass.) 4 L. R. A. 131, and note; Rand v. Hanson (Mass.) 12 L. R. A. 574 and note. And see notes to Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; and Mills v. Duryee, 3 L. ed. U. S. 411.

*As to estoppel of corporation to set up plea of ultra vires*—see notes to Miller v. American Mut. Acci. Ins. Co. (Tenn.) 20 L. R. A. 765; and Central Transp. Co. v. Pullman's Palace Car Co. 35 L. ed. U. S. 55.

were shown to the plaintiff to induce his subscription, one of which contained this statement:

For the investor.

This association issues three classes of certificates, designated as instalment, paid-up, and fully paid. All of which are guaranteed to mature in six and one half years.

Amply secured by first mortgages on real estate.

Paid-up stock doubles in six and one half years.

Fully paid certificates guaranteed.

Quarterly dividends, 7 per cent per annum.

For the borrower.

This association has no auction sales.

[124] *No bidding for loans.

And a definite time for repaying a loan.

Another, the following:

"'Only association giving investor and borrower definite maturity contract in seventy-eight months. Only association issuing definite contracts.'"

The defendant pleaded that there was no absolute promise to pay at the end of seventy-eight months, but only an estimate of the time at which the stock would mature; that an absolute promise to pay at the end of seventy-eight months was inconsistent with the nature of the corporation as a mutual company, and against the provisions of its charter and by-laws, and also illegal by the laws of New York, under which the company was incorporated.

On the trial before a jury, defendant, in support of its answer, introduced the charter and by-laws of the company, the statutes of New York under which it was incorporated, certain decisions of the courts of that state, and the testimony of the assistant secretary and actuary of the defendant that the shares of stock had not, in fact, matured; also the deposition of its general attorney, who, after affirming his familiarity with the law of that state regarding building and loan associations, of which, as he said, he had made a special study, testified that, under the defendant's articles of incorporation and by-laws, and the laws and decisions of New York, the heretofore-referred-to clause in the certificate of stock "is not to be construed or held as a guaranty period of maturity, but, on the other hand, an estimated period," and that the association is not required to pay the face value of the certificates until "the amount paid by the plaintiff on his shares of stock, augmented by the earnings apportioned and credited thereto, equal the par value." Upon this testimony, the defendant asked the court to charge the jury that full faith and credit must be given to the laws of New York as construed by its courts, and that by reason thereof, "under the terms of the contract of membership, and the contract of loan, by-laws, and charter, the transaction between the plaintiff and defendant does not terminate merely upon making a fixed number of payments, [125] but only when the dues paid in by *him, with the profits apportioned to his shares, make them equal their par value of $100 per share." Other instructions of a similar nature, or looking to the same result, were also asked, but all were refused.

*Mr.* **William Hepburn Russell** argued the cause, and, with *Messrs. William Beverly Winslow* and *D. A. Pierce*, filed a brief for plaintiff in error:

Defendant in error, as a borrowing or advanced member of the Eastern Building & Loan Association, whose stock has been redeemed and the certificates pledged as collateral to the association, is, by the statute law of New York under which the association is incorporated, expressly prohibited from withdrawing the stock until its maturity.

*Bedford* v. *Eastern Bldg. & L. Asso.* 181 U. S. 227, 228-231, 237-239, 45 L. ed. 834, 835, 843, 21 Sup. Ct. Rep. 597; Thomp. Bldg. Assos. 2d ed. § 134.

Payment of a share until its full par value has been attained by payments made and dividends credited constitutes "maturity" and makes the share "fully paid" under the building and loan association plan.

Thomp. Bldg. Asso. 2d ed. § 4, p. 9. See also § 134; Endlich, Bldg. Asso. 2d ed. §§ 117, 118, 461, 463; 3 New International Enc. 1902, p. 584, title *Bldg. & Loan Asso.*; *Racer* v. *International Bldg. & L. Asso.* (Ind. App.) 63 N. E. 772; Dexter, Co-operative Bldg. & L. Assos. chap. 3, p. 17.

Mutual corporations cannot guarantee profits to stockholders.

1 Morawetz, Priv. Corp. 2d ed. §§ 436, 457; 1 Thomp. Corp. §§ 2152, 2236; 1 Cook, Corp. 4th ed. § 277; *Taft* v. *Hartford, P. & F. R. Co.* 8 R. I. 310, 5 Am. Rep. 575; *Boardman* v. *Lake Shore & M. S. R. Co.* 84 N. Y. 173; Taylor, Priv. Corp. 5th ed. § 565; *Jermain* v. *Lake Shore & M. S. R. Co.* 91 N. Y. 483; *Burrall* v. *Bushwick R. Co.* 75 N. Y. 211; *Plimpton* v. *Bigelow*, 93 N. Y. 592.

A corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute; and in the application of this principle it is immaterial that the contract, except for prohibition would be lawful.

*Bath Gaslight Co.* v. *Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390.

A building and loan association cannot, by contract not expressly authorized by its charter and by-laws and the laws under which it is incorporated, discriminate between its members, and bind itself to pay to its members definite profits at a definite time without regard to the actual earnings of the corporation.

*King* v. *International Bldg. Loan & Invest. Union*, 170 Ill. 135, 48 N. E. 677; *Bertche* v. *Equitable Loan & Invest. Asso.* 147 Mo. 343, 48 S. W. 954; *Schell* v. *Equitable Loan & Invest. Asso.* 150 Mo. 103, 51 S. W. 406; *Province* v. *Interstate Bldg. & L. Asso.* (Tenn.) 58 S. W. 265.

The settled rule of law is that, no matter

how unqualified may be the contract of an association with its members to pay them profits, it can only do so if profits have been earned.

1 Cook, Corp. 4th ed. §§ 271, 277; 1 Morawetz, Priv. Corp. 2d ed. §§ 435, 436, 444, 457; *Lockhart* v. *Van Alstyne*, 31 Mich. 76, 18 Am. Rep. 156.

The articles of association, which showed the scheme of the organization and defined the obligations of the association and the rights of members, are binding upon each member thereof. They establish the relation between the association and the stockholder, and constitute a contract between them.

*Engelhardt* v. *Fifth Ward Permanent Dime Sav. & L. Asso.* 148 N. Y. 285, 35 L. R. A. 289, 42 N. E. 710.

A subscriber for shares must at his peril, not only ascertain the contents of the subscription paper which he signs, but also the provisions of the charter of the company or its articles of association, and the general laws. Every subscription for shares must necessarily refer to these and incorporate their provisions.

1 Morawetz, Priv. Corp. 2d ed. § 96; 2 Cook, Corp. 4th ed. § 493; Taylor, Priv. Corp. 5th ed. § 512; *Bedford* v. *Eastern Bldg. & L. Asso.* 181 U. S. 227, 240, 45 L. ed. 834, 844, 21 Sup. Ct. Rep. 597.

The contract to pay, unless profits have been earned which will permit the payment, is absolutely void.

1 Cook, Corp. 4th ed. § 277; *King* v. *International Bldg. Loan & Invest. Union*, 170 Ill. 135, 48 N. E. 677; *Bedford* v. *Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597; *Bennett* v. *Eastern Bldg. & L. Asso.* 177 Pa. 233, 34 L. R. A. 595, 35 Atl. 684; *Campbell* v. *Eastern Bldg. & L. Asso.* 98 Va. 729, 37 S. E. 350; *Eastern Bldg. & L. Asso.* v. *Snyder*, 98 Va. 710, 37 S. E. 298; *Miller* v. *Eastern Bldg. & L. Asso.* (Tenn. Ch. App.) 53 S. W. 231; *Daley* v. *People's Bldg., Loan & Sav. Asso.* 172 Mass. 533, 52 N. E. 1090; Opinion, per Holmes, J.

The supreme court of South Carolina was required to give to the statutes of New York and the articles of association and by-laws of the Eastern Building & Loan Association, made in pursuance of those statutes, the same faith, credit and effect given to them by the courts of New York in construing like contracts.

Cooley, Const. L. 2d ed. § 203; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 119 U. S. 615, 622, 623, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398.

The decisions of the courts of New York establishing the meaning, construction, and effect of such laws were given in evidence and proved, and admitted as undisputed facts in the courts of South Carolina. It is upon these laws and decisions proved as facts, that this case must be decided.

*O'Malley* v. *People's Bldg., Loan & Sav. Asso.* 92 Hun, 572, 36 N. Y. Supp. 1016; *Engelhardt* v. *Fifth Ward Permanent Dime Sav. & L. Asso.* 148 N. Y. 281, 35 L. R. A. 289, 42 N. E. 710; *People* v. *Lowe*, 117 N. Y. 175, 22 N. E. 1016; *Concordia Sav. & Aid Asso.* v. *Read*, 93 N. Y. 474.

The full faith and credit to which the public acts, records, and proceedings are entitled in other states is the same faith and credit to which they are entitled in the state whose acts, records, and judicial proceedings they are.

Cooley, Const. L. 2d ed. p. 203; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 119 U. S. 615, 622, 623, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398.

The "full faith and credit" to be given to the statute of a foreign jurisdiction forming a part of a contract, and properly proved as such, is to apply such statute in accordance with its terms and its settled construction in the jurisdiction of its enactment.

*Fitzsimons* v. *Guanahani Co.* 16 S. C. 195; *Thornton* v. *Dean*, 19 S. C. 583, 45 Am. Rep. 796; *Pegram* v. *Williams*, 4 Rich. L. 219; *Belcher* v. *Orphan House*, 2 McCord L. 23; *M'Candlish* v. *Cruger*, 2 Bay, 377; *Touro* v. *Cassin*, 1 Nott. & M'C. 173, 9 Am. Dec. 680.

Full faith and credit can only be given to the laws of New York by giving to them the same effect, in connection with the contract of membership, that has been given them by the courts of New York.

*Glenn* v. *Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 537, 27 L. ed. 1020, 1024, 3 Sup. Ct. Rep. 363; *Chase* v. *Curtis*, 113 U. S. 452, 458, 28 L. ed. 1038, 1040, 5 Sup. Ct. Rep. 554; *Whitman* v. *National Bank*, 176 U. S. 559, 564, 565, 44 L. ed. 587, 591, 20 Sup. Ct. Rep. 477; *Carpenter* v. *Strange*, 141 U. S. 87, 103, 35 L. ed. 640, 646, 11 Sup. Ct. Rep. 960.

Whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact.

*Lloyd* v. *Matthews*, 155 U. S. 222, 227, 39 L. ed. 128, 130, 15 Sup. Ct. Rep. 70.

And when so proved, as in the case at bar, then, not only the validity, but the construction and effect, of the law, must be determined by the state court in accordance with the Constitution and judicial decisions of the state by whose legislature it was enacted.

*Ibid.; Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398.

State statutes establishing rules of property can be given full faith and credit only by giving them the same construction, interpretation, and effect which they have in the state of their enactment.

*Walker* v. *Marks*, 17 Wall. 648, 651, 21 L. ed. 744, 745; *Randall* v. *Brigham*, 7 Wall. 523, 19 L. ed. 285; *Allen* v. *Massey*, 17 Wall. 351, 21 L. ed. 542; *Ohio* v. *Frank*, 103 U. S. 697, 26 L. ed. 531; *Green* v. *Neal*, 6 Pet. 291, 299, 8 L. ed. 402, 405; *Bucher* v. *Cheshire R. Co.* 125 U. S. 582, 31 L. ed. 798, 8 Sup. Ct. Rep. 974; *Hartford F. Ins. Co.* v.

*Chicago, M. & St. P. R. Co.* 175 U. S. 100, 44 L. ed. 89, 20 Sup. Ct. Rep. 33.

The construction of a state statute by the courts of the state of its enactment forms a part of the statute, and will be followed, no Federal question being involved, even though this court does not agree with such construction.

*Forsyth* v. *Hammond*, 166 U. S. 518, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665; *Board of Liquidation of City Debt* v. *Louisiana*, 179 U. S. 622, 45 L. ed. 347, 21 Sup. Ct. Rep. 263; *Jaffray* v. *McGehee*, 107 U. S. 361, 365, 27 L. ed. 495, 2 Sup. Ct. Rep. 367; *Brashear* v. *West*, 7 Pet. 608, 8 L. ed. 801; *May* v. *Tenney*, 148 U. S. 60, 64, 37 L. ed. 368, 370, 13 Sup. Ct. Rep. 491; *Louisiana* v. *Pilsbury*, 105 U. S. 278, 294, 26 L. ed. 1090, 1095; *South Branch Lumber Co.* v. *Ott*, 142 U. S. 622, 628, 35 L. ed. 1136, 1138, 12 Sup. Ct. Rep. 318.

Where the same statute has been enacted in different states, and the courts of such states differ in their construction of it, this court will follow the different constructions in cases coming from the different states, even though the statute thus becomes a different law in one state from what it is in the other.

*Union Nat. Bank* v. *Bank of Kansas City*, 136 U. S. 223, 235, 34 L. ed. 341, 345, 10 Sup. Ct. Rep. 1013.

So, this court will change its construction in obedience to later decisions of a state court of last resort changing the construction of a statute of such state, when no vested rights or contract obligations will be affected thereby.

*Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261; *Wade* v. *Travis County*, 174 U. S. 499, 508, 43 L. ed. 1060, 1064, 19 Sup. Ct. Rep. 715; *Bauserman* v. *Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Moores* v. *Citizens' Nat. Bank*, 104 U. S. 625, 26 L. ed. 870.

So, the construction as to the powers of a corporation, placed by the highest court of a state upon a state statute chartering it, is conclusive in this court.

*Smith* v. *Kernochen*, 7 How. 198, 12 L. ed. 666.

And in like manner, the construction by the state courts of a clause regulating the liability of stockholders, in a state statute authorizing the formation of corporations, will be followed by this court.

*Flash* v. *Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263.

It is also settled that the laws which subsist at the time and place of the making of a contract and where it is to be performed enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement.

Mr. Justice Swayne in *Von Hoffman* v. *Quincy*, 4 Wall. 535, 550, 18 L. ed. 403.

The decision and judgment of the supreme court of South Carolina denied to plaintiff in error "the equal protection of the laws," within the true meaning and intent of the 14th Amendment.

*Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Holden* v. *Hardy*, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Brannon, "The 14th Amendment," 97, 98; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Blake* v. *McClung*, 172 U. S. 239, 247, 43 L. ed. 432, 435, 19 Sup. Ct. Rep. 165, 176 U. S. 59, 63, 65, 68, 44 L. ed. 371, 372, 373, 374, 20 Sup. Ct. Rep. 307; *Sully* v. *American Nat. Bank*, 178 U. S. 289, 303, 44 L. ed. 1072, 1078, 20 Sup. Ct. Rep. 935; *Belfast Sav. Bank* v. *Stowe*, 34 C. C. A. 229, 63 U. S. App. 14, 92 Fed. 102.

Williamson, by reason of his contract of membership, acquired vested contract rights which cannot be impaired, and may be enforced by him under the laws of New York.

*Bedford* v. *Eastern Bldg. & L. Asso.* 181 U. S. 227, 240, 45 L. ed. 834, 844, 21 Sup. Ct. Rep. 597.

Therefore the association had corresponding rights as against him, and the state of South Carolina cannot, by judicial decision, discriminate in his favor, and at the same time deny validity to the laws of New York forming a part of the contract itself. This violates alike the "full faith and credit" clause of the Federal Constitution, and the "equal protection of the laws" clause of the 14th Amendment.

*Sully* v. *American Nat. Bank*, 178 U. S. 289, 303, 44 L. ed. 1072, 1078, 20 Sup. Ct. Rep. 935.

It is for this court to say, and it is its duty under the Constitution to determine, whether in the decision in the case at bar the supreme court of South Carolina gave to the laws of New York, and the contract made under those laws, the same effect that such laws and contracts have had in the courts of New York.

*Green* v. *Van Buskirk*, 5 Wall 307, 311, 314, 18 L. ed. 599, 600, 601; *Christmas* v. *Russell*, 5 Wall. 290, 302, 18 L. ed. 475, 478; *Mills* v. *Duryee*, 7 Cranch, 481, 483, 484, 3 L. ed. 411, 413; *Carpenter* v. *Strange*, 141 U. S. 87, 103, 35 L. ed. 640, 646, 11 Sup. Ct. Rep. 960; *Dupasseur* v. *Rochereau*, 21 Wall. 130, 138, 22 L. ed. 588, 592; *Huntington* v. *Attrill*, 146 U. S. 657, 666, 36 L. ed. 1123, 1127, 13 Sup. Ct. Rep. 224; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 119 U. S. 615, 622, 624, 30 L. ed. 519, 522, 523, 7 Sup. Ct. Rep. 398; *Chicago, R. I. & P. R. Co.* v. *Sturm*, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

The amended articles of incorporation, under which the defendant in error became a borrowing or advanced member in April, 1895, are binding upon the defendant in error in this case, and limit and qualify the terms and conditions of the stock certificate, upon which alone he bases his right to recover.

*Pepe* v. *City & Suburban Permanent Bldg. Soc.* [1893] 2 Ch. 311, 3 Rep. 472; *Davies* v. *Second Chatham Permanent Benefit Bldg. Soc.* 61 L. T. N. S. 680; *Supreme Lodge, K.*

of P. v. *Knight*, 117 Ind. 489, 3 L. R. A. 409, 20 N. E. 479; *Pain* v. *Société St. Jean Baptiste*, 172 Mass. 319, 52 N. E. 502; *Supreme Commandery K. of G. R.* v. *Ainsworth*, 71 Ala. 445, 46 Am. Rep. 332; *Smith* v. *Galloway* [1898] 1 Q. B. 71.

*Mr.* **H. E. Young** argued the cause and filed a brief for defendant in error:

It does not raise a Federal question when the court of a state refuses to follow the law of another state.

*Terry* v. *Davy*, 46 C. C. A. 141, 107 Fed. 51; *Glenn* v. *Garth*, 147 U. S. 367, 37 L. ed. 205, 13 Sup. Ct. Rep. 350.

All that a nation can be justly required to do is to open its own tribunals to foreigners in the same manner and to the same extent as they are open to its own subjects, and to give them the same redress as to rights and wrongs as it deems fit to acknowledge in its own municipal code for natives and residents.

Story, Confl. L. § 556.

The law never sustains the defense of *ultra vires* out of regard for the corporation. It does so only when the most persuasive considerations of public policy are involved.

*International Bldg. & L. Asso.* v. *Bratton*, 24 Ind. App. 654, 56 N. E. 105; *Smith* v. *Miami County*, 6 Ind. App. 153, 33 N. E. 243; *Wright* v. *Hughes*, 119 Ind. 324, 21 N. E. 907; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62, 20 Am. Rep. 504.

An arrangement for the repayment of loans and withdrawal of members, different from the terms prescribed therefor in the statute or charter, when wholly or partially executed, cannot, whether it be *ultra vires* or not, be rescinded or questioned by either party.

7 Thomp. Corp. § 8756.

Unless expressly declared retroactive laws are not such.

1 Thomp. Corp. § 1010; *Knights Templars' & M. Life Indemnity Co.* v. *Jarman*, 44 C. C. A. 93, 104 Fed. 643.

Nor can they, even if declared retroactive, disturb vested rights.

1 Thomp. Corp. §§ 1019, 8757.

Even where the charter gives the right to alter, amend, and repeal its by-laws, it cannot do this so as to impair rights vested under it.

*Ibid.* Citing *Kent* v. *Quicksilver Min. Co.* 78 N. Y. 159; *Knights Templars' & M. Life Indemnity Co.* v. *Jarman*, 44 C. C. A. 93, 104 Fed. 643; *St. Luke's Church* v. *Mathews*, 4 Desauss. Eq. 585, 6 Am. Dec. 619; *Palmetto Lodge No. 5, I. O. O. F.* v. *Hubbell*, 2 Strobh. L. 463, 49 Am. Dec. 604; *Columbia Bldg & L. Asso.* v. *Bollinger*, 12 Rich. Eq. 136, 78 Am. Dec. 463; 4 Am. & Eng. Enc. of Law 2d ed. p. 1019, notes; *Supreme Council, A. L. of H.* v. *Getz*, 50 C. C. A. 153, 112 Fed. 119.

The court of appeals of New York, though on different grounds, has decided exactly as the supreme court of South Carolina.

*Vought* v. *Eastern Bldg. & L. Asso.* 172 N. Y. 508, 65 N. E. 496.

Mr. Justice **Brewer** delivered the opinion of the court:

The Federal question presented arises on the contention that the South Carolina courts did not give "full faith and credit . . . to the public acts, records, and judicial proceedings" of the state of New York, as required by § 1, art. 4, of the Constitution of the United States.

Courts of one state do not take judicial notice of the laws of another state, whether written or unwritten. They must be proved as facts. *Talbot* v. *Seaman*, 1 Cranch, 1, 38, 2 L. ed. 15, 27; *Livingston* v. *Maryland Ins. Co.* 6 Cranch, 274, 3 L. ed. 222; *Ennis* v. *Smith*, 14 How. 400, 426, 14 L. ed. 472, 484; *Pierce* v. *Indseth*, 106 U. S. 546, 551, 27 L. ed. 254, 256, 1 Sup. Ct. Rep. 418; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 119 U. S. 615, 622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398; *Lloyd* v. *Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Eastern Bldg. & L. Asso.* v. *Ebaugh*, 185 U. S. 114, 121, 46 L. ed. 830, 833, 22 Sup. Ct. Rep. 566; *Nashua Sav. Bank* v. *Anglo-American Land, M. & A. Co.* 189 U. S. 221, *post*, 782, 23 Sup. Ct. Rep. 517.

The law of New York was so proved in this case, and the contention is that it was not rightly construed by the South Carolina courts; that the law of New York which entered into and formed a part of the contract sued on was not given by those courts the same force and effect that it had in New York, and that hence the rights secured by the Constitution of the United States to the plaintiff in error were denied. If it appeared that the South Carolina courts, without questioning the validity, simply construed a statute of New York, no Federal question would be presented. *Glenn* v. *Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd* v. **Matthews*, [126] 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Banholzer* v. *New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; *Johnson* v. *New York L. Ins. Co.* 187 U. S. 491, *ante*, 273, 23 Sup. Ct. Rep. 194.

But it is contended that the construction of the New York statutes as applicable to this contract was shown by the decisions of the courts of that state and the opinion of one learned in its laws; that there was no contradictory testimony, and, therefore, it was the duty of the South Carolina courts to find as a fact that such was the true construction.

The promise to pay $100 at the end of seventy-eight months is plain and unambiguous. It is a positive promise to pay at a fixed time. The circulars presented by the company to the plaintiff as an inducement for his subscription only emphasize the certainty of the promise. So, if the inquiry were limited to the mere language of the promise and the representations which led up to it, but one decision was possible. It is said that the promise made in the certificate is expressly based upon "full compli-

ance with the terms, conditions, and by-laws printed on the front and back of this certificate;" that one of the conditions expressed on the face of the certificate is: "The shareholder agrees to pay, or cause to be paid, a monthly instalment of 75 cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn;" that it contained this further stipulation: "Payable in the manner and upon the conditions set forth in said terms, conditions, and by-laws hereto attached," and that these matters thus referred to had the effect of changing the absolute promise to a conditional one. All these were received in evidence, and when so received it became a matter of judicial construction to determine whether they had such effect, and that was a question which, nothing else being shown, was for the consideration of the courts in which the litigation was pending. In like manner, after the decisions of the courts of New York were received in evidence, their meaning and scope became matters for the same consideration. While statutes and decisions of other states are facts to be proved, yet when proved their construction and meaning are for the consideration and judgment of the [127] courts *in which they have been proved. Nor is the rule changed by the testimony given in the deposition of defendant's counsel, for, as he states, his opinion is based on the statutes, the articles of incorporation, and the decisions admitted in evidence, together with similar decisions of other states under like statutes, articles of incorporation, and by-laws. No witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence. *Laing* v. *Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366. The duty of the court to construe and decide remains the same. It must be remembered that the effort here made is to change the obligations which the defendant apparently assumed by the issue to plaintiff of its certificates of stock, and to justify such change by its articles of incorporation, the statutes of the state of New York under which it was created, and the decisions of the courts of that state. There is no suggestion of any peculiar local law in New York independent of that created by these articles and statutes and shown by its decisions, and their effect upon the terms of the contract was a matter for judicial construction by the courts of South Carolina. That the defendant so understood the matter is apparent from the instructions it asked.

The conclusion reached by the courts of South Carolina that the articles of incorporation and by-laws and the statutes of New York did not alter the apparent meaning of the contract was correct. The absolute promise was not so inconsistent with the articles of incorporation or by-laws as to be void. The by-laws at the time of making this contract contained no such provision as appears in *Daley* v. *People's Bldg. Loan & Sav. Asso.* 172 Mass. 533, 52 N. E. 1090. There the provision was that "whenever the dues paid and dividends declared shall equal the par value of the shares held by any shareholder, said shares of stock shall be canceled," and the shareholder "shall be entitled to receive . . . the par value of the shares named . . . and no more." Here "all shareholders shall pay or cause to be paid a monthly instalment of 75 cents on each share named in their certificate, until the same shall be fully paid." (Art. 14, § 14.) But in §§ 21 and 22 of the same article are these provisions for a different mode and amount of payment:

*"Sec. 21. And it is hereby expressly [128] agreed between all shareholders and this association, that a payment of $100 per share, named in their certificate, that has been in force till maturity, shall be accepted as full payment of all claims on their certificate or against this association.

"Sec. 22. Paid-up and non-assessable stock may be issued and sold at the price of $50 per share, payable on date of issue. Any parties holding such paid-up stock, wanting to withdraw the same before maturity, may do so and receive 6 per cent annual interest from the date of issue of said stock."

Neither was the promise *ultra vires* the corporation. We are saved from the necessity of an extended discussion of these questions by a recent opinion of the court of appeals of New York in the case of *Vought* v. (this defendant), *Eastern Bldg. & L. Asso.* decided December 2, 1902, 172 N. Y. 508, 65 N. E. 496. It is true that the decision was not offered in evidence on the trial of this case in the South Carolina court. It had not then been announced. And it is also true that we do not take judicial notice of the decisions of the courts of one state in a case coming to us from the courts of another. *Hanley* v. *Donoghue*, 116 U. S. 1, 6, 29 L. ed. 535, 6 Sup. Ct. Rep. 242; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 119 U. S. 615-622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398; *Lloyd* v. *Matthews*, 155 U. S. 222, 227, 39 L. ed. 128, 15 Sup. Ct. Rep. 70. But, nevertheless, we may properly refer to the opinion as a construction of the law, and the views therein expressed not only commend themselves to our judgment as intrinsically sound, but also, as the views of the law of New York entertained by the justices of its highest court, have a peculiar and persuasive appropriateness. Referring to the contention that the terms of the articles of incorporation were inconsistent with the absolute promise contained in this certificate, that court said:

"In other words, the defendant's contention is that those provisions were sufficient to change an absolute promise to pay into a conditional one, dependent upon the success of its enterprise. We find nothing in these provisions which would justify any such conclusion. The provision in paragraph 1, that the plaintiff should pay until the share is paid or withdrawn, is entirely consistent with the agreement for absolute payment for the shares by the defendant at the time named, as by its contract *it agreed that the [129]

plaintiff's shares should mature at that time."

Again, referring to the contention that the absolute promise contained in such certificate was *ultra vires* the corporation, it observed:

"We deem it unnecessary at this time to determine whether the defendant was authorized by that statute to enter into such contracts, for, if we assume that the making of them was in excess of the express power conferred upon the corporation by that statute, still, as the contracts involved no moral turpitude, and did not offend any express statute, they were not illegal in a sense that would prevent the maintenance of an action thereon. It is now well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract. As has been said, corporations, like natural persons, have power and capacity to do wrong. They may, in their contracts and dealings, break over the restraints imposed upon them by their charters; and when they do so their exemption from liability cannot be claimed on the mere ground that they have no attributes or facilities which render it possible for them thus to act. While they have no right to violate their charters, yet they have capacity to do so, and are bound by their acts where a repudiation of them would result in manifest wrong to innocent parties, and especially where the offender alleges its own wrong to avoid a just responsibility. It may be that, while a contract remains unexecuted upon both sides, a corporation is not estopped to say in its defense that it had not the power to make the contract sought to be enforced; yet, when it becomes executed by the other party, it is estopped from asserting its own wrong, and cannot be excused from payment upon the plea that the contract was beyond its power. *Bissell* v. *Michigan S. & N. I. R. Cos.* 22 N. Y. 258; *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62, 20 Am. Rep. 504; *Rider Life Raft Co.* v. *Roach*, 97 N. Y. 378; *Holmes, B. & H.* v. *Willard*, 125 N. Y. 75, 80, 11 L. R. A. 170, 25 N. E. 1083; *Buffalo* v. *Balcom*, 134 N. Y. 532, 32 N. E. 7; *Bath* [130] *Gaslight Co.* v. *Claffy*, 151 N. Y. 24, 36 L. R. A. 664, 45 N. E. 390; *Moss* v. *Cohen*, 158 N. Y. 240, 249, 53 N. E. 8; *Hannon* v. *Siegel-Cooper Co.* 167 N. Y. 244, 52 L. R. A. 429, 60 N. E. 597."

We deem it unnecessary to add any observations of our own to these satisfactory declarations of the law of New York.

A single matter remains to be noticed. It is contended that the contract evidenced by the certificates was changed by a loan subsequently obtained by the plaintiff from the defendant upon the security of the shares,—a loan obtained after the by-laws had been amended to make, as alleged, more clear the obligations assumed by the issue of share certificates. That amendment is found in § 3, art. 8, which as amended reads:

"Sec. 3. Instalment stock shall mature and be payable when the dues paid thereon, with the profits apportioned and credited thereto, shall equal $100 per share. Paid-up stock shall mature and be payable when the dues thereon, with the profits apportioned and credited thereto in excess of any cash dividends, if any, that may be paid, shall equal $100 per share; and unless otherwise provided all other stock shall be payable as provided by the by-laws or certificates of shares."

But it is not shown that there was any express agreement between the parties to change the terms of the original contract; the amendment was clearly prospective in its operation (*Knights Templars' & M. Life Indemnity Co.* v. *Jarman*, 187 U. S. 197, *ante*, 139, 23 Sup. Ct. Rep. 108); and we are unable to perceive that the mere borrowing or the promise to return the money so borrowed had in themselves any effect upon the prior contract.

We see no error in the record, and *the judgment of the Supreme Court of South Carolina is affirmed.*

Mr. Justice **Harlan** and Mr. Justice **White** concurred in the result.

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*SAMUEL BELL, Clerk, *Petitioner*, [131]
*v.*
COMMONWEALTH TITLE INSURANCE & TRUST COMPANY.

(See S. C. Reporter's ed. 131-134.)

*Clerks — public records — examination, by title guaranty companies.*

A corporation engaged in examining titles and certifying thereto may, so far as necessary to assist in the examination of a title for which it is employed, inspect and examine

NOTE.—*On the right to inspect public records* —see notes to *Re* Caswell (R. I.) 27 L. R. A. 82; and Bell v. Commonwealth Title Ins. & T. Co. 49 C. C. A. 210.

*Right of access to public records for private abstract purposes.*

The extent to which public records may be used for the purposes of a private abstract business depends upon the provisions of the various statutes conferring the right of access to such records.

Under statutory or charter provisions authorizing any person or abstracter to inspect the records, they are entitled to a reasonable use of the same; and other persons, though not abstracters, are entitled to the same privileges. Stockman v. Brooks, 17 Colo. 248, 29 Pac. 746; State *ex rel.* Cole v. Rachac, 37 Minn. 372, 35 N. W. 7; People *ex rel.* Title Guarantee & T. Co. v. Reilly, 38 Hun, 429; Hanson v. Eichstaedt, 69 Wis. 538, 35 N. W. 30; Johnson v. Wakulla County, 28 Fla. 720, 9 So. 690; State *ex rel.* Clark v. Long, 37 W. Va. 266, 16 S. E. 578; *Re* Chambers, 44 Fed. 786; Burton v. Tuite, 78 Mich. 363, 7 L. R. A. 73, 44 N. W. 282; Burton v. Tuite, 80 Mich. 218, 7 L. R. A. 824, 45 N. W. 88; Day v. Button, 96 Mich. 600, 56 N. W. 3; Aitcheson v. Huebner, 90 Mich. 643, 51 N. W. 634.

The Michigan cases above cited in effect over-

the indices and cross indices of the judgment records prepared by the clerks of United States courts, which, by the act of August 1, 1888, § 2 (25 Stat. at L. 357, chap. 729, U. S. Comp. Stat. 1901, p. 701), "shall at all times be open to the inspection and examination of the public," so long as it does not interfere with the clerk or his assistants in the discharge of their duties, or with the equal rights of other persons to make such inspection and examination.

[No. 191.]

*Submitted March 10, 1903. Decided April 6, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Pennsylvania giving a title guaranty company access to the judgment indices and cross indices kept by a clerk of the United States Court. *Affirmed.*

See same case below, 49 C. C. A. 208, 110 Fed. 828.

Statement by Mr. Justice **Brewer:**

By § 828, Rev. Stat. (U. S. Comp. Stat. 1901, p. 635), clerks of the circuit and district courts are allowed certain fees for searching records for judgments, decrees, etc., and certifying the results of such searches. In the same section is this provision:

"All books in the offices of the clerks of the circuit and district courts, containing the docket or minute of the judgments, or decrees thereof, shall, during office hours, be open to the inspection of any person desiring to examine the same, without any fees or charge therefor."

Section 2 of the act of August 1, 1888 (25 Stat. at L. 357, chap. 729, U. S. Comp. Stat. 1901, p. 701), reads:

"The clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross indices of the judg-

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rule Webber v. Townley, 43 Mich. 534, 38 Am. Rep. 213, 5 N. W. 971, which required the abstracter to have a special interest in the records to be searched, before he was entitled to the privilege of inspection; but these cases were under a statute which expressly granted the right to abstracters.

A note or fee given for inspection of records to which the public is entitled is without consideration and against public policy. Parsons v. Randolph, 21 Mo. App. 353; Lum v. McCarty, 39 N. J. L. 287.

This last case in effect overruled Flemming v. Hudson County, 30 N. J. L. 280, which held that every person had access to the records, only on payment of a fee for the privilege of search.

While under the foregoing statutory provisions and decisions a reasonable use of the records is allowed, six hours a day when not used by the commissioners, and two hours on such days, is a reasonable regulation. Upton v. Catlin, 17 Colo. 546, 17 L. R. A. 282, 31 Pac. 172.

So, a restriction in the use of the office to three employees of an abstract company was held to be a reasonable regulation. People *ex rel.* German American Loan & T. Co. v. Richards, 99 N. Y. 620, 1 N. E. 258.

A surveyor has no right to desk room in the recorder's office, to copy all the field notes of all the surveys in the county. Phelan v. State, 76 Ala. 49.

And in Burton v. Reynolds, 102 Mich. 55, 60 N. W. 452, it was held that, while a general use is a matter of public privilege, the claimant must take his turn with the public; and it was said that, if he refuses to pay for special privileges for which others pay, he will not be entitled to such special privileges by mandamus.

Where abstracters have not been expressly provided for by the statutes, they have been refused the privilege of the use of the office when they had no special interest in the record at that time. Bean v. People, 7 Colo. 200, 2 Pac. 909; Buck v. Collins, 51 Ga. 391, 21 Am. Rep. 236; Randolph v. State, 82 Ala. 527, 60 Am. Rep. 761, 2 So. 714; Cormack v. Wolcott, 37 Kan. 391, 15 Pac. 245; Land Title Warranty & S. D. Co. v. Tanner, 99 Ga. 470, 27 S. E. 727; Barber v. West Jersey Title & Guaranty Co. 53 N. J. Eq. 158, 32 Atl. 222, 371, Reversing 49 N. J. Eq. 474, 24 Atl. 381.

But they are entitled to use the same if they have a present interest. Boylan v. Warren, 39 Kan. 301, 18 Pac. 174; Barber v. West Jersey Title & Guaranty Co. 53 N. J. Eq. 158, 32 Atl. 222, 371; BELL v. COMMONWEALTH TITLE INSURANCE & TRUST CO.

Under Md. Code, art. 17, § 1, providing that every clerk shall have the custody and carefully keep the books and papers of his office, and give copies on payment of a fee, an abstract company cannot compel the clerks of courts to furnish copies or abstracts and to make searches without payment of fees, or search the records of the office through its own employees, although the charter of the company provides for examination of title. Belt v. Prince George's County Abstract Co. 73 Md. 289, 10 L. R. A. 212, 20 Atl. 982.

And the same was held to be the rule in regard to abstracters generally in Illinois prior to the Illinois acts of May 31 and June 16, 1887. Scribner v. Chase, 27 Ill. App. 36.

And in Laughlin v. Hawley, 9 Colo. 174, 11 Pac. 45, it was said that the refusal by the county clerk of the opportunity to examine the files, sought by a land purchaser who was affected by a judgment lien, was a personal matter between him and the clerk.

The clerk of the New Jersey supreme court cannot be compelled to permit a guaranty title company to examine patent or short form indices to judgments, which are not required by law to be kept, though such indices are kept up at the public cost. Fidelity Trust Co. v. Clerk of Supreme Court, 65 N. J. L. 495, 47 Atl. 451.

A foreign corporation owning land was refused the privilege of making abstracts of the whole county, where the charter of the company was not shown. Diamond Match Co. v. Powers, 51 Mich. 145, 16 N. W. 314.

And in Newton v. Fisher, 98 N. C. 20, 3 S. E. 822, an opportunity was refused an attorney to inspect all chattel mortgages of a certain year to ascertain the financial condition of all the debtors of his clients. There appears to have been no statute involved in this case.

By statute in Minnesota the privilege of inspection and examination of public records is now denied when the purpose thereof is to certify abstracts of title. State *ex rel.* Clay County Abstract Co. v. McCubrey, 84 Minn. 439, 87 N. W. 1126.

ment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public."

On December 28, 1896, the Commonwealth Title Insurance & Trust Company commenced a suit in the circuit court of the United States for the eastern district of Pennsylvania against Samuel Bell, clerk of that court. The company is engaged in the business of insuring titles to real estate, [132] making searches for liens and encumbrances upon the same, and issuing certificates in respect thereto, and sought a decree giving to it access to the judgment indices and cross indices kept by the clerk. The case proceeded to a decree as follows:

"And now this 16th day of January, 1901, this case having come on to be heard upon pleadings and proofs, and having been argued by counsel, it is ordered, decreed, and adjudged that the respondent shall permit the properly authorized representatives of the complainant to inspect and examine the judgment indices and cross indices kept by the respondent, as clerk of the circuit court of the United States for the eastern district of Pennsylvania, in such way and manner as will enable the complainant to prosecute its business as insurer of titles, but subject to the following restrictions:

"The inspection and examination must in each instance relate and be confined to a transaction or transactions which at the time being shall be current or depending; and such inspection and examination shall be made only at such times and under such circumstances as will not interfere with the respondent or his assistants in the discharge of their duties, or with the exercise of the right of other persons to have access to said indices and cross indices."

This decree was affirmed on September 27, 1901, by the circuit court of appeals. 49 C. C. A. 208, 110 Fed. 828. On December 2 of the same year the case was brought here on certiorari. 183 U. S. 699, 46 L. ed. 396, 22 Sup. Ct. Rep. 946.

*Solicitor General* **Richards** and *Assistant Attorney General* **Beck** submitted the cause for petitioner.

*Assistant Attorney General Beck* filed a separate brief for petitioner:

The complainant must found his case upon a statutory right. If there can be said to have been any rule of common law upon the subject, it was that the right to inspect public records was confined to a person having some direct interest in the particular record sought to be inspected or copied, and that the right did not extend to one seeking to do so from mere curiosity or for his own private gain.

1 Greenl. Ev. 473, 475; *Hanson* v. *Eichstaedt*, 69 Wis. 538, 35 N. W. 31; *State ex rel. Cole* v. *Rachac*, 37 Minn. 372, 35 N. W. 7; *Cormack* v. *Wolcott*, 37 Kan. 391, 15 Pac. 245.

The question here involved has frequently been before the courts, and, although the decisions are not uniform, the majority uphold the position of the petitioner in this case.

*Bean* v. *People*, 7 Colo. 200, 2 Pac. 909; *Buck* v. *Collins*, 51 Ga. 391, 21 Am. Rep. 236; *Land Title Warranty & S. D. Co.* v. *Tanner*, 99 Ga. 470, 27 S. E. 727; *Phelan* v. *State*, 76 Ala. 51; *Cormack* v. *Wolcott*, 37 Kan. 391, 15 Pac. 245; *Keller* v. *Stone*, 96 Va. 667, 32 S. E. 454; *Newton* v. *Fisher*, 98 N. C. 20, 3 S. E. 822; *Belt* v. *Prince George's County Abstract Co.* 73 Md. 289, 10 L. R. A. 212, 20 Atl. 982; *Barber* v. *West Jersey Title & Guaranty Co.* 53 N. J. Eq. 158, 32 Atl. 222, 371.

*Mr.* **John G. Johnson** submitted the cause for respondent:

A person about to take title to real estate, and obliged to inform himself concerning the existence or nonexistence of liens against the same, can make this examination through a person or corporation conducting for him the business of examining the title of the property about to be purchased, and the condition of the encumbrances against the same.

*Lum* v. *McCarty*, 39 N. J. L. 287; *People ex rel. German American Loan & T. Co.* v. *Richards*, 99 N. Y. 620, 1 N. E. 258; *Day* v. *Button*, 96 Mich. 600, 56 N. W. 3; *State ex rel. Cole* v. *Rachac*, 37 Minn. 372, 35 N. W. 7; *Burton* v. *Tuite*, 78 Mich. 363, 7 L. R. A. 73, 44 N. W. 282; *Hanson* v. *Eichstaedt*, 69 Wis. 538, 35 N. W. 30.

Mr. Justice **Brewer** delivered the opinion of the court:

The question presented is to what extent a company engaged in the business of examining titles and certifying thereto may have access to and use the indices and cross indices of the judgment records prepared by [133] the clerks of United States courts. The statute declares that they "shall at all times be open to the inspection and examination of the public." [25 Stat. at L. 358, chap. 729, U. S. Comp. Stat. 1901, p. 701.] This company as one of the public has a right to this inspection and examination. It has no monopoly therein, and cannot interfere with the clerk or his assistants in the discharge of their duties, or with the equal rights of other persons to such inspection and examination. But this limitation is expressly provided for by the second of the two restrictions imposed in the decree. Under this decree the clerk, as custodian, can make such reasonable regulations as will secure to him and his assistants full use of all the books and records of his office,—which, of course, is a primary matter to be considered, —and also will guard against any tampering with or injury to those books and records, and at the same time give to the plaintiff and others access to the indices. From the testimony it is clear that there can be no difficulty on the score of time or otherwise in affording to this company and all others interested every proper facility for inspection and examination. Indeed, it is not contended that there is any trouble in that direction.

But the contention is that the office of clerk is not a salaried office; that he is paid by fees; that the fees for searches and certificates thereof have amounted to a very considerable sum, and in this office have resulted in a surplus above the maximum of compensation allowed by law to the clerk, which has gone into the Treasury of the United States, whereas, if this plaintiff and other like companies situated in Philadelphia, which are monopolizing the business of examinations of title, should be permitted to make their own inspection and examination of these indices, a large part of the fees hitherto received by the clerk will be lost, his maximum of compensation will not be reached, and there will be no surplus to be paid into the Treasury of the United States. It is insisted that although, by the terms of § 828 (U. S. Comp. Stat. 1901, p. 635), the judgment records are open to the inspection of any person without any fee or charge therefor, Congress, in directing the preparation of the indices and cross indices, and that they should be open to the inspection and examination of the public, did not add [134] thereto "without any *fee or charge therefor," and thus manifested its intent that they should not be so used as to interfere with the fees theretofore received by the clerk. We cannot so interpret the statute. If these indices were intended merely for the convenience of the clerk and to facilitate his work, the making of them would undoubtedly have been left to his discretion. The convenience of the public and assistance to those interested in the judgments were obviously in the thought of Congress, for it declared that they should be open to the inspection and examination of the public.

Very likely, at the time of the passage of the act, the monopolizing of the business of examining titles by one or two corporations was not contemplated. The work was scattered among the separate members of the bar, each one for his own client examining the title to property in which such client was interested. But if Congress provided and intended to provide that one, interested in the title to real estate and desiring an examination of judgment liens thereon, should, either by himself or agent, have access to these indices, that intent and that provision are not changed by the fact that the business has passed from the many to a few. The same right of inspection exists whether one is examining only the title to a single piece of real estate or the titles to a hundred. The inspection is an assistance to the examination of titles and obviously Congress intended that these indices should be open to the inspection of those rightfully making such examinations.

Whether parties have a right to make copies in full of these indices is not a question before us, for the decree carefully limits the right of inspection to a transaction or transactions at the time current or depending. So that all that this plaintiff is allowed by this decree is an inspection and examination of these indices, so far as may be necessary to assist in the examination of a title for which it is then employed.

*We see no error in the decree, and it is affirmed.*

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## *FIDELITY & DEPOSIT COMPANY OF MARYLAND [135]
## v.
## L. BUCKI & SON LUMBER COMPANY

(See S. C. Reporter's ed. 135-143.)

*Damages—in suits on attachment bonds—counsel fees—injury to credit—loss of profits—trial—continuance.*

1. Attorneys' fees incurred in dissolving an attachment, which by the local law of the state in which the attachment was issued can be recovered in an action in a court of such state on the attachment bond, are no less an element of damages because the action has been removed to a Federal court.
2. The injury to a vendee's credit, resulting from the bringing of actions by his vendor for a breach of contract and for a balance due thereunder, and any loss of profits because of the vendor's refusal to make further deliveries under the contract, are not elements of damages recoverable in a suit on the attachment bonds issued in such actions.
3. The refusal to discharge a jury and postpone the trial because of the misleading effect of rulings admitting testimony on the question of damages, afterwards excluded from the consideration of the jury, is not an abuse of discretion, where no witnesses had been discharged, nor any books or documents in possession of counsel sent away, during the trial, and there was no offer at the time to present further testimony.

[No. 220.]

*Argued March 20, 1903. Decided April 6, 1903.*

ON WRIT and Cross Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment modifying, and as modified affirming, a judgment of the United States Circuit Court for the Southern District of Florida in favor of plaintiff in an action on attachment bonds. *Affirmed.*

See same case below, 48 C. C. A. 436, 109 Fed. 393.

Statement by Mr. Justice **Brewer:**

On October 1, 1897, the Atlantic Lumber Company commenced two actions at law in

NOTE.—*As to state decisions and laws as rules of decision in Federal courts*—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson *ex dem.* St. John v. Chew, 6 L. ed. U. S. 583; United States *ex rel.* Buts v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; and Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

*On the question of damages for tort as affected by loss of profits*—see note to Wallace v. Pennsylvania R. Co. (Pa.) 52 L. R. A. 33.

the circuit court of Duval county, Florida, against The L. Bucki & Son Lumber Company. In each of these actions a writ of attachment was issued, the Fidelity & Deposit Company of Maryland being the surety on the attachment bonds. Both of the attachments were dissolved. Soon after such dissolution the Bucki Company brought the present action against the Fidelity Company upon the attachment bonds. The action was commenced in the circuit court of Duval county, Florida, but subsequently removed to the United States circuit court for the southern district of Florida. On a trial in that court the Bucki Company obtained a judgment which by the court of appeals of the fifth circuit was modified, and, as modified, affirmed. 48 C. [136]C. A. 436, 109 Fed. 393. *Subsequently thereto, each of the parties obtained a writ of certiorari from this court. 184 U. S. 698, 46 L. ed. 64, 22 Sup. Ct. Rep. 946.

*Mr.* **R. H. Liggett** argued the cause, and, with *Mr. Winfield Liggett*, filed a brief for Fidelity & Deposit Company:

Attorneys' fees are not an element of actual damages in an action of trespass.

*Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 106, 37 L. ed. 101, 13 Sup. Ct. Rep. 261; *Day* v. *Woodworth*, 13 How. 370, 14 L. ed. 181; *Flanders* v. *Tweed*, 15 Wall. 453, 21 L. ed. 204.

Nor in a suit on a bond.

*Oelrichs* v. *Spain*, 15 Wall. 211, *sub nom. Oelrichs* v. *Williams*, 21 L. ed. 43; *Tullock* v. *Mulbane*, 184 U. S. 524, 46 L. ed. 670, 22 Sup. Ct. Rep. 372.

There are two Federal decisions which relate directly to the right to recover attorneys' fees upon an attachment bond, and in both of these the right to recover such damages was denied.

*Bing Gee* v. *Ah Jim*, 7 Sawy. 117, 7 Fed. 812; *Jacobus* v. *Monongahela Nat. Bank*, 35 Fed. 395.

The Federal courts have consistently refused to allow counsel fees, not merely in actions at law, but also in admiralty and patent cases.

*Arcambel* v. *Wiseman*, 3 Dall. 306, 1 L. ed. 613; *The Baltimore*, 8 Wall. 377, 19 L. ed. 463; *The Margaret* v. *The Connestoga*, 2 Wall. Jr. 116, Fed. Cas. No. 9,070.

The word "costs" refers only to the costs which the defendant may have taxed in his favor in the attachment proceedings.

Anderson, Law Dict. 267; *Apperson* v. *Mutual Ben. L. Ins. Co.* 38 N. J. L. 388.

The fees which parties have to pay counsel for asserting their rights have never been considered as costs chargeable to the party cost.

*Melancon* v. *Robichaud*, 19 La. 357; *Constant* v. *Matteson*, 22 Ill. 546; *Eimer* v. *Eimer*, 47 Ill. 373; *McDonald* v. *Page*, Wright (Ohio) 121; *Frost* v. *Jordan*, 37 Minn. 546, 36 N. W. 713.

Assuming the word "damages" to be broad enough to include the expenses of defending the suit, yet must the meaning of that word be controlled and restrained by the word "costs," which has special relation to this subject.

*Reiche* v. *Smythe*, 13 Wall. 162, 20 L. ed. 566; Sutherland Stat. Constr. § 219.

At the time this Florida statute was passed, attorneys' fees were not treated as an element of damages for any breach of contract or for the commission of any tort.

*Skinner* v. *Pinney*, 19 Fla. 48, 45 Am. Rep. 1; *Leffingwell* v. *Elliott*, 10 Pick. 204.

There is even less reason for allowing attorneys' fees for the recovery of property taken under process of law than there is for the recovery of property taken by a naked trespasser.

*Patton* v. *Garrett*, 37 Ark. 613.

Where the judge who writes the opinion of the court expresses a view upon any point or principle which he is not required to decide, his opinion as to such point is an *obiter dictum*, and is binding upon no one.

*Hart* v. *Stribling*, 25 Fla. 435, 6 So. 455.

State decisions which treat the question of the measure of damages not as one of local law or of statutory construction, are not binding on the Federal courts.

*Venice* v. *Murdock*, 92 U. S. 501, 23 L. ed. 583; *Pana* v. *Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 106, 37 L. ed. 101, 13 Sup. Ct. Rep. 261.

In construing statutes the Federal courts are not required to adopt a construction based on the implications of a judicial opinion.

*Caesar* v. *Capell*, 83 Fed. 403.

This is not a question of local law.

*Swift* v. *Tyson*, 16 Pet. 18, 19, 10 L. ed. 871, 872.

This court does not follow the state courts in their construction of a will or any other instrument, as they do in the construction of statutes.

*Lane* v. *Vick*, 3 How. 476, 11 L. ed. 687, approved in *Barber* v. *Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 100, 41 L. ed. 925, 17 Sup. Ct. Rep. 488.

The fact that the contract or bond was given in pursuance of statute can make no difference.

*Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Florida C. & P. R. Co.* v. *Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399; *DeLamar's Nevada Gold Min. Co.* v. *Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; *Provident Sav. Life Assur. Soc.* v. *Ford*, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104.

Assuming the question to be one of local law, yet it is the duty of the court to exercise an independent judgment, because of the fact that the Florida court had not, prior to the execution of these bonds, passed upon the right to recover attorneys' fees as damages on an attachment bond.

*Burgess* v. *Seligman*, 107 U. S. 33, 34, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Pleasant Twp.* v. *Ætna L. Ins. Co.* 138 U. S. 67, 72, 34 L. ed. 864, 866, 11 Sup. Ct. Rep. 215; *Great Southern Fireproof Hotel Co.* v. *Jones*, 54 C. C. A. 165, 116 Fed. 798.

The removal of the attachment suits to the Federal court brought the subject within the purview of the Federal statute; and only such fees as are thereby allowed may be recovered.

*Flanders* v. *Tweed*, 15 Wall. 452, 21 L. ed. 204; *United States* v. *Treadwell*, 15 Fed. 532.

According to those authorities which recognize the right to recover counsel fees on attachment bonds, all the services rendered in defense of the attachment proceedings must have been capable of separation from those which would have been incurred in the defense of an action in any event.

1 Sedgw. Damages, § 237.

Loss of credit or custom generally involves the intervention of the will of strangers, and it is therefore generally remote. Thus, in a case of wrongful attachment, no compensation is allowed for loss of credit.

1 Sedgw. Damages, § 127.

The impairment of plaintiff's credit, the inability to sell lands levied on, or to contract a loan upon the security of such land, was not a proximate, but a remote, consequence of the attachment.

*Elder* v. *Kutner*, 97 Cal. 490, 32 Pac. 563.

Injuries to credit, reputation, or business are too remote and speculative.

*Union Nat. Bank* v. *Cross*, 100 Wis. 174, 75 N. W. 992.

Depreciation to real property upon which an attachment has been levied, which occurs while the levy remains in force, if there be no change of possession, is not the immediate result of the attachment, and recovery therefor cannot be had of the attaching creditor.

*Tisdale* v. *Major*, 106 Iowa, 1, 75 N. W. 663; *Marx Bros.* v. *Leinkauff*, 93 Ala. 453, 9 So. 818; Shinn, Attachm. 694; *Gerard* v. *Moore* (Tex. Civ. App.) 24 S. W. 652.

Damages to credit and business, and loss of profits, cannot be recovered in a suit on an attachment bond.

*Bates* v. *Clark*, 95 U. S. 204, 24 L. ed. 471; *Coulson* v. *Panhandle Nat. Bank*, 4 C. C. A. 616, 13 U. S. App. 39, 54 Fed. 859; *Watson* v. *Sutherland*, 5 Wall. 74, 18 L. ed. 580; *North* v. *Peters*, 138 U. S. 271, 34 L. ed. 936, 11 Sup. Ct. Rep. 346; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 480, 42 L. ed. 1116, 18 Sup. Ct. Rep. 645; *Howard* v. *Stillwell & B. Mfg. Co.* 139 U. S. 203, 35 L. ed. 149, 11 Sup. Ct. Rep. 500; 1 Sedgw. Damages, 8th ed. § 127; 1 Sutherland, Damages, 2d ed. § 55; 2 Sutherland, Damages, 2d ed. § 515; Drake, Attachm. §§ 175, 179b; 1 Shinn, Attachm. 342; Wade, Attachm. §§ 300, 301; 2 Sedgw. Damages, 8th ed. §§ 682, 436; *Thompson* v. *Webber*, 4 Dak. 240, 29 N. W. 671; *Watson* v. *Sutherland*, 5 Wall. 74, 18 L. ed. 580; *Hurd* v. *Barnhart*, 53 Cal. 97; *Trawick* v. *Martin Brown Co.* 79 Tex. 460, 14 S. W. 564; *Kirbs* v. *Provine*, 78 Tex. 353, 14 S. W. 849; *Sabine & E. T. R. Co.* v. *Joachimi*, 58 Tex. 497; *Wallace* v. *Finberg*, 46 Tex. 35; *Seattle Crockery Co.* v. *Haley*, 6 Wash. 302, 33 Pac. 650; *Crymble* v. *Mulvaney*, 21 Colo. 203, 40 Pac. 499; *Casper* v. *Klippen*, 61 Minn. 353, 63 N. W. 737; *Anderson* v. *Sloane*, 72 Wis. 566, 40 N. W. 214; *Braunsdorf* v. *Fellner*, 76 Wis. 1, 45 N. W. 97; *Oberne* v. *Gaylord*, 13 Ill. App. 30; *Pettit* v. *Mercer*, 8 B. Mon. 51; *Reidhar* v. *Berger*, 8 B. Mon. 160; *Holliday Bros.* v. *Cohen*, 34 Ark. 707; *Campbell* v. *Chamberlain*, 10 Iowa, 337; *Lowenstein* v. *Monroe*, 55 Iowa, 82, 7 N. W. 406; *Weeks* v. *Prescott*, 53 Vt. 57; *John Hutchinson Mfg. Co.* v. *Pinch*, 91 Mich. 156, 51 N. W. 930; *Levinski* v. *Middlesex Bkg. Co.* 34 C. C. A. 452, 92 Fed. 455; *Witherbee* v. *Meyer*, 155 N. Y. 446, 50 N. E. 58; *Central Trust Co.* v. *Clarke*, 34 C. C. A. 354, 92 Fed. 298.

An exceptional rule exists in Alabama and Tennessee, by force of statutes, in those cases where an attachment is maliciously sued out.

Sedgw. Damages, § 683; *Jerman* v. *Stewart*, 12 Fed. 268.

Profits that are speculative or conjectural are not generally regarded as elements in fixing damages, not because there is anything in their nature, *per se*, which demands their rejection, but because they cannot be estimated with reasonable certainty.

*Hodges* v. *Fries*, 34 Fla. 64, 15 So. 682; *Chipley* v. *Atkinson*, 23 Fla. 206, 1 So. 934.

*Mr.* **H. Bispee** argued the cause, and, with *Mr. George C. Bedell*, filed a brief for L. Bucki & Son Lumber Co.:

Contributing causes do not defeat the right to recover full damages for the cause complained of.

*Davis* v. *Garrett*, 6 Bing. 716; Bishop, Noncontract Law, § 39; *Grimes* v. *Bowerman*, 92 Mich. 258, 52 N. W. 751; *Ring* v. *Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Hackett* v. *Smelsley*, 77 Ill. 110; *Peck* v. *Neil*, 3 McLean, 22, Fed. Cas. No. 10,892; *Lake* v. *Milliken*, 62 Me. 240, 16 Am. Rep. 456; 8 Am. & Eng. Enc. Law, 2d ed. pp. 580, 581; *Myers* v. *Malcolm*, 6 Hill, 292, 41 Am. Dec. 744; *Chacey* v. *Fargo*, 5 N. D. 173, 64 N. W. 932; *Barrett* v. *Third Ave. R. Co.* 45 N. Y. 628; *Webster* v. *Hudson River R. Co.* 38 N. Y. 260; *Burrows* v. *March Gas & Coke Co.* L. R. 5 Exch. 67; *Pastene* v. *Adams*, 49 Cal. 87; *Beauchamp* v. *Saginaw Min. Co.* 50 Mich. 163, 45 Am. Rep. 30, 15 N. W. 65.

It was for the jury to decide whether the other so-called causes so infected plaintiff's business with disease that it would have ceased to do business if the other injury,—the attachments,—had not happened.

*Louisville & N. R. Co.* v. *Jones*, 83 Ala. 376, 3 So. 902; *Jacksonville, T. & K. W. R. Co.* v. *Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 116, 17 L. R. A. 33, 9 So. 653.

And the rule of damages is a question of local law.

8 Am. & Eng. Enc. Law, 2d ed. p. 581; *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 470, 24 L. ed. 257.

Reasonable certainty does not mean absolute certainty, but reasonable probability.

Sedgw. Damages, § 249.

The fact and amount of future loss is a question for the jury, which has discretion in establishing it.

Sedgw. Damages, §§ 249, 560, 561; *Allison* v. *Chandler*, 11 Mich. 542; *M'Neill* v. *Reid*, 9 Bing. 68; *Bagley* v. *Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *Driggs* v. *Dwight*, 17 Wend. 71, 31 Am. Dec. 283; *Dushane* v. *Benedict*, 120 U. S. 647, 30 L. ed. 814, 7 Sup. Ct. Rep. 696; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679; *Baltimore & O. R. Co.* v. *Griffith*, 159 U. S. 603, 40 L. ed. 274, 16 Sup. Ct. Rep. 105; *Warner* v. *Baltimore & O. R. Co.* 168 U. S. 339, 42 L. ed. 491, 18 Sup. Ct. Rep. 68.

Though there may be difficulty in arriving at the damages, there is no reason for not submitting the subject to the jury.

*Simpson* v. *London & N. W. R. Co.* L. R. 1 Q. B. Div. 274; *Wakeman* v. *Wheeler & Wilson Mfg. Co.* 101 N. Y. 205, 54 Am. Rep. 676, 4 N. E. 264; 1 Sutherland, Damages, 113; *Dennis* v. *Maxfield*, 10 Allen, 138; *Wells* v. *National Life Asso.* 53 L. R. A. 33, 39 C. C. A. 476, 99 Fed. 222.

The amount of damages from interruption of plaintiff's business caused by the attachments must be submitted to the jury.

1 Sedgw. Damages, 8th ed. §§ 127, 182; *Bagley* v. *Smith*, 10 N. Y. 489, 61 Am. Dec. 756; *Anvil Min. Co.* v. *Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876; 1 Sutherland, Damages, §§ 54, 59, 70; *Brooks* v. *Coquard*, 5 McCrary, 588, 18 Fed. 316; *Jerman* v. *Stewart*, 12 Fed. 266; *Sonneborn* v. *Stewart*, 2 Woods, 599, Fed. Cas. No. 13,176; *Brewer* v. *Jacobs*, 22 Fed. 220; *Marx Bros.* v. *Leinkauff*, 93 Ala. 453, 9 So. 818; *Tidwell* v. *State*, 70 Ala. 38; *Alexander* v. *Jacoby*, 23 Ohio St. 358; *Grimes* v. *Bowerman*, 92 Mich. 260, 52 N. W. 751; *Dushane* v. *Benedict*, 120 U. S. 630–648, 30 L. ed. 810–814, 7 Sup. Ct. Rep. 696; *Pollock* v. *Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Chaffe* v. *Mackenzie*, 43 La. Ann. 1062, 10 So. 372.

It was not the duty of plaintiff, imposed by law, to have had cash in bank, securities, or other property not levied on, to enable it to continue in business.

*Illinois C. R. Co.* v. *Cobb*, 64 Ill. 128; *Derry* v. *Flitner*, 118 Mass. 131; *Watson* v. *Sutherland*, 5 Wall. 74, 18 L. ed. 580; *North* v. *Peters*, 138 U. S. 271, 34 L. ed. 936, 11 Sup. Ct. Rep. 346.

All parties concerned in wrongfully issuing a statutory attachment are in the position of and liable as trespassers as soon as the attachment is dissolved. They are liable in damages sustained by such trespass, though they acted in good faith and in the belief that they were entitled to the writ.

*Hundley* v. *Chadick*, 109 Ala. 575, 19 So. 845; *Bryan* v. *Congdon*, 29 C. C. A. 670, 57 U. S. App. 505, 86 Fed. 223; *Kerr* v. *Mount*, 28 N. Y. 666; *Northrup* v. *McGill*, 27 Mich. 234; 1 Sedgw. § 59.

The supreme court of Florida has held that the condition of the attachment bond includes elements of damages for which a naked trespasser is not liable in a common-law action of trespass.

*Wittich* v. *O'Neal*, 22 Fla. 592; *Gonzales* v. *De Funiak Havana Tobacco Co.* 41 Fla. 477.

When no Federal element is involved, the elements of damages recoverable on an injunction and attachment bond are questions of local law.

*Tullock* v. *Mulvane*, 184 U. S. 497, 46 L. ed. 657, 22 Sup. Ct. Rep. 372; *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446.

The condition of the bond, being fixed by the remedial statute, should be liberally construed. At least, it should be given its natural construction, and the well-understood meaning of the words employed should be applied to effectuate the legitimate intent.

*Mitchell* v. *Duncan*, 7 Fla. 13; *Hardee* v. *Langford*, 6 Fla. 23; *Betton* v. *Willis*, 1 Fla. 226; *Southern Bell Teleph. & Teleg. Co.* v. *D'Alemberte*, 39 Fla. 25, 21 So. 570; 1 Shinn, Attachm. §§ 153, 173, 294; *Frankel* v. *Stern*, 44 Cal. 168.

Compensatory and actual damages are identical, and they should be commensurate with the injury suffered.

*Birdsall* v. *Coolidge*, 93 U. S. 64, 23 L. ed. 802; *Wicker* v. *Hoppock*, 6 Wall. 99, 18 L. ed. 753; *Dow* v. *Humbert*, 91 U. S. 298, 23 L. ed. 370.

The obligors are liable in consequential damages to the extent of all actual and compensatory damages that can be traced to the writs.

1 Sedgw. Damages, §§ 110–112, 125; *Eten* v. *Luyster*, 60 N. Y. 252.

Where the plaintiff has been deprived of machinery or other means of carrying on his business, he may recover for loss of business, if such loss naturally followed.

1 Sedgw. Damages, § 133; *Waters* v. *Towers*, 8 Exch. 401; *New York & C. Min. Syndicate & Co.* v. *Fraser*, 130 U. S. 611, 32 L. ed. 1031, 9 Sup. Ct. Rep. 665; *Jolly* v. *Single*, 16 Wis. 280; *Savannah, F. & W. R. Co.* v. *Pritchard*, 77 Ga. 412, 1 S. E. 261; *Van Winkle* v. *Wilkins*, 81 Ga. 93, 7 S. E. 644; *Sitton* v. *Macdonald*, 25 S. C. 68, 60 Am. Rep. 484; *New Haven S. B. Co.* v. *The Mayor*, 36 Fed. 716; 1 Shinn, Attachm. § 184.

Loss of profits by interruption of business and like damages caused by the writs, were proper elements of damages.

*Pollock* v. *Gantt*, 69 Ala. 373, 44 Am. Rep. 519; 1 Shinn, Attachm. §§ 188, 190, pp. 327, 342; *Carpenter* v. *Stevenson*, 6 Bush, 259; *Knapp & S. Co.* v. *Barnard*, 78 Iowa, 347, 43 N. W. 197; *Marquezze* v. *Sontheimer*, 59 Miss. 430; *Byrne* v. *Gardner*, 33 La. Ann. 6; *Flournoy* v. *Lyon*, 70 Ala. 308; *Oberne* v. *Gaylord*, 13 Ill. App. 30; *Mayer* v. *Duke*, 72 Tex. 445, 10 S. W. 565; 1 Sedgwick Damages, §§ 127, 134, 182; *New York & C. Min. Syndicate & Co.* v. *Fraser*, 130 U. S. 611, 32 L. ed. 1031, 9 Sup. Ct. Rep. 665; *Dushane* v. *Benedict*, 120 U. S. 631, 30 L. ed. 810, 7 Sup. Ct. Rep. 696; *McAfee* v. *Crofford*, 13 How. 447–455, 14 L. ed. 217–221; *Allison* v. *Chandler*, 11 Mich. 542; *Bagley* v. *Smith*, 10 N. Y. 489, 61 Am. Dec. 756;

*Anvil Min. Co.* v. *Humble*, 153 U. S. 540, 38 L. ed. 814, 14 Sup. Ct. Rep. 876; *Howard* v. *Stillwell & B. Mfg. Co.* 139 U. S. 199–206, 35 L. ed. 147–151, 11 Sup. Ct. Rep. 500; *Cincinnati Siemens-Lungren Gas Illuminating Co.* v. *Western Siemens-Lungren Co.* 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523; *Hundley* v. *Chadick*, 109 Ala. 575, 19 So. 845; *Birmingham Dry Goods Co.* v. *Finley*, 122 Ala. 534, 26 So. 138; *Pollock* v. *Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Flournoy* v. *Lyon*, 70 Ala. 308; *Doll* v. *Cooper*, 9 Lea, 576; *Grimes* v. *Bowerman*, 92 Mich. 258, 52 N. W. 751; *Sonneborn* v. *Stewart*, 2 Woods, 603, Fed. Cas. No. 13,176, Reversed in 98 U. S. 187, 25 L. ed. 116, but not on this ground; *Meyer* v. *Fagan*, 34 Neb. 184, 51 N. W. 753; *Kyd* v. *Cook*, 56 Neb. 71, 76 N. W. 524; *Hangen* v. *Hachemeister*, 114 N. Y. 566, 5 L. R. A. 137, 21 N. E. 1046; *Marx Bros.* v. *Leinkauff*, 93 Ala. 453, 9 So. 818; *Brewer* v. *Jacobs*, 22 Fed. 220; *Kennedy* v. *Meacham*, 18 Fed. 312; *Corner* v. *Mackintosh*, 48 Md. 389; 2 Greenl. Ev. § 268; *Wilcox* v. *Plummer*, 4 Pet. 172, 182, 7 L. ed. 821, 824; Mayne, Damages, 33–35.

When there is no intermediate efficient cause, the original wrong must be considered as reaching the effect, and as proximate to it. Refinements beyond this rule are too remote for rules of social conduct.

*Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 470, 476, 24 L. ed. 257, 259; *Ætna F. Ins. Co.* v. *Boon*, 95 U. S. 117–132, 24 L. ed. 395–399.

The relation of cause and effect is for the jury.

*Ætna F. Ins. Co.* v. *Boon*, 95 U. S. 117–132, 24 L. ed. 395–399; *Jacksonville, T. & K. W. R. Co.* v. *Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 116, 17 L. R. A. 33, 9 So. 653.

Damages to credit, though generally too remote are not always so.

*Pettit* v. *Mercer*, 8 B. Mon. 51; *Reidhar* v. *Berger*, 8 B. Mon. 160; *Holliday Bros.* v. *Cohen*, 34 Ark. 707; *State use of Roe* v. *Thomas*, 19 Mo. 613, 61 Am. Dec. 580; *Offutt* v. *Edwards*, 9 Rob. (La.) 90; *Campbell* v. *Chamberlain*, 10 Iowa, 337; *Mitchell* v. *Harcourt*, 62 Iowa, 349, 17 N. W. 581; *MacFarland* v. *Lehman*, 38 La. Ann. 351; *Kaufman* v. *Armstrong*, 74 Tex. 65, 11 S. W. 1048.

The value of the use of the property seized and taken from defendant by virtue of the writ may be recovered in an action on the bond.

2 Sutherland, Damages, 2d ed. 521; 2 Sedgw. Damages, § 682.

Where, in a case of malicious attachment, injuries to credit are sustained, they may be recovered for.

1 Shinn, Attachm. § 379; *Lawrence* v. *Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Parks* v. *Young*, 75 Tex. 278, 12 S. W. 986; *Kaufman* v. *Armstrong*, 74 Tex. 65, 11 S. W. 1048; *Marx Bros.* v. *Leinkauff*, 93 Ala. 453, 9 So. 818; *Bradley* v. *Borin*, 53 Kan. 628, 36 Pac. 977; *Pettit* v. *Mercer*, 8 B. Mon. 51; *MacFarland* v. *Lehman*, 38 La. Ann. 351; *Sonneborn* v. *Stewart*, 2 Woods, 599, Fed. Cas. No. 13,176; *Wheeler* v. *Hanson*, 161 Mass. 370, 37 N. E. 382.

Damages for injury to credit are sometimes allowed.

*Meyer* v. *Fagan*, 34 Neb. 184, 51 N. W. 753; *Kyd* v. *Cook*, 56 Neb. 71, 76 N. W. 524; *Lewis* v. *Taylor* (Tex. Civ. App.) 24 S. W. 92; *Hangen* v. *Hachemeister*, 114 N. Y. 566, 5 L. R. A. 137, 21 N. E. 1046; *Haverly* v. *Elliott*, 39 Neb. 201, 57 N. W. 1010; *Flournoy* v. *Lyon*, 70 Ala. 308; *Pollock* v. *Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Birmingham Dry Goods Co.* v. *Finley*, 122 Ala. 534, 26 So. 138; *Doll* v. *Cooper*, 9 Lea, 576; *Brewer* v. *Jacobs*, 22 Fed. 220; *Kennedy* v. *Meacham*, 18 Fed. 312; *Grimes* v. *Bowerman*, 92 Mich. 258, 52 N. W. 751; *McVeagh* v. *Bailey*, 29 Ill. App. 606; *Sonneborn* v. *Stewart*, 2 Woods, 603, 604, Fed. Cas. No. 13,176; 1 Sedgw. Damages, § 127, p. 184; 1 Sutherland, Damages, § 77; *Prehn* v. *Royal Bank*, 5 L. R. Exch. 92; *Schaffner* v. *Ehrman*, 139 Ill. 109, 15 L. R. A. 134, 28 N. E. 917; *Blair* v. *Kinch*, Ir. L. R. 10 C. L. 234; 8 Am. & Eng. Enc. of Law, 2d ed. p. 634.

Publication of notices of the attachment may be properly put in evidence for the purpose of showing injury to business and credit.

*Brand* v. *Hinchman*, 68 Mich. 590, 36 N. W. 664; Waples, Attachm. 2d ed. 1012.

Counsel fees are, under the laws of Florida, proper elements of damages, within the condition of the bonds.

*L. Bucki & Son Lumber Co.* v. *Fidelity & Deposit Co.* 48 C. C. A. 436, 109 Fed. 393; *Wittich* v. *O'Neal*, 22 Fla. 592; *Carter* v. *Bennett*, 6 Fla. 258; *Gonzales* v. *De Funiak Havana Tobacco Co.* 41 Fla. 471, 26 So. 1012.

There is a stronger reason for allowing such fees on an attachment than on an injunction bond.

*Territory ex rel. Lyser* v. *Rindskopf*, 5 N. M. 93, 20 Pac. 180; *Oelrichs* v. *Spain*, 15 Wall. 211, *sub nom. Oelrichs* v. *Williams*, 21 L. ed. 43.

The obligor, when the case was removed to the Federal court, must then have contemplated that the Federal court, if not bound by a prior state decision, would construe the bond and determine the liability in harmony with prior decisions of the state court.

*Burgess* v. *Seligman*, 107 U. S. 21–34, 27 L. ed. 361, 2 Sup. Ct. Rep. 10.

The very general rule prevailing in most of the states is that counsel fees are a proper element of damages.

1 Sedgw. Damages, § 237.

Counsel fees were held to be an element of damages in the following Federal cases:

*Territory ex rel. Lyser* v. *Rindskopf*, 5 N. M. 93, 20 Pac. 180; *Chambers* v. *Upton*, 34 Fed. 474–476; *Blunk* v. *Atchison, T. & S. F. R. Co.* 38 Fed. 311–317; *Sonneborn* v. *Stewart*, 2 Woods, 603, Fed. Cas. No. 13,176; *Tiblier* v. *Alford*, 12 Fed. 265; *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 103–111, 37 L. ed. 98–102, 13 Sup. Ct.

Rep. 261; *Newark Sav. Inst.* v. *Panhorst*, 7 Biss. 99-101, Fed. Cas. No. 10,142.

So far as any question of public policy is involved, each state declares its own upon all questions; and when declared it is conclusive on the Federal courts,—especially so on a rule of damages arising out of contract.

*Hartford F. Ins. Co.* v. *Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *Meyers* v. *Block*, 120 U. S. 210, 30 L. ed. 643, 7 Sup. Ct. Rep. 525; *Vance* v. *W. A. Vanderoook Co.* 170 U. S. 472, 473, 42 L. ed. 1112, 18 Sup. Ct. Rep. 645.

Mr. Justice **Brewer** delivered the opinion of the court:

The principal question arises in the claim to recover counsel fees incurred in securing the dissolution of the attachments. The reasonable value of such fees was specially found by the jury to have been $7,500. The circuit court refused to include this in its judgment, but the court of appeals ruled otherwise, and ordered judgment for that sum in addition to the amount of the general verdict.

By the law of Florida, counsel fees incurred in securing the dissolution of an attachment are recoverable in actions upon attachment bonds. This was distinctly ruled in *Gonzales* v. *De Funiak Havana Tobacco Co.* 41 Fla. 471, 26 So. 1012, in which the second headnote recites that "attorneys' fees and other expenses incurred in relation to the attachment, or in procuring its dissolution, are properly allowed as elements of damage in actions upon attachment bonds." And this is conclusive, for by McClellan's Dig. 345, § 21, it is provided that "the judges of the supreme court of this state shall, in deciding cases, prepare and make a syllabus or statement of the points and principles intended to be decided by the court, which shall be published in the reports in lieu of that usually prepared by the reporter." *Hart* v. *Stribling*, 25 Fla. 435, 6 So. 455. It is true, as contended by counsel, that the case in 41 Fla. was not decided until after the bonds sued on in this case had been executed, but the decision declares the law of the state, and that, in the absence of statutes affecting the question, [137] *must be taken to have been always the law. And in its opinion the court refers as authority, among other cases, to *Wittich* v. *O'Neal*, 22 Fla. 592, 599 (decided in 1886), in which it was held that, "in a suit on the bond given to obtain a temporary injunction, counsel fees incurred by the defendant in the suit to dissolve such injunction are damages that may be recovered, if covered by language of the bond." In the opinion in that case the court, while conceding that other appellate courts had ruled differently (among them this court in *Oelrichs* v. *Spain*, 15 Wall. 211, *sub nom. Oelrichs* v. *Williams*, 21 L. ed. 43), declined to follow such ruling, and said:

"It seems just and right that where a party asks the interposition of the power of the courts, in advance of a trial of the merits of the cause, to deprive the defendant of some right or privilege claimed by him, even though temporarily, that, if on investigation it is found that the plaintiff had no just right either in the law or the facts to justify him in asking and obtaining from the court such a harsh and drastic exercise of its authority, that he should indemnify the defendant in the language of his bond for 'all damages he might sustain,' and that *reasonable* counsel fees necessary to the recovering of such injunction are properly a part of his damage."

The promise in the bonds sued on here is like that referred to in the language just quoted, and was "to pay all costs and damages which the said L. Bucki Lumber Company may sustain in consequence of it, the said Atlantic Company's improperly suing out said attachment." Liability for these counsel fees, being, as declared by its highest court, a part of the obligation assumed by the obligor in an attachment bond given in the courts of Florida, should be enforced in every court in which an action on such a bond is brought. This action was commenced in a circuit court of the state, and, if it had proceeded there to judgment, unquestionably a liability for counsel fees would have been sustained; and it cannot be that by removing the case to the Federal court such liability has been taken away. In *Tullock* v. *Mulvane*, 184 U. S. 497, 505, 46 L. ed. 657, 663, 22 Sup. Ct. Rep. 372, 375, we held that when a bond had been given in a case pending in the Federal court, and an action was thereafter brought in the state court on such bond, the rule of liability was [138] that existing in the Federal court in which the bond was given, and said:

"It is clear that if it be true that the bond given in a Federal court of equity on the granting of an injunction is not to be construed with reference to the rules of law applicable to such bonds in such court, then there can be no certain general rule by which to determine the liability of the obligors upon the bond. Their responsibility would be one thing in a court of the United States and a different thing in the courts of the various states, which would imply that the parties did not contract with reference to any definite rule of liability." See also *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446.

In reference to the other alleged errors, the court of appeals, without referring to them in particular, said: "On the fullest consideration of the whole case, we conclude that the record presents no error on the part of the trial judge for which the judgment should be reversed."

We do not wonder at this observation of the court of appeals, as we find from the record that the plaintiff filed in that court thirty-seven assignments of error, covering seventeen printed pages, and the defendant thirty-nine such assignments. It may be true, as the Scriptures have it, that "in the multitude of counselors there is safety," but it is also true that in a multitude of assignments of error there is danger.

Perhaps it is well to first briefly outline the case and the testimony. Prior to October, 1897, the Atlantic Company had under contract been engaged in furnishing the Bucki Company with logs with which to operate its sawmills, at the rate of 2,000,000 feet per month. It canceled its contract on account of an alleged breach by the Bucki Company, and brought the two actions at law, one for $200,000 damages, resulting from such breach, and the other for $9,980.80, claimed to be due for logs delivered, and in these actions sued out the two attachments. They were levied upon the mill plant, the logs, lumber, and all other personal property of the Bucki Company. While the personal property was taken into possession by the sheriff, the mill was a fixture and part of the realty, and the writs [139] did *not operate to dispossess the Bucki Company therefrom, but simply established a lien upon it. By forthcoming bonds the personal property was, after a few days, released, and subsequently the attachments were dissolved. On the trial, the plaintiff was permitted to show the extent of its mill plant, the amount of business it had been doing in prior years, the net profits of such business during the nine or ten months preceding the levy of the attachments, the orders and contracts which it had on hand for timber and lumber, an alleged increase in the price of timber in the year succeeding the levy. There was testimony bearing upon the question of its ability to get logs elsewhere, the means of transporting them to its plant, and the existence of negotiations for a loan of money secured by the material it then had on hand. There was evidence also tending to show the financial condition of the company, its default in certain payments, and efforts it made to utilize its property subsequently to the attachments. After all the testimony had been presented, the defendant made a motion in writing to exclude a number of items thereof from the consideration of the jury, upon which motion the court ruled as follows:

"This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that, under the testimony introduced, any damages arising from the consideration of injury to credit or loss of profits would be too remote, uncertain and speculative, it is therefore ordered that this motion be granted as to the testimony relating to the cost of manufacturing lumber and the supply of timber lands; all testimony to the damage to credit, loss of profits, and all evidence relative to the market prices of lumber subsequent to the attachment. That in regard to the profits plaintiff's mill had been making prior to October 1, 1897, be retained and considered only for the purpose of determining the actual damages suffered during the time the operation of the mill was suspended on account of the attachment, and the motion be denied in all other respects."

And in making this ruling it said:

"This order is made at this time only for the purpose of confining the argument to the jury upon these lines. I am fully *satisfied [140] in my own mind that damages from the loss of profits arising from the subsequent or future business which might possibly have been carried on is, under the evidence, too remote and speculative for the testimony to go to the jury. Some courts have held that every fact should go to the jury to be considered, but the United States courts have uniformly held that where the testimony is such that any reasonable man, or any reasonable court, could view it in but one light, the court may exclude it from the jury. In this matter I have admitted the testimony, but I fail to find that there is such evidence of damage from loss of future profits as should go to the jury. If there was no combination of circumstances other than the attachment; had a third party come in and levied an attachment and stopped the business, and there had been no suspension save by the attachment,—then there might have been such testimony as would prove a loss of profits; but in this case the particular circumstances, the suspension of the contract for the delivery of logs and the bringing of the two common-law suits, so changed the circumstances that there is no certainty that there could have been any profit.

"Every author of authority referred to, even by the plaintiff's attorney, says there must be some certainty.

"Now the certainty of profits here depends upon this: It is claimed that on account of these attachments the plaintiff's credit was injured; that, had it not been for the attachments, money could have been borrowed, timber land or stumpage could have been procured, logs could have been procured profitably; if logs could have been procured profitably, lumber could have been manufactured and marketed profitably. Now, between the borrowing of the money and the marketing of the lumber there are so many uncertainties that the court cannot say that there is sufficient to justify the jury in finding, perhaps, large damages against the defendant in this case on account of loss of credit and profit,—from the levying of the attachments."

The plaintiff excepted on the ground of an invasion of the province of the jury, and because it was, as it alleged, misled by the rulings of the court in admitting such testimony, and therefore failed to introduce other testimony which it claimed *to possess [141] and which upon another theory would have tended to show the damages it had sustained. Because it was so misled it also filed a motion to discharge the jury and postpone the trial of the case, which motion was denied and the case submitted to the jury. Many instructions were asked by counsel on both sides looking to the question of damages, and exceptions were taken to the refusal of the court to give those instructions. In its general charge the court said:

"The only question is a clear-cut question. It is, How much damages did the Bucki Company suffer? This question be-

comes more difficult by reason of facts and circumstances attending the writs of attachment. At the time the writs of attachment were levied there were two common-law suits commenced, both of which have been terminated. That is one attending circumstance. The other is that the Atlantic Lumber Company canceled its contract or considered it canceled. That is, the Atlantic Company refused and ceased to deliver any more logs to the Bucki Company. So that the three combining circumstances, the levy of the writs of attachment, the ceasing to furnish logs, and the common-law suits unite in being the cause for subsequent suffering of damage by the Bucki Company.

. . . . . .

"But in this case the attachment did not cause the stoppage of the furnishing of logs, nor did the issuing of the attachment cause the institution of the common-law suits.

. . . . . .

"I have, therefore, as you have seen in the course of the case, granted a motion to exclude from your consideration all testimony as to damages for loss of credit and all testimony as to all profits the Bucki Company might have made in the future in procuring capital, in procuring lands, in procuring logging plants, and procuring logs at a profit, and so manufacturing lumber therefrom at a profit.

. . . . . .

"I therefore instruct you, gentlemen, that the damage must be confined to the damages suffered by the detention of the mill for the time being; those damages that have arisen 142] by the *detention of and taking the mill properties from the possession of the plaintiff."

Without further quotations, enough appears to show the general scope of the rulings of the court in reference to the measure of damages, and, even conceding that its action, as said by the court of appeals, "is, in several particulars, subject to the criticism which is leveled at it by some of the other numerous assignments of error," we are of opinion that there was no such substantial error as justifies a reversal of the judgment. That there may be such certainty of profits as in some actions for breach of contract will justify their recovery is undoubtedly true. *Howard* v. *Stillwell & B. Mfg. Co.* 139 U. S. 199, 206, 35 L. ed. 147, 150, 11 Sup. Ct. Rep. 500; *Cincinnati Siemens-Lungren Gas Illuminating Co.* v. *Western Siemens-Lungren Co.* 152 U. S. 200, 38 L. ed. 411, 14 Sup. Ct. Rep. 523; *Anvil Min. Co.* v. *Humble*, 153 U. S. 540, 549, 38 L. ed. 814, 817, 14 Sup. Ct. Rep. 876. If this action had been one by the Bucki Company against the Atlantic Company to recover damages for a breach of its contract to deliver logs, the inquiry as to profits might have been broader than was permitted in the present case. But, as pointed out in the charge of the court, the failure of the Atlantic Company to further deliver logs was not caused by, or the direct result of, the attachments. By signing these bonds the surety did not agree to become responsible for all the damages which the Bucki Company might sustain by every act of the Atlantic Company, but simply that it would be responsible for the damages resulting directly from the attachments. The direct result of the attachments was the placing of a lien upon the realty, and for a certain time interrupting the Bucki Company's business by taking possession of its personal property, and the damages which resulted directly from these alone were the damages which the surety company agreed to become responsible for. The court very properly admitted in evidence, and permitted the jury to consider, the net profits which had been earned from the carrying on of the business in the few months prior, not as in and of itself constituting the measure of damages, but as tending to show what damages the Bucki Company sustained by the brief interruption of its business. When the lien on the realty was ended and the personal property restored, the attachments *had [143] spent their force and the surety company became responsible for all the damages attributable directly to the attachments. The failure to further deliver logs, and the reflection on the credit of the Bucki Company by the bringing of the actions may also have damaged or added to the damages of the Bucki Company, but such result was not due to the attachments. The Atlantic Company, and not the surety company, was the party responsible therefor.

Neither can we see that there was error in refusing to discharge the jury and postpone the trial. A postponement or continuance is largely within the discretion of the trial court, and, unless that discretion is shown to have been abused, there is no sufficient ground for reversal. It does not appear that any witness had been discharged or any books or documents in possession of the counsel sent away during the trial, and there was no offer then and there to present further testimony. It does not seem to us that the Bucki Company was prejudiced by the ruling of the court in this respect.

The liability for counsel fees and the true measure of damages are the main questions in the case. This latter question was presented in different forms and with various limitations, but we think the rulings of the trial court thereon were substantially correct. We see no error in the record which justifies a reversal of the judgment, and it is *affirmed.*

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IDA McCLUNG, *Plff. in Err.*,
*v.*
WILLIAM A. PENNY.

(See S. C. Reporter's ed. 143-147.)

*Error to territorial supreme court—amount in dispute.*

The affirmance by a territorial supreme court of

NOTE.—*As to review by the United States Supreme Court of territorial decisions* — see note to Miners' Bank v. Iowa, 13 L. ed. U. S. 867.

a judgment for plaintiff in an action of forcible entry and detainer, in which defendant set up an equitable title to the land, cannot be reviewed by the Supreme Court of the United States, where the value of the possession, which alone could be in contest in such an action, and which alone was determined by the judgment, was less than $5,000.

[No. 384.]

*Argued March 6, 1903: Decided April 6, 1903.*

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment of the Probate Court of Kay County in favor of plaintiff in an action of forcible entry and detainer. *Dismissed.*

See same case below, 69 Pac. 499.

Statement by Mr. Justice **Brewer:**

This was an action of forcible entry and detainer, commenced by Penny, the defendant in error, in the probate court of Kay county, Oklahoma territory, a court adjudged by the supreme court of the territory to have jurisdiction in such actions by virtue of § 4805, art. 13, chap. 67, and § 1562, art. 15, chap. 18, Rev. Stat. 1893. A judgment for the plaintiff was affirmed by the supreme court of the territory (69 Pac. 499), and thereupon the case was brought here on a writ of error. The testimony on the trial developed these facts: The parties contested in the Land Department the right to enter the tract in controversy as a homestead. The plaintiff's contention was sustained, and he was permitted to make entry. Having received the homestead certificate, he commenced this action.

*Mr.* **Samuel H. Harris** argued the cause and filed a brief for plaintiff in error:

The title to real estate is involved in the action.

*Black* v. *Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; *Langford* v. *Monteith*, 102 U. S. 145, 26 L. ed. 53. See also *New Orleans P. R. Co.* v. *Parker*, 143 U. S. 42, 36 L. ed. 66, 12 Sup. Ct. Rep. 364; *Price* v. *Olds*, 9 Kan. 66; *Alderman* v. *Boeken*, 25 Kan. 658; *Duffey* v. *Rafferty*, 15 Kan. 9; *Simpson* v. *Boring*, 16 Kan. 248; *Mooney* v. *Olsen*, 21 Kan. 697; *Hollenback* v. *Ess*, 31 Kan. 88, 1 Pac. 275; *Conaway* v. *Gore*, 27 Kan. 122.

*Messrs. Samuel H. Harris* and *J. J. Darlington* also filed a supplemental brief for plaintiff in error:

The real matter to be adjudicated is the question of title, and this court cannot properly determine how that question should be adjudicated until the controversy is before the court from a court having jurisdiction to determine that matter and permit of its being properly brought to this court for review.

*Malloy* v. *Malloy*, 24 Neb. 766, 40 N. W. 285.

It is admitted by the record before this court that the plaintiff in error has done all things necessary to entitle her to a patent to the land in dispute, unless the defendant in error is entitled to have the legal title of the government conveyed to him. This, we think, constitutes an equity in the premises, and a right which the court should respect.

*Black* v. *Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648; *Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122.

A justice of the peace has no jurisdiction in an action of forcible entry and detainer.

*Smith* v. *Kirchner*, 7 Okla. 166, 54 Pac. 439; *Nightingale* v. *Barens*, 47 Wis. 389, 2 N. W. 767; *Chicago, B. & Q. R. Co.* v. *Skupa*, 16 Neb. 341, 20 N. W. 393.

The Code of Oklahoma territory prior to its adoption from the state of Kansas was construed to make provision for equitable titles, both in support of, and in defense to, actions of forcible entry and detainer and ejectment.

*Alderman* v. *Boeken*, 25 Kan. 658; *Hollenback* v. *Ess*, 31 Kan. 87, 1 Pac. 275; *Conaway* v. *Gore*, 27 Kan. 122; *Duffey* v. *Rafferty*, 15 Kan. 9; *Simpson* v. *Boring*, 16 Kan. 248; *Mooney* v. *Olsen*, 21 Kan. 697; *Gale* v. *Eckhart*, 107 Mich. 465, 65 N. W. 274.

*Mr.* **A. G. C. Bierer** argued the cause, and, with *Messrs. Frank Dale* and *C. W. Ransom*, filed a brief for defendant in error:

Title to real estate is not an issue, and cannot be put in issue, in forcible entry and detainer.

*Armour Packing Co.* v. *Howe*, 62 Kan. 587, 64 Pac. 42; *McClain* v. *Jones*, 60 Kan. 639, 57 Pac. 500; *Wideman* v. *Taylor*, 63 Kan. 884, 65 Pac. 664; *McDonald* v. *Stiles*, 7 Okla. 327, 54 Pac. 487; *Dysart* v. *Enslow*, 7 Okla. 386, 54 Pac. 550; *Cope* v. *Braden*, 11 Okla. 291, 67 Pac. 475; *Waite* v. *Teeters*, 36 Kan. 604, 14 Pac. 146; *Redden* v. *Tefft*, 48 Kan. 302, 29 Pac. 157.

The property which is the subject of the possession not being involved, its value should not be considered.

*Lowndsdale* v. *Parish*, 21 How. 290, 16 L. ed. 80; *Cameron* v. *United States*, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184; *Carne* v. *Russ*, 152 U. S. 250, 38 L. ed. 428, 14 Sup. Ct. Rep. 578.

In order to give jurisdiction in a case dependent upon the amount in controversy, the matter in dispute must be money, or some right the value of which in money can be calculated and ascertained.

*Potts* v. *Chumasero*, 92 U. S. 358, 23 L. ed. 499; *Barry* v. *Mercien*, 5 How. 120, 12 L. ed. 77; *United States* v. *Union P. R. Co.* 105 U. S. 263, 26 L. ed. 1021.

A jurisdiction, conferred by Congress upon any court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money.

*Kurtz* v. *Moffitt*, 115 U. S. 487, 29 L. ed. 458, 6 Sup. Ct. Rep. 148.

Where the issue between the parties to a suit is not the right of ownership, but the

right of possession, and the value of the latter right is, as to amount, below the appellate jurisdiction of the supreme court, an appeal taken to that court will be dismissed *ex proprio motu*.

*Re Genella*, 45 La. Ann. 1377, 14 So. 302.

Where the issue in a case is not the right of ownership of specific property, but of the possession thereof, it is the value of the latter right which determines the jurisdiction on appeal to the supreme court.

*Lea* v. *Orleans*, 46 La. Ann. 1444, 16 So. 456.

The supreme court of Kansas in *Duncan* v. *Yordy*, 27 Kan. 349, held that the mere filing of an answer stating that the boundaries of land are in dispute, although verified, as required by statute, will not necessarily oust the justice of jurisdiction.

This construction, having been placed upon this statute before its adoption into Oklahoma, was adopted as a part of the statute.

*Willis* v. *Eastern Trust & Bkg. Co.* 169 U. S. 295, 42 L. ed. 752, 18 Sup. Ct. Rep. 347.

An entryman may maintain an action of forcible entry and detainer.

*Black* v. *Jackson*, 177 U. S. 349, 44 L. ed. 801, 20 Sup. Ct. Rep. 648.

That the successful contestant for the right to make homestead entry is entitled to the possession of the land has been repeatedly affirmed by the supreme court of Oklahoma.

*Brown* v. *Hartshorn* (Okla.) 69 Pac. 1049; *McQuiston* v. *Walton* (Okla.) 69 Pac. 1048; *Anderson* v. *Ferguson* (Okla.) 71 Pac. 225.

So long as the title remains in the United States the courts have no jurisdiction, and will not interfere with departmental decisions concerning the disposition of the public domain.

*Johnson* v. *Towsley*, 13 Wall. 72, 20 L. ed. 485; *Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848; *Wilbourne* v. *Baldwin*, 5 Okla. 265, 47 Pac. 1045.

Mr. Justice **Brewer** delivered the opinion of the court:

The defendant in error has filed a motion to dismiss the writ of error for want of jurisdiction, on the ground that the value of the matter in controversy does not exceed $5,000, and in support thereof has filed the [145]affidavits of himself and five *others that the reasonable rental value of the land is not more than $620 per annum. The plaintiff in error contends that the matter in dispute is in fact not the possession of the land, but the ownership, and at the time the writ of error was allowed he filed the affidavits of four persons; one, his counsel, who testified that the action involved both the possession and the ownership of the lands, that the matter in controversy exceeded in value the sum of $6,000, that the value consisted in the right of possession and power to relinquish to the government the homestead entry; the others, who stated that the value of such relinquishment was $8,000 or $8,500. The record shows that in the answer was this averment: "That said land, with the improvements of the defendant thereon, is reasonably worth, and the relinquishment thereof could be sold for, the sum of $5,000; that this defendant demands the right to remain in possession of said land by virtue of her vested interest therein, and as against the claims of said plaintiff under his void and unlawful homestead entry, in order to protect the limited title which defendant has acquired in said land, and to acquire a perfect legal title therein, under and by virtue of the laws of the United States;" and also that on the trial she testified that the value of the land was $5,000. In her answer she set up facts which she insisted showed that she had an equitable right to the land, and averred that she intended, as soon as the patent was issued to the plaintiff, to begin an action in the proper court to have the same declared a title in trust for her benefit, and asserted that by reason thereof an action of forcible entry and detainer could not be maintained against her. The supreme court of the territory, in affirming the judgment, held that the matter in controversy was simply the right of possession. It closed its opinion in these words:

"This court, in the case of *Kirtley* v. *Dykes*, 10 Okla. 18, 62 Pac. 808, says: '. . . When the matter was finally decided by the Land Department, and a judgment rendered in favor of the plaintiff, her right to the possession of the premises was completed.' *Armour Packing Co.* v. *Howe*, 62 Kan. 587, 64 Pac. 43; *Wideman* v. *Taylor*, 63 Kan. 884, 65 Pac. 664. The entire theory of this action is that it is purely possessory; that it deals with the possessory rights, *and not the ultimate rights, of the [146]parties. Questions other than the immediate rights of the parties cannot be litigated in such action. If the party desires to have an adjudication on her right to a resulting trust in the land, she must resort to another forum and another form of action."

Affidavits on the motion to dismiss show the value of possession to be not more than $640 per annum. Her own allegation in the answer is that the land and the relinquishment thereof were reasonably worth $5,000. Her testimony on the trial, and there was none other, was that the land was worth $5,000. Affidavits of witnesses assert that the ownership was in controversy, and that the value of that ownership with the right of relinquishment was in excess of $5,000.

Upon these facts, we think the motion to dismiss should be sustained. The matter in dispute being only the possession, clearly the value of that possession was but a few hundred dollars. Even if the title had been in controversy, the record up to the time of the decision of the supreme court showed that there was not exceeding $5,000 in con-

troversy. The supreme court held that the matter in dispute was only the right of possession, and that right of possession was all that it decided. If the question of title was involved an action of forcible entry and detainer could not have been maintained, and the probate court had no jurisdiction of an action of ejectment. But before we can inquire whether the supreme court committed any error in its decision, it must appear that we have jurisdiction of the case. Now, whether the supreme court erred in permitting this forcible entry action to be maintained involves an inquiry whether it erred in permitting an action to be maintained in respect to something whose value is less than $5,000. If that which alone could be in contest in the action, and which alone was determined by the judgment, is of a value less than $5,000, then it is beyond our jurisdiction to inquire whether the court erred in permitting the action to be maintained.

Further, neither of the four witnesses whose affidavits were filed to secure the writ of error testified directly to the value of the land, and while they said that the value of the relinquishment was from $6,000 to $8,500, yet, clearly, the value of a relinquish-
[147] ment *cannot be greater than that of the land itself. But what is the relinquishment to which these witnesses refer? When one has made a homestead or pre-emption entry he may file in the land office a relinquishment of all rights obtained thereby, and if he does so the land becomes open to entry by another. If there has been no contest and the land records are free from any other claim than that which is relinquished, the second entryman may perfect a title. But if the records of the land office show that there has been a contest, and the successful contestant makes a relinquishment, a third party entering the land is charged with notice of the equitable rights of the unsuccessful contestant; and if, as a matter of law, those rights are entitled to protection, they can be enforced whenever the legal title has passed from the government. In other words, the relinquishment operates only against the party making the relinquishment, and does not destroy any adverse rights of which there is in the land office an existing record. The plaintiff, although possession be obtained by him through this forcible entry and detainer action, cannot, by thereafter relinquishing his entry, and permitting someone else to make an entry, destroy the equitable rights, if any, which defendant possesses. Hence, as a relinquishment will not deprive the defendant of her equitable rights, and simply substitutes one party for another in any legal proceedings which she may hereafter institute to assert those rights, it is clear that it cannot have any such value as is ascribed to it in these affidavits.

*The writ of error is dismissed.*

*ROBERT L. WINEBRENNER, *Appt.*, [148]
*v.*
EDWARD C. FORNEY

(See S. C. Reporter's ed. 148-154.)

*Public lands—settlement in Cherokee Outlet—100-foot strip.*

The description in the President's proclamation of August 19, 1893, opening to settlement a portion of the land ceded by the Cherokee Nation, of the 100-foot strip which might, without gaining any settlement right, be occupied in advance of the time set for the opening by persons intending to take part in the race for the land, as running "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation," controls any doubt arising from the further statement in that portion of the proclamation defining the purposes for which the strip was to be used, that the inner boundary of such strip "shall be 100 feet from the exterior boundary of the country known as the Cherokee Outlet."

[No. 409.]

*Argued March 6, 1903. Decided April 6, 1903.*

APPEAL from the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a decree of the District Court of Kay County dismissing a suit to establish an equitable right to real property. *Affirmed.*

See same case below, 69 Pac. 879.

Statement by Mr. Justice **Brewer:**

The appellee holds the government patent to the southwest quarter of section 19, township 26 north, range 1 east, of the Indian meridian in Kay county, Oklahoma territory. The appellant claimed an equitable right to the land, and brought this suit to have the defendant declared a trustee of the title for his benefit. A demurrer to a second amended petition was sustained by the trial court, and a decree entered dismissing the suit. This decree was affirmed by the supreme court of the territory (69 Pac. 879), and from that decision this appeal was taken. The tract is within that portion of the Cherokee Outlet opened to settlement by the President's proclamation of August 19, 1893, and the only question, as agreed by counsel on both sides, is whether appellee was disqualified by reason of being within prohibited limits on September 16, 1893, the day on which by the President's proclamation the land was opened for settlement.

*Mr.* **Samuel H. Harris** argued the cause, and, with *Mr. J. J. Darlington*, filed a brief for appellant:

The court will take judicial knowledge of the general conditions surrounding the opening of the lands in the country known as the Cherokee Outlet.

*Smith* v. *Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634.

Contemporaneous construction both by the Secretary of the Interior and the Com-

missioner of the General Land Office, the President of the United States and the Secretary of War, the vast number of intending settlers, and the lawyers of the country who were their advisers, is entitled to consideration.

*United States* v. *State Bank*, 6 Pet. 29, 8 L. ed. 308; *United States* v. *Moore*, 95 U. S. 760, 24 L. ed. 588; *United States* v. *Johnston*, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *United States* v. *Alabama G. S. R. Co.* 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306.

*Mr.* **A. G. C. Bierer** argued the cause, and, with *Mr. Frank Dale*, filed a brief for appellee:

Where the language of an act is clear, it needs no construction.

*Yerke* v. *United States*, 173 U. S. 439, 43 L. ed. 760, 19 Sup. Ct. Rep. 441.

One section or part of a statute will not be so construed as to destroy another.

*Bernier* v. *Bernier*, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244.

Courts in construing a state statute may, with propriety, recur to the history of the times when it was passed; and this is frequently necessary in order to ascertain the reason as well as the meaning of the particular provisions in it.

*Smith* v. *Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634.

Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, avoid an unjust or absurd conclusion.

*Lau Ow Bew* v. *United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

When a provision admits of more than one construction, that one will be adopted which best serves to carry out the purposes of the act.

*Bernier* v. *Bernier*, 147 U. S. 242, 37 L. ed. 152, 13 Sup. Ct. Rep. 244.

The boundaries of Oklahoma, as defined by the organic act, did not include the Cherokee Outlet.

*United States* v. *Pridgeon*, 153 U. S. 48, 38 L. ed. 631, 14 Sup. Ct. Rep. 746.

The departmental construction placed upon the President's proclamation, even if the language is conceded to be open to construction, should have very great weight with this court, and in case of doubt should be given controlling weight.

*United States* v. *State Bank*, 6 Pet. 29, 8 L. ed. 308; *United States* v. *Moore*, 95 U. S. 760, 24 L. ed. 588; *United States* v. *Johnston*, 124 U. S. 236, 31 L. ed. 389, 8 Sup. Ct. Rep. 446; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *United States* v. *Alabama G. S. R. Co.* 142 U. S. 615, 35 L. ed. 1134, 12 Sup. Ct. Rep. 306.

The Department of the Interior has uniformly held that the 100-foot strip on the east line of the Cherokee Outlet was west of the Osage Nation and Ponca and Otoe reservations.

*Cagle* v. *Mendenhall*, 20 Land Dec. 446; *Brady* v. *Williams*, 23 Land Dec. 533.

The intention of the prohibitory words was to give absolute equality to the intending homesteaders, and this equality was intended to be maintained by requiring the homesteaders to start from the border of the territory that was being opened to settlement, at the moment of the opening.

*Smith* v. *Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634.

The evident intention of Congress was to give all persons desiring homes an equal chance to obtain them.

*Kingfisher Townsite* v. *Wood*, 11 Land Dec. 330; *Guthrie Townsite* v. *Paine*, 12 Land Dec. 653.

*Mr. Justice **Brewer** delivered the opin- [149]
ion of the court:

The President's proclamation, after reciting that the Cherokee Nation of Indians had "ceded, conveyed, transferred, relinquished, and surrendered all its title, claim, and interest of every kind and character in and to that part of the Indian territory bounded on the west by the one hundredth degree (100°) of west longitude; on the north by the state of Kansas; on the east by the ninety-sixth degree (96°) of west longitude; and on the south by the Creek Nation, the territory of Oklahoma and the Cheyenne and Arapahoe reservation created or defined by executive order dated August 10th, 1869" [28 Stat. at L. 1223]; and also that Congress had passed an act authorizing the President of the United States to open to settlement any or all lands included in such cession not allotted or reserved, declared that on September 16, 1893, the lands so acquired would be open to settlement, saving and excepting certain specified tracts and portions, including in the latter the Osage, the Kansas, the Ponca, the Otoe, and Missouri reservations. The diagram on the next page shows in a general way the land first above described as ceded and relinquished by the Cherokee Indians, the land opened to settlement, and the excepted reservations. The proclamation declared that the land should be opened to settlement "under the terms of, and subject to all the conditions, limitations, reservations, and restrictions contained in, said agreements, the statutes above specified, the laws of the United States applicable thereto, and the conditions prescribed by this proclamation." The act of 1893 (27 Stat. at L. 640, 643, chap. 209), which is one of the statutes referred to, contained this provision:

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this act for the occupation and settlement of *said lands, to be incor- [151]

porated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

And in the President's proclamation it was declared:

"Said lands, so to be opened as herein proclaimed, shall be entered upon and occupied only in the manner and under the provisions following, to wit:

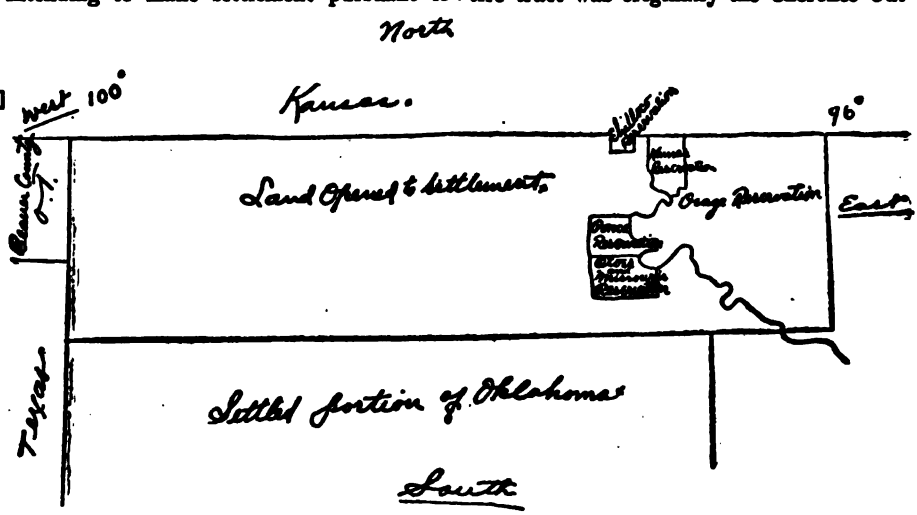
"A strip of land, 100 feet in width, around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, *viz.:*

"Said strip, the inner boundary of which shall be 100 feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby."

The defendant was on the day named, September 16, 1893, within the limits of the Ponca reservation, and from such reservation went into the territory opened to settlement, and made his homestead entry.

The contention of the plaintiff is that the strip is to be taken as extending around the outer boundaries of the entire tract specified in the cession and relinquishment of the Cherokee Indians, while the contention of the defendant is that it is to be considered as simply around the outer boundaries of the tract opened to settlement. If the contention of the plaintiff is correct, the strip on the north, west, and south would be immediately contiguous to the land opened to settlement, while on the east it would be a distance of many miles therefrom. If the contention of the defendant is correct, it would on all sides be contiguous to such land. There is a manifest equity in the latter contention, especially when we consider the great multitude (according to reports 100,000 and over) who at the *appointed time [152] surrounded this tract with a view of entering the same and obtaining homesteads. And such we think is the true construction of the proclamation. The strip is described as "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation." If this were all there would be no doubt. The doubt arises from subsequent words, "said strip, the inner boundary of which shall be 100 feet from the exterior boundary of the country known as the Cherokee Outlet." It is contended that what was known as the Cherokee Outlet extended from the ninety-sixth to the one hundredth degree of longitude, and included the three or four Indian reservations east of the tract opened to settlement. Undoubtedly this entire tract was originally the Cherokee Outlet. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 206, 39 L. ed. 120, 123, 15 Sup. Ct. Rep. 55, and treaties cited. It was originally set apart for the use of the Cherokees as a sort of appurtenance to the 7,000,000 acres specifically granted as their reservation. Subsequently, by various treaties, portions of it were withdrawn from the Cherokees' possession and set apart as reservations for the various tribes named. Still the entire territory was commonly known as the Cherokee Outlet, and was referred to as such in the act of 1893, which ratified the settlement and relinquishment by the Cherokees, and authorized the opening to settlement of such portions of the land so ceded and relinquished as the President should determine. There is thus a seeming contradiction between the two clauses of the proclamation. But the first is used in special description of the strip, while the second clause is found in that portion of the proclamation which defines the purposes for which the strip is to be used. As between the two clauses, therefore, the

[150]



first is entitled to preference, as at that time the attention of the writer must be supposed to have been directed to the location of the strip. But there are other reasons which make more clear the true construction. In addition to the equity referred to heretofore, these matters may be noticed: If the strip was within the tract to be opened to settlement it was public land, and the President might well set that apart for temporary occupancy by those who were designing to [153] go into *the body of lands to be opened to settlement; whereas, if the contention of the plaintiff is correct, the President would be setting apart a strip 100 feet in width through lands reserved to certain Indian tribes, and allowing a temporary occupancy thereof. We do not mean to deny the power of the President, but it is more reasonable to suppose that he was setting apart a strip of the public domain than a strip of Indian reservations for such temporary occupancy. Further, the last sentence in the paragraph from which the second clause is taken says that the occupancy of the strip "shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby,"—language which is apt if it described a portion of the larger body of the public domain to be opened to settlement, and not apt if it referred to a portion of Indian reservations. The significance of the description, "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," is found in the purpose to prevent anyone from being upon a railroad right of way running through the tract or upon any of the separate quarter sections or sections reserved by the proclamation for school and county purposes within the limits of the entire body. *Smith* v. *Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634; *Payne* v. *Robertson*, 169 U. S. 323, 42 L. ed. 764, 18 Sup. Ct. Rep. 337.

Our conclusions, therefore, are that the contention of the defendant is correct, and that the strip was one which ran around and immediately within the outer boundaries of the entire body of lands opened to settlement.

Such conclusion is in accord with the rulings of the Land Department. It is true that at or about the time of the opening of the land to settlement there were one or two contradictory orders and despatches sent out from that Department, but these were simply responses to requests for information, and made without any hearing from parties interested adversely, and it is also true that in the subsequent consideration of the question there were some differences of opinion between successive Secretaries of the Interior, but the final conclusions were in harmony with the views we have expressed. *Cagle* v. *Mendenhall*, 20 Land Dec. 446, 26 [154] Land Dec. 177; *Welch* v. *Butler*, 21 *Land Dec. 369; *Brady* v. *Williams*, 23 Land Dec. 533, 25 Land Dec. 55, 402.

*The judgment of the Supreme Court of Oklahoma is affirmed.*

Mr. Justice **White** and Mr. Justice **Peckham** dissented.

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JOSEPH A. SAWYER and Nellie A. Sawyer, *Plffs. in Err.*,
*v.*
DANIEL S. PIPER.

(See S. C. Reporter's ed. 154-158.)

*Error to state court—Federal question.*

A claim that a right under the Federal Constitution would be denied by the rendition of a decree of foreclosure by a state court, unless leave to file a supplementary answer should be granted, is so clearly without foundation, where the defense sought to be interposed is without merit, as to confer no jurisdiction on the Supreme Court of the United States of a writ of error to the state court.

[No. 225.]

*Argued April 6, 7, 1903. Decided April 27, 1903.*

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which affirmed a decree of foreclosure entered in the District Court of Steele County of that State. *Dismissed.*

See same case below, 78 Minn. 221, 80 N. W. 970.

Statement by Mr. Justice **Brewer**:

On April 27, 1897, Daniel S. Piper, the defendant in error, commenced a suit in the district court of Steele county, Minnesota, against the plaintiffs in error and L. C. Woodman. The complaint alleged the ownership by the Sawyers of a tract containing 790 acres, upon which were several mortgages, all of them fully set forth and all belonging to the plaintiff. It also averred an agreement, made on February 19, 1895, by the terms of which the Sawyers were to pay plaintiff the sum of $20,400, with, in addition, monthly payments of $100; that the Sawyers were to convey the land to plaintiff; that he should execute a deed to them, the deed to be placed in escrow in the hands of Woodman, the other defendant, and to be delivered to them on full payment of the sums named; with a proviso that upon *fail- [155] ure of the Sawyers to make payment of the $20,400, with the monthly additions of $100, all their rights under the contract should cease and determine. The complaint further alleged a failure to make the monthly payments. The prayer was for a judgment of

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

strict foreclosure of the contract unless redeemed within a year by the payment of the amount due, with interest; or, in the alternative, if the court should deem it inequitable to adjudge a strict foreclosure, that the contract and all the mortgages be foreclosed by the sale of the mortgaged premises, and for such other and further relief as should seem just and equitable. The defendant Woodman, who held the deed in escrow, made no defense. The Sawyers answered, admitting the allegations of the complaint in respect to the mortgages and contract, and alleged that by such contract the amount due the plaintiff was fixed at $20,400, which included interest upon all the mortgages up to February 19, 1895. They also averred that the plaintiff had commenced in the same court an action of ejectment, which was still pending, and therefore this action should be abated. In his reply the plaintiff admitted the commencement of the action of ejectment, but alleged that it had been dismissed prior to this suit. On the trial the Sawyers offered the plaintiff a decree of foreclosure for the $20,400, named in the contract, and all unpaid monthly payments, which offer was declined. The court thereupon found the facts in respect to the mortgages and agreement as alleged in the complaint; ruled that such agreement did not extinguish, by merger or otherwise, the several mortgages, and that the plaintiff was entitled to foreclosure of each of the mortgages for the amount due thereon, and rendered judgment of foreclosure and sale accordingly. The case was taken to the supreme court of the state, which held (73 Minn. 332, 76 N. W. 57), that the prior mortgages were merged in the agreement, which created an equitable mortgage on the land, and remanded the case with instructions to the court below to determine the amount due upon such equitable mortgage, and amend its findings of fact and conclusions of law accordingly. On the second trial, the Sawyers applied for leave to file a supplementary answer, setting forth their offer on the first trial to let judgment and [156] decree be entered for the foreclosure *of the equitable mortgage, and the refusal of the plaintiff to accept such offer, and asserting that thereby the plaintiff had waived the lien of such equitable mortgage and precluded himself from foreclosing the same; and, further, that a judgment in plaintiff's favor foreclosing said lien for any sum would deprive them of property without due process of law, and deny to them the equal protection of the laws. The court declined to permit the filing of such supplementary answer, amended its findings of fact and conclusions of law so as to show that the defendants had defaulted in the monthly payments referred to, and that therefore the equitable mortgage had become due, and entered a decree of foreclosure thereof and for the sale of the mortgaged premises. This decree was taken to the supreme court and affirmed (78 Minn. 221, 80 N. W. 970), and thereupon this writ of error was sued out.

*Mr.* **J. A. Sawyer** argued the cause, and, with *Mr. H. W. Childs*, filed a brief for plaintiffs in error:

While this court, jurisdiction being already vested in it, may examine this record to determine whether the conclusion of the state court is justified, such examination is in the exercise of, and not a condition of, jurisdiction.

*Kelley* v. *Rhoads*, 188 U. S. 1, *ante*, 359, 23 Sup. Ct. Rep. 260; *Blythe* v. *Hinckley*, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390.

A correct decision therein by the state court could not affect the jurisdiction.

*Andrews* v. *Andrews*, 188 U. S. 14, *ante*, 366, 23 Sup. Ct. Rep. 237.

A decision by a state court that it has not passed upon a Federal question, or has decided one correctly, does not affect either the fact or the extent of the jurisdiction of this court.

*McCullough* v. *Virginia*, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; *Columbia Water Power Co.* v. *Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Missouri, K. & T. R. Co.* v. *Elliott*, 184 U. S. 695, 46 L. ed. 763, 22 Sup. Ct. Rep. 937.

The opinion of the state supreme court, showing, as it does, that the refusal to hear these offered defenses by the trial court (based, as it is, solely on *res judicata*) was by the supreme court affirmed on that precise ground, shows on its face that the Federal question was in fact considered and decided by it. That is sufficient, though the record did not show any further fact.

*Meyer* v. *Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *Bellingham Bay Improv. Co.* v. *New Whatcom*, 172 U. S. 320, 43 L. ed. 463, 19 Sup. Ct. Rep. 873; *Columbia Water Power Co.* v. *Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 258, 41 L. ed. 994, 17 Sup. Ct. Rep. 992.

The demand was based upon the first clause of the 14th Amendment to the Federal Constitution, and presented a purely Federal question. That this demand was refused, and the asserted Federal right denied by both state courts, is patent from the record, and stands admitted. Jurisdiction in this court follows necessarily.

*Swafford* v. *Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783; *Equitable Life Assur. Soc.* v. *Brown*, 187 U. S. 308, *ante*, 190, 23 Sup. Ct. Rep. 123; *Great Western Teleg. Co.* v. *Purdy*, 162 U. S. 334, 40 L. ed. 989, 16 Sup. Ct. Rep. 810.

*Mr.* **Robert Taylor** argued the cause, and, with *Messrs. Frank B. Kellogg, Wesley A. Sperry*, and *Lewis L. Wheelock*, filed a brief for defendant in error:

This court has no jurisdiction of a writ of error to review the judgments of state courts, unless a real, and not a fictitious, Federal question is involved.

*Hamblin* v. *Western Land Co.* 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

The bare averment of a Federal question

is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.

*New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Millingar* v. *Hartupee*, 6 Wall. 258, 18 L. ed. 829.

To give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary for the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.

*De Saussure* v. *Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Johnson* v. *Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Cook County* v. *Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Haley* v. *Breeze*, 144 U. S. 130, 36 L. ed. 373, 12 Sup. Ct. Rep. 836.

Even the averment of the alleged Federal question in this cause was made entirely too late.

*Bushnell* v. *Crooke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Loeber* v. *Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Texas & P. R. Co.* v. *Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777.

The question on which the jurisdiction of this court depends (if such jurisdiction exists) is so frivolous as not to need further argument; and such question was rightly decided in the state court, and therefore it is unnecessary to keep the case in this court for further argument.

*Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Church* v. *Kelsey*, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897; *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023.

Mr. Justice **Brewer** delivered the opinion of the court:

In their application for leave to file a supplementary answer, the plaintiffs in error averred that to render a decree foreclosing the equitable mortgage would, under the circumstances, be a taking of property without due process of law, and denying to them the equal protection of the laws, and claimed "the protection guaranteed to all citizens of the United States by the provisions of § 10 of art. 1 of the Constitution of the United States and of § 1 of the 14th Amendment to the Constitution of the United States." While they thus asserted the existence of a Federal question, yet it is well settled that the mere averment of such a question is not sufficient. As said in *Hamblin* v. *Western Land Co.* 147 U. S. 531, 532, 37 L. ed. 268, 13 Sup. Ct. Rep. 353, 354:

*"A real, and not a fictitious, Federal [157] question is essential to the jurisdiction of this court over the judgments of state courts. *Millingar* v. *Hartupee*, 6 Wall. 258, 18 L. ed. 829; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 87, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142, 145. In the latter case it was said that 'the bare averment of a Federal question is not, in all cases, sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment; otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

See also *Wilson* v. *North Carolina*, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *St. Joseph & G. I. R. Co.* v. *Steele*, 167 U. S. 659, 42 L. ed. 315, 17 Sup. Ct. Rep. 925; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

We think this case comes within that rule. Rulings in respect to the amendment of pleadings are largely within the discretion of the trial court, and, unless a gross abuse of that discretion is shown, there is no ground for reversal. *Gormley* v. *Bunyan*, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453. Here the trial court refused to permit any amendment of the pleadings,—for a supplementary answer is substantially such an amendment. We cannot see that the trial court abused its discretion, even if that were a Federal question and properly before us for consideration. All the facts in reference to the original mortgages and the agreement were set forth in full in the original complaint, and relief was asked in the alternative,—either a strict foreclosure of the agreement, or, if that were deemed inequitable, a foreclosure of the original mortgages. The defendants, in their answer, set up all their defenses to plaintiff's claim of relief upon the facts stated in the complaint. That at the hearing they offered to consent to a decree of foreclosure of the equitable mortgage created by the agreement (which offer was declined by the plaintiff) did not pay the debt, or release the property from the liens. Debts are not paid nor liens canceled in that way. A defendant cannot, by offering on a trial to consent to a judgment or decree for a part of the claim sued on, prevent the plaintiff from subsequently obtaining the judgment or decree demanded by the facts of the case, although it be that which had been offered and also declined. All the facts were before the trial court as *well as the supreme court, and the decision [158] was that which right and justice demanded. There is no merit in the defense which was sought to be interposed, and certainly nothing which calls upon this court to interfere with the decision of the state court.

*The writ of error is dismissed.*

## THE OSCEOLA.

(See S. C. Reporter's ed. 158-177.)

*Admiralty—liability of ship for seaman's injuries.*

1. A vessel is not liable *in rem* to one of the crew, under the general principles of admiralty, for damages for personal injuries sustained by him through the improvident and negligent order of the master in directing a gangway for the discharge of cargo to be hoisted before the arrival of the vessel at her dock and during a heavy wind.
2. Injuries sustained by a member of the crew on board a ship in attempting to hoist a gangway in a heavy wind are not done "by such ship," within the meaning of Wis. Rev. Stat. 1898, § 3348, imposing liability on every ship "for all damages arising from injuries done to persons or property by such ship," as such statute was intended to cover only cases of damage done by the ship herself, as the offending thing, to persons or property outside the ship.

[No. 98.]

*Argued December 2, 1902. Decided March 2, 1903.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Seventh Circuit presenting questions as to the liability of a vessel *in rem* to a member of the crew for injuries sustained through the negligence of the master. *Answered in the negative.*

Statement by Mr. Justice **Brown:**

This was a libel *in rem* filed in the district court for the eastern district of Wisconsin, in admiralty, against the propeller Osceola, to recover damages for a personal injury sustained by one Patrick Shea, a seaman on board the vessel, through the negligence of the master.

The case resulted in a decree for the libellant, from which an appeal was taken by the owners to the circuit court of appeals, which certified to this court certain questions arising upon the following statement of facts:

"The owners had supplied the vessel with a movable derrick for the purpose of raising the gangways of the vessel when in port, in order to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair and condition. The gangways which were to be raised by the derrick were each about 10 feet long lengthwise of the ship, about 7 feet high, and weighed about 1,050 pounds. In the month of December, 1896, the vessel was on a voyage bound for the port of Milwaukee, and when within 3 miles of that port, and while in the open lake, the master of the vessel ordered the forward port gangway to be hoisted by means of the derrick, in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock. At this time the vessel was proceeding at the rate of 11 miles an hour against a head wind of 8 miles an hour. Under the supervision of the mate, the crew, including the appellee, Patrick Shea, who was one of the crew, proceeded to execute the order of the master. The derrick was set in place to raise the gangway. As soon as the gangway was swung clear of the vessel, the front end was caught by the wind and turned outward broadside to the wind, and by the force of the wind was pushed aft and pulled the derrick over, which in falling struck and injured the libellant. The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway should [160] be hoisted while the vessel was yet in the open sea, when the operation might be impeded and interfered with by the wind. The mate and the crew in executing the orders of the master of the vessel acted in all respects properly, and were guilty of no negligence in the performance of the work. The libel charged negligence upon the owners of the vessel in 'requiring and permitting the work of unshipping said gangway to be done while the said vessel was at sea and running against the wind.' The owners were not present upon the vessel, nor was the master a part owner of the vessel. It is contended that the vessel and its owners are liable for every improvident or negligent order of the captain in the course of the navigation or management of the vessel."

The questions of law upon which that court desired the advice and instruction of the Supreme Court are—

"First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

"Second. Whether in the navigation and management of a vessel the master of the vessel and the crew are fellow servants.

"Third. Whether, as a matter of law, the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent."

*Mr.* **John H. Roemer** argued the cause and filed a brief for appellees:

If a state statute gives a right of action touching a subject of maritime nature, admiralty can administer the law by a proceeding *in rem* if the statute grants a lien, or *in personam*, no lien being granted.

*The Corsair*, 145 U. S. 335, *sub nom. Barton* v. *Brown*, 36 L. ed. 727, 12 Sup. Ct. Rep. 949; *Bigelow* v. *Nickerson*, 30 L. R. A. 336, 17 C. C. A. 1, 34 U. S. App. 261, 70 Fed. 113.

If the Wisconsin statute merely applies

to causes *in personam* already maintainable under the statute, or the common or the maritime law, it is submitted that it is effective to create liens in all cases within its scope, and that such liens may be enforced by proceeding *in rem* in admiralty.

*Mendell* v. *The Martin White*, Hoff. Op. 450, Fed. Cas. No. 9,419; *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 340, 13 Sup. Ct. Rep. 498; *The Oregon*, 158 U. S. 186, 39 L. ed. 943, 15 Sup. Ct. Rep. 804; *The J. F. Warner*, 22 Fed. 342.

The subjects of admiralty jurisdiction include all affairs relating to mariners, whether ship officers, or common mariners; their rights and privileges respectively; their office and duty; their wages; their offenses, whether by wilfulness, casualty, ignorance, negligence, or insufficiency, with their punishments.

*Chamberlain* v. *Chandler*, 3 Mason, 242, Fed. Cas. No. 2,575.

The rule of the English courts that, unless the owner is liable at common law, the vessel cannot be held in admiralty, has been rejected in this country.

*Homer Ramsdell Transp. Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831.

Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion on the subject.

*The Marianna Flora*, 11 Wheat. 54, 6 L. ed. 405; *The Palmyra*, 12 Wheat. 1, 6 L. ed. 531; *The Explorer*, 20 Fed. 135; *The Wanderer*, 20 Fed. 140; *The Max Morris*, 24 Fed. 360, 28 Fed. 881, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29.

If it should be determined that the proceeding should have been commenced *in personam*, and not *in rem*, the question cannot be raised at this time.

Betts, Admiralty Practice, 99; *The Zenobia*, Abb. Adm. 48, Fed. Cas. No. 18,208; *Roberts* v. *The Huntsville*, 3 Woods, 386, Fed. Cas. No. 11, 904; *The Union*, 4 Blatchf. 90, Fed. Cas. No. 14,346; *The White Squall*, 4 Blatchf. 103, Fed. Cas. No. 17,570; *The Monte A.* 12 Fed. 331; *The Willamette*, 31 L. R. A. 715, 18 C. C. A. 366, 44 U. S. App. 26, 70 Fed. 874; *Leathers* v. *Blessing*, 105 U. S. 626, 26 L. ed. 1192; *Chamberlain* v. *Ward*, 21 How. 554, 16 L. ed. 211; *The Charles Morgan*, 115 U. S. 69, 29 L. ed. 316, 5 Sup. Ct. Rep. 1172; 2 Brown, Civil & Adm. Law, p. 400; *The Warren*, 2 Ben. 498, Fed. Cas. No. 17,192; *The Bilbao*, Lush. 149.

The reported cases show that there is a conflict of opinion as to whether or not the vessel and its owners are liable in admiralty for the negligence of the master in the management and navigation of the ship, proximately causing injury to an ordinary seaman. The line of cases holding that the vessel and its owners are responsible in such cases is certainly supported by the better reasoning.

*Peterson* v. *The Chandos*, 4 Fed. 645; *The Clatsop Chief*, 7 Sawy. 274, 8 Fed. 163, 767; *The Titan*, 23 Blatchf. 177, 23 Fed. 413; *The A. Heaton*, 43 Fed. 592; *The Julia Fowler*, 49 Fed. 277; *The Frank & Willie*, 45 Fed. 494; *McCullough* v. *New York, N. H. & H. R. Co.* 9 C. C. A. 521, 20 U. S. App. 570, 61 Fed. 364.

To the same effect see also *Keating* v. *Pacific Steam Whaling Co.* 21 Wash. 415, 58 Pac. 224.

*Mr.* **Charles H. Van Alstine** argued the cause and filed a brief for appellants:

A proceeding *in rem* in admiralty is a proceeding to give effect to a maritime lien; and such a lien must always exist, to form the basis of such a proceeding.

*Beane* v. *The Mayurka*, 2 Curt. C. C. 72, Fed. Cas. No. 1,175; *The Rock Island Bridge*, 6 Wall. 213, 215, *sub nom. Galena, D. D. & M. Packet Co.* v. *Rock Island R. Bridge*, 18 L. ed. 753, 754; *The Corsair*, 145 U. S. 335, 347, *sub nom. Barton* v. *Brown*, 36 L. ed. 727, 731, 12 Sup. Ct. Rep. 949; *Vandewater* v. *Mills*, 19 How. 82, 89, 15 L. ed. 554, 556; *The Glide*, 167 U. S. 606, 612, 42 L. ed. 296, 298, 17 Sup. Ct. Rep. 930.

The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly exclusively a judicial question. But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends upon what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.

*The Lottawanna*, 21 Wall. 558, *sub nom. Rodd* v. *Heartt*, 22 L. ed. 654.

The ancient maritime codes are insufficient to give a seaman a lien upon the vessel for damages based on mental and physical pain and loss of earning capacity.

Appendix to 30 Fed. Cas. pp. 1174, 1191, 1200, 1209; *The City of Alexandria*, 17 Fed. 390.

The court cannot make the law; it can only declare it. If, within its proper scope, any change is desired in its rules other than those of procedure, it must be made by the legislative department.

*The Lottawanna*, 21 Wall. 576, 577, *sub nom. Rodd* v. *Heartt*, 22 L. ed. 662, 663.

As the appellee resorted to a libel *in rem*, the court is bound by the maritime law.

*Homer Ramsdell Transp. Co.* v. *La Compagnie Générale Transatlantique*, 182 U. S. 406, 45 L. ed. 1155, 21 Sup. Ct. Rep. 831.

By the maritime law of this country the liability of the vessel owner, in cases like the present, is limited to medical and surgical attendance, and wages to the end of the voyage.

*The City of Alexandria*, 17 Fed. 390.

Cases holding the owner liable *in personam* are rested on the common law.

*The Titan and The Hills*, 23 Blatchf. 177, 23 Fed. 413; *The A. Heaton*, 43 Fed. 592; *The Sachem*, 42 Fed. 66; *McCullough* v.

*New York, N. H. & H. R. Co.* 9 C. C. A. 521, 20 U. S. App. 570, 61 Fed. 364.

The Federal courts enforce liens created by state statutes, upon vessels, when such statutes are not in conflict with the laws and usages of the United States, because, and only because, the lien touches a subject within the constitutional jurisdiction of the Federal courts; and it necessarily follows that they cannot go beyond the state or municipal law creating the cause of action and lien.

*Bigelow* v. *Nickerson*, 30 L. R. A. 336, 17 C. C. A. 1, 34 U. S. App. 261, 70 Fed. 113; *The City of Norwalk*, 55 Fed. 98, 107, 108, 112; *Sherlock* v. *Alling*, 93 U. S. 104, 23 L. ed. 820; *The Corsair*, 145 U. S. 347, *sub nom. Barton* v. *Brown*, 36 L. ed. 731, 12 Sup. Ct. Rep. 949.

Under the facts certified, appellee and the master of the vessel were fellow servants; and the owners are not liable under the laws of the state.

*Hedley* v. *Pinkney & Sons S. S. Co.* [1892] 1 Q. B. 58; *Dwyer* v. *American Exp. Co.* 82 Wis. 307, 52 N. W. 304; *Stutz* v. *Armour*, 84 Wis. 623, 54 N. W. 1000; *Cadden* v. *American Steel Barge Co.* 88 Wis. 409, 60 N. W. 800; *Hartford* v. *Northern P. R. Co.* 91 Wis. 374, 64 N. W. 1033; *Klochinski* v. *Shores Lumber Co.* 93 Wis. 417, 67 N. W. 934; *McMahon* v. *Ida Min. Co.* 95 Wis. 308, 70 N. W. 478; *Albrecht* v. *Chicago & N. W. R. Co.* 108 Wis. 530, 53 L. R. A. 653, 84 N. W. 882; *Wiskie* v. *Montello Granite Co.* 111 Wis. 443, 87 N. W. 461; *Thompson* v. *Hermann*, 47 Wis. 602, 32 Am. Rep. 784, 3 N. W. 579; *Mathews* v. *Case*, 61 Wis. 491, 50 Am. Rep. 151, 21 N. W. 513.

Mr. Justice **Brown** delivered the opinion of the court:

In the view we take of this case, we find it necessary to express an opinion only upon the first and third questions, which are, in substance, whether the vessel was liable *in rem* to one of the crew by reason of the improvident and negligent order of the master in directing the hoisting of the gangway for the discharge of cargo, before the arrival of the vessel at her dock, and during a heavy wind. As this is a libel *in rem*, it is unnecessary to determine whether the owners would be liable to an action *in personam*, either in admiralty or at common law, although cases upon this subject are not wholly irrelevant.

If the rulings of the district court were correct, that the vessel was liable *in rem* for these injuries, such liability must be founded either upon the general admiralty law or upon a local statute of the state within which the accident occurred. As the admiralty law upon the subject must be gathered from the accepted practice of courts of admiralty, both at home and abroad, we are bound in answering this [169]question to examine *the sources of this law and its administration in the courts of civilized countries, and to apply it, so far as it is consonant with our own usages and principles, or, as Mr. Justice Bradley observed in *The Lottawanna*, 21 Wall. 558, *sub nom. Rodd* v. *Heartt*, 22 L. ed. 654, "having regard to our own legal history, Constitution, legislation, usages, and adjudications."

By article 6 of the Rules of Oleron, sailors injured by their own misconduct could only be cured at their own expense, and might be discharged; "but if, by the master's order and commands, any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the cost and charges of the said ship." By article 18 of the Laws of Wisbury, "a mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship," with a further provision that, if he be injured by his own recklessness, he may be discharged and obliged to refund what he has received. Practically the same provision is found in article 39 of the Laws of the Hanse Towns; in the Marine Ordinances of Louis XIV. book III. title 4, article 11; and in a Treatise upon the Sea Laws, published in 2 Pet. Adm. Dec. In neither of these ancient Codes does there appear to be any distinction between injuries received accidentally or by negligence, nor does it appear that the seaman is to be indemnified beyond his wages and the expenses of his maintenance and cure. We are also left in the dark as to whether the seaman in such a case has recourse to the ship herself, or is remitted to an action against the owners.

By the modern French Commercial Code (art. 262), "seamen are to be paid their wages, and receive medical treatment at the expense of the ship, if they fall sick during a voyage, or be injured in the service of the vessel." Commenting upon this article, Goirand says in his commentaries upon the French Code, that "when a sailor falls ill before the sailing of the vessel he has no right to his wages; if he becomes ill during the voyage, and from no fault of his own, he is paid his wages, and tended at the expense of the ship," and if he is left on shore, the ship is also liable for the expense of his return home; and *under article 263[170] the same treatment is accorded to sailors wounded or injured in the service of the ship. The expenses of treatment and dressing are chargeable to the ship alone, or to the ship and cargo, according to whether the wounds or injuries were received in the service of the ship alone, or that of the ship and cargo.

Similar provisions are found in the Italian Code, article 363; the Belgian, article 262; the Dutch, articles 423 and 424; the Brazilian, article 560; the Chilian, article 944; the Argentine, article 1174; the Portuguese, article 1469; the Spanish, articles 718 and 719; the German, articles 548 and 549. In some of these Codes, notably the Portuguese, Argentine, and Dutch, these expenses are made a charge upon the ship and her cargo and freight, and considered as a subject of general average. By the Argentine Code, article 1174, the sailor is also entitled to an indemnity beyond his wages

and cure in case of mutilation; and by the German Code he appears to be entitled to an indemnity in all cases for injuries incurred in defense of his ship; and by the Dutch Code, the sailor, if disabled, is entitled to such damages as the judge shall deem equitable. In all of them there is a provision against liability in case of injuries received by the sailor's wilful misconduct.

Except as above indicated, in a few countries, the expense and maintenance and cure do not seem to constitute a privilege or lien upon a ship, since by the French Code, article 191, classifying privileged debts against vessels, no mention is made of a lien for personal injury. The other Continental and South American Codes do not differ materially from the French in this particular. Probably, however, the expenses of maintenance and cure would be regarded as a mere incident to the wages, for which there is undoubtedly a privilege.

By the English merchants' shipping act (17 & 18 Vict. chap. 104, § 228, subd. 1), "if the master or any seaman or apprentice receives any hurt or injury in the service of the ship to which he belongs, the expense of providing the necessary surgical and medical advice, with attendance and medicines, and of his subsistence until he is cured, or dies, or is brought back to some port in the United Kingdom, if shipped in [171] the *United Kingdom, or, if shipped in some British possession, to some port in such possession, and of his conveyance to such port, and the expense (if any) of his burial, shall be defrayed by the owner of such ship, without any deduction on that account from the wages of such master, seaman, or apprentice."

These provisions of the British law seem to be practically identical with the Continental Codes. In the English courts the owner is now held to be liable for injuries received by the unseaworthiness of the vessel, though not by the negligence of the master, who is treated as a fellow servant of the owner. Responsibility for injuries received through the unseaworthiness of the ship is imposed upon the owner by the merchants' shipping act of 1876 (39 & 40 Vict. chap. 80, § 5), wherein, in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage. *Hedley* v. *Pinkney & Sons' S. S. Co.* [1894] A. C. 222, an action at common law. Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence or otherwise in the service of the ship. None such is given in the admiralty court jurisdiction act of 1861, although it seems an action in admiralty will lie against the master *in personam* for an assault committed upon a passenger or seaman. *The Agincourt*, 1 Hagg. Adm. 271; *The Lowther Castle*, 1 Hagg. Adm. 384. This feature of the law we have ourselves adopted in general admiralty rule 16, declaring that "in all suits for assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only." In England the master and crew are also treated as fellow servants, and hence it would follow that no action would lie by a member of the crew against either the owners or the ship for injuries received through the negligence of the master. *Hedley* v. *Pinkney & Sons' S. S. Co.* [1894] A. C. 222. It is otherwise, however, in Ireland (*Ramsay* v. *Quinn*, Ir. Rep. 8, C. L. 322), and in Scotland, where *the master is regarded as a [172] vice principal. *Leddy* v. *Gibson*, 11 Ct. Sess. Cas. 3d series, 304.

The statutes of the United States contain no provision upon the subject of the liability of the ship or her owners for damages occasioned by the negligence of the captain to a member of the crew; but in all but a few of the more recent cases the analogies of the English and Continental Codes have been followed, and the recovery limited to the wages and expenses of maintenance and cure. The earliest case upon the subject is that of *Harden* v. *Gordon*, 2 Mason, 541, Fed. Cas. No. 6,047, in which Mr. Justice Story held that a claim for the expenses of cure in case of sickness constituted in contemplation of law a part of the contract for wages, over which the admiralty had a rightful jurisdiction. The action was *in personam* against the master and owner for wages and other expenses occasioned by the sickness of the plaintiff in a foreign port in the course of the voyage, all of which were allowed. The question of indemnity did not arise in this case, but the court held that upon the authority of the Continental Codes, and by its intrinsic equity, there was no doubt of the seaman's right to the expenses of his sickness.

This case was followed in *The George*, 1 Sumn. 151, Fed. Cas. No. 5,329, and in *Reed* v. *Canfield*, 1 Sumn. 195, Fed. Cas. No. 11,641. Though the last case did not involve the question of indemnity, Mr. Justice Story, in delivering the opinion, remarked that "the sickness or other injury may occasion a temporary or permanent disability, but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages. The question, then, in all such cases is, What expenses have been virtually incurred for the cure?"

The question of indemnity, however, was fully considered by Judge Brown, of the southern district of New York, in *The City of Alexandria*, 17 Fed. 390, which was an action *in rem* for personal injuries received by the cook in falling through the fore hatch into the hold; and it was held that upon common-law principles the claim could not be sustained, as the *negligence [173] through which the accident occurred was that of fellow servants engaged in a com-

mon employment. The court, however, went on to consider whether the negligence, upon the recognized principles of maritime law, entitled the libellant to compensation from the ship or her owners in cases not arising from unseaworthiness. After going over the Continental Codes, the cases above cited, and a few others, Judge Brown came to the conclusion that he could find "no authority in the ancient or modern Codes, in the recognized text-books or the decisions on maritime law, for the allowance of consequential damages resulting from wounds or hurts received on board ship, whether arising from ordinary negligence of the seaman himself or of others of the ship's company. Considering the frequency of such accidents and the lasting injuries arising from them in so many cases, the absence of any authority holding the vessel liable beyond what has been stated is evidence of the strongest character that no further liability under the maritime law exists."

The general rule that a seaman receiving injury in the performance of his duty is entitled to be treated and cured at the expense of the ship was enforced in *The Atlantic*, Abb. Adm. 451, Fed. Cas. No. 620, though it was said in this case, and in *Nevitt* v. *Clarke*, Olcott, 316, Fed. Cas. No. 10,138, that the privilege of being cured continues no longer than the right to wages under the contract in the particular case. In *The Ben Flint*, 1 Abb. (U. S.) 126, 1 Biss. 562, Fed. Cas. No. 1,229, the claim to be cured at the expense of the ship is held to be applicable to seamen employed on the lakes and navigable rivers within the United States. See also *Brown* v. *Overton*, 1 Sprague, 462, Fed. Cas. No. 2,024; *Croucher* v. *Oakman*, 3 Allen, 185; *Brown* v. *The Bradish Johnson*, 1 Woods, 301, Fed. Cas. No. 1,992.

In *The Edith Godden*, 23 Fed. 43, the vessel was held liable *in rem* for personal injuries received from the neglect of the owner to furnish appliances adequate to the place and occasion where used; in other words, for unseaworthiness. This is readily distinguishable from the previous case of *The City of Alexandria*, 17 Fed. 390, and is in line with English and American authorities holding owners to be responsible to the seamen for the unseaworthiness of [174] the ship and her appliances. *In *The Titan*, 23 Blatchf. 177, 23 Fed. 413, the ship was held liable to a deck hand who was injured by a collision occasioned partly by fault of his own vessel. The question of general liability was not discussed but assumed. In the case of *The Noddleburn*, 12 Sawy. 129, 28 Fed. 855, the question of jurisdiction was not pressed by counsel, but merely stated and submitted. The case is put upon the ground that, as the accident was occasioned by the master knowingly allowing a rope to remain in an insecure condition, the vessel was consequently unseaworthy. In *Olson* v. *Flavel*, 13 Sawy. 232, 34 Fed. 477, libellant was allowed to recover damages for personal injury suffered by him while employed as mate; but if there were any negligence on the part of the respondent, it appears to have been not providing proper appliances, so that the case was one really of unseaworthiness. In the case of *The A. Heaton*, 43 Fed. 592, a seaman was allowed to recover consequential damages for negligence of the owners in not providing suitable appliances, although in the opinion, which was delivered by Mr. Justice Gray, he seems to assume the right of the seaman to recover against the masters or owners for injuries caused by their wilful or negligent acts. The case, however, was one of injuries arising from unseaworthiness, although the learned judge in his discussion does not draw a distinction between the cases arising from the unseaworthiness of the ship and the negligent act of the master. It is interesting to note that in *The Julia Fowler*, 49 Fed. 277, a seaman employed in scraping the main mast on a triangle surrounding the mast was allowed to recover for the breaking of the rope which held the triangle, and precipitated libellant to the deck; while in a case almost precisely similar (*Kalleck* v. *Deering*, 161 Mass. 469, 37 N. E. 450), the owners were held not to be liable for an injury caused by the negligence of the mate in constructing the triangle and ordering the seaman to use it. In *The Frank & Willie*, 45 Fed. 494, the ship was held liable to a sailor who was injured by the negligence of the mate in not providing safe means for discharging the cargo. As the opinion was delivered by Judge Brown, who was also the author of the opinion in *The City of Alexandria*, 17 Fed. 390, the case can be reconciled with that upon the ground that the *question was really one of [175] unseaworthiness, and not of negligence.

Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff* v. *Metcalf*, 107 N. Y. 211, 13 N. E. 796.

3. That all the members of the crew, except, perhaps, the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

It will be observed in these cases that a departure has been made from the Continental Codes in allowing an indemnity beyond the expense of maintenance and cure

in cases arising from unseaworthiness. This departure originated in England in the merchants' shipping act of 1876, above quoted (*Couch* v. *Steel*, 3 El. & Bl. 402; *Hedley* v. *Pinkney & Sons' S. S. Co.* 7 Asp. M. L. Cas. 135 [1894] A. C. 222), and in this country, in a general consensus of opinion among the circuit and district courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own.

2. It is insisted, however, that a lien is given upon the vessel by a local statute of [176]Wisconsin (Rev. Stat. 1898, § 3348), *repeating a previous statute upon the same subject, which provides that every ship, boat, or vessel used in navigating the waters of that state shall be liable "for all damages arising from injuries done to persons or property by such ship, boat, or vessel," and that the claim for such damages shall constitute a lien upon such ship, boat, or vessel, which shall take precedence of all other claims or liens thereon. As the accident happened within 3 miles of the port of Milwaukee, and as the Constitution of Wisconsin fixes the center of Lake Michigan as the eastern boundary of the state, there is no doubt that the vessel was navigating the waters of that state at the time of the accident. But the vital question in the case is whether the damages arose from an injury done to persons or property *by such ship*, boat, or vessel. The statute was doubtless primarily intended to cover cases of collision with other vessels or with structures affixed to the land, and to other cases where the damage is done by the ship herself, as the offending thing, to persons or property outside of the ship, through the negligence or mismanagement of the ship by the officers or seamen in charge. To hold that it applies to injuries suffered by a member of the crew on board the ship is to give the act an effect beyond the ordinary meaning of the words used. Would it apply, for instance, to injuries received in falling through an open hatchway; or to a block blown against a seaman by the force of the wind, though the accident in either case might have resulted from the negligence of the master? We think not.

The act in this particular uses the same language as the 7th section of the English admiralty court act of 1861, which declares that "the high court of admiralty shall have jurisdiction over any claim for damage done by any ship." Construing that act, it has been held by the court of admiralty that it applies to damages occasioned by a vessel coming in collision with a pier (*The Uhla*, L. R. 2 Adm. & Eccl. 29, note), and also to cases of personal injury (*The Sylph*, L. R. 2 Adm. & Eccl. 24, where a diver, while engaged in diving in the river Mersey, was caught by the paddle wheel of a steamer and suffered considerable injury); but not to a case where personal injuries were sustained by a seaman falling down into the [177]hold of a vessel, *owing to the hatchway being insufficiently protected (*The Theta* [1894] Prob. 280), or to loss of life (*The Vera Cruz*, L. R. 9 Prob. Div. 96). As we have indicated above, the statute was confined to cases of damage done by those in charge of a ship with the ship as the "'noxious instrument," and that cases of damages done *on board* the ship were not, within the meaning of the act, damages done *by the ship*.

In the case under consideration the damage was not done by the ship in the ordinary sense of the word, but by a gangway, which may be assumed to be an ordinary appliance of the ship, being blown against the libellant by the force of the wind.

*It results that the first and third questions must be answered in the negative.*

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## SAN JOSE LAND & WATER COMPANY,
*Plff. in Err.,*
*v.*
## SAN JOSE RANCH COMPANY.

(See S. C. Reporter's ed. 177-185.)

*Error to state court—Federal question—railroad land grants — forfeiture — bona fide purchasers—rights as against prior appropriators.*

1. A Federal right is "specially set up or claimed in a state court," within the meaning of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), so as to confer jurisdiction on the Supreme Court of the United States of a writ of error to such court, where a claim of such right sufficiently appears in a motion for new trial and in the assignments of error in the state supreme court, and was fully considered in the opinion of that court, whose decision was adverse to such claim.
2. Land within the indemnity limits of the grant made by the act of Congress of July 27, 1866 (14 Stat. at L. 292, chap. 278), to the Atlantic & Pacific Railroad did not, by reason of the forfeiture of such grant by the act of July 6, 1886 (24 Stat. at L. 123, chap. 687), pass to the Southern Pacific Railroad Company, although such land was within the place limits of the grant to the Texas & Pacific Railroad made by the act of March 3, 1871 (16 Stat. at L. 573, chap. 122), the rights under which subsequently became vested in the Southern Pacific Railroad Company, which built the road and selected the land under that act, since the forfeiture of the earlier grant did not inure to the benefit of the later grantee, but to the benefit of the United States.
3. One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded vested ditch and water rights by the act of Congress of July 26, 1866 (14 Stat. at L. 251, chap. 262), § 9, as against

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*As to land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

subsequent purchasers of the land from the Southern Pacific Railroad Company, whose only claim to such land rests upon the right of purchase from the United States, given by the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 5, to bona fide purchasers from railway companies of forfeited lands.

4. Bona fide purchasers of forfeited lands from a railroad company, who are not in possession and have not attempted to exercise their right under the act of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 5, to purchase the lands from the United States, are not, by reason of such right to purchase, entitled to maintain an action to quiet title against persons claiming an adverse interest therein.

[No. 113.]

*Submitted December 2, 1902. Decided March 2, 1903.*

IN ERROR to the Supreme Court of the State of California to review a decree which affirmed a judgment of the Superior Court in favor of defendant in an action to quiet title. *Affirmed.*

See same case below, 129 Cal. 673, 62 Pac. 269.

Statement by Mr. Justice **Brown**:

[178] *This was an action brought in 1889 by the Land & Water Company, under the Code of Civil Procedure of California, to quiet the title of the plaintiff and determine the nature of the adverse claim of the defendant to the half of a quarter section of land, which had been sold by the Southern Pacific Railroad Company February 28, 1887, to plaintiff's predecessors in title, as part of its land grant of 1871.

The case was tried in 1890, though the decree was not entered until 1897. The facts found by the court were substantially that the Southern Pacific Railroad Company had accepted the benefit of a land grant made March 3, 1871, to the Texas & Pacific railroad, filed its map of location April 3, 1871, and on August 12, 1873, formed a new corporation, also known as the Southern Pacific Railroad Company; built and constructed a road from Tehachapi pass by way of Los Angeles to Yuma, and selected the land in question under the act of March 3, 1871; that such land was within the place limits of the Southern Pacific, and also within the indemnity limits of a land grant to the Atlantic & Pacific railroad by act of July 27, 1866. This latter company never complied with the terms of the grant, and never built its road.

That on February 28, 1887, the Southern Pacific agreed with two parties named Nolan and Heckenlively to sell them this land, and, after the receipt from the United States of a patent therefor, to deliver them a deed; that by subsequent conveyances, and on August 29, 1888, the right of the grantees became vested in the plaintiff, the San José Land & Water Company; that the land is situated in San Dimas canyon, through a portion of which the San Dimas creek flows; that prior to December, 1883, one Stowell claimed to own a water right in the waters flowing down such creek, the character and extent of which the court did not adjudicate, and about that time entered upon the land and constructed across a portion of it a 12-inch pipe line for the purpose of conducting the water so claimed by him from its point of diversion across said lands to other lands; that prior to July, 1887, the San José Ranch Company, defendant, had, by mesne conveyances, succeeded to the rights of Stowell, and also constructed upon such land, at a point where *the waters of San Dimas creek [179] flowed, a brick and cement forebay, sand box, or dam, and laid therefrom across a portion of said land a 14-inch pipe line, both of which pipe lines it claims the right to maintain, but makes no other claim of right to such lands.

Upon this state of facts the superior court entered a judgment in favor of the defendant, which was affirmed by the supreme court. 129 Cal. 673, 62 Pac. 269. Whereupon the plaintiff sued out this writ of error.

*Mr.* **W. H. Anderson** submitted the cause for plaintiff in error. *Messrs. James Anderson* and *Richard Dunnigan* were with him on the brief:

This is an action under a state statute which permits the holder of any kind of interest in real property, whether equitable or legal, to maintain an action to determine the claims of others adverse to him; and this, whether in or out of possession, the only limitation being that the holder of an equitable title may not maintain the action against the holder of the legal title.

*Pennie* v. *Hildreth*, 81 Cal. 130, 22 Pac. 398; *Pierce* v. *Felter*, 53 Cal. 18; *Tuffree* v. *Polhemus*, 108 Cal. 670, 41 Pac. 806.

The act of March 3, 1887, confers some right or interest in the land upon the bona fide purchaser thereof in good faith for value from the railroad company, which may be enforced and protected.

*Sethman* v. *Cline*, 17 Land Dec. 307; *Stephan* v. *Morris*, 21 Land Dec. 557; *Telford* v. *Keystone Lumber Co.* 19 Land Dec. 141; *Gasper* v. *St. Louis River Water Power Co.* 22 Land Dec. 587; *Durrell* v. *Windom*, 23 Land Dec. 508; *Hunt* v. *Maxwell*, 23 Land Dec. 183; *Holton* v. *Rutledge*, 20 Land Dec. 227; *Skinvik* v. *Longstreet*, 22 Land Dec. 32; *Yocum* v. *Keystone Lumber Co.* 22 Land Dec. 558; *Union P. R. Co.* v. *McKinley*, 14 Land Dec. 237.

The right of a homestead settler who has made entry, but has not made final proof of residence and cultivation, or obtained a patent, amounts to an equitable interest in the land, subject to the future performance of certain conditions; and, until forfeited by failure to perform the conditions, it must prevail, not only against individuals, but against the government.

*McGuire* v. *Brown*, 106 Cal. 660, 30 L. R. A. 384, 39 Pac. 1060.

The effect of a withdrawal of the lands

from settlement, by virtue of a grant to the railroad company, is well settled.

*St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 17, 35 L. ed. 77, 84, 11 Sup. Ct. Rep. 389; *Butte* v. *Northern P. R. Co.* 119 U. S. 69, 30 L. ed. 336, 7 Sup. Ct. Rep. 100; *Sage* v. *Swenson*, 64 Minn. 517, 67 N. W. 544; *Wolcott* v. *Des Moines Nav. & R. Co.* 5 Wall. 681, 18 L. ed. 689; *Williams* v. *Baker*, 17 Wall. 144, 153, *sub nom. Cedar Rapids & M. R. Co.* v. *Martindale*, 21 L. ed. 561, 563; *United States* v. *Des Moines Nav. & R. Co.* 142 U. S. 510, 546, 35 L. ed. 1099, 1109, 12 Sup. Ct. Rep. 308; *Riley* v. *Welles*, 154 U. S. 578, 19 L. ed. 648, 14 Sup. Ct. Rep. 1166; *Wood* v. *Beach*, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410; *Northern P. R. Co.* v. *Musser-Sauntry Land, Logging & Mfg. Co.* 168 U. S. 608, 611, 42 L. ed. 598, 599, 18 Sup. Ct. Rep. 205.

The right to acquire any kind of interest in the United States public domain, whether it be a right to settle upon, to appropriate water upon it, or to construct or maintain a ditch upon it, or to divert water upon it, is confined to such portion of such domain as is legally known as "public land."

By public lands is meant such land as is open to sale or other disposition under the general laws. Land to which any claims or rights of others attach does not fall within the designation of public lands.

*Bardon* v. *Northern P. R. Co.* 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856.

The term "public lands," in a statute authorizing location of scrip, does not include "tide lands." The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

*Hann* v. *Tacoma Land Co.* 153 U. S. 274, 38 L. ed. 715, 14 Sup. Ct. Rep. 820.

One who has acquired a right to maintain a pipe line over public lands cannot, after the rights of others have intervened in the land, acquire any new rights on the land different from those already acquired by virtue of his old easement.

*McGuire* v. *Brown*, 106 Cal. 670, 30 L. R. A. 384, 39 Pac. 1060; *Sturr* v. *Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350.

One who has an easement for a ditch cannot change it to a 12-inch pipe line.

*Allen* v. *San Jose Land & Water Co.* 92 Cal. 138, 15 L. R. A. 93, 28 Pac. 215.

By parity of reason, a 12-inch pipe across the land cannot be changed to a 14-inch pipe connected with a forebay or dam constructed upon the land.

*Mr. W. H. Anderson* also filed a separate brief for plaintiff in error:

The court's opinion upon writ of error from the decision of the highest judicial tribunal of the state is part of the record.

*Cousin* v. *Labatut*, 19 How. 202, 15 L. ed. 601; *Murdock* v. *Memphis*, 20 Wall. 633, 22 L. ed. 443; *Gross* v. *United States Mortg. Co.* 108 U. S. 485, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Fire Asso. of Philadelphia* v. *New York*, 119 U. S. 116, 30 L. ed. 346, 7 Sup. Ct. Rep. 108; *Creiger* v. *Shelby R. Co.* 125 U. S. 44, 31 L. ed. 678, 8 Sup. Ct. Rep. 752; *Scudder* v. *Coler*, 175 U. S. 36, 44 L. ed. 64, 20 Sup. Ct. Rep. 26.

Where the record affirmatively shows that a Federal question was raised,—that is, that it was "set up" or "claimed,"—whether that fact is deducible from the pleadings or from the judgment or from any other part of the record, it is sufficient to confer jurisdiction; and it is immaterial where, when, or how it was raised, provided it was raised prior to the final judgment, and was determined and passed upon adversely in the final judgment.

*Maxwell* v. *Newbold*, 18 How. 511–516, 15 L. ed. 506–508; *Sully* v. *American Nat. Bank*, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935; *Gross* v. *United States Mortg. Co.* 108 U. S. 484, 27 L. ed. 797, 2 Sup. Ct. Rep. 940; *Fire Asso. of Philadelphia* v. *New York*, 119 U. S. 116, 30 L. ed. 346, 7 Sup. Ct. Rep. 108; *Sayward* v. *Denney*, 158 U. S. 180, 181, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; *Meyer* v. *Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106; *Dewey* v. *Des Moines*, 173 U. S. 193–201, 43 L. ed. 665–667, 19 Sup. Ct. Rep. 379.

*Mr.* **John S. Chapman** submitted the cause for defendant in error:

Under U. S. Rev. Stat. § 709*a*, title, right, privilege, or immunity claimed under the Constitution must be specifically made. And, more than that, such right or title must be specially set up or claimed on the record.

*Murdock* v. *Memphis*, 20 Wall. 590, 634, 22 L. ed. 429, 444; *Clark* v. *Pennsylvania*, 128 U. S. 395, 397, 32 L. ed. 487, 488, 9 Sup. Ct. Rep. 2, 113.

The arguments of counsel cannot be looked into to show a Federal question.

*Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Zadig* v. *Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639.

Nor are the assignments of error available to show the Federal question, for they are not a part of the record.

*Sayward* v. *Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Fowler* v. *Lamson*, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112.

Nor is it sufficient that such a claim appears in the petition for the writ.

*Clark* v. *Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 2, 113.

Nor can it be made out by the certificate of the judge.

*Caperton* v. *Bowyer*, 14 Wall. 216, 236, 20 L. ed. 882, 885; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63, 41 L. ed. 72, 16 Sup. Ct. Rep. 939.

The claim made must be distinct and positive, and not left to mere inference. "Specially set up" means unmistakably, distinctly, and positively brought to the attention of the court.

*F. G. Oxley Stave Co.* v. *Butler County*, 166 U. S. 648, 652, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709; *Green Bay & M. Canal Co.* v. *Patten Paper Co.* 172 U. S. 58, 66–70, 43 L. ed. 364, 368, 369, 19 Sup. Ct. Rep. 97.

A special reference must be made to the

particular statute or law of the United States under which the party claims.

*Speed* v. *McCarthy*, 181 U. S. 269, 272-276, 45 L. ed. 855, 858, 859, 21 Sup. Ct. Rep. 613.

This court sometimes takes jurisdiction where it manifestly appears from the record that a Federal question was involved; but that is not done when the case comes under the particular provision of the act of Congress which we are now considering.

*Eastern Bldg. Asso.* v. *Welling*, 181 U. S. 47, 48, 45 L. ed. 739, 741, 21 Sup. Ct. Rep. 531.

The plaintiff had no title under the facts as found in this case.

129 Cal. 673, 62 Pac. 269.

Mr. Justice **Brown** delivered the opinion of the court:

Motion is made to dismiss this writ of error upon the ground that no Federal right, title, privilege, or immunity was "specially set up or claimed" by the plaintiff in error, as required by the 3d clause of Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575). None such appears in the complaint, although we think it sufficiently appears in the motion for a new trial and in the assignments of error in the state supreme court. It also appears from the opinion of the court that plaintiff relied upon the act of Congress of March 3, 1887, for the readjustment of land grants (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595); and the question considered by the court, and upon which the case turned, was whether the plaintiff had brought itself within the scope of that act. This question was fully considered by the court, and it was held that the defendant, having acquired its rights prior to the act of 1887, must prevail against the right claimed by the plaintiff.

While the right under the act of 1887, thus considered, was not originally specially set up and claimed by the plaintiff, inasmuch as it was not an original right, but a right available in rebuttal of the defense, it is one which appears to have been insisted upon in the argument; and under the [180] rule of this court *requiring the opinions to be sent up with the record, it has been frequently held to be a sufficient compliance with the words "specially set up and claimed," that it was fully considered in the opinion of the court and ruled against the plaintiff in error. *Murdock* v. *Memphis*, 20 Wall. 590, 633, 22 L. ed. 429, 443; *Gross* v. *United States Mortg. Co.* 108 U. S. 477, 27 L. ed. 795, 2 Sup. Ct. Rep. 940; *Fire Asso. of Philadelphia* v. *New York*, 119 U. S. 110, 115, 30 L. ed. 342, 345, 7 Sup. Ct. Rep. 108; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Saywards* v. *Denny*, 158 U. S. 180, 184, 39 L. ed. 941, 942, 15 Sup. Ct. Rep. 777; *Mallett* v. *North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730. These must be considered as leading, under our change of rule, to a different result from that reached in some prior cases (*Williams* v. *Norris*, 12 Wheat. 117, 6 L. ed. 571; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733, and *Gibson* v. *Chouteau*, 8 Wall. 314, 19 L. ed. 317), in which we held that the opinion of the state court could not be resorted to for the purpose of showing that a question of Federal cognizance was decided.

2. The case upon the merits presents but little difficulty. The action is brought under § 738 of the Code of Civil Procedure of California, which provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim."

The land in question was within the indemnity limits of the land grant of July 27, 1866 (14 Stat. at L. 292, chap. 278), to the Atlantic & Pacific Railroad Company. Plaintiff, however, claims nothing under this grant, as the railroad company never complied with its terms; never built its road; and the grant was forfeited by act of July 6, 1886 (24 Stat. at L. 123, chap. 637), and the land restored to the public domain. The act, however, becomes pertinent in another connection.

The land in question was also within the place limits of the grant to the Texas & Pacific Railroad Company by act of March 3, 1871 (16 Stat. at L. 573, chap. 122), and subsequently became vested in the Southern Pacific, which constructed the road and selected the land in question, claiming it under that act.

It was held by this court, however, in *United States* v. *Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152, that the forfeiture of the Atlantic & Pacific grant of July 6, 1886, did not inure to the benefit of the Southern Pacific, which held the *later grant of the same land, but to the [181] benefit of the United States, and thereby became a part of their public lands. In the next following case (*United States* v. *Colton Marble & Lime Co.* 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163), this ruling was extended to the indemnity lands of the Atlantic & Pacific, which, upon forfeiture of its land grant, also reverted to the United States.

Hence, on February 28, 1887, when the Southern Pacific company contracted to sell these lands to Nolan and Heckenlively, it had really nothing to sell, and no interest in the land that could pass under that agreement. There was a stipulation in it to make a deed of the premises as soon as the railroad had received a patent therefor from the United States; that it would use ordinary diligence to procure such patent, and that if, in consequence of circumstances beyond its control, it failed to obtain a patent, it guaranteed nothing with regard to the title, but agreed to repay everything which had been paid by the grantees. There was a further agreement that the contract should not be assignable except by indorsement, and with the written consent of the company, and a written promise of the assignee to perform all the undertakings and promises of the grantees.

After making the first payment and paying the annual interest to February 28, 1892, the grantees ceased all further pay-

ments. The findings show that at the time of the execution of the contract "said tract of land was not in the bona fide occupation of any adverse claimant under the pre-emption or homestead laws of the United States, and the same had not been settled upon at the date of such purchase, or on the 3d day of March, 1887, or subsequent to December 1, 1882, by any person claiming to enter the same under the settlement laws of the United States." That neither the grantees nor their assigns ever settled upon the land, cultivated or fenced it, although Heckenlively did, shortly after the purchase, enter upon the land and begin the construction of a ditch and tunnel thereon. Subsequently the land passed by intermediate conveyances to the plaintiff. Manifestly, however, there was a clear failure of title on the part of the plaintiff to maintain this action. The Southern Pacific had [182] no title to convey, and, beyond this, there *is no finding that the contract was assigned by indorsement or with the written consent of the railroad company, or that there was any promise on the part of the assignees to perform the undertakings of the original grantees.

Plaintiff's claim to the land must rest, if at all, upon the act of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), entitled "An Act to Provide for the Adjustment of Land Grants made by Congress to Aid in the Construction of Railroads, and for the Forfeiture of Unearned Lands, and for Other Purposes,"—the main purpose of which act was to relieve bona fide purchasers from railway companies of forfeited lands, by permitting such purchasers or settlers to perfect their entries upon compliance with the public land laws. By § 5 of this act, "where any said company shall have sold to citizens of the United States, . . . as a part of its grant, lands not conveyed to or for the use of such company, . . . and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands, at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns." The section, however, contained provisos excepting from its terms all lands which at the date of such sales from the government were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws, and also of lands settled upon subsequent to the 1st day of December, 1882, by persons claiming to enter the same under the settlement laws of the United States.

There are two difficulties connected with the application of this statute: (1) Assuming that Nolan and Heckenlively were bona fide purchasers in good faith from the government, which, indeed, is a part of the finding, there is nothing to indicate that they had ever made payment to the United States for the lands, or ever applied to do so; nor does a patent ever appear to have been issued to them. In short, the plaintiff relies upon the statute without showing that anything was done under it. (2) The provisions of this section do not apply to lands occupied adversely under the pre-emption, homestead, or settlement laws *of the [183] United States, and the finding in this connection is that in 1883 one Stowell owned, or claimed to own, a certain water right in the waters of San Dimas creek, which flowed through a portion of the land, the character and extent of which water right the court did not find; and that in November of that year Stowell entered on the land, laid and constructed across a portion of it a 12-inch pipe line for the purpose of taking the water across the land to other lands, probably for the purposes of irrigation; and that in July, 1887, the defendant, which had by mesne conveyances succeeded to this water right of Stowell, entered upon the land and built and constructed thereon a stone, brick, and cement forebay, sand box, or dam, and also a 14-inch pipe line across a portion of the lands. It still claims the right to these improvements, but makes no other claim of right, title, or interest to the land or any part thereof.

The record does not show exactly how Stowell obtained his rights to the waters of this creek, although the testimony sent up with the record indicates that one Haynes settled upon the land in question in 1869, and obtained a patent either in August or September, 1878; that he used the water from the creek to irrigate the land; made a dam and a ditch and ran it down to the ranch; that he began using the water in March, 1870, and so used it up to the spring of 1878, when he obtained the patent, sold to Stowell, and conveyed the land by deed.

Conceding, however, that, under the findings, we cannot look back of 1883, when Stowell entered the land and laid a 12-inch pipe line there, under a claim of ownership of the water right, we see no reason why he and his grantees are not protected by § 9 of the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), which declares that, "whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed."

Bearing in mind that these lands were from July 6, 1886, the *date of the forfeit- [184] ure, public lands, subject to the pre-emption, homestead, or settlement laws, and that at the time Stowell entered upon the land, and constructed a pipe line thereon (1883), which at that time seems to have been wholly unoccupied, we think the fact that Heckenlively, under his agreement of purchase of February 28, 1887, and shortly after the same was executed, entered upon the land and began the construction of a

ditch and tunnel there, becomes immaterial, since there is a finding that he never settled upon the land, cultivated or fenced it, or took possession of it, and no finding how long he continued the construction of the ditch or tunnel, or the amount of work in connection therewith. For aught that appears he may have abandoned it immediately. There is no evidence that the original grantees from the railroad company, or their successors in interest, ever sought to take advantage of the act of 1887, or ever applied to purchase the lands, or made payment to the United States, or did anything whatever before the beginning of this suit to indicate that they relied upon this statute. We agree with the supreme court of California that the plaintiff was not entitled, upon the showing of a mere right to purchase, to demand that its title be adjudged good and valid, and that the defendant had no estate or interest in the land, or that it should be enjoined from asserting any claim adverse to the plaintiff, or that it should recover possession of the land, with the right of ousting the defendant from the improvements which its predecessors had made thereon.

An inceptive right under the statute was an insufficient basis of recovery. A party cannot rest forever on such a right, but is required by the statute, before asserting it against innocent third parties, to take some steps to perfect it. The litigation seems to turn really upon the respective rights of the parties to the waters of San Dimas creek, and as defendant's predecessors first appropriated them, and the plaintiff shows no superior title, it cannot prevail against the ranch company. In view of the uncertain character of the finding that Heckenlively did, shortly after his purchase, enter upon the land and commence the construction of a ditch and tunnel thereon, we are unable to see how the case is affected by the fact [185] that, in *July and August of the same year, the defendant entered upon the land and constructed their forebay or dam, and laid a 14-inch pipe in addition to the 12-inch pipe which Stowell had laid in 1883. We express no opinion as to the possibility of the plaintiff maintaining a second action upon its patent since obtained, or how far this case may, if at all, operate as *res judicata* in that.

*There was no error in the decree of the Supreme Court, and it is therefore affirmed.*

Mr. Justice **McKenna** took no part in the disposition of this case.

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## THE ROANOKE.

(See S. C. Reporter's ed. 185-199.)

*Constitutional law—validity of state statute creating lien on foreign vessels—interference with Federal admiralty jurisdiction.*

An unlawful interference with the exclusive jurisdiction of admiralty and maritime cases, vested by the Federal Constitution in the courts of the United States, is made by the attempt by 2 Bal. (Wash.) Code & Stat. §§ 5953, 5954, to create a preferred lien on ocean-going vessels owned in other states or countries for work done and materials furnished on the order of a contractor, which lien may be enforced at any time within three years, although such contractor has been paid in full by the owner without knowledge of any unpaid claims.

[No. 123.]

*Submitted December 17, 1902. Decided March 2, 1903.*

APPEAL from the District Court of the United States for the District of Washington to review a decree enforcing a lien for labor and materials furnished to a contractor charged with the repair of a vessel. *Reversed* and remanded, with directions to dismiss the libel.

Statement by Mr. Justice **Brown**:

This was a libel *in rem* for materials, and also for work and labor, alleged to have been furnished by the libellants King and Winge in the repair of the steamship Roanoke, to certain contractors with the owners, who had full charge of the alteration and repair of the steamship. An intervening libel was also filed by one Fraser for labor and material furnished under the same conditions.

The cases resulted in decrees for the libellants, from which the North American Transportation & Trading Company, owner of the steamship, appealed directly to this court, and the following facts were found:

"The North American Transportation & Trading Company appeared as claimant and owner, and the vessel was released upon its stipulation.

"It admitted all the allegations of the libel except that the work was done on the credit of the ship, which it denied except that it admitted that libellants had acted under the belief that they had a lien by virtue of law. It then alleged its incorporation and existence under the laws of the state of Illinois, the residence there at all times of its president and general manager, its maintaining only agencies at Seattle and at other places in Alaska and Canada, and its enjoying a high credit. The Roanoke it alleged to be an ocean-going vessel, registered at Chicago, Illinois, under the navigation laws of the United States, with the name of "Chicago" painted on her stern. She was alleged *to have been purchased by [187] claimant in 1898 on the Atlantic coast, and, upon the Pacific coast since that time, employed between Seattle and the mouth of the Yukon in the summer, and between San Francisco and southern ports in the winter. It was further alleged that the claimant

NOTE.—*On the validity of state statutes creating liens on vessels*—see note to Balzley v. The Odorilla (Pa.) 1 L. R. A. 505.

had never given any order for the material and labor described in the libel, and that these were furnished on the order of the contractor, who, before the filing of the libel and without any knowledge by claimant of these unpaid claims, had been paid by this claimant for these materials and labor in full. It was alleged in conclusion that the lien claimed by libellants was claimed under §§ 5953 and 5954 of Ballinger's Code and Statutes of Washington, that such a lien was in this instance void, being in violation of the 8th section of the 1st article of the Constitution of the United States, conferring upon Congress the power to regulate commerce among the several states, was an illegal burden upon interstate commerce, and in violation also of the 14th article of the Constitution of the United States, as depriving claimant of its property without due process of law and without its equal protection, and was in violation of the 2d section of the 3d article of the Constitution conferring on the courts of the United States admiralty and maritime jurisdiction.

"To the intervening libel of Fraser the same answer was made.

"To each of these answers respectively the libellants and intervening libellant excepted as insufficient, and the whole of each, to constitute any answer or defense to the libel.

"The exceptions were sustained, the claimant elected to stand on its answer, and a decree was entered against it and its stipulators for the whole sum claimed in the libels."

*Messrs.* **Frederick Bausman** and **Daniel Kelleher** submitted the cause for appellant:

Whatever encroachments of state law may be tolerated in commerce on land, commerce on sea is a subject even more exclusively within the national care.

*Baltimore & O. R. Co.* v. *Maryland*, 21 Wall. 456, 470, 22 L. ed. 678, 683; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 32, 35 L. ed. 620, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

Hard as it is to conceive that the Federal government will ever permit the encroachment of state liens where both commerce and admiralty are concerned, it is altogether too hard to imagine that they will permit such liens to be unreasonable in themselves.

*The Belfast*, 7 Wall. 624, 19 L. ed. 266.

As regards the admiralty jurisdiction of the Federal government, such laws, whether reasonable in terms or not, are void as to vessels of other states, because wholly unnecessary and in their nature incompatible with the complete system of admiralty and its policy.

*The General Smith*, 4 Wheat. 438, 4 L. ed. 609; *Peyroux* v. *Howard*, 7 Pet. 324, 8 L. ed. 700; *The Belfast*, 7 Wall. 624, 19 L. ed. 266; *The Lottawanna*, 21 Wall. 558, *sub nom. Rodd* v. *Heartt*, 22 L. ed. 654; *The J. E. Rumbell*, 148 U. S. 1, 37 L. ed. 345, 13 Sup. Ct. Rep. 498; *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717; *The New York* v. *Rae*, 18 How. 223, 15 L. ed. 359; *Hall* v. *De Cuir*, 95 U. S. 485, 24 L. ed. 547; *The Globe*, 2 Blatchf. 427, Fed. Cas. No. 5,483; *The Selah*, 4 Sawy. 40, Fed. Cas. No. 12,636; *The Lyndhurst*, 48 Fed. 839; Hughes, Admiralty, p. 108.

*Mr.* **Harold Preston** submitted the cause for appellees. *Messrs. Benton Embree* and *Clarence S. Preston* were with him on the brief:

The laws of the state in which personal property is situated govern respecting the transfer of title to and liens thereon, even where the owner is a nonresident of the state.

*Walworth* v. *Harris*, 129 U. S. 355, 32 L. ed. 710, 9 Sup. Ct. Rep. 340; *Brown* v. *Smart*, 145 U. S. 454, 36 L. ed. 773, 12 Sup. Ct. Rep. 958; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 32, 35 L. ed. 619, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *The Iris*, 40 C. C. A. 301, 100 Fed. 104, 106; *Green* v. *Van Buskirk*, 5 Wall. 307, 18 L. ed. 599, 7 Wall. 139, 19 L. ed. 109.

In those respects in which Congress has not exercised its power to regulate interstate and foreign commerce, state legislation is valid so long as it affects such commerce only indirectly or remotely.

*Kidd* v. *Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6, and citations; *Lake Shore & M. S. R. Co.* v. *Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465, and citations; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Re Rahrer*, 140 U. S. 545, *sub nom. Wilkerson* v. *Rahrer*, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

There seems to be no just ground for a distinction between commerce on land and commerce by water.

*Baltimore & O. R. Co.* v. *Maryland*, 21 Wall. 456, 22 L. ed. 678; *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. ed. 819.

This court draws a distinction between the effect of taxation upon the instruments of interestate commerce, and the regulation of such commerce by other means.

*Sherlock* v. *Alling*, 93 U. S. 99, 23 L. ed. 819; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 632, 42 L. ed. 878, 884, 18 Sup. Ct. Rep. 488; *Louisville & N. R. Co.* v. *Kentucky*, 161 U. S. 677, 701, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Pittsburg & S. Coal Co.* v. *Louisiana*, 156 U. S. 590, 598, 599, 39 L. ed. 544, 548, 5 Inters. Com. Rep. 18, 15 Sup. Ct. Rep. 459.

Compulsory pilotage laws of a state, while admitted to be regulations of commerce, are held valid so long as Congress refrains from legislating on the subject.

*Cooley* v. *Philadelphia Port Wardens*, 12 How. 299, 320, 13 L. ed. 996, 1005; *Huus* v. *New York & P. R. S. S. Co.* 182 U. S. 392, 393, 45 L. ed. 1146, 1147, 21 Sup. Ct. Rep. 827; *The China*, 7 Wall. 53, 19 L. ed. 67; *Ex parte McNiel*, 13 Wall. 236, 20 L. ed.

624; *Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450, 17 L. ed. 805.

So long as Congress does not interpose to regulate the subject, the rights of materialmen furnishing necessaries to a vessel in her home port may be regulated in each state by state regulation.

*The Lottawanna*, 21 Wall. 558, *sub nom. Rodd* v. *Heartt*, 22 L. ed. 654.

There would be no reason or justice in exempting vessels owned by nonresidents, when employed within this state, from liabilities and burdens imposed upon vessels having resident owners.

*McRae* v. *Bowers Dredging Co.* 86 Fed. 344, 350.

Any law which discriminates in favor of nonresident shipowners is equally as obnoxious to the principles of justice and the requirements of fair trade as a law which discriminates against nonresident shipowners.

*The Robert Dollar*, 115 Fed. 218, 221.

A lien conferred by a state statute as incident to a maritime contract is, for all practical purposes, a maritime lien; and such a lien is cognizable in the admiralty.

*The J. E. Rumbell*, 148 U. S. 1, 20, 37 L. ed. 345, 350, 13 Sup. Ct. Rep. 498; *The Glide*, 167 U. S. 606, 42 L. ed. 296, 17 Sup. Ct. Rep. 930; *The Robert Dollar*, 115 Fed. 218.

It will not do to confound questions of jurisdiction with those of mere procedure.

*The Glide*, 167 U. S. 612, 42 L. ed. 298, 17 Sup. Ct. Rep. 930.

The changes made in the 12th admiralty rule by this court seem to evince a purpose to place vessels, both domestic and foreign, on an equal footing as regards the enforcement of liens, whether arising under the general maritime law or created by state statutes.

*The Robert Dollar*, 115 Fed. 223; *The Lottawanna*, 21 Wall. 558, *sub nom. Rodd* v. *Heartt*, 22 L. ed. 654.

The distinction between the effect in admiralty of local laws which are consistent with the principles of the general maritime law, and those which are inconsistent therewith, is upheld in *Workman* v. *New York*, 179 U. S. 552, 45 L. ed. 314, 21 Sup. Ct. Rep. 212.

Mr. Justice **Brown** delivered the opinion of the court:

This case is appealed directly from the district court to this court under that clause of § 5 of the court of appeals act which permits such appeal "in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States." [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549.] No additional significance is given to the appeal by certain questions certified by the district court, as the power to certify is only given in cases appealed upon questions of jurisdiction. But as the case is properly before us upon direct appeal from the district court; we proceed to dispose of the question of the constitutionality of the law of Washington, under which these proceedings were taken.

*By that law (2 Ballinger's Codes and Statutes, §§ 5953 and 5954)— [193]

"5953. All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable—

. . . . . .

"3. For work done or material furnished in this state, for their construction, repair, or equipment, at the request of their respective owners, masters, agents, consignees, contractors, subcontractors, or other person or persons having charge in whole or in part of their construction, alteration, repair, or equipment; and every contractor, subcontractor, builder, or person having charge, either in whole or in part, of the construction, alteration, repair, or equipment of any vessel, shall be held to be the agent of the owner, for the purposes of this chapter; . . .

"Demands for these several causes constitute liens upon all steamers, vessels, and boats, and their tackle, apparel, and furniture, and have priority in their order herein enumerated, and have preference over all other demands; but such liens only continue in force for the period of three years from the time the cause of action accrued."

"5954. Such liens may be enforced in all cases of maritime contracts or service by a suit in admiralty, *in rem*, and the law regulating proceedings in admiralty shall govern in all such suits; and in all cases of contracts or service not maritime by a civil action in any district court of this territory."

In this connection the following propositions may be considered as settled:

1. That by the maritime law, as administered in England and in this country, a lien is given for necessaries furnished a foreign vessel upon the credit of such vessel (*The General Smith*, 4 Wheat. 438, 4 L. ed. 609; *The Grapeshot*, 9 Wall. 129, *sub nom. The Grapeshot* v. *Wallerstein*, 19 L. ed. 651; Gen. Admiralty Rule 12); and that in this particular the several states of this Union are treated as foreign to each other. *The General Smith*, 4 Wheat. 438, 4 L. ed. 609; *The Kalorama*, 10 Wall. 204, 212, *sub nom. Pendergast* v. *The Kalorama*, 19 L. ed. 943.

2. That no such lien is given for necessaries furnished in the home port of the vessel or in the port in which the vessel is owned, registered, enrolled, or licensed, and the remedy in such *case, though enforceable [194] in the admiralty, is *in personam* only. *The Lottawanna*, 21 Wall. 558, *sub nom. Rodd* v. *Heartt*, 22 L. ed. 654; *The Edith*, 94 U. S. 518, *sub nom. Poole* v. *Tyler*, 24 L. ed. 167. This is a distinct departure from the Continental system, which makes no account of the domicil of the vessel, and is a relic of the prohibitions of Westminster Hall against the court of admiralty, to the principle of which this court has steadily adhered.

3. That it is competent for the states to create liens for necessaries furnished to do-

mestic vessels, and that such liens will be enforced by the courts of admiralty under their general jurisdiction over the subject of necessaries. *The General Smith*, 4 Wheat. 438, 4 L. ed. 609; *Peyroux* v. *Howard*, 7 Pet. 324, 8 L. ed. 700; *The St. Lawrence*, 1 Black, 522, *sub nom. Meyer* v. *Tupper*, 17 L. ed. 180; *The Lottawanna*, 21 Wall. 558, *sub nom. Rodd* v. *Heartt*, 22 L. ed. 654; *The Belfast*, 7 Wall. 624, *sub nom. The Belfast* v. *Boon*, 19 L. ed. 266; *The J. E. Rumbell*, 148 U. S. 1, 12, 37 L. ed. 345, 347, 13 Sup. Ct. Rep. 498. The right to extend these liens to foreign vessels in any case is open to grave doubt. *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717; *The Lyndhurst*, 48 Fed. 839.

The question involved in this case, however, is whether the states may create such liens as against foreign vessels (vessels owned in other states or countries), and under such circumstances as would not authorize a lien under the general maritime law. The question is one of very considerable importance, as it involves the power of each state, which a vessel may visit in the course of a long voyage, to impose liens under wholly different circumstances and upon wholly different conditions. In the case under consideration the vessel was owned by an Illinois corporation, enjoying a high credit, and maintaining agencies at Seattle and at other places in Alaska and Canada. The Roanoke was an ocean-going vessel, registered at Chicago under the navigation laws of the United States, with the name "Chicago" painted on her stern, although she was engaged in trade upon the Pacific coast between Seattle and the mouth of the Yukon in summer, and between San Francisco and southern ports in winter. Neither the owner nor master nor other officers of the vessel had given an order for the material and labor set forth in the libel, which were furnished upon the order of [195] a contractor, who, before the filing *of the libel and without any knowledge by the owner of these unpaid claims, *had been paid in full for these claims.*

Although this court has never directly decided whether materials and labor furnished by workmen or subcontractors constitute a lien upon a vessel, — in other words, whether the contractor can be regarded as an agent of the vessel in the purchase of such labor and materials,—there is a general consensus of opinion in the state courts and in the inferior Federal courts that labor and materials furnished to a contractor do not constitute a lien upon the vessel, unless at least notice be given to the owner of such claim before the contractor has received the sum stipulated by his contract. *Smith* v. *The Eastern Railroad*, 1 Curt. C. C. 253, Fed. Cas. No. 13,039; *Southwick* v. *The Clyde*, 6 Blackf. 148; *Hubbell* v. *Denison*, 20 Wend. 181; *Burst* v. *Jackson*, 10 Barb. 219; *The Whitaker*, 1 Sprague, 229, 282, Fed. Cas. Nos. 17,524, 17,525; *Harper* v. *The New Brig*, Gilpin, 536, Fed. Cas. No. 6,090; *Ames* v. *Swett*, 33 Me. 479; *Squire* v. *100 Tons of Iron*, 2 Ben. 21, Fed. Cas. No. 13,270; *The Marquette*, Brown, Adm. 354, Fed. Cas. No. 9,101.

The injustice of permitting such claims to be set up is plainly apparent. The master is the agent of the vessel and its owner in more than the ordinary sense. During the voyage he is in fact the *alter ego* of his principal. He is intrusted with an uncontrolled authority to provide for the crew, and for the preservation and repair of the ship. He engages the cargoes, receives the freight, hires and pays his crew, and is intrusted, perhaps for years, with the command and disposition of the vessel. With full authority to bind the vessel, his position is such that it is almost impossible for him to acquaint himself with the laws of each individual state he may visit, and he has a right to suppose that the general maritime law applies to him and his ship, wherever she may go, unhampered by laws which are mainly intended for local application, or for domestic vessels. Local laws, such as the one under consideration, ordinarily protect the ship by requiring notice of the claim to be filed in some public office, limiting the time to a few weeks or months within which the laborer or subcontractor may proceed against her, requiring notice to be given of the claim, before the contractor himself has been paid, and limiting his recovery *to the amount remaining un- [196] paid at the time such notice is received. The statute of Washington, however, provides for an absolute lien upon the ship for work done or material furnished at the request of the contractor or subcontractor, and makes no provision for the protection of the owner in case the contractor has been paid the full amount of his bill before notice of the claim of the subcontractor is received. The finding in this case is that the contractor, who had agreed, in consonance with the usual course of business, to make the repairs upon this vessel, had been paid in full by the claimant. The injustice of holding the ship under the circumstances is plainly manifest.

Not only is the statute in question obnoxious to the general maritime law in declaring every contractor and subcontractor an agent of the owner, but it establishes a new order of priority in payment of liens, abolishes the ancient and equitable rule regarding "stale claims," and permits the assertion of a lien at any time within three years, regardless of the fact that the vessel may have been sold to a bona fide purchaser, not only without notice of the claim, but without the possibility of informing himself by a resort to the public records. It also gives, or at least creates the presumption of, a lien, though the materials be furnished upon the order of the owner in person.

No opinion upon this subject can afford to ignore the admirable discussion of Mr. Justice Story in the case of *The Chusan*, 2 Story, 455, Fed. Cas. No. 2,717, in which he refused to apply to a Massachusetts vessel a law of the state of New York, requiring

a lien for supplies to be enforced before the vessel left the state:

"This statute is, as I conceive, perfectly constitutional, as applied to cases of repairs of domestic ships, that is, of ships belonging to the ports of that state. . . . But in cases of foreign ships and supplies furnished to them the jurisdiction of the courts of the United States is governed by the Constitution and laws of the United States, and is in no sense governed, controlled, or limited by the local legislation. . . . For myself, I can only say that during the whole of my judicial life I have never up to the present hour heard a single doubt breathed upon the subject." To the same effect is *The Lyndhurst*, 48 Fed. 839.

[197] *While no case involving this precise question seems to have arisen in this court, we have several times had occasion to hold that where Congress has dealt with a subject within its exclusive power, or where such exclusive power is given to the Federal courts, as in cases of admiralty and maritime jurisdiction, it is not competent for states to invade that domain of legislation, and enact laws which in any way trench upon the power of the Federal government. Cases arising in other branches of the law furnish apt analogies. The principle is stated in a nutshell by Chief Justice Marshall in *Sturges* v. *Crowninshield*, 4 Wheat. 122, 193, 4 L. ed. 529, 548: "But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the states has not been expressly prohibited. The confusion resulting from such a practice would be endless. . . . That whenever the terms in which a power is granted to Congress, or the nature of the power, required that it should be exercised exclusively by Congress, the subject is as completely taken from the state legislatures as if they had been expressly forbidden to act on it." This was said of a bankrupt law of New York which assumed to discharge the debtor from all liability for debts previously contracted, notwithstanding the Constitution had vested the power in Congress of establishing uniform laws on the subject of bankruptcy. It was held that the states had a right to pass bankrupt laws until the power had been acted upon by Congress, though the law of New York discharging the debtor from liability was held to be void as impairing the obligation of prior contracts within the meaning of the Constitution.

In *Hall* v. *DeCuir*, 95 U. S. 485, 498, 24 L. ed. 547, 551, it was said that, inasmuch as interstate commerce is regulated very largely by congressional legislation, it followed that such legislation must supersede all state legislation upon the same subject, and, by necessary implication, prohibit it, except in cases where the legislation of Congress manifests an intention to leave some particular matter to be regulated by the several states, as, for instance, in the case of pilotage. *Cooley* v. *Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996. Upon this principle it was held that a law of Louisiana excluding colored passengers from the cabin set *apart for the use of [198] whites during the passage of steamboats down the Mississippi, was a regulation of interstate commerce, and therefore unconstitutional. To the same effect is *Sinnot* v. *Davenport*, 22 How. 227, 16 L. ed. 243. In the subsequent cases of *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348, and *Plessy* v. *Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138, state laws requiring separate railway carriages for the white and colored races were sustained upon the ground that they applied only between places in the same state.

In the very recent case of *Easton* v. *Iowa*, 188 U. S. 220, *ante*, 452, 23 Sup. Ct. Rep. 288, it was held that a state law punishing presidents of banks receiving deposits of money at a time when the bank was insolvent, and when such insolvency was known to them, was unconstitutional as applied to national banks whose operations were governed exclusively by acts of Congress. Said Mr. Justice Shiras: "But we are unable to perceive that Congress intended to leave the field open for the states to attempt to promote the welfare and stability of national banks by direct legislation. If they had such power it would have to be exercised and limited by their own discretion, and confusion would necessarily result from control, possessed and exercised by two independent authorities." See also *Farmers' & M. Nat. Bank* v. *Dearing*, 91 U. S. 29, 23 L. ed. 196; *M'Culloch* v. *Maryland*, 4 Wheat. 425, 4 L. ed. 606.

The following cases are also to the same general effect: *Degant* v. *Michael*, 2 Ind. 396; *State* v. *Pike*, 15 N. H. 83; *Lynch* v. *Clarke*, 1 Sandf. Ch. 583, 644; *Jack* v. *Martin*, 12 Wend. 311; *Ex parte Hill*, 38 Ala. 429, 450; *People* v. *Fonda*, 62 Mich. 401, 29 N. W. 26. Although it is equally true that where Congress, having the power, has exercised it but incidentally, and obviously with no intention of covering the subject, the states may supplement its legislation by regulations of their own not inconsistent with it. *Reid* v. *Colorado*, 187 U. S. 137, *ante*, 108, 23 Sup. Ct. Rep. 92.

Bearing in mind that exclusive jurisdiction of all admiralty and maritime cases is vested by the Constitution in the Federal courts, which are thereby made judges of the scope of such jurisdiction, subject, of course, to congressional legislation, the statute of the state of Washington, in so far as it attempts to *control the administration of [199] the maritime law by creating and superadding conditions for the benefit of a particular class of creditors, and thereby depriving the owners of vessels of defenses to which they would otherwise have been entitled, is an unlawful interference with that jurisdiction, and to that extent is unconstitutional and void.

*The decree of the District Court is there-*

*fore reversed*, and the case remanded to that court with directions to dismiss the libels.

Mr. Justice **Harlan** concurred in the result.

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UNITED STATES, *Appt.*,
*v.*
EVETT D. NIX. (No. 142)

EVETT D. NIX, *Appt.*,
*v.*
UNITED STATES. (No. 195)

(See S. C. Reporter's ed. 199-206.)

*Marshals—mileage fees—per diem fee— approval of account by court—statutes—repeal—special and general acts—evidence—escape of prisoner—presumption of negligence.*

1. A United States marshal is not entitled to mileage for the distance traveled in serving warrants of arrest, in excess of the usually traveled route between the place of receiving the writs and the place of service, however great the necessity of pursuing a circuitous route, in view of U. S. Rev. Stat. § 829 (U. S. Comp. Stat. 1901, p. 636), which directs such mileage to be computed "from the place where the process is returned to the place of service."
2. The *per diem* fee for the attendance of a United States marshal at a court which has been opened for business by order of the judge is allowable, although business may not have been transacted in court on such day, and the judge may not have been present.
3. The special provision of 26 Stat. at L. 81, chap. 182, § 10, that persons charged with any offense against the territory of Oklahoma shall in all cases be taken before the United States commissioner whose office is nearest to the place where the offense was committed, was not repealed by the general provisions of the sundry civil appropriation bill of August 18, 1894 (28 Stat. at L. 372, chap. 301), that marshals shall take arrested persons before the commissioner nearest the place of arrest, or shall be entitled to no mileage therefor.
4. The allowance by the district judge of the account of a United States marshal is prima facie evidence of the correctness of the mileage items of such account.
5. The expense of transporting a prisoner under a warrant of commitment cannot be allowed a United States marshal, where such prisoner escaped from the custody of his deputy before he could be delivered to the penitentiary, and there is no finding of due diligence on the part of the officer to prevent the escape.
6. A prisoner who escapes from the custody of a deputy marshal while going to supper in a hotel will be presumed to have escaped through the officer's negligence.

[Nos. 142, 195.]

*Submitted December 18, 1902. Decided March 2, 1903.*

ON APPEALS from the Court of Claims to review a judgment in favor of a United States marshal for a portion of the fees claimed by him in his petition. *Reversed* and remanded for further proceedings.

See same case below, 36 Ct. Cl. 598.

Statement by Mr. Justice **Brown**:

This is a petition for marshal's fees for the district of Oklahoma, upon which the court of claims made the findings of fact set forth in the margin.†

†I. The claimant, Evett D. Nix, was United States marshal for the district of Oklahoma from July 1, 1893, to February 24, 1896, appointed, qualified, and acting.

II. During said period the claimant, as such marshal, by his deputies, performed services and travel and incurred expenses in behalf of the United States, and his accounts therefor, verified by his oath and approved by the court in accordance with the law, were finally acted upon by the accounting officers of the Treasury Department, and part thereof was allowed and paid, but a part thereof, as more specifically set forth in finding 3, was disallowed, and no portion thereof has been paid to the claimant.

III. Item 2. To travel, 1,153 miles in going to serve warrants of arrest, at 6 cents per mile, $69.18, being for travel in excess of the distance from the place of arrest to the place of receiving writs. The travel charged for was in a new and unsettled Indian country, without postoffices, post routes, or section lines. The defendants were moving about from place to place to avoid arrest, and it was necessary to travel a circuitous route. The deputies had to find fordable places to cross the river to locate the defendants, there being no bridges. After arrest the defendants were taken by the most direct routes to commissioners for examination.

Item 10. For attendance of the marshal at court, by deputy, for twenty days, at $5 per day, $100.00.

It does not appear whether business was transacted in the court on said days, although the court was opened for business by order of the judge. It does not appear that the judge was present at court on any of these days.

Item 12. This item was charged in claimant's accounts as transportation of prisoners, deputies, and guards from the several places of arrest, for hearing before the United States commissioners whose offices were nearest the places where the crimes for which the prisoners were arrested were committed. The number of miles charged in claimant's accounts for this travel was 51,355 miles, at 10 cents a mile, amounting to $5,135.50.

Those accounts were submitted to the United States district court for Oklahoma under the provisions of the act of February 22, 1875 (18 Stat. at L. chap. 95, 333), and the said accounts, including this item, as above charged, were approved by that court. When the accounts so approved were submitted to the accounting officers, all the charges for travel included in that item were disallowed by them under the provisions of the sundry civil appropriation act of August 18, 1894 (28 Stat. at L. 372-416 chap. 301, U. S. Comp. Stat. 1901, p. 717), which made it the duty of the marshal to take the defendant before the nearest circuit court commissioner or the nearest judicial officer having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial. Subsequently the accounting officers allowed and paid claimant of this item $27.

After suit was brought in this court, the

*Mr.* **Felix Brannigan** and *Assistant Attorney General* **Pradt** submitted the causes for the United States.

*Messrs.* **Franklin H. Mackey** and **Frank B. Crosthwaite,** submitted the cause for Nix:

The approval of the marshal's accounts is prima facie evidence of its correctness, and, in the absence of clear and unequivocal proof to the contrary, it should be conclusive.

*United States* v. *Jones,* 134 U. S. 483, 488, 33 L. ed. 1007, 1008, 10 Sup. Ct. Rep. 615; *United States* v. *Poinier,* 140 U. S. 163, 35 L. ed. 395, 11 Sup. Ct. Rep. 752; *United States* v. *Barber,* 140 U. S. 179, 35 L. ed. 399, 11 Sup. Ct. Rep. 751; *United States* v. *Harmon,* 147 U. S. 268, 37 L. ed. 164, 13 Sup. Ct. Rep. 327.

Specific and general statutory provisions may subsist together, the former qualifying the latter.

*Magone* v. *King,* 2 C. C. A. 363, 1 U. S. App. 267, 51 Fed. 525, 526; *State ex rel. Fosdick* v. *Perrysburg,* 14 Ohio St. 480; *Churchill* v. *Crease,* 5 Bing. 177; *State* v. *Clarke,* 25 N. J. L. 54. See also *State, Bartlett, Prosecutor,* v. *Trenton,* 38 N. J. L. 64, to same effect; Noy, Maxims; *Townsend* v. *Little,* 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357; *London, C. & D. R. Co.* v. *Wandsworth Dist. Bd. of Works,* L. R. 8 C. P. 185; Bishop, Written Laws, § 112a.

Mr. Justice **Brown** delivered the opinion of the court:

Item 2 of the third finding, namely, [201] "traveling 1,153 miles *in going to serve warrants of arrest, at 6 cents per mile, $69.18," involves the question whether travel in excess of the distance from the place of service to the place of receiving the writs can be allowed, in view of the fee bill for marshals. Rev. Stat. § 829 (U. S. Comp. Stat. 1901, p. 636), provides "for travel, in going only, to serve any process, warrant, attachment, or other writ, including writs of subpœna in civil or criminal cases, 6 cents a mile, to be computed, from the place where the process is returned to the place of service." This has always been interpreted to mean by the usual traveled route (*Hitch* v. *United States,* 66 Fed. 937), the length of which is not given in the finding. The excuse for not pursuing the route in this case is that it was a new and unsettled Indian country; that defendants were moving about from place to place to avoid arrest, and it was necessary to travel a circuitous route; and that, in the absence of bridges, the deputies had to find fordable places to cross the river to locate the defendants.

*However equitable the charge may have [202] been in this particular case, there is no authority of law for its allowance. There is, however, a special provision in the last clause of § 829 (U. S. Comp. Stat. 1901, p. 636) by which "in all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath to the satisfaction of the court." This seems to contemplate the very contingency which arose in this case, of a number of miles actually and necessarily traveled in excess of the direct route from the place where the process

claimant's deposition was taken in respect to this item, and he proved that, of his own knowledge, 11,433 miles were traveled in the transportation of said prisoners, deputies, and guards. As to the remainder of the travel, he could not testify of his own knowledge, because that travel had been performed by certain of his deputies who were not then in the territory, and who, he supposed, were in Alaska or the Philippine Islands. The depositions of those deputies were not taken. No other evidence was offered by the claimant to establish the number of miles actually traveled than the approval of the district court for Oklahoma and his own deposition subsequently taken, as above stated. If the approval of his account by said district court is competent evidence to establish the number of miles actually traveled, this court finds the ultimate fact that he traveled 51,355 miles. If such approval of the district court is incompetent to establish the number of miles actually traveled, this court finds that the number of miles so traveled was 11,433 in the transportation of prisoners, deputies, and guards, as before set forth.

Item 16. For service of a capias and transportation (mileage) of a deputy, prisoner, and guard. The capias was issued by the clerk of the United States district court at Topeka, Kansas, on an indictment found by the grand jury at Topeka. The capias was received by the claimant in Oklahoma city and was executed by arresting the prisoner named in the capias, who was transported to the United States district court at Wichita, Kansas.

The claimant charged 6 cents a mile for going 62 miles, from Oklahoma city to Perry, to serve the writ, $2 for the service of the writ, and 10 cents per mile each for the deputy, prisoner, and guard for 111 miles, $33.30, from Perry, Oklahoma, to Wichita, Kansas, and one meal for the prisoner, 75 cents, making a total of $39.77.

Item 24. For actual expenses for transporting a prisoner from Springfield, Ohio, to the penitentiary at Brooklyn, New York, under a warrant of commitment. The warrant of commitment was issued at Oklahoma, and the marshal transported the prisoner on that warrant to Springfield, Ohio, where the prisoner was temporarily detained as a witness for the United States in a counterfeiting case. The prisoner having been discharged as a witness in that case at Springfield, the marshal continued his transportation from Springfield to New York city on the original warrant of commitment. The prisoner, with a deputy and guard, arrived in New York city too late for the prisoner to be received at the Brooklyn penitentiary on the day of arrival in New York, and he escaped from the custody of the deputy on the night of the same day while they were going to supper in the hotel where they were stopping. The marshal made every effort to retake the prisoner, and failed. $90.50.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant recover judgment of and from the United States in the sum of one hundred and eight dollars and ninety-five cents ($108.95) on items 2 and 16 of finding 3.

All other items disallowed.

was returned to the place of service. It reimburses the marshal his expenses, but denies him a profit upon them. This item must be disallowed.

(2) Item 10. "For attendance of the marshal at court by deputy, 20 days at $5 per day, $100." The fact that it did not appear whether business was transacted in court on these days, or whether the judge was present in court, was immaterial, in [203] *view of the fact that the court was opened for business by order of the judge. *United States* v. *Finnell*, 185 U. S. 236, 46 L. ed. 890, 22 Sup. Ct. Rep. 633; *McMullen* v. *United States*, 146 U. S. 360, 36 L. ed. 1007, 13 Sup. Ct. Rep. 127. For aught that appears, the attendance may have been under the circumstances in which a similar charge was allowed in *United States* v. *Pitman*, 147 U. S. 669, 37 L. ed. 324, 13 Sup. Ct. Rep. 425. Where the court is opened for business by order of the judge, it is the duty of the marshal to attend, and there is no reason why he should not receive his *per diem* therefor as if the judge were actually present. This claim is not contested by the government, and should be allowed.

(3) Item 12, for the transportation of prisoners arrested under warrants issued by United States commissioners, involves two questions: First, whether travel should have been charged from the place of arrest to the *nearest* circuit court commissioner, or to the office of the commissioner *nearest to the place where the crimes* with which the prisoners were charged *were committed;* second, whether, assuming the position of the claimant in this particular to be correct, as matter of law, there was sufficient evidence of the number of miles traveled to entitle him to the charge of $5,135.50.

By "An Act to Provide a Temporary Government for the Territory of Oklahoma" (26 Stat. at L. 81, chap. 182), a certain portion of the Indian territory was set off [204] as a territorial government under the *name of Oklahoma. By § 9 the judicial power of the territory was vested in certain courts, and the usual executive and judicial offices created. By § 10, "persons charged with *any* offense or crime in the territory of Oklahoma, and for whose arrest a warrant has been issued, may be arrested by the United States marshal or any of his deputies, wherever found in said territory, but in *all cases* the accused shall be taken, for preliminary examination, before a United States commissioner, or a justice of the peace of the county, whose office is nearest to the place where the offense or crime was committed. All offenses committed in said territory, if committed within any organized county, shall be prosecuted and tried within said county." By § 28, "the Constitution and all the laws of the United States not locally inapplicable shall, except so far as modified by this act, have the same force and effect as elsewhere within the United States."

This is the act upon which the claimant relies for his right to travel, while, upon the other hand, the government contends that this act was repealed by a general act of August 18, 1894 (28 Stat. at L. 372, chap. 301), making appropriations for sundry civil expenses for the year 1895, one of the clauses of which, under the head of "Judicial," provides that "it shall be the duty of the marshal, his deputy or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the *nearest* circuit court commissioner, or the *nearest* judicial officer, having jurisdiction under existing laws, for a hearing, commitment, or taking bail for trial; and the officer or magistrate issuing the warrant shall attach thereto a certified copy of the complaint, . . . and no mileage shall be allowed any officer violating the provisions hereof."

The object of this statute was manifestly to amend Rev. Stat. § 829, which provided that the mileage of the marshal for transportation of prisoners should be computed from the place where the process was served to the place where it was returned. This statute provides that he shall be taken to the circuit court commissioner nearest the place of arrest, regardless of the fact by whom the warrant was issued. Inasmuch as the later act is a general one, applicable to marshals generally throughout *the coun- [205] try, we do not think it was intended to repeal or interfere with the former act, providing specially for persons charged with *any* offense or crime in the territory of Oklahoma, and that in *all cases*, whether the crime was committed against the territory or the general government, the accused shall be taken before a commissioner whose office is nearest to the place where the offense or crime was committed.

The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in *Townsend* v. *Little*, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357, that special and general statutory provisions may subsist together, the former qualifying the latter. See also *Churchill* v. *Crease*, 5 Bing. 177; *Magone* v. *King*, 2 C. C. A. 383, 1 U. S. App. 267, 51 Fed. 525, and cases cited; *State* v. *Clarke*, 25 N. J. L. 54.

It would seem that this construction works no particular hardship upon the government, since in all cases where the criminal is unable to give bail he is required to be ultimately transported for trial to the county wherein the crime was committed.

The second question connected with this item is whether the marshal produced sufficient evidence of the number of miles traveled. His claim was for 51,350 miles at 10 cents per mile. He was unable to prove, of his own knowledge, more than 11,433 miles. As to the remainder he could not testify of his own knowledge, because that travel had been performed by certain of his deputies who were not then in the territory, and who, he supposed, were in Alaska or the Philippine islands. The depositions of those deputies were not taken. He showed,

however, that his accounts had been allowed by the district judge. That was sufficient to cast upon the government the burden of showing any error of fact in his account. *United States* v. *Jones*, 134 U. S. 483, 33 L. ed. 1007, 10 Sup. Ct. Rep. 615. In that case we held that the approval of the commissioner's account by a circuit court of the United States, under the act of February 22, 1875 (18 Stat. at L. 333, chap. 95), was prima facie evidence of the correctness of the items of that account, and, in the absence of clear and unquestionable proof of mistake on the part of the [206] court, it should be conclusive. We *adhere to that view. It would be an insupportable burden upon the officers of courts if, every time a question was made before the accounting officers of the Treasury of the correctness of their account, they were required to produce affirmative evidence of every item. This was evidently not contemplated by the statute. Notwithstanding this, however, there is no doubt that the account may be impeached for error of law. *McMullen* v. *United States*, 146 U. S. 360, 36 L. ed. 1007, 13 Sup. Ct. Rep. 127. This item should have been allowed in full, less the amount paid.

(4) Item 24, for actual expenses in transporting a prisoner from Springfield, Ohio, to the penitentiary at Brooklyn, New York, under a warrant or commitment, is the only other one contested. The prisoner with a deputy and guard arrived in New York too late for the prisoner to be received at the Brooklyn penitentiary on the same day, and that night he escaped from the custody of the deputy while they were going to supper in the hotel where they were staying.

As there is no finding, either by the district judge in approving his accounts or by the court of claims, of due diligence on the part of the officer to prevent the escape, the item was properly disallowed. The presumption is that he escaped by negligence. *State* v. *Hunter*, 94 N. C. 829; *State* v. *Lewis*, 113 N. C. 622, 18 S. E. 69; *Shattuck* v. *State*, 51 Miss. 575.

*The judgment of the Court of Claims will therefore be reversed*, and the case remanded to that court for further proceedings in conformity with this opinion.

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[207] *DAVIS & FARNUM MANUFACTURING COMPANY, *Appt.*,

*v.*

CITY OF LOS ANGELES.

(See S. C. Reporter's ed. 207-221.)

*Appeal—direct appeal from circuit court—equity—injunction against criminal proceedings—adequate remedy at law.*

1. An appeal lies directly to the Supreme Court of the United States from a decree of a circuit court dismissing a bill which is based, not only upon diversity of citizenship, but upon the alleged unconstitutionality of certain municipal ordinances as impairing the obligation of a contract with the municipality under prior ordinances.

2. The absence of an adequate remedy at law cannot be urged by a subcontractor who has contracted to erect gas works on certain premises, as a ground for injunctive relief to prevent the enforcement, by criminal proceedings against his employees, of municipal ordinances prohibiting the erection or maintenance of such structures within certain limits, which are alleged to infringe the obligation of the contract of the owner of the land with the municipality under prior ordinances, since his remedy, if any, is by action against the principal contractor, who is presumed to be able to respond in damages for all such which the subcontractor may have suffered by the interruption of the contract.

[No. 507.]

*Submitted January 12, 1903. Decided March 2, 1903.*

ON APPEAL from the Circuit Court of the United States for the Southern District of California to review a decree which dismissed a bill to enjoin the enforcement of certain municipal ordinances alleged to impair the obligation of a contract with the municipality under prior ordinances. *Affirmed.*

See same case below on motion for preliminary injunction, 115 Fed. 537.

Statement by Mr. Justice **Brown**:

This was a bill in equity filed in the circuit court for the southern district of California by appellant, a citizen of Massachusetts, to restrain the city of Los Angeles and its officers from enforcing certain municipal ordinances prohibiting the erection or maintenance of gas tanks or reservoirs within certain portions of the city.

The gravamen of the bill was that on September 1, 1901, Caroline W. Dobbins made a contract with the Valley Gas & Fuel Company, a California corporation, to build certain gas works for her, including all things necessary for the manufacture, *recovery, [208] and storage of gas, on lands thereafter to be designated; that on September 17 the appellant made a contract with the gas and fuel company to erect upon Mrs. Dobbins's premises a water tank and gas holder having a capacity of 100,000 cubic feet of gas, and that immediately thereafter it constructed and prepared the material and machinery necessary for the erection of the tank and gas holder, and shipped the same to Los Angeles; that on September 28 Mrs. Dobbins purchased certain lands in Los Angeles, which were within the limits wherein it was lawful to erect gas works as described

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NOTE. — *On direct review in the Supreme Court of the United States of circuit and district court judgments*—see note to Gwin v. United States, 46 L. ed. U. S. 741.

*On the jurisdiction of equity where remedy at law exists*—see notes to Meldrum v. Meldrum (Colo.) 11 L. R. A. 65; Delaware, L. & W. R. Co. v. Central Stock Yards & Transit Co. (N. J. Eq.) 6 L. R. A. 855; and Tyler v. Savage, 36 L. ed. U. S. 83.

in a municipal ordinance adopted August 26, 1901, and on November 1 applied to the board of fire commissioners for a permit to erect such gas works; that on November 22 her petition came on for hearing before the fire commissioners, and after proof had been made that all provisions of prior ordinances had been complied with, the matter was duly considered, and finally resulted, November 29, in a vote to grant a permit to erect and maintain the gas works.

That upon the 22d day of November Mrs. Dobbins's contractors began at once to lay the foundation for said works at a cost of upwards of $2,500, when, on November 25, the city adopted an ordinance, amending that of August 26, 1901, including her property in the prohibited territory for the erection or maintenance of gas works (which ordinance, however, seems to have proved defective), and subsequently, in February, 1902, caused certain of the employees of the gas and fuel company to be arrested, charging them with a violation of this ordinance. Subsequently, under new proceedings, certain employees of the plaintiff were arrested and the work stopped.

Another ordinance was passed on March 3, 1902, also amending that of August 26, 1901, and other arrests were made of the employees for a violation of this ordinance. It was averred that the gas works are in an uncompleted condition, exposed to the elements and in danger of being destroyed, and that all of the aforesaid ordinances were adopted by the common council at the instigation of the Los Angeles Light Company, which has enjoyed a monopoly of the gas business for the last ten years.

[209] *A demurrer was filed to this bill by the city for want of equity and of jurisdiction, which was sustained by the court, and the bill dismissed (115 Fed. 537), apparently upon the ground that a court of chancery has no power to restrain criminal proceedings, unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there. Whereupon an appeal was taken to this court.

*Messrs.* **Lynn Helm** and **Henry T. Helm** submitted the cause for appellant. *Messrs. Edward C. Bailey, Henry T. Lee,* and *J. R. Scott* were with them on the brief:

This court having jurisdiction of this case for the purpose of determining whether the ordinances are in contravention of the Constitution of the United States, there exists the power in this court to consider all other questions arising on the record.

*Horner* v. *United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Chappell* v. *United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397; *Loeb* v. *Columbia Twp.* 179 U. S. 472, 478, 45 L. ed. 280, 21 Sup. Ct. Rep. 174; *Penn Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 685, 695, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223.

A court of equity has power to restrain by injunction a municipality from instituting criminal proceedings, when such criminal prosecutions are threatened under color of an invalid ordinance, for the purpose of compelling the relinquishment of a property right.

*Central Trust Co.* v. *Citizens' Street R. Co.* 80 Fed. 225, 82 Fed. 1; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Southern Exp. Co.* v. *Ensley*, 116 Fed. 756; *Louisiana State Lottery Co.* v. *Fitzpatrick*, 3 Woods, 222, Fed. Cas. No. 8,541; *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 558; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Wood* v. *Brooklyn*, 14 Barb. 425; *Manhattan Iron Works Co.* v. *French*, 12 Abb. N. C. 446; *Rushville* v. *Rushville Natural Gas Co.* 132 Ind. 575, 15 L. R. A. 321, 28 N. E. 853; *Davis* v. *Fasig*, 128 Ind. 271, 27 N. E. 726; *Platte & D. Canal & Mill. Co.* v. *Lee*, 2 Colo. App. 184, 29 Pac. 1036; *Smith* v. *Bangs*, 15 Ill. 399; *Baltimore* v. *Radecke*, 49 Md. 218, 33 Am. Rep. 239; *Cape May & S. L. R. Co.* v. *Cape May*, 35 N. J. Eq. 419; *Los Angeles City Water Co.* v. *Los Angeles*, 103 Fed. 711; *Atlanta* v. *Gate City Gaslight Co.* 71 Ga. 106; *Austin* v. *Austin City Cemetery Asso.* 87 Tex. 330, 28 S. W. 528; *Port of Mobile* v. *Louisville & N. R. Co.* 84 Ala. 115, 4 So. 106; *Smyth* v. *Ames*, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 378, 46 L. ed. 592, 600, 22 Sup. Ct. Rep. 410; *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 82, 46 L. ed. 808, 815, 22 Sup. Ct. Rep. 585.

The plaintiff has no remedy against the defendant for damages for the wrongful arrest of its employees, or for the destruction of its business and property rights.

*Stedman* v. *San Francisco*, 63 Cal. 193; *Chope* v. *Eureka*, 78 Cal. 588, 4 L. R. A. 325, 21 Pac. 364; *Doeg* v. *Cook*, 126 Cal. 213, 58 Pac. 707.

It is not enough that the plaintiff has a remedy at law. It must be as efficient and as prompt in its administration as the remedy in equity.

*Boyce* v. *Grundy*, 3 Pet. 210, 7 L. ed. 655; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 12, 43 L. ed. 341, 346, 19 Sup. Ct. Rep. 77; *Phœnix Mut. L. Ins. Co.* v. *Bailey*, 13 Wall. 616, 621, 20 L. ed. 501, 503; *Kilbourn* v. *Sunderland*, 130 U. S. 505, 514, 32 L. ed. 1005, 1008, 9 Sup. Ct. Rep. 594; *Tyler* v. *Savage*, 143 U. S. 79, 95, 36 L. ed. 82, 12 Sup. Ct. Rep. 340; 2 Story, Eq. Jur. § 928.

A court of equity will entertain a bill in the nature of a bill of peace to restrain the enforcement of void city ordinances, where numerous prosecutions are threatened or instituted thereunder, causing irreparable damage.

*Hutchinson* v. *Beckham*, 55 C. C. A. 333, 118 Fed. 399.

A court of equity may by injunction restrain the enforcement of a municipal ordinance, provided a proper showing be made to warrant the extraordinary relief.

21 Am. & Eng. Enc. Law, 2d ed. 998.

Another distinction is made between the power of a court of equity to enjoin the en-

forcement of criminal statutes adopted by the legislature, and the power to enjoin the enforcement of municipal ordinances.

*Sylvester Coal Co.* v. *St. Louis*, 130 Mo. 323, 32 S. W. 640; *Southern Exp. Co.* v. *Ensley*, 116 Fed. 756.

*Mr.* **Albert H. Crutcher** submitted the cause for appellee. *Messrs. W. B. Mathews, Le Compte Davis*, and *J. R. Rush* were with him on the brief:

A court of equity has no power to interfere with the enforcement of criminal laws.

*Re Sawyer*, 124 U. S. 200-225, 31 L. ed. 402-410, 8 Sup. Ct. Rep. 482; *Suess* v. *Noble*, 31 Fed. 855; *Hemsley* v. *Myers*, 45 Fed. 286; *Fitts* v. *McGhee*, 172 U. S. 528, 43 L. ed. 541, 19 Sup. Ct. Rep. 269; *Minneapolis Brewing Co.* v. *McGillivray*, 104 Fed. 259.

A bill in equity will not lie to restrain prosecutions under a municipal ordinance, upon the mere ground of its alleged invalidity.

*Denver* v. *Beede*, 25 Colo. 172, 54 Pac. 624; *St. Peter's Episcopal Church* v. *Washington*, 109 N. C. 21, 13 S. E. 700; *State ex rel. Kenamore* v. *Wood*, 155 Mo. 425, 48 L. R. A. 425, 56 S. W. 477; *Crighton* v. *Dahmer*, 70 Miss. 602, 21 L. R. A. 84, 13 So. 237; *Wolfe* v. *Burke*, 56 N. Y. 115; *Wallack* v. *Society for Reformation of Juvenile Delinquents*, 67 N. Y. 28; *West* v. *New York*, 10 Paige, 539; *Bainbridge* v. *Reynolds*, 111 Ga. 758, 36 S. E. 935; *Moultrie* v. *Patterson*, 109 Ga. 370, 34 S. E. 600.

Mr. Justice **Brown** delivered the opinion of the court:

As the bill in this case is based, not only upon diversity of citizenship, but upon the alleged unconstitutionality of the municipal ordinances of November 25, 1901, and March 3, 1902, as impairing the obligation of Mrs. Dobbins's contract with the city under prior ordinances, an appeal lies directly to this court, and upon such appeal the whole case is opened for consideration. *Horner* v. *United States*, 143 U. S. 570, 36 L. ed. 266, 12 Sup. Ct. Rep. 522; *Chappell* v. *United States*, 160 U. S. 499, 40 L. ed. 510, 16 Sup. Ct. Rep. 397. The state having delegated certain powers to the city, the ordinances of the municipal authorities in this particular are the acts of the state through one of its properly constituted instrumentalities, and their unconstitutionality is the unconstitutionality of a state law [217] within the meaning of § 5 of the circuit court of appeals act. [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549.] *City R. Co.* v. *Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653; *Penn Mut. L. Ins. Co.* v. *Austin*, 168 U. S. 685, 694, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; *St. Paul Gaslight Co.* v. *St. Paul*, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575.

2. The court below did not pass upon the validity of these ordinances, but came to the conclusion that a bill in equity would not lie to restrain their enforcement, and in this aspect we shall discuss the case. As the only method employed for the enforcement of these ordinances was by criminal proceedings, it follows that the prayer of the bill to enjoin the city from enforcing these ordinances, or prevent plaintiff from carrying out its work, must be construed as demanding the discontinuance of such criminal proceedings as were already pending, and inhibiting the institution of others of a similar character.

That a court of equity has no general power to enjoin or stay criminal proceedings unless they are instituted by a party to a suit already pending before it, and to try the same right that is in issue there, or to prohibit the invasion of the rights of property by the enforcement of an unconstitutional law, was so fully considered and settled in an elaborate opinion by Mr. Justice Gray, in *Re Sawyer*, 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482, that no further reference to prior authorities is deemed necessary, and we have little more to do than to consider whether there is anything exceptional in the case under consideration to take it out of the general rule. The plaintiff in the case of Sawyer sought to restrain the mayor and committee of a city in Nebraska from removing a city officer under charges filed against him for malfeasance in office. This was held to fall within the general rule, and not within the exception.

The general rule that a circuit court of the United States sitting as a court of equity cannot stay by injunction proceedings pending in a state court to enforce the criminal laws of such state was applied in *Harkrader* v. *Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119, to a case where the plaintiff sought to enjoin proceedings against him for the embezzlement of the assets of a bank; and in *Fitts* v. *McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269, to a suit brought by the receiver of a railroad against the attorney general of the state to restrain him from instituting or prosecuting criminal proceedings to enforce against the plaintiff the pro- [218] visions of a state law reducing the tolls which had been exacted of the public by the railroad, of which the plaintiff was receiver. This was held to be in reality a suit against the state to enjoin the institution of criminal proceedings, and hence within the general rule. See also *Prout* v. *Starr*, 188 U. S. 537, *ante*, 584, 23 Sup. Ct. Rep. 398.

Plaintiff seeks to maintain its bill under the exception above noted, wherein, in a few cases, an injunction has been allowed to issue to restrain an invasion of rights of property by the enforcement of an unconstitutional law, where such enforcement would result in irreparable damages to the plaintiff. It cites in that regard the case of *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Interst. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, in which, under a law of Texas giving express authority to a railroad company or other party in interest to bring suit against the railroad commissioners of that state, a bill was sus-

tained against such commission to restrain the enforcement of unreasonable and unjust rates, and in the opinion a few instances were cited where bills were sustained against officers of the state, who, under color of an unconstitutional statute, were committing acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. It would seem that, if there were jurisdiction in a court of equity to enjoin the invasion of property rights through the instrumentality of an unconstitutional law, that jurisdiction would not be ousted by the fact that the state had chosen to assert its power to enforce such law by indictment or other criminal proceeding. *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 558.

In order to determine the exact property rights at stake in the case under consideration, it should be borne in mind that this is not a bill by Mrs. Dobbins, the owner of the land and of the proposed gas works, to enjoin the city from interfering with carrying out the permit she had obtained to erect these gas works, nor by the Valley Gas & Fuel Company, with which she had made a contract to erect these works but by a subcontractor which had made a contract with the gas and fuel company to erect for *it*, and upon premises to be designated by Mrs. Dobbins, a water tank and [219]gas holder; and, without even *alleging that the gas and fuel company had refused to carry out its contract, or pay to plaintiff damages, or that Mrs. Dobbins had refused to settle any claim the gas and fuel company might have against her, seeks to enjoin the city of Los Angeles in the assumed right of Mrs. Dobbins from interfering with its servants and employees, and from preventing plaintiff from carrying out the work of erecting the water tank and gas holder, and also to desist and refrain from enforcing its ordinances. It sets up no contract of its own with the city which the municipal ordinances have impaired, but a contract of the city with Mrs. Dobbins, to which it was no party, in which it had no direct interest, and that, too, without averring that the gas and fuel company was insolvent, or unable to respond to its claim for damages. It proceeds wholly upon the assumption that the revocation of Mrs. Dobbins's license will operate injuriously to it, and that it cannot obtain a full and adequate remedy at law by an action against the gas and fuel company upon its contract to pay the price agreed upon between them.

It is true the bill is based upon the theory that plaintiff would suffer great and irreparable loss by the interference of the city and by the exposed condition of the works, and that the refusal of an injunction would result in innumerable actions at law and a multiplicity of suits, which would have to be instituted at great expense and without the possibility of recovering indemnity. We are not, however, bound by this allegation, when the facts set forth in the bill show that, if the plaintiff be entitled to a remedy at all, it has an action against the gas and fuel company, which is presumed at least to be able to respond in damages for all such as plaintiff may have suffered by the interruption of the contract. Whether the gas and fuel company in such action could defend upon the ground that the municipality had forbidden the prosecution of the work might depend somewhat upon the terms of the contract, and upon the right of the gas and fuel company to take advantage of the interference of the city. As to this we express no opinion. It is true the employees of the plaintiff were arrested, but that fact alone wrought no legal injury to the plaintiff, since, if it were prevented from any cause for which the gas and fuel company *were chargeable, it might bring an ac-[220]tion for damages against that company, with which alone its contract was made, and recover such damages as it could prove to have sustained.

It is true that in a number of cases bills have been sustained by one or more stockholders in a corporation against the corporation and other parties, to restrain the enforcement of an unconstitutional law against the corporation itself, but it has always been held, and general equity rule 94 requires, that such bill must contain an allegation under oath that the suit is not a collusive one to confer on a court of the United States jurisdiction, and must also contain an allegation that the directors of a corporation have refused to institute the proceedings themselves in the name of such corporation, and the efforts of the plaintiff to secure such action on the part of the directors, and the cause of his failure to obtain it. *Dodge* v. *Woolsey*, 18 How. 331, 15 L. ed. 401; *Hawes* v. *Oakland*, 104 U. S. 450, *sub nom. Hawes* v. *Contra Costa Water Co.* 26 L. ed. 827; *Corbus* v. *Alaska Treadwell Gold Min. Co.* 187 U. S. 455, *ante*, 256, 23 Sup. Ct. Rep. 157. This rule, however, has no application to subcontractors, who stand in no position to enforce the right of their immediate contractors, such as was the gas and fuel company, or of the owner of the property, who had agreed with such immediate contractors to do the work. The plaintiff in this case stands practically in the position of one who seeks to take advantage of the unconstitutionality of a law in which it has only an indirect interest, and by the enforcement of which it has suffered no legal injury. In this it stands much in the position of the plaintiff in *Tyler* v. *Registration Ct. Judges*, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; and in *Turpin* v. *Lemon*, 187 U. S. 51, *ante*, 70, 23 Sup. Ct. Rep. 20; *Wellington, Petitioner*, 16 Pick. 87, 96, 26 Am. Dec. 631; *Sinclair* v. *Jackson*, 8 Cow. 543; *Jones* v. *Black*, 48 Ala. 540; *Shehane* v. *Bailey*, 110 Ala. 308, 20 So. 359; *Dejarnett* v. *Haynes*, 23 Miss. 600.

In this connection, also, the appellant cites the case of *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 393, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, in which we held that the trustee of the bondholders of a railway corporation could maintain a suit against the state railway commission to restrain the enforcement

of unreasonable and unjust rates. The case, however, was put upon the express ground that the bondholders were the equitable and the beneficial owners of the property of the corporation, and in that capac-
[221] ity *might "invoke the judgment of the Federal courts as to whether the contract rights created by the charter, and of which it is the beneficial owners, are violated by subsequent acts of the state in limitation of the right to collect tolls." In that case the bondholders were not only the beneficial owners of the property, but a reduction of the tolls might have resulted in the practical destruction of their securities, and unless the bill were maintained they were practically remediless. The case has but a remote analogy to the one under consideration.

As the appellant has shown no legal interest in this litigation, and no lack of a complete and adequate remedy at law, it results that the bill was properly dismissed, and *the decree of the court below is therefore affirmed.*

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NASHUA SAVINGS BANK, *Petitioner,*
*v.*
ANGLO-AMERICAN LAND, MORTGAGE, & AGENCY COMPANY.

(See S. C. Reporter's ed. 221-232.)

*Evidence—proof of foreign law—foreign corporations—liability of shareholder for calls — pleading — defective declaration cured by verdict—sufficiendy of notice of call—necessity of express promise to pay.*

1. Copies of acts of Parliament are sufficiently authenticated to be admissible in evidence in a Federal court sitting in New Hampshire, when produced by an attorney and solicitor of the supreme court of judicature in England of thirty years' experience, in connection with his testimony that he was intimately acquainted with such acts, and that the copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof."
2. By subscribing to stock in a foreign corporation the subscriber subjects himself to the laws of the foreign country in respect to the powers and obligations of such corporation.
3. Courts cannot, in the absence of fraud, inquire into the necessity for an assessment by the directors of a foreign corporation upon its capital stock.
4. The lack of essential averments in a declaration in *indebitatus assumpsit* is cured by the verdict, if the evidence offered was sufficient to support the verdict, and no objection was made to a variance between allegations and proof.
5. The posting of a notice of a call upon shareholders in an English corporation, in a conspicuous place in the registered office of the company, for more than a month before the call was payable, and the forwarding of a printed notice of the call to a foreign shareholder, is a sufficient compliance with the provisions of the articles of association that notices for a nonresident shareholder who neglects to give his address, as therein provided, shall be posted in a conspicuous place in such office, which, for all purposes of the regulations shall be deemed to be his registered place of abode.
6. A sale or forfeiture of a stockholder's shares in an English corporation is not a condition precedent to the maintenance of an action against him to recover an assessment on the capital stock of the corporation, although

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NOTE.—*On the right to enforce stockholder's liability outside the state of incorporation*—see note to Cushing v. Perot (Pa.) 34 L. R. A. 737.

*As to what defects are cured by verdict*—see note to Wills v. Claflin, 23 L. ed. U. S. 490.

*On subscriptions to corporate stock; implied promise to pay*—see note to Winston v. Brooks (Ill.) 4 L. R. A. 507.

*Proof of the statute law of foreign countries.*

Foreign statutory law is to be proved as a fact (Talbot v. Seeman, 1 Cranch. 1, 2 L. ed. 15), by the law itself or by exemplified copies (Baltimore & O. R. Co. v. Glenn, 28 Md. 287, 92 Am. Dec. 688; De Sobry v. De Laistre, 2 Harr. & J. 191, 3 Am. Dec. 535; Gardner v. Lewis, 7 Gill. 379).

The production of an exemplified copy of the foreign statute, properly authenticated under the seal of the state, is sufficient. Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Allen v. Watson, 2 Hill L. 319; Lincoln v. Battelle, 6 Wend. 475.

The statute may be proved by a sworn copy. Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Innerarity v. Mims, 1 Ala. 660; Lincoln v. Battelle, 6 Wend. 475; Phillips v. Gregg, 10 Watts, 158, 36 Am. Dec. 158.

A copy proved to be a true copy by a witness who has examined and compared it with the original will be received in evidence. Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Anglo-American Land Mortg. & Agency Co. v. Dyer, 181 Mass. 593, 64 N. E. 416.

It has even been held that an expert in foreign law might testify orally as to what such laws were, and might produce a copy of the foreign statutes or code, and refer to the same for the purpose of refreshing his recollection. Barrows v. Downs, 9 R. I. 446, 11 Am. Rep. 283.

So, in Hall v. Costello, 48 N. H. 176, 2 Am. Rep. 207, New Hampshire attorneys who had investigated the Canadian laws were permitted to give the results of their investigation.

To the contrary are a number of cases holding that a copy of the law, properly authenticated, is essential. Hemphill v. Bank of Alabama, 6 Smedes & M. 50; Gardner v. Lewis, 7 Gill. 379; Robinson v. Clifford, 2 Wash. C. C. 1, Fed. Cas. No. 11,948; Lincoln v. Battelle, 6 Wend. 475.

Parol testimony as to foreign written laws was rejected in Innerarity v. Mims, 1 Ala. 660.

And the evidence of a Canadian attorney concerning the Canadian law of interest was held inadmissible to show the terms of the Canadian statute, in Kermott v. Ayer, 11 Mich. 181.

And in United States v. Ortega, 4 Wash. C. C. 531, Fed. Cas. No. 15,971, the court stated that, although the unwritten law of foreign countries might be proved by witnesses, the written law could be proved only by itself.

A copy of the Irish statutes, sworn to by an Irish barrister as having been received from the King's printer, and as receivable in evidence in all courts in Ireland as authentic, was held admissible in Jones v. Maffet, 5 Serg. & R. 523.

And the English written law was allowed to be proved by printed statutes proved to be officially published by that government, a copy of

a remedy by forfeiture is given by its articles of association.

7. An express promise by a stockholder in an English corporation need not be proved in an action to recover an assessment on its capital stock, in view of the promise implied from a subscription to the shares by 25 & 26 Vict. chap. 89, which declares that all moneys payable by any member in pursuance of the articles of the company shall be deemed a debt due by such member.

[No. 167.]

*Submitted January 29, 1903. Decided March 16, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the First Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of New Hampshire in favor of plaintiff in an action by a foreign corporation to recover an assessment on its capital stock. *Affirmed.*

See same case below, 48 C. C. A. 15, 108 Fed. 764.

Statement by Mr. Justice **Brown:**

This was an action by the defendant in error, a British corporation, in the circuit court for the district of New Hampshire, against the Nashua Savings Bank, a New Hampshire corporation, to recover an assessment made by such corporation in pursuance of its charter and by-laws, upon defendant's subscription to a thousand shares of its stock.

The case was tried before the circuit judge and a jury, and resulted in a verdict for the plaintiff by direction of the court, and a judgment against the bank in the sum of $7,131.10, which was affirmed on writ of error by the circuit court of appeals. 48 C. C. A. 15, 108 Fed. 764.

*Mr.* **John S. H. Frink,** submitted the cause for petitioner. *Mr. A. T. Batchelder* was with him on the brief:

The statutes of Great Britain are facts of which this court does not take cognizance without proof.

*Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 445, 32 L. ed. 793, 9 Sup. Ct. Rep. 469.

The ordinary modes of proof are: (1) By exemplification under great seal; (2) by certificate of an officer having authority to make it; (3) by testimony from comparison with original enrollment.

*Church* v. *Hubbard,* 2 Cranch, 187, 2 L. ed. 249; *Emery* v. *Berry,* 28 N. H. 485, 61 Am. Dec. 622.

If it is enough to present a portion of the enactment of a foreign country, purporting to be printed by authority, without any verification, then these statutes have been proved, otherwise not.

*Beach* v. *Workman,* 20 N. H. 379.

The general rule as to the proof of foreign laws is that the law which is written—that is, statute law—must be proved by a copy properly authenticated, and that the unwritten law must be proved by the testimony of experts; that is, by those acquainted with the law.

*Ennis* v. *Smith,* 14 How. 400, 14 L. ed.

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the statutes being shown, to the reasonable satisfaction of the court, to be genuine. The Pawashick, 2 Low. Dec. 142, Fed. Cas. No. 10,851.

So, where the books offered in evidence purported to contain the laws of a British province, printed by the printer to His Majesty, and distributed by the government to its officers, and cited and read in the courts there as laws in force, regulating the administration of justice, and receiving the sanction of the executive and judicial officers of the province as containing its laws, the latter fact being proved by the oath of witnesses, the court held that such evidence was equally as satisfactory as the exemplification of a roll found in the possession of the *custos rotulorum,* accompanied by the oath of the person making it, and was no departure from the rule requiring the best evidence. Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 143.

And where the claimant offered in evidence of the French law volumes of the 4th, 24th, and others of the Bulletin Des Lois, sent to the supreme court by the French government, they were held admissible in evidence without further proof, for the purpose of proving the French law. Dauphin v. United States, 6 Ct. Cl. 221.

But the laws regulating the court of consulado of Havana were held not provable by a printed book purchased in Havana, purporting to contain the royal charter establishing that court. Packard v. Hill, 2 Wend. 411.

And in Chanoine v. Fowler, 3 Wend. 173, the chancellor of the French consulate of New York produced a book in the French language containing the Commercial Code of France, which, he stated, though not the official edition, was conformable to that edition, and testified that he regulated his official conduct by the laws as contained in that book, which, he stated, was an exact copy of the laws furnished by the French government to his consul, and the defendant agreed so to consider it; but the court held such book was not evidence of the laws of France.

But testimony of a former United States consul at Santiago de Cuba, that a book printed in Spanish contained the general ordinances of the customhouse of that island in existence "by the force of the law" and was the official book in general use, is sufficient evidence of its publication by authority of the Spanish government to warrant its reception in evidence under N. Y. Code Civ. Proc. § 942, over an objection that no proper foundation had been laid for its introduction. Hecla Powder Co. v. Sigua Iron Co. 157 N. Y. 437, 52 N. E. 650.

Marine ordinances of foreign countries, promulgated by the executive by order of the legislature of the United States, may be read in the courts of the United States without further authentication or proof. Talbot v. Seeman, 1 Cranch, 1, 2 L. ed. 15.

Spanish pamphlets which purport to be regulations of railroads in and for the Republic of Mexico are not receivable in evidence as Mexican laws, under Sayles' Civ. Stat. (Tex.) art. 2304, where there is no proof that they were printed under the authority of the laws of Mexico. Mexican National R. Co. v. Ware (Tex. Civ. App.) 60 S. W. 343.

For other authorities upon the question of the oral proof of foreign laws, see note to State v. Behrman (N. C.) 25 L. R. A. 449.

472; *Pierce* v. *Indseth*, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418.

The rule that the courts of one country cannot take cognizance of the laws of another without plea and proof has constantly been maintained at law and in equity, in England and America.

*Bank of North America* v. *Rindge*, 154 Mass. 203, 13 L. R. A. 56, 27 N. E. 1015; *Hancock Nat. Bank* v. *Ellis*, 166 Mass. 414, 44 N. E. 349.

In the absence of anything to show the contrary, there is a presumption that the common law of another state (foreign country) is like that prevailing here.

*Kelley* v. *Kelley*, 161 Mass. 111, 25 L. R. A. 806, 36 N. E. 837.

Contracts made in a foreign country, in the absence of evidence of what their legal effect would be in the place in which they were executed, receive the same construction and have the same effect as if they were executed in the place where the action to enforce them is brought.

*Whidden* v. *Seelye*, 40 Me. 247, 63 Am. Dec. 661.

Great Britain being an alien country, the burden was on plaintiff to prove its laws.

*Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; *Pierce* v. *Indseth*, 106 U. S. 546, 27 L. ed. 254, 1 Sup. Ct. Rep. 418.

Under the law of New Hampshire an express promise is necessary to sustain this action.

*Franklin Glass Co.* v. *Alexander*, 2 N. H. 381, 9 Am. Dec. 92; *New Hampshire C. R. Co.* v. *Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Rockingham Bldg. Co.* v. *Burlingame*, 67 N. H. 301, 31 Atl. 23; *Shattuck* v. *Robbins*, 68 N. H. 565, 44 Atl. 694.

There are no Federal decisions contravening the New Hampshire cases, and the Federal courts will therefore follow the views of the state courts.

*Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

There seems to be a principle of reciprocity attending the administration of the laws of an alien country, which would, as a matter of international comity, induce our country to give the same weight to these acts that they give to ours.

*Hilton* v. *Guyot*, 159 U. S. 113, 40 L. ed. 95, 16 Sup. Ct. Rep. 139.

The delivery and receipt of shares of stock does not imply a promise to pay a call or assessment.

*New Hampshire C. R. Co.* v. *Johnson*, 30 N. H. 390, 64 Am. Dec. 300; *Rockingham Bldg. Co.* v. *Burlingame*, 67 N. H. 301, 31 Atl. 23; *Shattuck* v. *Robbins*, 68 N. H. 565, 44 Atl. 694.

*Mr.* **Omar Powell** submitted the cause for respondent. *Messrs. Gilbert A. Davis* and *Daniel L. Cady* were with him on the brief:

The New Hampshire law of evidence is that of the United States circuit court when sitting in that district.

*M'Neil* v. *Holbrook*, 12 Pet. 84, 9 L. ed. 1009; *Connecticut Mut. L. Ins. Co.* v. *Union Trust Co.* 112 U. S. 250, 28 L. ed. 708, 5 Sup. Ct. Rep. 119.

Foreign statutory laws may be proved by a printed copy produced by a licensed practicing attorney of the foreign country, authenticated by his oath as having been officially printed, and as receivable in evidence in that country without further proof.

*Hall* v. *Costello*, 48 N. H. 176, 2 Am. Rep. 207; *Kennard* v. *Kennard*, 63 N. H. 303; *State ex rel. Bartlett* v. *Davis*, 69 N. H. 350, 41 Atl. 267; *Barrows* v. *Downs*, 9 R. I. 446, 11 Am. Rep. 283; *The Pawashick*, 2 Low. Dec. 142, Fed. Cas. No. 10,851; *Jones* v. *Maffet*, 5 Serg. & R. 523; *Lacon* v. *Higgins*, 3 Stark. 178; *Merrifield* v. *Robbins*, 8 Gray, 150.

When a judge will take a book from his library shelf, cite it as the law of England, and follow it as an authority, why should an attorney do more than present the same book and swear to it as the officially printed laws?

*Church* v. *Hubbart*, 2 Cranch, 238, 2 L. ed. 265; *Ennis* v. *Smith*, 14 How. 426, 14 L. ed. 484; *Pacific Pneumatic Gas Co.* v. *Wheelock*, 80 N. Y. 278; *Dundee Mortg. & Trust Invest. Co.* v. *Cooper*, 26 Fed. 665.

By becoming a stockholder the petitioner subjected himself to the laws of England governing the respondent company, and to all reasonable rules of the company.

*Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Hudson River Pulp & Paper Co.* v. *H. H. Warner & Co.* 39 C. C. A. 452, 99 Fed. 187; *Mandel* v. *Swan Land & Cattle Co.* 154 Ill. 177, 27 L. R. A. 313, 40 N. E. 462.

In the absence of fraud a stockholder cannot question the wisdom or necessity of a call.

*Oglesby* v. *Attrill*, 105 U. S. 605, 26 L. ed. 1186.

A stockholder cannot question the necessity or advisability of a call.

Cook, Stock & Stockholders, §§ 111–113.

A call made by directors is conclusive evidence of its necessity, and binds the stockholder without notice.

*Great Western Teleg. Co.* v. *Purdy*, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 810; *Bailey* v. *Birkenhead, L. & C. Junction R. Co.* 12 Beav. 443; *Anglo-American Land, Mortg. & Agency Co.* v. *Dyer*, 181 Mass. 593, 64 N. E. 416; 2 Thomp. Corp. § 1710.

The accepting and holding of the shares by petitioner created an implied, if not an express, promise to pay the balance when called.

*Tucker* v. *Haughton*, 9 Cush. 350; *Buffalo & N. Y. City R. Co.* v. *Dudley*, 14 N. Y. 351; *Howarth* v. *Lombard*, 175 Mass. 574, 49 L. R. A. 301, 56 N. E. 888; *Webster* v. *Upton*, 91 U. S. 67, 23 L. ed. 386; *Upton* v. *Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Anglo-American Land, Mortg. & Agency Co.* v. *Dyer*, 181 Mass. 593, 64 N. E. 416.

Comity is the common law of this country, which the courts must enforce.

*Bank of Augusta* v. *Earle*, 13 Pet. 589, 10 L. ed. 308.

A corporation organized under a foreign

government stands in this respect upon the same footing as corporations of other states.

*British American Land Co.* v. *Ames*, 6 Met. 391; Story, Confl. L. §§ 5-65; 2 Morawetz, Priv. Corp. §§ 960, 961.

Petitioner's share certificate expressly bound him to an English contract.

*Milliken* v. *Pratt*, 125 Mass. 374, 28 Am. Rep. 241.

It requires no greater quantum of proof to make a case for an English corporation than it would for a corporation of anyone of the United States.

*Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363.

To save the right of objection upon the ground of variance, the party must object to the admission of the evidence when it is offered, and if he does not do so, it is waived.

*Roberts* v. *Graham*, 6 Wall. 578, 18 L. ed. 791; *Boston & A. R. Co.* v. *O'Reilly*, 158 U. S. 334, 39 L. ed. 1006, 15 Sup. Ct. Rep. 830; *Graves* v. *State*, 121 Ind. 359, 23 N. E. 155; *Dunstan* v. *The R. R. Kirkland*, 3 Hughes, 641, Fed. Cas. No. 4,181.

If the objection be not taken when the evidence is offered, the court may instruct the jury upon the whole field of inquiry covered by the evidence.

*Boyce* v. *California Stage Co.* 25 Cal. 460.

As the common-law rules of pleadings prevail in New Hampshire, it is submitted that *debitatus assumpsit* is the proper form of action.

1 Chitty, Pl. 13th Am. ed. 340, 341, 401, 106; 2 Chitty, Pl. 52; *Pullman* v. *Upton*, 96 U. S. 328, 24 L. ed. 818; *Mandel* v. *Swan Lake & Cattle Co.* 154 Ill. 177, 27 L. R. A. 313. 40 N. E. 462; *Dermott* v. *Jones*, 2 Wall. 1, *sub nom. Ingle* v. *Jones*, 17 L. ed. 762.

Mr. Justice **Brown** delivered the opinion of the court:

The assessment in question had been made by the directors of the company, in pursuance of their amended articles of association, which declared that "the directors may, from time to time, make such calls as they think fit upon the members in respect of all moneys unpaid on their shares, and each member shall pay the amount of every call so made upon him to the persons, and at the times and places, appointed by the directors."

1. In order to prove the incorporation of the plaintiff company, as well as the liability and rights of the stockholders, the deposition of an attorney and solicitor of the supreme court of judicature in England, who was also managing director of the plaintiff company, was read in evidence. His testimony showed that the plaintiff was a corporation organized with limited liability under five different acts of Parliament, from 1862 to 1880, copies of which he produced and delivered to the commissioner, stating that these copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." To the *admission of the statutes [228] the defendant excepted upon the ground that they were not proved according to the established rules of law.

As these statutes were the basis of the plaintiff's corporate existence, and its right to bring this action, they must undoubtedly be proved as facts. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 445, 32 L. ed. 788, 793, 9 Sup. Ct. Rep. 469. While it was stated by this court in the early case of *Church* v. *Hubbart*, 2 Cranch, 187, 238, 2 L. ed. 249, 266, that foreign judgments are usually and most properly authenticated either by an exemplification under the great seal, by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate must itself be properly authenticated, the circuit court of the United States sitting in New Hampshire may, under Rev. Stat. § 721 (U. S. Comp. Stat. 1901, p. 581), declaring that "the laws of the several states," with certain exceptions, "shall be regarded as rules of decision in trials at common law in the courts of the United States," receive such evidence of the authentication of foreign statutes as the practice of the courts in that state may authorize and justify. *M'Niel* v. *Holbrook*, 12 Pet. 84, 89, 9 L. ed. 1009, 1011; *Connecticut Mut. L. Ins. Co.* v. *Union Trust Co.* 112 U. S. 250, 255, 28 L. ed. 708, 710, 5 Sup. Ct. Rep. 119; *Vance* v. *Campbell*, 1 Black, 427, 17 L. ed. 168. The "laws of the several states" with respect to evidence within the meaning of this section apply, not only to the statutes, but to the decisions of their highest courts. *Bucher* v. *Cheshire R. Co.* 125 U. S. 555, 582, 31 L. ed. 795, 798, 8 Sup. Ct. Rep. 974; *Ex parte Fisk*, 113 U. S. 713, 720, 28 L. ed. 1117, 1120, 5 Sup. Ct. Rep. 724; *Ryan* v. *Bindley*, 1 Wall. 66, 17 L. ed. 559.

The law of New Hampshire upon this subject appears to have been settled in *Hall* v. *Costello*, 48 N. H. 176, 2 Am. Rep. 207, in which an attorney, resident in New Hampshire, who had gone to Canada to investigate Canadian law, was permitted to state orally what he found the law to be, as embodied in the Queen's proclamation of neutrality. To same effect are *Barrows* v. *Downs*, 9 R. I. 446, 11 Am. Rep. 283; *Jones* v. *Maffet*, 5 Serg. & R. 523. There is an even greater reason for permitting a local attorney, of thirty years' experience, who, as he states, was intimately acquainted with the English company or corporation laws, to produce as evidence of such laws copies of the statutes printed by authority *of the English government, and used as [229] proofs of statutes in the English courts.

It would appear that such authentication of foreign laws would be deemed sufficient in the English courts, as in *Lacon* v. *Higgins*, 3 Starkie, 178, it was held that the French Code was sufficiently proved by a witness—a French vice consul—who produced a book printed by authority of the French government, which the witness stated contained the French Code, upon

which he acted in his office as vice consul. In most, if not all, of the states of this Union statutes have been passed permitting laws of sister states to be proved simply by the production of a book containing what purports to be an authorized edition of such laws printed by state authority. *Emery* v. *Berry*, 28 N. H. 473, 61 Am. Dec. 622. While the same liberality is not extended to foreign laws required to be proved as facts, it would seem like sticking in the bark to hold that a foreign expert might testify orally as to what such laws were, and not be able to produce what purports to be the official edition of such laws, and to testify as to the authenticity of such edition, and to the fact that it was received as evidence in the domestic courts of that country. To the average mind it would seem as though there was much less liability to mistake in a printed copy of a statute from the official printer, than in a copy written and compared by an ordinary scrivener. The evidence was properly received.

2. Exception was also taken to the declaration, in that it contained no averment or allegation upon what conditions the plaintiff was authorized to make assessments. In this connection, it is insisted that the declaration should have averred that such an assessment was necessary to pay the debts of the plaintiff, or was made for the benefit of its creditors; that it is also defective in that it contains no averment of notice of such assessment to defendant, or that defendant ever made an express promise to pay such assessment; and no direct allegation that defendant was a stockholder at the time the assessment was made. It appears, however, by the act of 25 and 26 Vict., chap. 89, "for the incorporation, regulation, and winding up of trading companies and other associations," that the ar-[230]ticles *of association, "when registered, . . . shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this act; and all moneys payable by any member of the company, in pursuance of the conditions and regulations of the company or any of such conditions or regulations *shall be deemed to be a debt* due from such member to the company, and in England and Ireland to be in the nature of a specialty debt." It also appeared by the articles of association of the plaintiff corporation, No. 3, "that every person who has accepted any share or shares in this company, and whose name is entered in the registry of members, and no other person, shall be deemed to be a member." These regulations also contained the provision heretofore mentioned, that the directors might from time to time make such calls as they think fit upon the members in respect of all moneys unpaid on their shares. The board of directors is thus constituted a tribunal to determine when and to what amount assessments shall be made upon the unpaid shares of stock. By subscribing to stock in a foreign corporation, defendant subjected itself to the laws of such foreign country in respect to the powers and obligations of such corporation. *Canada Southern R. Co.* v. *Gebhard*, 109 U. S. 527, 27 L. ed. 1020, 3 Sup. Ct. Rep. 363; *Relfe* v. *Rundle*, 103 U. S. 222, *sub nom. Life Asso. of America* v. *Rundle*, 26 L. ed. 337.

In the absence of fraud the necessity for an assessment upon the capital stock cannot be made the subject of inquiry by the courts. As was said by Mr. Justice Field in *Oglesby* v. *Attrill*, 105 U. S. 605, 609, 26 L. ed. 1186, 1188: "As to the wisdom of an assessment, or its necessity at the time, or the motives which prompt it, the courts will not inquire, if it be within the legitimate authority of the directors to levy it, and the objects for which the company was incorporated would justify the expenditure of the money to be raised. They will not examine into the affairs of a corporation to determine the expediency of its action, or the motives for it, when the action itself is lawful." *Bailey* v. *Birkenhead, L. & C. Junction R. Co.* 12 Beav. 433. See also Cook, Stock & *Stockholders, § 113; *Great*[231] *Western Teleg. Co.* v. *Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810. Whether such assessment could be impeached by showing that the corporation was not a bona fide enterprise, or had never actually engaged in business, or become a going concern, or that the assessment was made unnecessarily and in bad faith, or that a discrimination was made against foreign stockholders, it is unnecessary to determine, since no evidence to that effect was offered on behalf of the defendant. Certainly, under the cases above cited, it would be unnecessary in order to make a prima facie case to negative these facts. There is a presumption of good faith attaching as well to foreign, as to domestic, corporations.

The trial proceeded under the third count of the declaration, which was in *indebitatus assumpsit*, and no objection was made to the evidence offered upon the ground of variance. Under such circumstances, and without expressing an opinion as to the admissibility of the evidence offered, the declaration is good after verdict. In *Roberts* v. *Graham*, 6 Wall. 578, 18 L. ed. 791, we held that variances between the allegation and proof must be taken when the evidence is offered, and if such evidence be sufficient to support the verdict the defect in the declaration is cured. *Patrick* v. *Graham*, 132 U. S. 627, 33 L. ed. 460, 10 Sup. Ct. Rep. 194.

The court in charging the jury in this case instructed them that there was no doubt the call for this assessment had been properly proved; that the only possible question which could have arisen was whether or not certain persons were directors of the corporation at the time of the call, and that as the amended articles of

the association provided that calls might be made by the directors, there was no doubt that the call in question was properly made.

As the bill of exceptions contains nothing to indicate that the call was not properly made, and does not show that it contained *all* the evidence in the case, we should be at liberty, if the circumstances of the case required it, to infer that there was other evidence to supply any defect in respect to the legality of the call. *Hansen* v. *Boyd*, 161 U. S. 397, 40 L. ed. 746, 16 Sup. Ct. Rep. 571; *Providence* v. *Babcock*, 3 Wall. 240, *sub nom. Gardner* v. *Babcock*, 18 L. ed. 31; *United States* v. *Patrick*, 20 C. C. A. 11, 36 U. S. App. 645, 73 Fed. 800. The sufficiency of the evidence cannot be re-[2]viewed on writ of *error. *Generes* v. *Campbell*, 11 Wall. 193, 199, 20 L. ed. 110, 112; *Dower* v. *Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

It appears from the testimony of the secretary of the company that a notice of the call was posted up in a conspicuous place in the registered office of the company for more than a month before the call was payable, and in addition thereto a printed notice of the call was also forwarded to the defendant bank. This was a sufficient compliance with article 140 of the articles of association, which provides that "if any member resident out of the United Kingdom neglect to give such address as is herebefore required, notices for him may be posted up in a conspicuous place in the registered office of the company, and for all the purposes of these regulations the registered office of the company shall be deemed to be the registered place of abode of such member."

3. A sale or forfeiture of defendant's shares was not a condition precedent to the right to recover this assessment. While a remedy by forfeiture is given by the articles of the association, this remedy is cumulative, and is no bar to an action at law for the debt. This is clearly intended as a concurrent remedy.

4. Nor do we think there was any necessity of proving an express promise to pay this assessment. The English statute above quoted provides that all moneys payable by any member in pursuance of the articles of the company shall be deemed a *debt due by such member* of the company, and as this statute implies a promise to pay from a subscription to the shares, it clearly obviates the necessity of proving an express promise. *Upton* v. *Tribilcock*, 91 U. S. 45, 23 L. ed. 203; *Webster* v. *Upton*, 91 U. S. 65, 23 L. ed. 384; *Chubb* v. *Upton*, 95 U. S. 665, 24 L. ed. 523; *Howarth* v. *Lombard*, 175 Mass. 574, 49 L. R. A. 301, 56 N. E. 888. Although the law of New Hampshire seems to be that, in the absence of an express promise, no personal action will lie (*Shattuck* v. *Robbins*, 68 N. H. 565, 44 Atl. 694), yet even there an obligation created by the charter is treated as the equivalent of an express promise. Cook, Stock & Stockholders, § 71; *Anglo-American Land, Mortg. & Agency Co.* v. *Dyer*, 181 Mass. 593, 64 N. E. 416.

There was no error in the action of the court below, and *its judgment is, therefore, affirmed.*

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*MARIANO F. SENA, *Appt.*, [233]
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 233-242.)

*Private land claims—adoption of findings of court below—right to confirmation—abandonment—laches.*

1. A finding of the court of private land claims, that "the evidence as to the settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant, and knowledge of the existence in the community or by the oldest inhabitants now living is so vague, contradictory, and uncertain as to be almost wholly wanting," will, in the absence of clear evidence to the contrary, be adopted on appeal by the Supreme Court of the United States.
2. Confirmation of a Spanish land grant cannot be had in the court of private land claims, where possession of the land had been abandoned by the descendants of the grantee for at least nine years before the treaty of 1848 with Mexico, under which the land passed into the possession of the United States, and there has been no possession by representatives of such grantee since the treaty, and no attempt to assert their title thereto for more that fifty years thereafter.

[No. 40.]

*Argued January 16, 19, 1903. Decided April 6, 1903.*

APPEAL from the Court of Private Land Claims to review a decree dismissing a petition for confirmation of a Spanish land grant. *Affirmed without prejudice to further proceedings.*

Statement by Mr. Justice **Brown:**

This was a petition for the confirmation of a tract of land in the county of Santa Fé, New Mexico, known as the José de Leyba grant, which has never been officially surveyed, but is estimated to contain about 18,000 acres.

After filing the petition, it was found there were a number of persons holding portions of the tract sued for under a claim of title adverse to the grant; and, upon motion of the United States, requiring these adverse claimants to be made parties defendant, the original petition was amended, and two of these, the American Turquoise Company and one McNulty, joined with the United States in defending the case.

*The court disallowed the claim upon the [234] ground that the evidence did not show a perfect grant, inasmuch as there was no evidence of a compliance with the royal ordinance of 1754, which provided that all

grants subsequent to 1700 must be confirmed as a prerequisite to their validity; and that, if it were an imperfect grant, it should, under the act creating the court of private land claims, have been filed within two years from the taking effect of the act, and was therefore barred.

Since the decree of the court of private land claims, certain additional evidence has been discovered, tending to show possession of the land covered by the grant for a long period subsequent thereto, and which, it is now insisted, supplies the defects which caused the rejection of the grant.

*Mr.* **Frank W. Clancy** argued the cause, and, with *Mr. H. S. Clancy*, filed a brief for appellant:

Possession in 1783, under the grant of 1728, shows a perfect title and a compliance with the ordinance of 1754.

*United States* v. *Chavez*, 175 U. S. 520, 44 L. ed. 258, 20 Sup. Ct. Rep. 159; *United States* v. *Pendell*, 185 U. S. 189, 46 L. ed. 866, 22 Sup. Ct. Rep. 624.

Existence of ownership, or possession or both, being proved, it is a well-recognized presumption that they continue unless their cessation is proved by evidence; and the rule is that the burden of proof is upon him who disputes their continued existence.

*Lazarus* v. *Phelps*, 156 U. S. 205, 39 L. ed. 398, 15 Sup. Ct. Rep. 271; *Gray* v. *Finch*, 23 Conn. 513; *Leport* v. *Todd*, 32 N. J. L. 128; *Bayard* v. *Colefax*, 4 Wash. C. C. 41, Fed. Cas. No. 1,130; *Kidder* v. *Stevens*, 60 Cal. 419; *Table Mountain G. & S. Min. Co.* v. *Waller's Defeat Min. Co.* 4 Nev. 220, 97 Am. Dec. 526; *Bates* v. *Pricket*, 5 Ind. 22, 61 Am. Dec. 73; *Lind* v. *Lind*, 53 Minn. 51, 54 N. W. 934; *Anderson* v. *Watt*, 138 U. S. 706, 34 L. ed. 1082, 11 Sup. Ct. Rep. 449; *Adams* v. *Slate*, 87 Ind. 575; *Sullivan* v. *Goldman*, 19 La. Ann. 13; *Thomas* v. *Hatch*, 3 Sumn. 182, Fed. Cas. No. 13,899; *Clements* v. *Hays*, 76 Ala. 280; *Cargile* v. *Wood*, 63 Mo. 514; *Gilleland* v. *Martin*, 3 McLean, 491, Fed. Cas. No. 5,433; *Higdon* v. *Higdon*, 6 J. J. Marshall, 51; *O'Gara* v. *Eisenlohr*, 38 N. Y. 299; Best, Presumptions, 186; *Wilkins* v. *Earle*, 44 N. Y. 172, 3 Am. Rep. 655; *Scales* v. *Key*, 11 Ad. & El. 819; *Brown* v. *King*, 5 Met. 173; *Currier* v. *Gale*, 9 Allen, 525; *Rowland* v. *Updike*, 28 N. J. L. 101.

A complete legal title to land, once vested, cannot be lost by failure to occupy.

1 Escriche, Dictionary of Legislation & Jurisp. pp. 6–8, ed. of 1847; 3 Washb. Real Prop. chap. 2, §§ 1, 5; *Robie* v. *Sedgwick*, 35 Barb. 329; *Picket* v. *Dowdall*, 2 Wash. (Va.) 115; 1 Moreau-Lislet & Carleton, Partidas, 365, 400; *Philadelphia* v. *Riddle*, 25 Pa. 263; *Crespin* v. *United States*, 168 U. S. 218, 42 L. ed. 441, 18 Sup. Ct. Rep. 53; *Jones* v. *Montes*, 15 Tex. 353.

Evidence of reputation of ancient ownership and possession of land, as shown by statements of aged persons now deceased, is competent.

*Casey* v. *Inloes*, 1 Gill. 492, 39 Am. Dec. 658; *Boardman* v. *Reed*, 6 Pet. 341, 8 L. ed. 415; *Shutte* v. *Thompson*, 15 Wall. 162, 21 L. ed. 126; *Sanscrainte* v. *Torongo*, 87 Mich. 69, 49 N. W. 497; *Wooster* v. *Butler*, 13 Conn. 313; *Scott* v. *Ollabdugh*, 3 Harr. & M'H. 511; *Sparrow* v. *Hovey*, 44 Mich. 64, 6 N. W. 93; *McCausland* v. *Fleming*, 63 Pa. 38.

*Mr.* **Matthew G. Reynolds** argued the cause, and, with *Solicitor General Richards* and *Messrs. William H. Pope* and *Edward L. Bartlett*, filed a brief for appellee:

Where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much, and no more, is plain.

*Ainsa* v. *United States*, 161 U. S. 208, 40 L. ed. 673, 16 Sup. Ct. Rep. 544; *Ely* v. *United States*, 171 U. S. 220, 43 L. ed. 142, 18 Sup. Ct. Rep. 840; *United States* v. *Maish*, 171 U. S. 242, 43 L. ed. 150, 18 Sup. Ct. Rep. 948; *Perrin* v. *United States*, 171 U. S. 292, 43 L. ed. 169, 18 Sup. Ct. Rep. 861; *Reloj Cattle Co.* v. *United States*, 184 U. S. 624, 46 L. ed. 721, 22 Sup. Ct. Rep. 499; *Arivaca Land & Cattle Co.* v. *United States*, 184 U. S. 649, 46 L. ed. 731, 22 Sup. Ct. Rep. 525.

Where doubt arises respecting a royal grant, even a congressional grant, it is resolved in favor of the government.

*Slidell* v. *Grandjean*, 111 U. S. 412, 28 L. ed. 321, 4 Sup. Ct. Rep. 475; *United States* v. *Oregon & C. R. Co.* 164 U. S. 526, 41 L. ed. 541, 17 Sup. Ct. Rep. 165.

As bearing upon the exercise by the Crown of the *jus disponendi* of the overplus within the metes and bounds, the absence of serious open, exclusive, actual possession anciently begun and consistently continued cannot be overlooked as affecting the original intent and assertion of ownership to the exclusion of others, in determining the estate granted, and the extent thereof.

*Bergere* v. *United States*, 168 U. S. 66, 42 L. ed. 383, 18 Sup. Ct. Rep. 4.

This court will defer to the judgment of the court below on matters of fact, such as possession.

*United States* v. *Pendell*, 185 U. S. 189, 46 L. ed. 866, 22 Sup. Ct. Rep. 624.

This claim is a stale one, and not entitled to recognition, according to justice and right, from a court proceeding upon equitable principles.

*United States* v. *Martinez*, 184 U. S. 441, 46 L. ed. 632, 22 Sup. Ct. Rep. 422; *Gildersleeve* v. *New Mexico Min. Co.* 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663; *United States* v. *Moore*, 12 How. 209, 13 L. ed. 958; *Indiana* v. *Kentucky*, 136 U. S. 479, 34 L. ed. 329, 10 Sup. Ct. Rep. 1051; *United States* v. *Repentigny*, 5 Wall. 211, 18 L. ed. 627; *Muse* v. *Arlington Hotel Co.* 68 Fed. 637; *Ticbout* v. *Millican*, 61 Tex. 514.

Knowledge, on the part of the Leybas, of the passage of the act of July 22, 1854, and their right to file their claim with the surveyor general and preserve their evidence, is to be presumed.

*Gildersleeve* v. *New Mexico Min. Co.* 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663.

A court of equity will not aid a party whose application is destitute of conscience, good faith, and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred.

*Hammond* v. *Hopkins*, 143 U. S. 224, 36 L. ed. 134, 12 Sup. Ct. Rep. 418.

This claim is void because of abandonment.

1 Moreau-Lislet & Carleton, Partidas, 50, p. 365; *Landes* v. *Perkins*, 12 Mo. 238; *Fine* v. *St. Louis Public Schools*, 30 Mo. 166; *Tayon* v. *Ladew*, 33 Mo. 205; *Clark* v. *Hammerle*, 36 Mo. 639; *Sideck* v. *Duran*, 67 Tex. 256, 3 S. W. 264.

There must be such proof of boundaries as will, with reasonable certainty, define and limit the thing claimed, differentiating it from other things of the same kind.

*United States* v. *Delespine*, 15 Pet. 229, 10 L. ed. 720; *United States* v. *King*, 3 How. 773, 11 L. ed. 824; *Arivaca Land & Cattle Co.* v. *United States*, 184 U. S. 649, 46 L. ed. 731, 22 Sup. Ct. Rep. 525.

*Mr. James W. Vroom* filed a brief on behalf of respondent L. Bradford Prince, for the purpose of raising the question of jurisdiction of the court of private land claims.

Mr. Justice **Brown** delivered the opinion of the court:

The petition of Leyba, upon which the grant was originally made, and which is the material document in this case, and is in the Spanish language, is thus translated in the record:

City of Santa Fé, May 24, 1728, before the governor and captain general of this kingdom, there was presented this petition with its contents:

Joseph de Leyba, resident of the city of Santa Fé, appear before your excellency in due legal form, and state that, in accordance with the royal ordinance of His Royal Majesty, I enter a piece of land and wood, vacant and unsettled, enough for half a *fanega* of corn-planting land, somewhat more or less, which is bounded on the east by the San [235] Marcos road; on the *south by an arroyo called Cuesta del Oregano; on the west by land of Juan Garcia de las Rivas, and on the north by lands of Captain Sebastian de Vargas.

Therefore, I ask and pray, your excellency be pleased to make me, in the name of His Majesty, a grant for the said piece of land, for myself and my children, heirs and successors, and that the act of royal possession be executed to me, whereby I will receive benefit and favor as well as justice which I seek. And I swear in due form that this, my petition, is not made in malice, and as it may be necessary, etc.

Joseph de Leyba.

Annexed thereto is the grant of the governor and captain general of the province, with the condition that the grantees settle the land within the term prescribed by the royal ordinances, and a direction to the alcalde to put the party in possession.

Following this is the report of the chief alcalde of the city of Santa Fé, that, having taken witnesses and "inspected the lands and woods prayed for by the said petitioner," he put him in royal possession by performing the customary ceremonies of livery of seisin.

There are two disputed propositions connected with this petition of Leyba's: (1) As to the quantity of land granted; (2) as to its boundaries. It is admitted by both parties that the above translation from the record of the quantity of the land granted "as a piece of land and wood, vacant and unsettled, enough for half a *fanega* of corn-planting land, somewhat more or less," is incorrect, the original Spanish being as follows: "*Registro un pedaso de tierras y monte, yermo y despoblado, que cabe media fanega de maiz de sembradura, poco mas ó menos.*"

The argument of the government is that the quantity covered by the grant was only enough land to plant half a *fanega* of corn, a little more or less, and that, as a *fanega de maiz* is a measure of corn which will plant 8.82 acres, half of a *fanega* would measure 4.41 acres; the government translation being: "I register a piece of land and woods, uncultivated and unsettled, that will contain half a *fanega de maiz de sembradura*, a *lit- [236] tle more or less." The inference from this is that all that was conveyed was a piece of land that "will contain" enough for half a *fanega of maiz*. Claimant's translation, however, of the words *que cabe* is that it is a tract of land that "contains" within its outer boundaries half a *fanega* of corn, that is, of land capable of cultivation.

The probabilities, aside from the fact that the word *cabe* is a verb of the present tense, favor the construction of the claimant, as the words "lands and woods" would hardly be used as descriptive of a tract of 4½ acres. In addition to that, however, the description of quantity is wholly inconsistent with the boundaries (hereafter stated), which evidently contemplated a large tract of land, according to the Spanish and Mexican customs of making grants to settlers. Indeed, a grant of 4½ acres of land at a distance from any town, city, or settlement is so rare that the presumptions are all against it. If the boundaries were defined with accuracy, we should have very little difficulty in holding that they would not be controlled by the vague description of "a parcel of land and woods, uncultivated and unsettled, which includes half a *fanega* of corn-planting land."

This is the more apparent by an inspection of the subsequent documents, which include a will of Simon de Leyba, son of the grantee, of the year 1783, giving the boundaries of the tract, and a deed of Salvador Antonio de Leyba, grandson of José, to his son in 1834, also describing the lands by similar boundaries. Indeed, none of the subsequent documents make any reference what-

ever to the half *fanega* of corn-planting land. The will also contains a bequest of live stock and farming tools seemingly appurtenant to the ranch and greatly in excess of what would naturally belong to a tract of 4½ acres.

2. The difficulty, however, is with the description of the boundaries themselves, which is: "On the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by land of Juan Garcia de las Rivas, and on the north by lands of Captain Sebastian de Vargas." In the will of Simon de Leyba of 1783, the boundaries are the same upon the south and east, and on the north "the road which [237]goes *towards Pecos from the Cerrillos, *or* lands of Captain Sebastian de Vargas," and on the west "with the lands of the old pueblo of the Cienega." The land is described in substantially the same terms in the deed of 1834. The description of the lands on the east side as bounded by the San Marcos road is clearly defined. The description of the north boundary as the road from Pecos to the Cerrillos is also defined with somewhat less certainty, the lands of Sebastian de Vargas having been located, surveyed, and confirmed several miles to the east of the Leyba grant; but upon the west and south the boundaries, even as sworn to orally by witnesses, are so uncertain as to afford little guide to a surveyor in attempting to locate the tract.

The west boundary, which is described in the grant as "the lands of Juan Garcia de las Rivas," is described in the will of 1783 as "the lands of the old pueblo of the Cienega." While there is some evidence from the archives that the father of Garcia de las Rivas, in 1701, owned a piece of land somewhere west of the Leyba tract, known even then as the old Pueblo of la Cienega, there is nothing to show the east boundary of the pueblo, and consequently the west boundary of the Leyba tract. The south boundary, said to be "an arroyo called Cuesta del Oregano," it seems to be impossible to locate with any degree of certainty, though it was probably near the Coyote spring, at which the only house built upon this tract appears to have been located. This house long since fell into ruins, and there is no evidence that it has been occupied since the last owner of the grant, Juan Angel de Leyba, was supposed to have been killed by the Indians in 1839.

The evidence of possession subsequent to the grant does not afford much aid in fixing the boundaries, since the land, like most of that in Spanish-American territories, was not of a kind admitting of a well-defined, actual, and adverse possession, such as that of cultivated land. The most favorable view for petitioner that can be taken of this evidence is that possession of a house or a certain field of arable land may be referable to the entire tract included within the boundaries of the grant; but when the boundaries themselves are indefinite, the possession of a house is of no value in fixing [238]the boundaries. A grant too *indefinite to be located, and never fixed by any survey, is void as against the United States. As was observed in *United States* v. *Delespine*, of a Spanish grant in Florida (15 Pet. 319, 335, 10 L. ed. 753, 758), "the public domain cannot be granted by the courts." They may locate the boundaries fixed by grant, but the boundaries must be so fixed as to admit of a survey. *United States* v. *Miranda*, 16 Pet. 153, 160, 10 L. ed. 920, 922; *United States* v. *King*, 3 How. 773, 11 L. ed. 824; *Villalobos* v. *United States*, 10 How. 551, 13 L. ed. 535; *Arivaca Land & Cattle Co.* v. *United States*, 184 U. S. 649, 652, 46 L. ed. 731, 733, 22 Sup. Ct. Rep. 525.

The grant was made and possession was given to the grantee in 1728. Nothing being shown to the contrary, we presume that the possession continued until 1783, the date of the will of Simon de Leyba to his son, Salvador Antonio de Leyba, "whom I recognize as my sole heir." The next item of interest tending to show possession is the deed of Salvador Antonio de Leyba in 1834 to his son, Juan Angel de Leyba, who are both described as residents of the city of Santa Fé, wherein the same boundaries are also given, although the land is called "the rancho of the Coyote spring, with its houses and corrals, together with the grant in which the said ranch is situated, which was given to my grandfather by the King of Spain, May 25, 1728." Juan Angel appears to have been killed by Indians a few years after this deed was made, but it seems to have been uncertain whether he was in actual possession of the tract.

To rebut the case made by the claimant, the government offered in evidence the depositions of several residents of that neighborhood, who swore that they had never heard of the José de Leyba grant, or its boundaries. Objection was made to the reading of these depositions upon the ground that the witnesses named were present in court, and might be sworn orally. It is unnecessary to determine whether the court erred in admitting the depositions under such circumstances, in view of the vague and unsatisfactory evidence on behalf of the claimant of the boundaries and possession of this tract.

Admitting that the documents introduced afforded a sufficient presumption of a continued possession from 1783 to 1834, there was no evidence of the occupation of the land by any member of the Leyba family subsequent to 1839. This fact of *a total [239]absence of any claim to the land made by the last heirs of the occupant, and that the house was allowed to fall into ruins, is strong evidence either that the land was abandoned as not worth cultivating, or that a residence there had become too dangerous by reason of the presence of hostile Indians. In this connection the court below found that the evidence as to the settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant, and knowledge of the existence in the community

or by the oldest inhabitants now living, is so vague, contradictory, and uncertain as to be almost wholly wanting." In the absence of clear evidence to the contrary, we deem it our duty to adopt the opinion of the court below in that particular. *United States* v. *Pendell*, 185 U. S. 189, 197, 46 L. ed. 866, 870, 22 Sup. Ct. Rep. 624.

While, in construing these Spanish grants, owing to the loose manner in which they were made and the boundaries described, we have been extremely liberal, still we are bound to consider that grants of this description, as of all others, must be construed favorably to the government, and the grantee is bound to show, not only the grant itself, but that the boundaries were fixed with reasonable certainty. *Slidell* v. *Grandjean*, 111 U. S. 412, 437, 28 L. ed. 321, 329, 4 Sup. Ct. Rep. 475; *United States* v. *Oregon & C. R. Co.* 164 U. S. 526, 539, 41 L. ed. 541, 544, 17 Sup. Ct. Rep. 165.

3. But, conceding that an experienced surveyor, acquainted with the land in that neighborhood, might locate the boundaries of this tract, there is a still more serious difficulty in the evidence of abandonment and the laches of the claimant, which defenses may properly be considered together. Under our Anglo-Saxon system of jurisprudence, questions of the abandonment of land by the owner rarely arise, since they are usually sold to a purchaser or to the state for taxes; but the Spanish law recognizes distinctly the right to abandonment. It is stated in 1 Partidas, Law 50, p. 365, that "if a man be dissatisfied with his immovable estate and abandons it, immediately he departs from it corporally, with an intention that it shall be no longer his, it will become the property of him who first enters thereon." See also Hall's Mexican Law, § 1489. The same principle is stated by [240] Escriche, title, *Abandono de cosas*: *"If an owner voluntarily abandons a thing, whether personal or real, with intent no longer to count it in the number of his possessions, because it is useless or burdensome, or for mere caprice, he loses his ownership, and the first who occupies it makes it his." We are also referred by counsel to a law of the Departmental Council of New Mexico, enacted in 1837, which declares that "every individual who abandons the land upon which he has settled, and which he acquired by grant, with the intention of establishing himself elsewhere to live there, and does not leave someone to take his place in ordinary labor, shall lose the real property he had acquired." See also *Landes* v. *Perkins*, 12 Mo. 238, 256; *Sideck* v. *Duran*, 67 Tex. 256, 3 S. W. 264.

As there is no testimony tending to show that the Leybas ever sought to resume possession of the land after the death of Juan Angel, in 1839, there was, at least, a presumption of abandonment. Not only is there no evidence tending to show possession of the land by representatives of the original grantee since 1839, but for sixty years thereafter there was no attempt made to assert title thereto. By § 7 of the private land claims act [26 Stat. at L. 854, chap. 539, U. S. Comp. Stat. 1901, p. 765], "all proceedings" therein "shall be conducted, as near as may be, according to the practice of the courts of equity of the United States;" and, by § 13, no claim shall be allowed upon an imperfect title unless "the claimant would have had a lawful right to make perfect had the territory not been acquired by the United States;" nor upon a perfect title, "if the same was not at said date already complete and perfect." While it is true that we have held that evidence of possession since the date of the treaty cannot be regarded as an element going to make up a title (*Crespin* v. *United States*, 168 U. S. 208, 42 L. ed. 438, 18 Sup. Ct. Rep. 53; *Hayes* v. *United States*, 170 U. S. 637, 653, 42 L. ed. 1174, 1180, 18 Sup. Ct. Rep. 735; *Hays* v. *United States*, 175 U. S. 248, 259, 44 L. ed. 150, 154, 20 Sup. Ct. Rep. 80), it does not follow that abandonment of the land, and failure to assert a title since the treaty, may not operate as a bar. It is clear that, in the establishment of a title as of a certain date, possession subsequent to that date *is of no value; but, considering the title [241] to have been sufficient as of that date, failure to assert such title within a reasonable time thereafter opens the case to the defense of laches.

In *United States* v. *Moore*, 12 How. 209, 13 L. ed. 958, it was said of a Spanish grant in Louisiana: "We are called on to decide in this case according to the rules governing a court of equity, and are bound to give due weight to lapse of time. The party was under no disability, and slept on his rights, as he now claims them, for nearly fifty years, without taking a single step. He makes no excuse for his long delay, and cannot now get relief by having his title completed. No case has come within our experience where the obscurity and antiquity of the transaction more forcibly than in the present case required a court of equity to bar a complainant on legal presumptions founded on lapse of time; and where the bar should take the place of individual belief." To the same effect are *Gildersleeve* v. *New Mexico Min. Co.* 161 U. S. 573, 40 L. ed. 812, 16 Sup. Ct. Rep. 663, and *United States* v. *Martinez*, 184 U. S. 441, 46 L. ed. 632, 22 Sup. Ct. Rep. 422.

There are facts connected with this case which render the doctrine of laches peculiarly applicable. This land passed into the possession of the United States under the treaty with Mexico of 1848. Possession of the land had then been abandoned by the descendants of the grantees for at least nine years, and probably longer. In 1854, six years after the treaty, a surveyor general was appointed for New Mexico (10 Stat. at L. 308, chap. 103), whose duty it was to ascertain the origin, nature, character, and existence of all claims to lands under the laws, usages, and customs of Spain and Mexico, and report to Congress with a view of confirming bona fide grants, and giving full effect to the treaty. No action appears to have been taken before him to ascertain.

the validity or boundaries of this grant, although the act seems to have remained in force until 1891, when the court of private land claims was created. The public land surveys were extended over the tract in 1861; homestead and other entries were made, improvements established, patents secured, mines opened and developed, but no attempt made to assert the rights of the grantee or his descendants. The court of private land claims was established in 1891, [242] and all persons having imperfect *titles were required to present them within two years, and all having perfect titles had the right, but were not bound, to apply to that court for confirmation of such title. It was not until 1899 that the petition in this case was filed by a person who appears, in 1895, to have found lineal descendants of the original grantee, from whom he had secured deeds of this abandoned grant, the very existence of which seems to have been forgotten. If this be considered an imperfect grant, the right to file it expired years ago; if it be a perfect grant, as now claimed, we see no reason why the owner may not prosecute his claim in the territorial courts. Without expressing an opinion as to whether this was a perfect or imperfect grant within the meaning of the law, or whether the boundaries might not still be ascertained by a survey, we are satisfied that it is one which the court of private land claims could not be called upon to confirm, and that, if for no other reason, the petition should be dismissed upon the ground of laches.

*The decree of the court below is therefore affirmed.*

On petition for modification of the above decree of affirmance, Mr. Justice **Brown** announced on June 1, 1903, the order of the court that such decree be amended by adding the following words: "So far as such decree orders that the petition be dismissed, but without prejudice to such further proceedings as petitioner may be advised to take."

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GEORGE C. RANKIN, Receiver, etc., *Plff. in Err.*,
*v.*
FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY.

(See S. C. Reporter's ed. 242-254.)

*National banks—personal liability of shareholder—when pledgee liable as owner—evidence—province of court and jury.*

1. A pledgee of national bank stock which he took as collateral security for a loan is not chargeable with the personal liability for the debts of the bank imposed on "shareholders" by U. S. Rev. Stat. § 5151 (U. S. Comp. Stat. 1901, p. 3465), unless he has either become the owner of the shares in fact, or has held himself out to be the owner, and thereby estopped himself to deny his personal liability as such.
2. A memorandum made by the assignee of a pledgeor of national bank stock, without the knowledge or acquiescence of the pledgee, to the effect that such stock had been converted by the latter and did not sell for enough to pay the debt for which it was pledged, is inadmissible in evidence on the issue whether such pledgee had become the owner of the shares, and as such chargeable with the personal liability of the shareholders,—especially where such memorandum was obviously untrue, as the stock had never been sold.
3. Whether a pledgee of national bank stock is estopped to deny his personal liability as a shareholder by speaking of himself as holding or owning the stock, in letters to the officers of the bank, who understood perfectly the capacity in which such stock was retained, is a question for the jury.
4. A pencil memorandum in the stock ledger of a national bank, at the top of an account with the person to whom certain pledged shares of stock had been transferred at the request of the pledgee, which consists merely of the name of the latter, with whom the correspondence in regard to such account was carried on, is inadmissible in evidence on the issue whether such pledgee had become the owner of the stock and was chargeable with the personal liability of a shareholder.
5. A case which turns upon the proper conclusions to be drawn from a commercial correspondence, in connection with other facts and circumstances, is properly referred to a jury, although the construction of written instruments is ordinarily a question for the court.

NOTE.—*On enforcement of statutory liability of stockholders in national bank*—see note to Williamson v. American Bank, 52 C. C. A. 6.

*As to who are liable as shareholders in national banks*—see notes to Earle v. Carson, 46 C. C. A. 503; and Beal v. Essex Sav. Bank, 15 C. C. A. 130.

[No. 178.]

*Argued February 26, 27, 1903. Decided April 6, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Pennsylvania entered upon a verdict for the defendant in an action to recover an assessment upon shareholders in a national bank. *Affirmed.*

See same case below, 46 C. C. A. 509, 108 Fed. 475.

Statement by Mr. Justice **Brown**:

This was an action at law by the receiver of the Keystone National Bank of Erie, Pennsylvania, against the defendant company, as the actual owner and holder of 172½ shares of the capital stock of the bank, standing upon its books in the name of one William W. Hand, to recover an assessment upon the shareholders of 100 per cent made by the Comptroller of the Currency pursuant to Rev. Stat. § 5151 (U. S. Comp. Stat. 1901, p. 3465).

The facts of the case are substantially as follows: On November 15, 1890, Delamater & Co., a banking firm of Meadville, Pa., borrowed $15,000 of defendant company, in renewal of prior loans, giving therefor their

note for sixty days, and as collateral security deposited 230 shares of the capital stock of the Keystone National Bank of the par value of $100 per share, standing in the name of the individual members of the firm. The shares were valued at the time at par, $23,000; the bank was in good credit, and for twenty-seven years had regularly, and was then paying, semiannual dividends. With its certificates of stock thus deposited, powers of attorney signed by the individual holders of the stock were also delivered to the defendant. These documents [244] empowered the defendant to *transfer the shares—the name of the transferee and the attorney being blank.

Twenty days thereafter, and on December 5, 1890, Delamater & Co. failed and made a general assignment for the benefit of their creditors, and on December 17, defendant having received notice of the assignment, wrote to the assignees declining to renew the note, but offering to anticipate its payment and return the collaterals. It seems the assets of Delamater & Co. were insufficient for this purpose.

On January 10, 1891, defendant sent to the Keystone National Bank of Erie the original certificates, deposited as collateral, and requested the bank to transfer the shares to William W. Hand, a clerk in the employ of the defendant. Three days later, and on January 13, the bank paid a semiannual dividend of 2 per cent, but it does not appear who received this dividend, which proved to be the last one paid by the bank. The transfer was made on the books of the bank, and new certificates issued in the name of Hand, dated January 15, 1891, and were transmitted by the bank to the company, which acknowledged receipt of the stock, and stated that it would like to have a bid for the stock "if you know of a purchaser." Hand signed the transfer in blank on the back of these certificates, and in that form they were retained by the defendant. There was no receipt for the certificates except a memorandum in the handwriting of the clerk on the stub of the stock book: "Sent to the Fidelity Insurance, Trust, and Safe Deposit Company, Philadelphia, Penn., 1/17/91."

Fourteen months thereafter, and on March 16, 1892, the Comptroller of the Currency, finding that the capital of the bank was impaired, ordered an assessment of 25 per cent on the capital stock to make good the deficiency. The assessment upon these shares amounted to $5,750. This amount was paid by the defendant and charged on its books to Delamater & Co. as an additional advance. Its check was sent to the bank in a letter signed by Mr. Hand.

On December 22, 1892, pursuant to Rev. Stat. § 5143 (U. S. Comp. Stat. 1901, p. 3463), and with the approval of the Comptroller of the Currency, the capital stock of the bank was reduced from $250,- [245] 000 to $150,000, *divided into 1,500 shares of $100 each. Thereupon, and on January 24, 1893, the defendant sent to the bank the certificates for 230 shares, and on February 7 received the certificates in the name of Hand, for 172½ shares, being the reduced number. Hand signed a transfer in blank on the back of the certificates, and in that form they remained in the possession of the defendant. On March 20, 1894, the vice president of the defendant company addressed a letter to the bank, stating that the company held 172½ shares of the stock registered in the name of W. W. Hand, and requesting a copy of their last statement and any other information regarding the business of the bank, and as to whether there were any sales of stock, saying "We would like to sell our holdings, if marketable." No reply being received to this letter, the defendant company repeated its substance in another letter of April 4, stating that "as we have a loan of $22,000 depending upon the value of 172½ shares, we desire the above information." Several other letters were written to the same purport.

On June 20, 1897, the Keystone National Bank closed its doors, on July 26, the Comptroller of the Currency appointed a receiver, and on November 3 ordered an assessment of 100 per cent on the stockholders. Whereupon this action was brought to recover an assessment of $17,500 on the shares registered in the name of Hand.

The case was tried before a jury, and the question submitted to them "whether, before this Keystone National Bank failed, the defendant company, the Fidelity Trust Company of this city, was the real owner of these shares of stock, or whether it continued to be the pledgee of the stock,—whether the stock had become theirs in the sense in which we use in ordinary speech the word 'owner,' or whether it had been continued to be pledged to them as collateral security for the payment of the note which has been offered in evidence."

Upon the issue thus submitted the jury returned a verdict for the defendant, upon which judgment was entered, and the case taken to the circuit court of appeals upon writ of error. That court affirmed the judgment. 46 C. C. A. 509, 108 Fed. 475.

*Mr.* **Asa W. Waters** argued the cause and filed a brief for plaintiff in error:

The trial court erred in excluding from the jury the evidence that defendant, upon its notice that it owned the shares, had been entered upon the books of the bank, before its failure, as a stockholder, by the bank's cashier.

*Carey* v. *Williams*, 25 C. C. A. 227, 51 U. S. App. 204, 79 Fed. 906; *Turnbull* v. *Payson*, 95 U. S. 418, 24 L. ed. 437.

The refusal of the trial court to permit the assignees to testify that their memory was refreshed and recollections confirmed as to the representations made by the officers of the defendant company to them, by their own official report, was error.

Greenl. Ev. Lewis's ed. 1896, § 436.

Defendant in error is estopped to deny ownership of the 172½ shares, to the insolvent bank's creditors.

*Priestly* v. *Fernie*, 3 Hurlst. & C. 977;

Bigelow, Estoppel, 5th ed. 124; *Kingsley* v. *Davis*, 104 Mass. 178; *Kirk* v. *Hartman*, 63 Pa. 97; 2 Morawetz, Priv. Corp. § 870; *Hobart* v. *Johnson*, 19 Blatchf. 359, 8 Fed. 495; *Langtry* v. *Wallace*, 38 C. C. A. 510, 97 Fed. 867; *Upton* v. *Englehart*, 3 Dill. 496, Fed. Cas. No. 16,800; *Schalucky* v. *Field*, 124 Ill. 617, 16 N. E. 904; *Sawyer* v. *Hoag*, 17 Wall. 610, 21 L. ed. 731; Bouvier, Law Dict. title *Estoppel;* Bigelow, Estoppel, 4th ed. 445; *Lewis* v. *Carstairs*, 5 Watts. & S. 205; *Turnipseed* v. *Hudson*, 50 Miss. 429, 19 Am. Rep. 15; *Mayer* v. *Ramsey*, 46 Tex. 371; *Coleman* v. *Pearce*, 26 Minn. 123, 1 N. W. 846; *Vermont Copper Min. Co.* v. *Ormsby*, 47 Vt. 709; *Barnard* v. *German American Seminary*, 49 Mich. 444, 13 N. W. 811; *Paxson* v. *Brown*, 10 C. C. A. 135, 27 U. S. App. 49, 61 Fed. 874; *Philadelphia, W. & B. R. Co.* v. *Howard*, 13 How. 307, 335, 337, 14 L. ed. 157, 169, 170; *Dickerson* v. *Colgrove*, 100 U. S. 578, 580, 584, 25 L. ed. 618, 619, 621; *Southern L. Ins. Co.* v. *McCain*, 96 U. S. 74–86, 24 L. ed. 653, 654; *Bronson* v. *Chappell*, 12 Wall. 681, *sub nom. Townsend* v. *Chappell*, 20 L. ed. 436; *Thompson* v. *First Nat. Bank*, 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. Rep. 689; Ewart, Estoppel.

The registry of the shares on the books of the bank by defendant in error in the name of W. W. Hand, its agent, in contemplation of law was a registry, upon the facts in this case, in its own name, and closes its mouth to contradict ownership, just as if its own name had been registered. This is because of the legal identity of agent and principal.

*Hubbell* v. *Houghton*, 86 Fed. 547; *Davis* v. *Stevens*, 17 Blatchf. 259, Fed. Cas. No. 3,653; *Case* v. *Small*, 4 Woods, 78, 10 Fed. 722.

The defendant in this case is not a "mere pledgee;" it at least became a mortgagee, and it is "registered" upon the books of the bank in legal effect, because of the legal identity of agent and principal, and further, because the cashier of the bank did, in fact, enter its name in the stock ledger of the bank as a shareholder.

*Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448.

If the owner transfers his shares to another person as collateral security for a debt due to the latter from such owner, and if, by the direction or with the knowledge of the pledgee, the shares are placed on the books of the association in such a way as to imply that he is the real owner, then he may be treated as a shareholder.

*Pauly* v. *State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465.

The estoppel upon all the evidence is a question of law for the court.

*Lewis* v. *Carstairs*, 5 Watts & S. 205; *Keating* v. *Orne*, 77 Pa. 89; Ewart, Estoppel, pp. 189–191.

*Mr.* **Richard C. Dale** argued the cause and filed a brief for defendant in error:

A mere pledgee of stock is not chargeable with the stockholder's liability, where he is not registered as owner.

*Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525; *National Park Bank* v. *Harmon*, 25 C. C. A. 214, 51 U. S. App. 148, 79 Fed. 891; *Wilson* v. *Merchants' Loan & T. Co.* 39 C. C. A. 231, 98 Fed. 688; *Robinson* v. *Southern Nat. Bank*, 36 C. C. A. 584, 94 Fed. 964; *Matteson* v. *Dent*, 176 U. S. 521, 44 L. ed. 571, 20 Sup. Ct. Rep. 419; *Pauly* v. *State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465.

The books of a corporation in themselves are not evidence, against persons charged as stockholders, to establish the fact of their ownership of stock.

*Sigua Iron Co.* v. *Greene*, 44 C. C. A. 221, 104 Fed. 854, 31 C. C. A. 458, 88 Fed. 203, 31 C. C. A. 477, 59 U. S. App. 555, 88 Fed. 207; *Carey* v. *Williams*, 25 C. C. A. 227, 51 U. S. App. 204, 79 Fed. 906.

Mr. Justice **Brown** delivered the opinion of the court:

There being but little conflict in the testimony as to the actual facts, the question really is whether the court should have submitted the case to the jury, or instructed a verdict for the plaintiff.

By Rev. Stat. § 5151 (U. S. Comp. Stat. 1901, p. 3465), "the *shareholders* of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements for such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares;" and by § 5234 (U. S. Comp. Stat. 1901, p. 3507), the receiver may, upon order of the proper court, enforce this individual liability.

Most of the cases arising under this section have turned upon the question whether defendant was in fact the owner of the shares. In this connection the following propositions may be considered as settled:

1. That liability may be established by allowing one's name to appear upon the books of the corporation as owner, though in fact he be only a pledgee. *Pullman* v. *Upton*, 96 U. S. 328, 24 L. ed. 818. Nor can the real owner exonerate himself from responsibility by making a colorable transfer of the stock, with the understanding that, at his request, it shall be retransferred. *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448; *Bowden* v. *Johnson*, 107 U. S. 251, *sub nom. Adams* v. *Johnson*, 27 L. ed. 386, 2 Sup. Ct. Rep. 246; *Stuart* v. *Hayden*, 169 U. S. 1, 42 L. ed. 639, 18 Sup. Ct. Rep. 274.

2. Stockholders of record are liable for unpaid instalments, though in fact they may have parted with their stock, or held it for others. *Hawkins* v. *Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739.

3. A mere pledgee, however, who receives from his debtor a transfer of shares, surrenders the certificate to the bank and takes out new ones in his own name, in which he is described as "pledgee," and holds them afterwards in good faith, and as *collateral [247] security for the payment of his debt, is not

subject to personal liability as a shareholder. *Pauly* v. *State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465. But it is otherwise if he allow his name to appear on the book as owner, or, being the owner, makes a colorable transfer of the stock. *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448.

Three cases in this court are specially pertinent to the one under consideration, and we have little more to do than to point out the salient facts of each and determine by which one of them this case is controlled.

In *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448, it appeared that the Germania Bank lent $14,000 to the firm of Phelps, McCullough, & Co., who, to secure the payment of the loan, pledged to the bank 100 shares of the stock of the Crescent City Bank, with power, on nonpayment of the note, to dispose of the stock for cash at public or private sale, without recourse to legal proceedings. At the same time a power of attorney was given, authorizing a transfer of the stock to the Germania Bank. The note not being paid at maturity, a transfer was made to the Germania Bank on the transfer books of the Crescent City Bank. The stock was subsequently transferred to one of the clerks of the Germania Bank with an understanding between him and the officers of the bank that he should retransfer it at their request. It was held that, notwithstanding the transfer to the clerk, the stock remained subject to the bank's control; that the transfer was made to evade the liability of the true owners; and that, as Phelps, McCullough, & Co. had ceased to be the owners of the stock, the bank was liable. The liability was put by the court upon the ground that the stock was transferred to the Germania Bank upon the transfer books of the Crescent City Bank, and thereby the bank became subject to the liabilities of a stockholder, and that, as a transfer of the stock to its clerk, Waldo, was colorable, it had not exonerated itself from that liability.

The case is distinguishable from the instant case by the fact that the stock was actually transferred to the bank upon the transfer books of the Crescent City Bank, which thus appeared as owner, and that the subsequent transfer to Waldo was merely [248]*colorable. There was also the further fact that the Crescent City Bank was in a failing condition when the transfer to Waldo was made, and there was no reasonable doubt that the defendant, Germania Bank, knew it, and made the transfer to escape responsibility. In the present case the stock was never transferred to the defendant, and the transfer to Hand took place within two months of the time of the original pledge, when the Keystone Bank was supposed to be perfectly solvent, and remained so for more than a year thereafter, when the assessment of 25 per cent was made, the bank continuing in business until June 20, 1897, more than six years after the transfer to Hand.

In *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525, the law as laid down in the prior case was somewhat relaxed, and a tendency manifested to look more closely at the equities. In that case Blumer & Co. borrowed a sum of money from the defendant, and as security for the loan transferred 450 shares of stock of the First National Bank of Allentown standing in the name of one Kern, a partner in the firm of Blumer & Co., on the books of the bank, and had a new certificate issued in the name of one Henry, president of the defendant warehouse company. The fact of the transfer of this stock to its president was brought to the attention of the directors of the warehouse company, who deemed it inadvisable to have the stock stand in the name of the president, and it was therefore transferred to one McCloskey, a porter in the employ of the company, and irresponsible. McCloskey never had possession of the certificate, and, at the request of the warehouse company, gave a power of attorney for the sale and transfer of the stock, and shortly thereafter died. The stock was subsequently transferred to one Ferris, another employee, also irresponsible. Dividends were regularly paid on this stock to Kern, and the warehouse company never acted as a shareholder. It was held that, as there was no evidence of fraud or bad faith,—as the warehouse company was never the owner of the stock, and never held itself out as such; never consented to a transfer of the stock on the books; never claimed dividends, or acted as a shareholder, or ever pretended to be anything but a mere pledgee,—it was not liable. *Said the court: [249] "The creditors were put in no worse position by the transfers that were made than they would have been if the stock had remained in the name of Kern, or Blumer & Co. who were always the real owners." It was held that, as the defendant promptly declined to allow itself to stand as a registered shareholder, because it was unwilling to incur the liability such a registry would impose, and asked that the transfer be made to McCloskey, from that time the case stood precisely as it would if the transfer had been originally made to him instead of to Henry, the president of the company. "All this was done in good faith, when the bank was in good credit and paying large dividends, and years before its failure or even its embarrassment." The case differs from this only in the fact that here there was *some* evidence (enough to go to the jury) that defendant had held itself out as the owner of the shares.

In *Pauly* v. *State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465, the stock which was delivered to the defendant as collateral security was reissued, and new certificates issued to the defendant as "pledgee." It was held that, as the stock book gave information that the defendant held the stock as pledgee only, it was not liable to an assessment. See also *Robinson* v. *Southern Nat. Bank*, 180 U. S. 295, 45 L. ed. 536, 21 Sup. Ct. Rep. 383; *National Park Bank* v. *Harmon*, 25 C. C. A. 214, 51

U. S. App. 148, 79 Fed. 891, *S. C.* 172 U. S. 644, 43 L. ed. 1182, 19 Sup. Ct. Rep. 877.

There is no doubt whatever that the defendant originally took blank transfers of the certificates of stock in question as security for its loan to the Delamaters; that at that time the stock was worth its face value, $23,000; had paid dividends for twenty-seven years prior thereto, and was in good credit. To charge the defendant with liability as a shareholder it must be made to appear that it had either become the owner of the shares in fact, or had held itself out to be the owner, and thereby estopped itself to deny its liability as such.

The first change in its attitude toward the stock took place within two months after the original pledge, and was caused by the failure of the Delamaters, which occurred within twenty days after the loan was made. The change consisted in sending back, January 10, 1891, the original certificates, and requesting the bank to transfer the shares [250] to Hand, which was *done. Defendant evidently did not then intend to become the owner of the stock, as, immediately after receiving notice of the failure of the Delamaters, the vice president of the company addressed a note to them, or their assignees, calling attention to the note and the pledge of the stock, and saying that if they were prepared to anticipate the payment of the note and have the collateral returned, they would be glad to so arrange it; and in a further letter of May 5, 1891, to the Delamaters, he notified them that the note was secured by the Keystone Bank stock, and "if we cannot secure payment for the note and interest, I have to notify you that we shall proceed to sell the collateral at auction." It also appears that on July 7, 1892, the vice president of the company addressed a letter to the auditor of the Delamater estate, notifying him of their claim against that estate upon the note for $15,000, and stating that the company held the shares of the Keystone Bank as collateral for the loan. Thereafter, and on March 30, 1893, the company received a dividend of $795.60, to which it was undoubtedly entitled as pledgee.

Even so late as 1894 the vice president of the defendant company addressed a note to the Keystone Bank, requesting information regarding their business; whether there had been any sales of the stock and at what price, and saying that "as we have a loan of $22,000 depending upon the value of 172½ shares, we desire the above information." It is true that the defendant in 1892 paid an assessment of $5,750 upon this stock, but the amount was charged to the Delamaters as an additional advance, and was evidently paid to save its interest in the stock from forfeiture. Rev. Stat. § 5205 (U. S. Comp. Stat. 1901, p. 3495), as amended in 1876 (19 Stat. at L. 64, chap. 156, U. S. Comp. Stat. 1901, pp. 3509, 2398, 3500, 3514). It is not easy to see how the defendant could have done otherwise than it did without prejudice to its own rights, as well as to the rights of the assignees of the pledgeors.

It is also evident that the assignees of the Delamaters treated the interest of the defendant in the stock as a mere pledge, since in their account filed in the court of common pleas of Crawford county, July 13, 1896, they charge themselves in the account as follows: "Equities in stocks and bonds, pledges as collateral on loan unadjusted, as follows: (*a*) $23,000, stock of *the Key- [251] stone National Bank of Erie, pledged for a loan of $15,000, appraised at $8,000." Proof was offered that in this account the assignees had made another entry, "said stock having been converted by the holder of the note, and said stock having been assessed to the amount of 25 per cent of its face value, did not sell for enough to pay the debt for which it was pledged." This memorandum was excluded, and properly so, by the court below, inasmuch as it was a mere assertion of fact made by these assignees without the knowledge of the defendant. The company could not be bound by a statement thus made by these assignees without its knowledge or acquiescence. Again, it was obviously untrue, as the stock had never been sold. Evidently all that was intended by the word "converted" was that the stock was not worth enough "to pay the debt for which it was pledged." There can be no doubt that defendant would have been willing at any time to surrender the stock upon payment of the debt, and that it retained it simply because it was forced to do so.

It is also true that a number of letters were written during the time the defendant held possession of its certificates, in which it made inquiries as to the value of the stock, the number of sales made, and spoke of itself as holding or owning the stock which it desired to sell, and that Hand once or twice voted the shares by proxy; but the bank clearly could not have been misled, as the nature of such ownership was shown in the letter of April 4, 1894, in which they spoke of a loan of $22,000 depending upon the value of 172½ shares, and repeatedly thereafter, and as late as April, 1897, said they were anxious to sell this stock "to close an account" for which it was collateral.

If such representations had been made either by a formal entry upon the books of the bank or to the public, or to anyone who could have been prejudiced by them, defendant might be held to be estopped, but as they were made to officers of the bank, who understood perfectly the capacity in which the defendant retained the stock, it was properly held to be a question for the jury.

Plaintiff also offered to show in the stock ledger of the *bank over the name of W. W. [252] Hand, in an account opened with him at the request of the defendant, a pencil memorandum at the top of the page in these words: "Fidelity Trust & Safe Deposit Company, Philadelphia." As it does not appear who made this memorandum, when or for what

purpose it was made, or what it was intended to indicate, it was properly excluded from the consideration of the jury. It was probably explanatory of the fact that correspondence with regard to Hand's account was kept up with the defendant company. It had no tendency, however, to show anything inconsistent with defendant's position as pledgee of the stock. As the stock stood in Hand's name, the entry had no tendency to prove ownership in another. *Carey* v. *Williams*, 25 C. C. A. 227, 51 U. S. App. 204, 79 Fed. 906; *Sigua Iron Co.* v. *Greene*, 44 C. C. A. 221, 104 Fed. 854.

The fact that the certificates were put in the name of Hand, though calculated upon its face to awaken suspicion, wrought no material change in the situation. If defendant were in fact the owner of the shares, it could not avoid liability by listing them in the name of another. *Germania Nat. Bank* v. *Case*, 99 U. S. 628, 25 L. ed. 448. If it were the pledgee, it had the option of listing these shares in its own name as pledgee; *Pauly* v. *State Loan & T. Co.* 165 U. S. 606, 41 L. ed. 844, 17 Sup. Ct. Rep. 465; or in the name of another and irresponsible party, even though this were done for the purpose of avoiding liability. *Anderson* v. *Philadelphia Warehouse Co.* 111 U. S. 479, 28 L. ed. 478, 4 Sup. Ct. Rep. 525. The creditors were not injured, since if the exact truth had appeared upon the face of the certificates, by registering the shares as pledgee, they would have had no recourse against the defendant. Upon the other hand, if defendant had really owned the shares, it would have been a fraud to list them in the name of Hand. Perhaps it would have been less open to criticism to have listed them in its own name as pledgee, but as its failure to do so, under the theory of the defendant that it was in fact the pledgee, misled no one, it should not be held liable for what was done in good faith and with no intent to defraud.

The case then really turned upon the actual ownership of the shares, and this question was properly left to the jury as one of fact. Although the construction of [59] written instruments is one *for the court, where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury. *Brown* v. *M'Gran*, 14 Pet. 479, 10 L. ed. 550. In that case it was said by Mr. Justice Story that "there certainly are cases in which, from the different senses of the words used or their obscure and indeterminate reference to unexplained circumstances, the true interpretation of the language may be left to the consideration of the jury for the purpose of carrying into effect the real intention of the parties. This is especially applicable to cases of commercial correspondence, where the real objects, and intentions, and agreements of the parties are often to be arrived at only by allusions to circumstances which are but imperfectly developed." This case is specially applicable to the one under consideration, inasmuch as plaintiff relies chiefly upon the fact that defendant, in its correspondence with the bank, spoke of itself as owning or holding the shares standing in the name of Hand. Under the circumstances, it is entirely possible that the word "owner" may have been used in its ordinary sense, or as representing a pledgee upon whom the ownership of the shares had been cast by the failure of the pledgeor, and the depreciation of the value of the shares to an amount insufficient to pay the note. It can hardly be possible that the statute was intended to impose a liability upon a pledgee who had taken the shares as collateral security, and, through the failure of the pledgeors, had been forced against its will into the position of ownership. Such a result might operate to destroy altogether the possibility of raising money upon the deposit of national bank shares as collateral. See also *Fagin* v. *Connoly*, 25 Mo. 94, 69 Am. Dec. 450; *Prather* v. *Ross*, 17 Ind. 495; *Roberts* v. *Bonaparte*, 73 Md. 191, 10 L. R. A. 689, 20 Atl. 918; *Macdonald* v. *Morrill*, 154 Mass. 270, 28 N. E. 259.

This case could only have been withdrawn from the jury upon the theory that, taking all the testimony together, there could be but one reasonable interpretation put upon the conduct of the defendant with respect to these certificates. Such, in our opinion, is not the case. The fact undoubtedly was that the *defendant did not intend to impose [254] upon itself the statutory liability of a shareholder, and, considering that it had not only lost its original debt of $15,000 (less a small dividend) by the failure of the Delamaters, as well as the additional assessment of $5,750, paid to save the shares from forfeiture, that there was no evidence of fraud or double dealing in its conduct, and that its liability was purely a technical one, it was not unnatural for the jury to require that such liability should be clearly established, before imposing upon it an additional burden of $17,250, for which it had received no possible consideration.

Some stress is laid by the plaintiff upon the fact that neither the Delamaters nor their assignees ever gave their consent to the transfer of the stock to Hand; but, as the power of attorney originally given upon the deposit of the stock expressly authorized such transfer, and the rights of the defendant could only be protected in that way, there is no force in the objection, particularly in view of the fact that neither the Delamaters nor their assignees complained of such transfer. Being an act which it was authorized to take as pledgee, it cannot be made responsible as owner therefor.

There was no error in the action of the Court of Appeals, and *its judgment is therefore affirmed.*

Mr. Justice **Harlan** dissented.

[255]*CHARLES J. GLIDDEN, Trustee, *Plff. in Err.*,
*v.*
JOHN H. HARRINGTON, Collector.

(See S. C. Reporter's ed. 255-260.)

*Constitutional law — due process in taxation proceedings.*

Due process of law is not violated by proceedings taken in conformity with a state statute providing that personal property held in trust shall be assessed to the trustee, which requires the assessors to give public notice to the inhabitants to return a list of their personal estates, and, in case of failure to make such return, to ascertain as nearly as possible the particulars of the estate, and estimate its just value, which shall be conclusive upon the owner unless he can show a reasonable excuse for omitting to make his return; and which makes provision for an application to the assessors for an abatement of taxes, and for an appeal to the county commissioners in case of a refusal of the assessors to abate the tax.

[No. 199.]

*Argued March 12, 1903. Decided April 6, 1903.*

IN ERROR to the Superior Court of the Commonwealth of Massachusetts to review a judgment entered in pursuance of the mandate of the Supreme Judicial Court of that State in favor of plaintiff in a suit to recover a tax upon personal property. *Affirmed.*

See same case below, 179 Mass. 486, 61 N. E. 54.

Statement by Mr. Justice **Brown:**

This was an action brought in the superior court of Middlesex county by Harrington, collector of taxes for the city of Lowell, to recover a tax upon personal property, assessed upon the defendant as trustee, for the year 1889.

The case resulted in a verdict for the plaintiff, which was carried by exceptions to the supreme judicial court, where the exceptions were ordered overruled (179 Mass. 486, 61 N. E. 54) and the case remanded to the superior court, in which judgment was entered.

*Mr.* **Harvey M. Shepard** argued the cause and filed a brief for plaintiff in error:

The statutes in question provide a remedy which, if the person assessed is an inhabitant of the town or city levying the tax, and has property subject to taxation by the assessors, is exclusive. He cannot recover such a tax if paid under protest, or defend in an action by the collector to collect it, on the ground that the assessment is partially unlawful.

*Bates* v. *Boston*, 5 Cush. 93; *Wright* v. *Boston*, 9 Cush. 233; *Bourne* v. *Boston*, 2 Gray, 494; *Davis* v. *Macy*, 124 Mass. 193; *Chapel of Good Shepherd* v. *Boston*, 120 Mass. 212.

Whether the excess is due to placing too great a valuation upon property lawfully taxable, or to including property for which the person is not lawfully taxable, there is merely an overvaluation, and the remedy must be by abatement.

*Little* v. *Greenleaf*, 7 Mass. 236; *Osborn*, v. *Danvers*, 6 Pick. 98; *Lincoln* v. *Worcester*, 8 Cush. 55.

In this respect the three classes of taxes—polls, personal property, and real property—are separate. If a person is properly assessable for any tax of a certain class, the inclusion of property of that class for which he is not properly assessable can be shown only in proceedings for abatement.

*Salem Iron Factory Co.* v. *Danvers*, 10 Mass. 514; *Preston* v. *Boston*, 12 Pick. 7; *Lincoln* v. *Worcester*, 8 Cush. 55.

An injunction does not lie to restrain the collection of a tax or assessment.

*Brewer* v. *Springfield*, 97 Mass. 152; *Loud* v. *Charlestown*, 99 Mass. 208; *Norton* v. *Boston*, 119 Mass. 194.

The decisions of a state court upon the construction of its own statutes are final, and are adopted by this court without regard to this court's opinion of their correctness.

*State Railroad Tax Cases*, 92 U. S. 617, *sub nom. Taylor* v. *Secor*, 23 L. ed. 674; *New York* v. *Weaver*, 100 U. S. 539, 25 L. ed. 705; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *McElvaine* v. *Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; *Wood* v. *Brady*, 150 U. S. 18, 37 L. ed. 981, 14 Sup. Ct. Rep. 6; *First Nat. Bank* v. *Ayers*, 160 U. S. 660, 40 L. ed. 573, 16 Sup. Ct. Rep. 412; *First Nat. Bank* v. *Chehalis County*, 166 U. S. 440, 41 L. ed. 1069, 17 Sup. Ct. Rep. 629; *W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *Columbus Southern R. Co.* v. *Wright*, 151 U. S. 475, 38 L. ed. 241, 14 Sup. Ct. Rep. 396; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 425, 38 L. ed. 1036, 14 Sup. Ct. Rep. 1414; *Commercial Nat. Bank* v. *Chambers*, 182 U. S. 556, 45 L. ed. 1227, 21 Sup. Ct. Rep. 863.

The Federal requirement of due process of law extends to judicial, as well as to legislative, action of the states. The judgment of a court may invade the requirement, no less than a statute.

*Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581.

NOTE.—*As to what constitutes due process of law*—see Kuntz v. Sumption (Ind.) 2 L. R. A. 655, and note; *Re* Gannon (R. I.) 5 L. R. A. 359, and note; Ulman v. Baltimore (Md.) 11 L. R. A. 224, and note; and Gilman v. Tucker (N. Y.) 13 L. R. A. 304, and note. And see notes to People v. O'Brien (N. Y.) 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

*On notice and hearing required to constitute due process of law*—see notes to Kuntz v. Sumption (Ind.) 2 L. R. A. 657; Chauvin v. Valiton (Mont.) 3 L. R. A. 194; and Ulman v. Baltimore (Md.) 11 L. R. A. 225.

The collection of taxes is within the phrase "due process of law."

*United States* v. *Ferreira*, 13 How. 40, 14 L. ed. 42.

The courts have uniformly recognized the necessity of some sort of hearing before property can be seized under the power of taxation. Notice and an opportunity to be heard are essential to due process of law.

*Violett* v. *Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909; *Bowler* v. *Huston*, 30 Gratt. 273, 32 Am. Rep. 673; *Cook* v. *Gregg*, 46 N. Y. 442; *Happy* v. *Mosher*, 48 N. Y. 317; *Overing* v. *Foote*, 65 N. Y. 263; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Patten* v. *Green*, 13 Cal. 329; *Mulligan* v. *Smith*, 59 Cal. 206; *Boorman* v. *Santa Barbara*, 65 Cal. 313, 4 Pac. 31; *People* v. *Pittsburg R. Co.* 67 Cal. 625, 8 Pac. 381; *Brewster* v. *Newark*, 11 N. J. Eq. 118; *Savannah, F. & W. R. Co.* v. *Savannah*, 96 Ga. 680, 23 S. E. 847; *Thomas* v. *Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Kundinger* v. *Saginaw*, 59 Mich. 355, 26 N. W. 634; *Marshall* v. *McDaniel*, 12 Bush, 378; *Dasey* v. *Skinner*, 33 N. Y. S. R. 15, 11 N. Y. Supp. 821, 823; *Griswold College* v. *Davenport*, 65 Iowa, 633, 22 N. W. 904; *McFadden* v. *Longham*, 58 Tex. 579; *Relfe* v. *Columbia L. Ins. Co.* 11 Mo. App. 378; *Darling* v. *Gunn*, 50 Ill. 424; *Kuntz* v. *Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *Griffin* v. *Mixon*, 38 Miss. 424; *Neave* v. *Weather*, 3 Q. B. 984; *Den ex dem. Murray* v. *Hoboken Land & Improv. Co.* 18 How. 276, 15 L. ed. 374; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 722; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Meyers* v. *Shields*, 61 Fed. 713; *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Palmer* v. *McMahon*, 133 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. Rep. 324; *Lent* v. *Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *King* v. *Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

A notice essential to confer jurisdiction upon any tribunal in any proceeding must point to the party to whom it is addressed, to the tribunal in which, and to the time when, and to the place where, he may be heard in that proceeding.

*State, Brinkley, Prosecutor,* v. *Perth Amboy*, 29 N. J. L. 259; *State, Boice, Prosecutor,* v. *Plainfield*, 38 N. J. L. 96; *State, Central R. Co., Prosecutors,* v. *Bayonne*, 49 N. J. L. 313, 8 Atl. 296; *Lent* v. *Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825.

Due process of law implies the right to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

*Zeigler* v. *South & North Ala. R. Co.* 58 Ala. 594; *McGavock* v. *Omaha*, 40 Neb. 75, 58 N. W. 543.

A distinction is to be made, in considering the legality of assessment laws, between cases where taxes can be collected by distraint or arrest, and cases where the inhabitant has an opportunity to defend in court.

*Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Meyers* v. *Shields*, 61 Fed. 713; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

Opportunity to redeem property forfeited under the statute was given under the statute invalidated by the decision in *Marshall* v. *McDaniel*, 12 Bush, 378.

Where the city charter provided for appointment, by the board of aldermen, of assessors to assess damage caused by the construction of highways, no provision for notice to property holders being included, nor for the promulgation of their decision when made, it was held that the statute was not rendered valid by the provision that any property holder affected might appeal to a jury in a superior court.

*Savannah, F. & W. R. Co.* v. *Savannah*, 96 Ga. 680, 23 S. E. 847; *Violett* v. *Alexandria*, 92 Va. 561, 31 L. R. A. 382, 23 S. E. 909.

The Massachusetts statutes discriminate against the inhabitant who has failed to bring in a list. Discrimination of some sort is usual in several states, and may be unobjectionable, but it cannot go to the extent of inflicting a penalty without a trial.

*Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 722; *Meyers* v. *Shields*, 61 Fed. 713; *King* v. *Mullins*, 171 U. S. 404, 43 L. ed. 214, 18 Sup. Ct. Rep. 925; *Marshall* v. *McDaniel*, 12 Bush, 378.

It is not within the power of the legislature by a simple act to deprive a person of his property by declaring it shall be forfeited to the state. A judicial judgment is necessary under our Constitution and form of government.

*Griffin* v. *Mixon*, 38 Miss. 424.

There can be no proceedings against life, liberty, or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.

*Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663.

*Mr.* **George F. Richardson** argued the cause, and, with *Messrs. Francis W. Qua* and *William A. Hogan*, filed a brief for defendant in error:

In judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these, and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law, but if found to be arbitrary, oppressive, and unjust, it

may be declared to be not due process of law.

*Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616.

Proceedings to raise the public revenue by levying and collecting taxes are not necessarily judicial, and due process of law as applied to that subject does not imply or require the right to such notice and hearing as are considered to be essential to the validity of the proceedings and judgments of judicial tribunals. Notice by statute is generally the only notice given, and that has been held sufficient.

*Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

A tax law which grants to the taxpayer a right to be heard on the assessment of his property before final judgment provides due process of law for determining the valuation, although it makes no provision for a rehearing.

*Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1414.

If the supreme court of a state has acted in consonance with the constitutional laws of a state and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process.

*Allen* v. *Georgia*, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525.

The manner of notice, and the specific period of time in the proceedings when a party may be heard, are not very material, if reasonable opportunity is afforded before he has been deprived of his property or the lien thereon is irrevocably fixed. So it has been held that it is sufficient if the party is accorded the right of appeal or to be heard upon an application for abatement, or the assessment is to be enforced by a suit to which he is to be made a party.

*King* v. *Portland*, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290.

A property owner need not have notice of every step of the proceedings.

*Weyerhaueser* v. *Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485; *Voigt* v. *Detroit*, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337.

If the essential requisites of full notice and an opportunity to defend were present, this court will accept the interpretation given by the state court as to the regularity, under the state statute, of the practice pursued in the particular case.

*Simon* v. *Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836.

The due process clause in the 14th Amendment to the Constitution does not require that the proceedings in a state court should be by a particular mode, but only that there should be a regular course of proceedings in which notice was given of the claim asserted, and an opportunity offered to defend against it.

*New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

Due process of law, under New York Constitution, need not be a legal proceeding according to the course of the common law; neither must there be a personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity offered him to defend.

*Happy* v. *Mosher*, 48 N. Y. 313.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the question whether the proceedings taken to enforce this tax deprived the defendant Glidden of his property without due process of law, within the meaning of the 14th Amendment.

The facts of the case are substantially that a resolution for the assessment of taxes for the year 1889 was passed by the municipal council of Lowell, and approved by the mayor on March 22 of that year; and it was ordered that a copy of the resolution be furnished to the assessors on or before April 1. Before proceeding to make the assessment, the assessors, in the latter part of April, gave proper notice to the inhabitants of the city, by posting in public places in the several wards of said city, notifications that they were about to assess taxes, and requiring the inhabitants to bring into the assessor's office on or before June 15 of that year true lists of their polls and personal estates not exempt from taxation.

Two members of the board of assessors were appointed a committee "to inquire into telephone matters for taxation." The committee "advised that a suitable person be sent to Albany to look up matters in that direction," which committee was authorized by the board to use its discretion in the matter. The expert employed by the committee to look up foreign corporations reported stock of the Erie Telegraph & Telephone Company held by individuals in Lowell, and mentioned seven trustees one of whom was the defendant. On July 25, 1889, the board "voted to tax (assess) the directors of the Erie Telegraph & Telephone Company as trustees $160,000 each." There were $1,600,000 held by ten trustees, of which the defendant was one. No list of personal estate held in trust had *been or was submitted by [257] defendant. The tax bill, as trustee, was delivered personally to the defendant about September first. About two months after such assessment, September 10, the warrant for the collection of the taxes was put in the hands of the collector.

On February 24, 1890, defendant filed a statement to the effect that, although he was informed that certain shares of stock stood in his name as trustee, he was not the owner of the shares and not taxable therefor, and thereupon made application as trustee for an abatement, upon which application a number of hearings were had. But,

before the proceedings were determined, this action was brought by a succeeding collector.

Upon the trial in the superior court, it appeared that the defendant was assessed as trustee upon certain shares of three telephone companies, which the assessors understood were held by him in trust for the Erie Telegraph & Telephone Company. The basis of valuation adopted by the assessors was the market price of the shares of this latter company. Defendant offered evidence tending to show that at the time of the assessment he owned no personal property whatever as trustee; that said shares were owned by the Erie Telegraph & Telephone Company and were in its possession and control, although they stood in his name; and further evidence tending to show that said property was not taxable to him, and was not within the jurisdiction of the assessors or of the state. This evidence was excluded by the court, which ruled that the only questions for the jury were "whether the assessors ascertained as nearly as possible the particulars of the personal estate held by the defendant as trustee, for the purposes of making this assessment, and whether, having obtained those particulars, they estimated such property at its just value, according to their best information and belief."

The court held the validity of the tax to depend upon the question whether the assessors had jurisdiction to make the assessment. Having found that the defendant was an inhabitant of Lowell, and had taxable personal property there, it was thought that he was within the jurisdiction of the [258] assessors, *and that it made no difference whether such property was all held by him individually, or partly as individual and partly as trustee, inasmuch as it was all a personal tax. The court, having held that the proceedings conformed to the state statute, and that defendant's only remedy was the statutory proceeding for abatement, it only remains for us to consider whether these proceedings constitute due process of law within the 14th Amendment.

This was not a special assessment, but the ordinary annual tax upon personal property. The act requires that all personal estate, within or without the commonwealth, shall be assessed to the owner; that personal property held in trust, the income of which is payable to another person, shall be assessed to the trustee in the city or town in which such other person resides, if within the commonwealth; and, if he resides out of the commonwealth, shall be assessed in the place where the trustee resides. Before making the assessment, the assessors shall give notice by posting in some public place or places; that in case the taxpayer shall fail to make return, they shall ascertain, as nearly as possible, the particulars of the estate and estimate its just value, which shall be conclusive upon the owner, unless he can show a reasonable excuse for omitting to make his return. Provision is also made for an application to the assessors for an abatement of taxes, and for an appeal to the county commissioners in case of a refusal of the assessors to abate the tax.

These proceedings are sufficient to constitute due process of law. Although, with respect to this class of taxes, we have never had occasion to determine exactly what the 14th Amendment required, we have held that the proceedings should be construed with the utmost liberality, and, while a notice may be required at some stage of the proceedings, such notice need not be personal, but may be given by publication or by posting notices in public places. It can only be said that such notices shall be given as are suitable in a given case, and it is only where the proceedings are arbitrary, oppressive, or unjust that they are declared to be not due process of law. *Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Paulsen [259] v. *Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Allen* v. *Georgia*, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *King* v. *Portland*, 184 U. S. 61, 46 L. ed. 431, 22 Sup. Ct. Rep. 290; *Simon* v. *Craft*, 182 U. S. 427, 46 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Turpin* v. *Lemon*, 187 U. S. 51, *ante*, 70, 23 Sup. Ct. Rep. 20.

In the *Kentucky Railroad Tax Cases*, 115 U. S. 321, *sub nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 414, 6 Sup. Ct. Rep. 57, it was held that a state statute for the assessment of taxes, which gave notice of the proposed assessment to the owner by requiring him, at a time named, to present a statement of his property, with an estimate of its value, which fixed time and place for public sessions of other officers, at which this statement and estimate were to be considered, where the party interested had a right to be present and to be heard and which gave him opportunity to judicially contest the validity of the proceedings, was due process of law within the 14th Amendment. In *Lent* v. *Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825, it was held that in a case of a special assessment for widening streets, publication in a newspaper was sufficient notice to property owners interested.

The complaint in this case is based upon the proposition thus stated by plaintiff: That it is not due process of law for a state "to compel a man, who holds no property in trust and makes no return to the assessors, to pay a tax assessed against him as such trustee, without opportunity to show that he held no property in trust." This proposition, however, assumes that no opportunity was given the defendant to show that he held no property in trust, when the fact was that public notice was given the inhabitants to produce before the assessors a list of their personal estates, among which there was specified by the statute personal property held in trust. Defendant did not choose to comply with that notice by submitting a list of the property held by him in

trust, although he subsequently made application for abatement, upon which application a number of hearings were had. Upon his failure to make his returns the assessors did the only thing they could do: ascertain as nearly as possible the particulars of the personal estate and estimate it at what they believed its just value. If defendant held personal property as trustee it was as much his duty to disclose it as if it had been individual property, and his contention now, that he had no reason to anticipate that he [260] would be taxed for *property held in trust, because he held none, is met by the fact that he applied for an abatement of this tax, and that, after several hearings upon the case, it was refused him. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 335, *sub nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 414, 418, 6 Sup. Ct. Rep. 57.

There was nothing in the proceedings of which the plaintiff had any right to complain as a violation of the 14th Amendment, and the *judgment of the Superior Court is therefore affirmed.*

Mr. Justice **White**, not having heard the argument, took no part in the decision of this case.

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CLINTON B. WISER *et al., Appts.,*
*v.*
JOHN LAWLER *et al.*

(See S. C. Reporter's ed. 260-274.)

*Fraud—misstatements as to title—effect of owner's silence.*

The owners of the legal title to a group of mines being operated by a corporation pursuant to the terms of an escrow agreement which required the proceeds of operation to be applied on the purchase price, and provided for a forfeiture in case of default in payment, are not chargeable, because of their silence, with the fraud perpetrated on subscribers to the stock of such corporation by misstatements as to the corporation's title, contained in prospectuses, issued to promote the sale of its stock, although they may have known the contents of such prospectuses, and that some of the payments on account of the purchase price were from proceeds of the sales of the stock.

[No. 174.]

*Argued February 25, 26, 1903. Decided April 27, 1903.*

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Yavapai County dismissing a bill which seeks to charge the owners of mining properties with the fraud perpetrated on subscribers to the stock of a corporation in possession of such property by misstatements as to title contained in its prospectuses. *Affirmed.*

See same case below (Ariz.) 62 Pac. 695.

Statement by Mr. Justice **Brown**:

This was a complaint in the nature of a bill in equity filed in the district court of Yavapai county, Arizona, by appellants, *for [261] themselves and all others interested, against John Lawler and Edward W. Wells, principal defendants, and the Seven Stars Gold Mining Company, the Industrial Mining & Guaranty Company, and John Griffin, receiver of such companies, to adjudge Lawler and Wells to be estopped from disputing the title of the Seven Stars Company to certain mining properties, and to decree such properties to belong to that company, and for an account of the proceeds of all ore taken from the mines and received by defendants Lawler and Wells, or, in the alternative, for a money decree against them for the aggregate amount paid by plaintiffs and others for stock in the company, upon the representations contained in certain prospectuses and maps, by which the plaintiffs were induced to purchase stock in such company, and for a confirmation of the title to the property in such defendants.

The cause came on for hearing upon the pleadings, and at first resulted in an interlocutory decree in favor of the plaintiffs, with an order for an accounting by defendants. The case was then referred to a master to report the number of shares in the Seven Stars Company subscribed and paid for, and to ascertain the amount paid to defendants Lawler and Wells on account of the purchase price of the property. This was finally fixed at the sum of $180,139.82, which was held to be a lien, and the property was ordered sold in satisfaction thereof. A new trial was subsequently granted, upon the hearing of which, upon pleadings and evidence, it was held that plaintiffs were entitled to no relief, and the complaint was dismissed, and an appeal taken to the supreme court of Arizona, which affirmed the decree of dismissal. 62 Pac. 695.

The supreme court made a finding of facts in sixty-four paragraphs, which is quite too long to be reproduced here, but which may be summarized as follows:

In May, 1892, the defendants Lawler and Wells were the owners of the legal title to a collection of mines known as the "Hillside Group," the muniments of such title being of record in the county recorder's office of Yavapai county.

Lawler and Wells offered these mines for sale at $450,000 cash, and on May 12 one Warner visited the mines and contracted *for [262] their purchase for $450,000, paying $20,000 in cash, the remainder to be paid in instalments in accordance with the terms of an escrow agreement entered into between Lawler and Wells and one Cowland. This agreement provided, among other things, that a deed conveying the mines to Cowland be held in escrow by the Bank of Arizona and be delivered upon paying the full sum of $450,000; and that, upon the failure of the pay-

NOTE.—*As to when silence amounts to fraudulent concealment*—see note to Jackson v. Combs (D. C.) 1 L. R. A. 742.

ments, the deed should be redelivered to Lawler and Wells, and all payments be forfeited. Cowland agreed that all moneys paid by him should belong to Lawler and Wells, and should be retained by them as liquidated damages accruing from the failure to pay for the property, and Lawler and Wells be released from any obligation to convey the property. It was further agreed that Cowland might take possession of the property, develop and operate it, the proceeds to be paid to the vendors and credited upon the purchase price; that Lawler and Wells should, nevertheless, remain in legal possession of the property until full payment, but should not work it or interfere with its operation by Cowland. It was further agreed that, should Cowland fail to make any payments, all improvements on the property and ore taken therefrom should be the property of Lawler and Wells. A deed of the property was executed to Cowland and placed in escrow as above stated. Warner was the real party in interest and Cowland only his agent.

On June 14 Warner and Cowland, with some others, incorporated the Industrial Mining & Guaranty Company for the purpose of handling mines and buying and selling stock, to which company Cowland delivered a written assignment of all his interest in the escrow agreement, as well as a deed of the mining properties, with a covenant of warranty against encumbrances. The new company assumed all the covenants of Cowland in the escrow agreement, to make the payments therein stipulated, and to procure the escrow deed, then in the hands of the Bank of Arizona. Possession of the properties was delivered to the new company with full knowledge on its part of the terms of the escrow agreement. The company remained in possession until October 1, 1892.

On August 15, 1892, Warner and several [263] others incorporated *the Seven Stars Gold Mining Company under the laws of New Jersey, of which certain persons, including one of the plaintiffs, were elected directors. About the same time the guaranty company offered to sell and convey all its interests in certain mining properties, including a part of those described in the escrow agreement, to the Seven Stars Company, upon receiving $2,800,000 in cash or stock of such company. On October 1 the guaranty company placed the Seven Stars Company in possession of the Hillside Group, with full knowledge on the part of the latter of the terms of the escrow agreement.

The guaranty company, as the agent of the Seven Stars Company, issued in September, 1892, a prospectus, known as the American prospectus, to promote the sale of the stock of the Seven Stars Company, 300,000 of which prospectuses, accompanied by a map and an application for subscription to stock, were circulated throughout the United States. In October, 1892, the guaranty company directed the issuing of an English prospectus, which was never circulated, but another, issued without the authority of the guaranty company or the Seven Stars Company, was prepared, supervised, and circulated by Cowland. The descriptive matter in this prospectus was obtained from data furnished by the officers of the guaranty company. The circulation of this prospectus amounted to 80,000 copies, and accompanying each copy was a map and application for subscription to stock; but neither Lawler nor Wells had any knowledge or information that this prospectus had been or was being circulated in England, or had any knowledge of its contents until some time in October, 1893. The further material facts are set forth in the opinion.

*Mr.* **Michael F. Gallagher** and **G. W. Kretzinger** argued the cause and filed a brief for appellants:

In statements sent to the public for the purpose of inducing investments in a corporation, representations of fact must be made with strict accuracy, and every fact material to the investment must be disclosed.

Bispham, Eq. 5th ed. § 208; *Central R. Co.* v. *Kisch*, L. R. 2 H. L. 113; *Lagunas Nitrate Co.* v. *Lagunas Nitrate Syndicate*, 68 L. J. Ch. N. S. 699; *New Brunswick & C. R. & Land Co.* v. *Muggeridge*, 1 Drew. & S. 363; *Re Olympia* [1898] 2 Ch. Div. 153; *Edgington* v. *Fitzmaurice*, L. R. 29 Ch. Div. 459; *Henderson* v. *Lacon*, L. R. 5 Eq. 262; *Hubbard* v. *Weare*, 79 Iowa, 678, 44 N. W. 915; *Hayward* v. *Leeson*. 176 Mass. 310, 49 L. R. A. 725, 57 N. E. 656.

The prospectus and accompanying documents must be construed together, to determine the meaning of any part.

*Schuylkill Nav. Co.* v. *Moore*, 2 Wharf. 491.

The effect produced by the whole prospectus and map is to be considered.

*Andrews* v. *Mockford* [1896] 1 Q. B. 372; *Arnison* v. *Smith*, L. R. 41 Ch. Div. 359.

The court, in reading statements of this character circulated generally among the people, will consider how they would influence the ordinary mind.

*New Brunswick & C. R. & Land Co.* v. *Muggeridge*, 1 Drew. & S. 363; *Sessions* v. *Rice*, 70 Iowa, 306, 30 N. W. 735; *Arnison* v. *Smith*, L. R. 41 Ch. Div. 359; *Ellsworth* v. *Campbell Bros.* 87 Iowa, 532, 54 N. W. 477; *Greenwood* v. *Leather Shod Wheel Co.* 69 L. J. Ch. N. S. 135.

Due weight should be given to the testimony of the large number of persons who say they were led by the statements in the prospectus to believe the company the absolute owner of the mines.

*Clarke* v. *Dickson*, 6 C. B. N. S. 463.

The public had the right to rely on the prospectus without inquiry.

*Bosher* v. *Richmond & H. Land Co.* 89 Va. 455, 16 S. E. 360; *Clarke* v. *Dickson*, 6 C. B. N. S. 463; *Andrews* v. *Mockford* [1896] 1 Q. B. 372; *Wilson* v. *Higbee*, 62 Fed. 723; *Quirk* v. *Thomas*, 6 Mich. 120; *Morgan* v. *Skiddy*, 62 N. Y. 325; Thomp. Corp. § 1312; *Richardson* v. *Silvester*, L. R. 9 Q. B. 34.

The false representation must be material

to the investment, but it need not be the sole inducement.

*Morgan* v. *Skiddy*, 62 N. Y. 319; *Peek* v. *Derry*, L. R. 37 Ch. Div. 541; 1 Bigelow, Fr. p. 544; *James* v. *Hodsden*, 47 Vt. 127; *Arnison* v. *Smith*, L. R. 41 Ch. Div. 359; *Pulsford* v. *Richards*, 17 Beav. 96; *Smith* v. *Chadwick*, L. R. 20 Ch. Div. 27; *Edgington* v. *Fitzmaurice*, L. R. 29 Ch. Div. 459.

The law presumes that subscriptions coming in within a reasonable time after the general circulation of a prospectus were induced by it. The estoppel will be extended far enough to protect everyone who may be presumed to have acted upon or been governed by it.

Herman, Estoppel & Res Adjudicata, §§ 794, 795; *Hatch* v. *Spooner*, 35 N. Y. S. R. 151, 13 N. Y. Supp. 642; *Bradley* v. *Poole*, 98 Mass. 183, 93 Am. Dec. 144; *Smith* v. *Chadwick*, L. R. 9 App. Cas. 187.

The principle of the doctrine of equitable estoppel is honesty and fair dealing, and in its application the court seeks to make parties do what honesty and fair dealing require.

*Gill* v. *Griffith*, 2 Md. Ch. 270; *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 353; 2 Pom. Eq. Jur. § 802; *Watson* v. *Threlkeld*, 2 Esp. 637; *Ramsden* v. *Dyson*, L. R. 1 H. L. 135; *Jones* v. *Bolles*, 9 Wall. 364, 19 L. ed. 734; *Horn* v. *Cole*, 51 N. H. 287, 12 Am. Rep. 111; *Gregg* v. *Wells*, 10 Ad. & El. 90; *Jowers* v. *Phelps*, 33 Ark. 465; *Lucas* v. *Hart*, 5 Iowa, 415; *Anderson* v. *Hubble*, 93 Ind. 570, 47 Am. Rep. 394; Herman, Estoppel & Res Adjudicata, 943, 938, 939, 952–954; *Kettlewell* v. *Watson*, L. R. 26 Ch. Div. 507; *Radant* v. *Werheim Mfg. Co.* 106 Wis. 600, 82 N. W. 562; *Cairncross* v. *Lorimer*, 3 MacQ. H. L. Cas. 829; *Truesdail* v. *Ward*, 24 Mich. 117; *O'Connor* v. *Clark*, 170 Pa. 318, 29 L. R. A. 607, 32 Atl. 1029; *Erie County Sav. Bank* v. *Roop*, 48 N. Y. 292; *Heyn* v. *O'Hagen*, 60 Mich. 150, 26 N. W. 861; *Pickard* v. *Sears*, 6 Ad. & El. 469; *Wells* v. *Pierce*, 27 N. H. 503; *Powers* v. *New Haven*, 120 Ind. 185, 21 N. E. 1083; *Hendrix* v. *Southern R. Co.* 130 Ala. 205, 30 So. 596; *Greene* v. *Smith*, 57 Vt. 268; *Logan* v. *Gardner*, 136 Pa. 588, 20 Atl. 625; *Tilton* v. *Nelson*, 27 Barb. 595; *Storrs* v. *Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316; *Richardson* v. *Hyams*, 1 La. Ann. 286.

No contractual or fiduciary relation is necessary; knowledge imposes the duty to disclose the legal title.

*Logan* v. *Gardner*, 136 Pa. 588, 20 Atl. 625; *Anderson* v. *Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *The Ottumwa Belle*, 78 Fed. 643; *Bosher* v. *Richmond & H. Land Co.* 89 Va. 455, 16 S. E. 360; *Clarke* v. *Dickson*, 6 C. B. N. S. 463; *Andrews* v. *Mockford* [1896] 1 Q. B. 372; *Wilson* v. *Higbee*, 62 Fed. 723; *Quirk* v. *Thomas*, 6 Mich. 120; *Morgan* v. *Skiddy*, 62 N. Y. 325; Thomp. Corp. § 1312; *Richardson* v. *Silvester*, L. R. 9 Q. B. 34.

Intent to mislead is unnecessary; "fraudulent effect" or "unjust result" is sufficient.

*Hart* v. *Giles*, 67 Mo. 179; *Dair* v. *United States*, 16 Wall. 1, 4, 21 L. ed. 491, 492; *Hill* v. *Blackwelder*, 113 Ill. 283; *The Ottumwa Belle*, 78 Fed. 643; *Horn* v. *Cole*, 51 N. H. 287, 12 Am. Rep. 111; *Anderson* v. *Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Commercial Loan & Bldg. Asso.* v. *Trevette*, 160 Ill. 390, 43 N. E. 769.

The presence of title on the record is no excuse or justification for the acquiescence, participation, and receipt of benefits here shown on the part of Lawler and Wells.

*Sumner* v. *Seaton*, 47 N. J. Eq. 103, 19 Atl. 884; *Kingman* v. *Graham*, 51 Wis. 232, 8 N. W. 181; *Carr* v. *Wallace*, 7 Watts, 394; *Markham* v. *O'Connor*, 52 Ga. 183, 21 Am. Rep. 249; *Dodge* v. *Pope*, 93 Ind. 480.

There need be no direct communication between parties claiming the estoppel and the party alleged to be estopped.

*Anderson* v. *Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Clarke* v. *Dickson*, 6 C. B. N. S. 463; *Kelley* v. *Fisk*, 110 Ind. 552, 11 N. E. 453; *Stevens* v. *Ludlum*, 46 Minn. 160, 13 L. R. A. 270, 48 N. W. 771.

"Standing by" does not necessarily mean actual presence.

*Anderson* v. *Hubble*, 93 Ind. 570, 47 Am. Rep. 394; Herman, Estoppel, § 954; *Thompson* v. *Blanchard*, 4 N. Y. 309; *Richardson* v. *Chickering*, 41 N. H. 380, 77 Am. Dec. 769; *Powers* v. *Large*, 75 Wis. 494, 43 N. W. 1120; *Gatling* v. *Rodman*, 6 Ind. 289.

Estoppel may arise in favor of one not purchasing directly into the title. The doctrine has been applied for the protection of stockholders and creditors.

*Jones* v. *Bolles*, 9 Wall. 364, 19 L. ed. 734; *Trenton Bkg. Co.* v. *Duncan*, 86 N. Y. 222; Herman, Estoppel & Res Adjudicata, § 397; *Livermore* v. *Maxwell*, 87 Iowa, 705, 55 N. W. 37.

The persons defrauded in the act of purchasing stock are, under no theory of the law, chargeable with the notice of what the records of the company showed. Even stockholders are not chargeable, as a matter of law, with notice of the acts of officers or resolutions of the directors.

Thomp. Corp. § 4455; Cook, Stockholders, § 731.

A party who receives benefits gained by representations that the title to his property is in another will not be permitted to assert rights inconsistent with the transaction, to the injury of the person misled.

*Brewster* v. *Baker*, 16 Barb. 613; *Wilkinson* v. *Blades* [1896] 2 Ch. 788; *Breeding* v. *Stamper*, 18 B. Mon. 175; *Whitaker* v. *Williams*, 20 Conn. 109.

A party cannot participate in the fruits of a fraud, and at the same time repudiate it as not his act.

Perry, Tr. § 172; *Texas Consol. Compress & Mfg. Asso.* v. *Dublin Compress & Mfg. Co.* (Tex. Civ. App.) 38 S. W. 404; *Olmsted* v. *Hotailing*, 1 Hill, 317; *Crans* v. *Hunter*, 28 N. Y. 389; *Morse* v. *Ryan*, 26 Wis. 356.

He who receives money or property or a benefit of any kind, under an instrument, whatever its character or his relation to the maker, cannot question the instrument in whole or in part.

*Re Peaslee*, 73 Hun, 113, 25 N. Y. Supp. 940; *Havens* v. *Sackett*, 15 N. Y. 365; *Bir-*

*mingham* v. *Kirwan*, 2 Sch. & Lef. 444; *Wood* v. *Seely*, 32 N. Y. 105.

The following are different applications of the same principle:

*Field* v. *Doyon*, 64 Wis. 560, 25 N. W. 653; *Leathers* v. *Ross*, 74 Iowa, 630, 38 N. W. 516; *Maple* v. *Kussart*, 53 Pa. 348, 91 Am. Dec. 214; Herman, Estoppel & Res Adjudicata, §§ 1063, 800; *Wilkinson* v. *Blades* [1896] 2 Ch. 788; *McConnell* v. *People*, 71 Ill. 481; *Daniels* v. *Tearney*, 102 U. S. 415, 26 L. ed. 187; *Franklin* v. *Pollard Mill Co.* 88 Ala. 318, 6 So. 685; *Swain* v. *Seamens*, 9 Wall. 254, 19 L. ed. 554; *Fry* v. *Morrison*, 159 Ill. 244, 42 N. E. 774; *Kinyon* v. *Kinyon*, 6 Misc. 584, 27 N. Y. Supp. 627.

The concealment of the important terms of a transaction, or the secret retention of benefits, by a grantor, has always been held sufficient to show the fraud of a transaction, and support a decree for the restoration of the property or money of the deceived purchaser or creditor.

*Robinson* v. *Elliott*, 22 Wall. 513, 22 L. ed. 758; *Gill* v. *Griffith*, 2 Md. Ch. 270; *Wendell* v. *Van Rensselaer*, 1 Johns. Ch. 353.

That one or two of the stockholders may have purchased with knowledge is no defense. Otherwise, to corrupt one would protect the fraud.

*New Sombrero Phosphate Co.* v. *Erlanger*, L. R. 5 Ch. Div. 73.

Equitable estoppel is frequently held a ground for affirmative relief.

*Jones* v. *Bolles*, 9 Wall. 364, 19 L. ed. 734; *Kirk* v. *Hamilton*, 102 U. S. 68, 26 L. ed. 79; *Storrs* v. *Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316; *Lucas* v. *Hart*, 5 Iowa, 415; *Anderson* v. *Hubble*, 93 Ind. 570, 47 Am. Rep. 394; *Drexel* v. *Berney*, 122 U. S. 241, 30 L. ed. 1219, 7 Sup. Ct. Rep. 1200.

The estoppel is commensurate with the representation, and operates to put the title where it was represented to be.

*Grissler* v. *Powers*, 81 N. Y. 57, 37 Am. Rep. 475; Beach, Modern Eq. Jur. 800; *Trenton Bkg. Co.* v. *Duncan*, 86 N. Y. 221; *Ellsworth* v. *Campbell Bros.* 87 Iowa, 532, 54 N. W. 477.

A court of equity has power to decree a title to real estate, as against a party whose conduct raises an estoppel.

*Jones* v. *Bolles*, 9 Wall. 364, 19 L. ed. 734; *Robbins* v. *Moore*, 129 Ill. 57, 21 N. E. 934; *Lucas* v. *Hart*, 5 Iowa, 415; *Kirk* v. *Hamilton*, 102 U. S. 68, 26 L. ed. 79; *Stone* v. *Tyree*, 30 W. Va. 701, 5 S. E. 878; *Storrs* v. *Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316.

The moneys obtained from appellants and others in like estate, by the fraudulent misrepresentations and concealment, will be impressed with a trust in the hands of the Industrial Mining & Guaranty Company.

*Fulton* v. *Jansen*, 99 Cal. 591, 34 Pac. 331; *Nebraska Nat. Bank* v. *Johnson*, 51 Neb. 546, 71 N. W. 294; *Dunn* v. *Zuilling Bros.* 94 Iowa, 233, 62 N. W. 746; *American Sugar Ref. Co.* v. *Fanchor*, 145 N. Y. 552, 27 L. R. A. 757, 40 N. E. 206; *Nester* v. *Gross*, 66 Minn. 371, 69 N. W. 39; Perry, Tr. §§ 171, 217; Beach, Trusts & Trustees, § 182.

The funds thus impressed with a trust will be followed into the hands of Lawler and Wells.

*Bundy* v. *Monticello*, 84 Ind. 119; *Smith* v. *Bowen*, 35 N. Y. 83; *Holmes* v. *Gilman*, 138 N. Y. 384, 20 L. R. A. 566, 34 N. E. 205; *Knight* v. *Knight*, 75 Ga. 386; *Calhoun* v. *Burnett*, 40 Miss. 599; *United States* v. *Waterborough*, 2 Ware, 158, Fed. Cas. No. 16,648; *Continental Ins. Co.* v. *Insurance Co.* 2 C. C. A. 541, 1 U. S. App. 201, 51 Fed. 884; *Clarke* v. *Shee*, Cowp. 197; *Morrow Shoe Mfg. Co.* v. *New England Shoe Co.* 24 L. R. A. 417, 6 C. C. A. 508, 18 U. S. App. 256, 57 Fed. 685; *Sadler's Appeal*, 87 Pa. 154; *Swift* v. *Williams*, 68 Md. 236, 11 Atl. 835.

Upon the facts found by the supreme court of Arizona the court should adjudge, as a matter of law, that if Lawler and Wells did not have actual, they had implied or constructive, notice of how such funds had been obtained.

*Condit* v. *Maxwell*, 142 Mo. 266, 44 S. W. 467; *Williamson* v. *Brown*, 15 N. Y. 364; 1 Perry, Tr. § 223, note b; *First Nat. Bank* v. *National Broadway Bank*, 156 N. Y. 459, 42 L. R. A. 139, 51 N. E. 398; *Baltimore* v. *Whittington*, 78 Md. 231, 27 Atl. 984; *Hewitt* v. *Loosemore*, 9 Hare, 455; *Whitbread* v. *Boulnois*, 1 Younge & C. Exch. 303.

The question as to whether, upon conceded facts, implied or constructive notice arises, is a question of law.

*Claflin* v. *Lenheim*, 66 N. Y. 306; *Birdsall* v. *Russell*, 29 N. Y. 220; *Van Doren* v. *Robinson*, 16 N. J. Eq. 261; *Plumb* v. *Fluitt*, 2 Anst. 432; *Hewitt* v. *Loosemore*, 9 Hare, 455; *Kennedy* v. *Green*, 3 Mylne & K. 699.

The fact that the Industrial Mining & Guaranty Company deposited the funds obtained from the stockholders in its general bank account, and therefrom drew in favor of Lawler and Wells to make the payments on account of the Cowland contract, does not destroy the identity of the funds and make relief by money decree impossible. The withdrawals on account of the Seven Stars Gold Mining Company will be attributed to its funds.

*Re Hallett*, L. R. 13 Ch. Div. 696; *Central Nat. Bank* v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 26 L. ed. 693; *Pennell* v. *Deffell*, 4 DeG. M. & G. 372; *Woodhouse* v. *Crandall*, 197 Ill. 104, 58 L. R. A. 385, 64 N. E. 292; *Hall* v. *Otis*, 77 Me. 122.

Where money or property obtained by fraud passes into the hands of a third person, he cannot retain it without showing its receipt in due course of business, for a valuable consideration, and without any notice of the fraud.

1 Bigelow, Fr. p. 494; *Miller* v. *Fraley*, 21 Ark. 35; *Haskins* v. *Warren*, 115 Mass. 514; *Chaffin* v. *Kimball*, 23 Ill. 36; *Campbell* v. *Whitson*, 68 Ill. 240, 18 Am. Rep. 553; *Brown* v. *Fitch*, 43 Conn. 512; *Throckmorton* v. *Rider*, 42 Iowa, 84; Perry, Tr. § 219.

Where a note is shown to have been fraudulently put into circulation, the burden shifts to the holder to show he received it before maturity, without notice, and for a valuable consideration.

*Thompson* v. *Sioux Falls Nat. Bank*, 150 U. S. 237, 37 L. ed. 1065, 14 Sup. Ct. Rep. 94; *Stewart* v. *Lansing*, 104 U. S. 509, 26 L. ed. 868; *Smith* v. *Livingston*, 111 Mass. 342; *Camden Safe Deposit & T. Co.* v. *Abbott*, 44 N. J. L. 257; 2 Randolph, Com. Paper, § 1026; *Louisville, N. A. & C. R. Co.* v. *Ohio Valley Improv. & Contract Co.* 57 Fed. 42; *Shain* v. *Goodwin*, 46 Fed. 564; *Merchants Exch. Nat. Bank* v. *New Brunswick Sav. Inst.* 33 N. J. L. 170.

In cases like that at bar, equity requires the most positive and specific denial and disproof of knowledge.

Perry, Tr. § 219; Story, Eq. Jur. § 400; *Holly* v. *Missionary Society*, 180 U. S. 284, 45 L. ed. 531, 21 Sup. Ct. Rep. 395.

Before the party can retain the funds, he must show he gave credit on the faith of them.

*Wilson* v. *Smith*, 3 How. 763, 11 L. ed. 820; *United States* v. *State Nat. Bank*, 96 U. S. 30, 24 L. ed. 647.

Where an agent receives funds of his principal, and mingles them with his own, and then draws from the common fund, withdrawals for his own use will be attributed to his funds, and withdrawals in behalf of his principal attributed to the funds of his principal.

*Pearce* v. *Dill*, 149 Ind. 142, 48 N. E. 788; *Blair* v. *Hill*, 165 N. Y. 672, 59 N. E. 1119; *Smith* v. *Combs*, 49 N. J. Eq. 420, 24 Atl. 9.

*Messrs.* **W. C. Scarritt** and **H. C. McDougal** argued the cause, and, with *Mr. E. L. Scarritt*, filed a brief for appellees:

There is no such thing as an estoppel *in pais* for neglecting to speak or act, where the party did not know the facts which, if known, would have made it his duty to speak.

*Delaplaine* v. *Hitchcock*, 6 Hill, 14; *Acton* v. *Dooley*, 74 Mo. 63; *Galbreath* v. *Newton*, 30 Mo. App. 380; *Boggs* v. *Merced Min. Co.* 14 Cal. 279.

Mere silence or inaction of one who holds the record title to real property will not estop him from asserting his title thereto as evidenced and proclaimed by the public records.

*Kingman* v. *Graham*, 51 Wis. 232, 8 N. W. 181; *Rice* v. *Dewey*, 54 Barb. 455; *Sulphine* v. *Dunbar*, 55 Miss. 255; *Mayo* v. *Cartwright*, 30 Ark. 407; *Knouff* v. *Thompson*, 16 Pa. 357; *Markham* v. *O'Connor*, 52 Ga. 183, 21 Am. Rep. 249; Bigelow, Estoppel, pp. 575, 576; *Viele* v. *Judson*, 82 N. Y. 32; *M'Kenzie* v. *British Linen Co.* L. R. 6 App. Cas. 82; *Leather Mfrs. Nat. Bank* v. *Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657; *People* v. *Bank of N. A.* 75 N. Y. 548; 11 Am. & Eng. Enc. Law, 2d ed. p. 432; *Thompson* v. *Simpson*, 128 N. Y. 270, 28 N. E. 627; *Dameron* v. *Jamison*, 143 Mo. 483, 45 S. W. 258.

And he will not be estopped by his silence, though he may know or be informed that others are negotiating for rights and interests in property bound by his title of record, as he is under no obligation to warn or apprise them of that which the record discloses.

*Porter* v. *Wheeler*, 105 Ala. 451; 17 So. 221; *Knouff* v. *Thompson*, 16 Pa. 357; *Sulphine* v. *Dunbar*, 55 Miss. 255; *Bales* v. *Perry*, 51 Mo. 449; *Frazee* v. *Frazee*, 79 Md. 27, 28 Atl. 1105; *Rice* v. *Dewey*, 54 Barb. 455; *Brinckerhoff* v. *Lansing*, 4 Johns. Ch. 65, 8 Am. Dec. 538.

Knowledge by an owner of land that one is about to buy it from another does not impose upon the owner the duty to seek out that one and advise him not to buy.

*Bramble* v. *Kingsbury*, 39 Ark. 131.

A landowner is not estopped, by knowing that a lithographed map showing a subdivision of his land into lots and blocks is in circulation, to deny the validity of such subdivision.

*Sullivan* v. *Davis*, 29 Kan. 28.

The party who has placed his written title on record has given the notice which every person is bound to know and respect. The law does not require him to go further. But if he speaks or acts, it must be consistent with his legal title. The law distinguishes between silence and encouragement.

*Knouff* v. *Thompson*, 16 Pa. 357.

The doctrine of estoppel *in pais* should not be too readily extended, when the effect of it is to devest men of their estates in lands.

*Davis* v. *Davis*, 26 Cal. 23, 85 Am. Dec. 157; *Trenton Bkg. Co.* v. *Duncan*, 86 N. Y. 221.

It is difficult to imagine how the concealment of a fact which an individual of common prudence and sagacity can discover can constitute a fraud.

*Alexander* v. *Kerr*, 2 Rawle, 90, 19 Am. Dec. 616.

Plaintiffs were not justified in relying on the statements of the prospectus as establishing, as against the world, that the title to the mines was vested in the Gold Company.

*Banque Franco-Egyptienne* v. *Brown*, 34 Fed. 196; MacSwinney, Mines, pp. 187, 189; *Curling* v. *Flight*. 2 Phill. Ch. 613; *Holmes* v. *Powell*, 8 DeG. M. & G. 572.

If the purchaser is intending to rely upon the loose expressions of a prospectus, it becomes his duty to read every word of it, and to give those words their usually accepted meaning.

Bigelow, Estoppel, p. 562.

The representation to justify a prudent man in acting upon it must be plain, not doubtful or matter of questionable inference.

*Tillotson* v. *Mitchell*, 111 Ill. 518; *Blodgett* v. *Perry*, 97 Mo. 263, 11 S. W. 891; *Bennett* v. *Dean*, 41 Mich. 472, 2 N. W. 680; *Keating* v. *Orne*, 77 Pa. 89.

It must have reference to a present or past state of things.

Bigelow, Estoppel, p. 555; *Jackson* v. *Allen*, 120 Mass. 64; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Starry* v. *Korab*, 65 Iowa, 267, 21 N. W. 600.

Presumptions favor defendants.

*Southern Development Co.* v. *Silva*, 125 U. S. 249, 31 L. ed. 680, 8 Sup. Ct. Rep. 881.

The words "belonging to" mean about the same as "the property of," and these terms

when applied to real estate are of a vague and indefinite significance.

*Gitchell* v. *Kreidler*, 84 Mo. 476; *People ex rel. Morgenthau* v. *Cady*, 105 N. Y. 299, 11 N. E. 810.

The silence and inaction which create an estoppel occur under such circumstances, and are committed by a person sustaining such a relation to the other, that the person seeking to enforce the estoppel would reasonably presume such silence and inaction to be a positive representation, on the part of the other, of the truth of the fact, of which the contrary is sought to be asserted.

Pom. Eq. Jur. § 805; *Bloomfield* v. *Charter Oak Nat. Bank*, 121 U. S. 121, 30 L. ed. 923, 7 Sup. Ct. Rep. 865; Bigelow, Estoppel, 4th ed. p. 445; *Gray* v. *Gray*, 83 Mo. 106; *Yates* v. *Hurd*, 8 Colo. 343, 8 Pac. 575; *Delaplaine* v. *Hitchcock*, 6 Hill, 14; *Sulphine* v. *Dunbar*, 55 Miss. 255; Herman, Estoppel & Res Adjudicata, § 948; *Com.* v. *Moltz*, 10 Pa. 527, 51 Am. Dec. 499; *Brewer* v. *Boston & W. R. Corp.* 5 Met. 479, 39 Am. Dec. 694; *Boggs* v. *Merced Min. Co.* 14 Cal. 279; *Henshaw* v. *Bissell*, 85 U. S. 255, 21 L. ed. 835; *Morgan* v. *Chicago & A. R. Co.* 96 U. S. 716, 24 L. ed. 743; *Leather Mfrs. Nat. Bank* v. *Morgan*, 117 U. S. 108, 29 L. ed. 816, 6 Sup. Ct. Rep, 657; *Brant* v. *Virginia Coal & I. Co.* 93 U. S. 326, 23 L. ed. 927.

When one has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying consideration.

*Chilton* v. *Braiden*, 67 U. S. 458, 17 L. ed. 304; *Slide & S. Gold Mines* v. *Seymour*, 153 U. S. 509, 38 L. ed. 802, 14 Sup. Ct. Rep. 842.

Mr. Justice **Brown** delivered the opinion of the court:

The principal defendants to this suit are [264] Lawler and Wells *(hereinafter termed "the defendants"), and the case turns upon their complicity in, and responsibility for, the contents of the prospectuses, which are full of exaggerated and delusive statements, and were undoubtedly a gross fraud upon persons who took stock upon the faith of their exuberant promises. Indeed, they were of such a character as to create surprise that intelligent investors should have believed their statements to be true. The representation upon which the greatest reliance is placed is that contained in the American prospectus; that "the titles are unquestionable to the Seven Stars, Hillside, Happy Jack, and other mines, being held under United States patents;" and in the English prospectus, that "the mines *owned by the company* are situated in the Eureka mining district, Yavapai county, Arizona," and that "the title is indefeasible, being United States patents to five claims, together with several locations as easements."

Attached to these prospectuses was a map entitled "map of the group of mines belonging to the Seven Stars Gold Mining Company." It is true that there is neither in the prospectuses nor in the map a distinct assertion that the legal title to the properties mentioned was vested in the Seven Stars Company; but we think that no one can read them without inferring and believing that the Seven Stars was the owner of these properties, and that the net proceeds of their operation would be distributed in dividends to stockholders. As they were circulated as an inducement to take stock in the enterprises, we are bound to interpret them by the effect they would produce upon an ordinary mind. *Andrews* v. *Mockford* [1896] 1 Q. B. 372. They were, however, even more damaging in their omissions than in their statements. No mention was made of the fact that the title to these properties stood in the names of Lawler and Wells; no allusion to the Cowland agreement, with its provisions for forfeiture, nor to the fact that the only interest of the company was an equitable right to the properties after the sum of $450,000 had been realized from the profits and paid to defendants. In estimating the probability of subscribers being misled by these prospectuses we may take into consideration, not only the facts stated, but the facts suppressed. *New Brunswick & *C. R.* [265] *& Land Co.* v. *Muggeridge*, 1 Drew. & S. 363. They are entitled to know the cons as well as the pros. *Gluckstein* v. *Barnes* [1900] A. C. 240; *Hubbard* v. *Weare*, 79 Iowa, 678, 44 N. W. 915; *Hayward* v. *Leeson*, 176 Mass. 310, 49 L. R. A. 725, 57 N. E. 656; *Re Leeds & H. Theatres* [1902] 2 Ch. 809.

It does not appear, however, that these defendants were promoters or interested in the organization of the guaranty company, or the Seven Stars Company, or in the sale of the capital stock of such companies, although they knew that Warner's intention was to incorporate a company, and, to use the language of one of the defendants, "work it for all there was in it." As they were not concerned in the methods used to procure subscriptions to stock, or in the statements made in the prospectuses, it is difficult to see how they can be held responsible, unless they are made so by the fact that they knew and connived in the misstatements as to the title of the company. But while they might have known that the prospectuses were being issued, they were under no obligation to read them or contradict their exaggerated statements and promises. In their agreement with Cowland they had stipulated that he, or his assignee, should explore, work, and operate the property, and they could not have failed to know that this would be done through a company organized for that purpose. Such company would be authorized to issue prospectuses and obtain subscriptions to stock as best it could, and, clearly, defendants were not bound to supervise its methods in doing so, or render themselves responsible for statements made by the company, provided they did not indorse them. There were no relations between them and the purchasers of the capital stock, and no duty on their part to interfere with the circulation and distribution of the prospectuses and maps, or to inform the subscribers personally that they were the owners of the legal title to the property. They had the

right to rely, so far as respected these companies and their stockholders, upon the fact that their title was of record, and was notice of their rights to every one who contemplated taking stock in the company.

The testimony bearing upon the complicity of Lawler and Wells with the preparation of [266] these prospectuses and maps is *such as amounts rather to a suspicion that they may have known and approved of their contents, than to positive proof that they received their indorsement. Of course, if it were shown that they were put forth by them personally, with knowledge upon their part of their contents, and of the falsity of their statements, and that they were issued as a basis of obtaining subscriptions to stock, they would be justly held liable as participants in the fraud; but the mere fact that they turned over the organization of the company to other parties, who would pursue the usual course of issuing prospectuses for the purpose of raising subscriptions, would not, of itself, charge them with the duty of examining and verifying their statements.

The facts principally relied upon are that the defendants caused to be delivered to Mr. Rickard, an agent of Cowland, a report previously made upon the mines, known as the Blauvelt report, together with a map of the underground workings of the mines, known as the Blauvelt map, as well as copies of the smelter and milling returns of ores shipped from the mines, known as the "smelters' returns." It is not found, however, that these documents were false in any particular, except the map, which was prepared by one Brodie, without the knowledge of the defendants, but was seen by defendant Lawler hanging in the office of the companies in New York, and was entitled "Plat of the Hillside and adjoining claims," although it appears that afterwards, without the knowledge of Lawler, these entitling words were changed, before the maps were distributed, to the words, "Map of group of mines belonging to the Seven Stars Gold Mining Company." It thus appears that when Lawler saw this map it contained no words indicative of ownership in the Seven Stars Company. It also appeared that in August of the same year defendant Wells visited the office of the guaranty company in New York, and while there had an interview with Warner, president of both companies; but the evidence does not show that anything was said to Wells about the plans of the companies, or the issue and circulation of a prospectus; although Lawler became aware of the fact that the prospectus was being prepared for circulation, and [267] for the *purpose of promoting the sale of the stock of the company, and that the Blauvelt report and map were being used in connection with it.

In October, 1892, Warner represented to the defendants that he was unable to place the securities he held, in time to meet the payment of that portion of the price falling due November 12, and, relying upon his representations and requests, defendants agreed to an extension of the time; but on May 8, 1893, the whole scheme, so far as Warner was connected with it, collapsed by his executing a general assignment of his property for the benefit of his creditors. Defendants, learning of this, made a further agreement with Cowland, extending the time for payment under his agreement, receiving as part of the consideration, $50,000 par value of the guaranteed capital stock of the Seven Stars Company, and the appointment of Lawler as manager of the mines. In May, 1893, Lawler received notice in writing that remittances on account of the Cowland contract were being made from money derived from the sale of stock of the Seven Stars Company, and in August, 1893, the chancery court of New Jersey, in which state the company was incorporated, appointed defendant Griffin receiver of both companies. In September, defendants, as owners of the legal title, and exercising their rights under the original escrow agreement, entered into possession of the group of mines, and remained in exclusive possession until September, 1897, when a receiver was appointed by an Arizona court.

The most important item of testimony, and one which lies at the basis of this suit, is the fact that the defendants received from the proceeds of the mines, during their operation by the Seven Stars Company, sums aggregating $47,812.25, and also received from Warner and others, on account of the purchase price of the property, $112,339.96. This, however, they had a perfect right to do under their contract, unless they were distinctly apprised of the fact that it was fraudulently procured. But the prospectus, map, and application were prepared under the supervision of Warner, and the documents framed in accordance with his views. The evidence tends to show that while defendants had knowledge of the preparation and circulation of the prospectus *and maps, [268] knowledge of the statements and representations contained in them is not brought home to them, nor were they bound to inform themselves as to their contents.

There are further findings that defendants in October, 1892, became aware that the American prospectus was being distributed by the guaranty company, and that they did not at any time protest against its preparation or circulation, or in any way give notice of their rights in the mines to any of the purchasers of the stock of the Seven Stars Company, except as such notice might be imputed to them through the record title in defendants. But it is further found that they did not, at the time the subscriptions to the stock were being made, make any representations or communications to any subscriber to said stock; nor did they have any notice or knowledge that any moneys received by them on account of the purchase price formed a part of the money raised from subscriptions to stock and paid by the guaranty company on account of the purchase price,—at least, not until May 20, 1893, when nearly all the payments had been made. Neither were they interested, as promoters or otherwise, in the

organization of either of the corporations, or in the issue or circulation of the prospectuses, or the sale of the capital stock.

Were they bound to refuse the money when it was tendered them? Even if defendants had knowledge or notice that payments received by them on account of the purchase price were made from moneys raised from subscriptions to stock, there was no impropriety in receiving their money from the proceeds of the sales of the stock, although the contract specified only that they should be entitled to the proceeds of the ore mined. As they had agreed to sell their interests at $450,000, and Cowland had agreed to pay that amount, it may be assumed that this was the real value of the properties at that time. This amount defendants had a right to receive before they surrendered the deed of the properties, but how it was to be raised was no concern of theirs. Granting the provision in the contract for the forfeiture of all moneys paid, in case the sale finally fell through, to have been a harsh one (and in fact it was much less harsh than it appeared to be), it was [269] fully understood *and agreed upon by both parties; and while a bill in equity might not have lain to enforce it, it does not follow that defendants will be compelled to return the money unless they actively participated in the representations under which it was raised. The case would have been stronger if the Cowland agreement had provided distinctly that a mining company should be formed and defendants paid from the proceeds of sales of its stock, but the agreement made no provision how the money should be raised or from what fund it should be paid, except that the proceeds of the operation of the mines and the ores should be at once paid to the defendants and be credited on the agreement. It was not provided, however, that this should be the only source from which the money should be raised.

As matter of fact, the guaranty company was engaged in promoting sundry mining and industrial enterprises, including the business of the Seven Stars Company; and during the time the payments were being made, it received and disbursed the sum of $824,142.13, which was deposited in its own name in a common fund in the Continental National Bank, and checked out by the guaranty company in its various business enterprises as required, and, amongst others, to the defendants on account of the Cowland agreement. These checks, which were generally payable to Cowland, were collected by the payee, the money transmitted to the Bank of Arizona, and placed to the credit of defendants on account of the purchase price of the property. Between June 15, 1892, and September 18, 1893, the guaranty company paid out for operating expenses, purchase of machinery, purchase price of the Hillside group of mines, dividends, and all other expenses, an aggregate sum of $380,295.81,—over $100,000 more than the amount of money received from the sale of the Seven Stars guaranteed stock.

The case, then, comes to this: Whether the mere facts that defendants knew that a prospectus was to be issued, that they furnished the Blauvelt report (not shown to be false) to which was appended a map indicating (though not to their knowledge) that the mines belonged to the Seven Stars Company, and that *they might have informed [270] themselves, if they had chosen to do so, of the contents of the prospectus, and did actually receive a large amount of money without knowing the source from which it came,—render them liable as participants in the fraud perpetrated by the circulation of the prospectus.

Putting the case in the most favorable light for the plaintiffs, it was only a case of estoppel by silence. Indeed, it was not even an ordinary case of estoppel by silence, but an estoppel by silence concerning facts of which defendants may have had no actual knowledge. To constitute an estoppel by silence there must be something more than an opportunity to speak. There must be an obligation. This principle applies with peculiar force where the persons to whom notice should be given are unknown. So, too, to constitute an estoppel, either by express representation or by silence, there must not only be a duty to speak, but the purchase must have been made in reliance upon the conduct of the party sought to be estopped; and the express finding of the court in this case is "that the subscribers to the capital stock of the Seven Stars Company, in making their several subscriptions therefor and payments thereon, did so without any knowledge of, and without relying on, anything said or done, or omitted to be said or done, in the premises by the said Lawler and Wells, or either of them." Granting that if these subscribers had known all the defendants knew regarding the title to this property, they would not have subscribed to the stock of the company, it does not follow that defendants were bound to take active steps to inform the public of that which already appeared upon the record.

This case does not belong to that class of which *Gregg* v. *Von Phul*, 1 Wall. 274, 17 L. ed. 536, is an example, wherein it was said that "if one has a claim against an estate, and does not disclose it, but stands by and suffers the estate [to be] sold and improved, with knowledge that the title has been mistaken, he will not be allowed afterwards to assert his claim against the purchaser." Such cases are believed to be confined to those where the party's silence is inconsistent with the position subsequently assumed by him, as where he suffers land to be improved while holding an unrecorded deed of it. In this case, however, defendants' position *was perfectly consistent with their ti- [271] tle of record and with the Cowland agreement, which distinctly provided that Cowland or his assignees should enter into possession, develop and work the mines upon their own account, though paying the proceeds to them.

But, conceding defendants to have been apprised of the contents of the prospectus, it would certainly be an exceptional case if

a person holding a deed of property which he has placed upon record would be bound to disclose his title to a person contemplating purchasing or making improvements upon the land, or would be estopped from making his claim thereto by mere silence, since he has a right to rely upon the constructive notice given by the record; although the rule would be otherwise in case of positive misrepresentations upon his part. *Brant* v. *Virginia Coal & I. Co.* 93 U. S. 326, 337, 23 L. ed. 927, 929; *Knouff* v. *Thompson*, 16 Pa. 357; *Brinckerhoff* v. *Lansing*, 4 Johns. Ch. 65, 8 Am. Dec. 538; *Rice* v. *Dewey*, 54 Barb. 455; *Kingman* v. *Graham*, 51 Wis. 232, 8 N. W. 181; *Sulphine* v. *Dunbar*, 55 Miss. 255; *Porter* v. *Wheeler*, 105 Ala. 451, 17 So. 221. The authorities also recognize a distinction between mere silence and a deceptive silence accompanied by an intention to defraud, which amounts to a positive beguilement. *Sumner* v. *Seaton*, 47 N. J. Eq. 103, 19 Atl. 884; *Hill* v. *Epley*, 31 Pa. 331; *Markham* v. *O'Connor*, 52 Ga. 183, 21 Am. Rep. 249.

For instance, if a mortgagee stood by while a mortgagor was selling a piece of property to a person whom the mortgagee knew was purchasing the property upon the supposition that it was unencumbered, he might be estopped by his silence, even though his mortgage were of record. But, upon the other hand, if he were merely informed that the mortgagor was endeavoring to sell the property as unencumbered, he would clearly be under no obligation to look up the purchaser, or to inform the public generally of the existence of the mortgage. In such case he might safely rely upon the record. No duty to speak arises from the mere fact that a man is aware that another may take an action prejudicial to himself if the real facts are not disclosed. *Sullivan* v. *Davis*, 29 Kan. 28. As stated by Bigelow on Estoppel, 5th ed. page 596: "So long as he is not brought into contact with the person [272] about to act, and does *not know who that person may be, he is under no obligation to seek him out, or to stop a transaction which is not due to his own conduct as the natural and obvious result of it." It cannot be that A would be estopped by silence with respect to his title to property which B is about to purchase, when he has no knowledge that B contemplates buying and B has no knowledge that A is connected with the property. We know of no case holding that a man is estopped by silence as against the public, or any particular person with whom he has no fiduciary relation. It was said by the court of appeals of New York in *Viele* v. *Judson*, 82 N. Y. 32, 40, of the cases holding a party to be estopped by his silence: "In all of them the silence operated as a fraud and actually itself misled. In all there was both the specific opportunity and apparent duty to speak. And, in all, the party maintaining silence knew that some one else was relying upon that silence, and either acting or about to act as he would not have done, had the truth been told. These elements are essential to create a duty to speak."

Before holding that defendants are liable by reason of their silence it ought to be made to appear what action they could have taken to prevent the perpetration of the fraud embodied in the prospectus and maps. If they had actually participated in it by circulating these documents, or representing them to be true, the case would have been different; but if they be held at all it must be by reason of their silence and inaction, when it is not even shown that they were cognizant of the statements contained in them. They may have seen them, but they were not bound to read them, or inform themselves of the truth of their statements, since they were no party to them in any way whatever, and were interested only in obtaining payment for their property. But, conceding that they were fully apprised of their contents, what action were they bound to have taken? They could not give notice to the hundreds of thousands to whom the prospectuses were sent, since they were not even apprised of their names or addresses. A notice to the company not to send out these prospectuses would have been equally futile, in case the directors chose to disregard *it, since they could not [273] control their action, nor could they have sustained a bill for injunction, since they could have shown no personal injury to themselves by reason of the action of the promoters.

The difficulty of doing exact justice to the plaintiffs in this case, without also doing an injustice to the defendants, suggests another reason why they should not be charged with liability for the circulation of this prospectus and map, without clear proof of their complicity. At the time of the sale of these mining properties their real value must have been unknown. If the mines proved successful they may have been worth millions; if unsuccessful, they would be of little value,—perhaps worthless. The amount agreed upon, $450,000, was one which the defendants were willing to take as a compromise, and one which the plaintiffs† were willing to pay as a speculation. Each party to the sale took his own chances, and no complaint is made of unfair dealing on either side. In their cross complaint defendants tendered to the court, and offered to deliver, the deed and possession of the mines, upon the payment of the residue due them under the escrow agreement. If the property be now more valuable than the amount agreed to be paid, no reason is apparent why the tender should not have been accepted. If, as appears to be more probable, it is of less value, or wholly valueless, the defendants in refunding the amount paid would not only lose that amount, but all possibility of reselling the mines to other parties, and would thereby assume the risk of an unfortunate speculation, which the whole design of the sale was to impose upon the purchasers under the Cowland agreement, namely, the plaintiffs.† In making the purchase the vendees were willing to assume the risk of the mines proving unsuccessful. The vendors were evi-

†[The word "plaintiffs" is obviously here inadvertently used for "other defendants" or "co-defendants."—Ed.]

dently unwilling to take this risk, and preferred to take a sum certain for their speculative chances. Assuming that, in equity, the defendants could be called upon to refund the money paid, it seems unjust that they should also be saddled with the burden of an unfortunate speculation. In short, the circumstances have so changed that justice cannot be done without imposing damages upon the defendants which were not within the contemplation of the parties.

[274] *If the first alternative prayer of the bill were granted, and it were adjudged that the defendants were estopped from asserting that the Seven Stars Company was not the owner of the mining properties, and adjudging such company to have full title thereto, and that defendants should also repay all the proceeds of ore taken therefrom and received by them, amounting to $47,812.25, it will result that of the $450,000, agreed upon as the price of the property, they would have received but $112,339.96, and would lose $337,660.04 of the amount agreed to be paid. Upon the other hand, if the second alternative prayer were granted, and defendants were adjudged to return the money found due in the first decree of the district court, namely, $180,139.82, and retake the property, which now appears to be of little value, they would be practically, in either case, charged with the entire burden of the venture which it was the express object of the Cowland agreement to avoid. A decree that would bring about this result would savor of punishment to defendants rather than of compensation to plaintiffs.

We think the plaintiffs have wholly failed to make out such a complicity on the part of the defendants with the preparation and circulation of these prospectuses as would make them liable for the losses which the plaintiffs have doubtless sustained.

*The decree of the court below is therefore affirmed.*

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## MISSOURI PACIFIC RAILWAY COMPANY, *Appt.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 274-291.)

*Commerce — discrimination by carriers — right of Federal law officers to maintain suit to restrain.*

1. A suit to enjoin a common carrier from discriminating between localities in violation of the Act to Regulate Commerce could not be brought on behalf of the United States by its law officers at the request of the Interstate Commerce Commission prior to the passage of the act of Congress of February 19, 1903, the 3d section of which expressly authorizes the prosecution of such suits.
2. The new remedies to compel compliance with the Act to Regulate Commerce, given by the act of Congress of February 19, 1903, § 3, are so far made applicable to prior pending proceedings to enforce the former act by the provision of § 4, that pending causes shall not be affected by the repeal of conflicting laws provided for therein, but shall be prosecuted to a conclusion in the manner theretofore provided "and as modified by the provisions of this act," that a decree granting the relief prayed for in a suit brought on behalf of the United States by its law officers to enjoin discrimination between localities, which suit was unauthorized because brought before the passage of the later act, must be reversed and the cause remanded for further proceedings consistent with the Act to Regulate Commerce as originally enacted and subsequently amended.

[No. 108.]

*Argued January 23, 26, 1903. Decided March 9, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which affirmed a decree of the Circuit Court for the Second Division of the District of Kansas enjoining a common carrier from discriminating between localities in violation of the Act to Regulate Commerce. *Reversed* and remanded to the Circuit Court for further proceedings.

Statement by Mr. Justice **White:**

The original bill of complaint in this cause was filed on behalf of the United States against the present appellant in the circuit court of the United States for the second division of the district of Kansas on July 26, 1893. To the bill a demurrer was filed and overruled. 5 Inters. Com. Rep. 106, 65 Fed. 903. Subsequently, exceptions were sustained to an answer, and thereafter an amended answer and a replication were filed. The questions now presented for decision, however, were raised by an amended bill filed on July 19, 1897. In such amended bill it was alleged that the suit was brought on behalf of the United States by the United States attorney for the district of Kansas, by the authority of and under the direction of the Attorney General of the United States, and that such authority and direction had been given in pursuance of a request of the Interstate Commerce Commission of the United States "that the United States attorney for the district of Kansas be authorized and directed to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the Interstate Commerce Law against the defendant in relation to the matters herein complained of." It was further averred, in substance, that the respondent was subject to the terms and provisions of the Act to Regulate Commerce, and operated lines of railway between the city of St. Louis, in the state of Missouri, and the city of Omaha, in the state of Nebraska, a distance of 501 miles, and between the city of St. Louis and the city of Wichita, in the state of Kansas, a distance of 458 miles. It was charged that in the transportation of freight between St. Louis and said cities of Omaha and Wichita the service was *substantially of a like, con- [276] temporaneous character, and was made un-

der substantially similar circumstances and conditions, but that, notwithstanding such fact, the rates exacted upon shipments of freight between St. Louis and Wichita very much exceeded the rates charged on freight shipped between St. Louis and Omaha. It was averred that the collection of such alleged excessive freight rates or any rate of freight on shipments between St. Louis and Wichita in excess of the rate charged for shipments of freight of a similar character and classification between St. Louis and Omaha, operated an unjust and unreasonable prejudice and disadvantage against the city of Wichita and the localities tributary thereto, and against the shippers of freight between St. Louis and the city of Wichita. Averring that the wrongs complained of "are remediless in the premises under the ordinary forms and proceedings at law, and are relievable only in a court of equity and in this form of procedure," the ultimate relief asked was the grant of a perpetual injunction restraining the respondent from continuing to exact a greater rate for transportation of freight of like classification between the city of Wichita and the city of St. Louis than was asked between the city of St. Louis and the city of Omaha. A demurrer was filed to the amended bill upon various grounds, one of which denied the right of the United States to institute the suit.

On hearing, the demurrer was overruled exception was reserved, and, the defendant electing to stand on its demurrer, a final decree was entered granting a perpetual injunction as prayed, and, on appeal, the circuit court of appeals affirmed the decree, but filed no opinion. An appeal was thereupon allowed.

*Mr.* **John F. Dillon** argued the cause, and, with *Messrs. J. H. Richards, C. E. Benton, B. P. Waggener,* and *Alexander G. Cochran,* filed a brief for appellant:

The Interstate Commerce Act is a complete code of laws and rules of procedure, both civil and criminal, governing interstate commerce and it radically revolutionizes all prior procedure.

*Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Re Morris,* 2 Inters. Com. Rep. 617, 40 Fed. 101; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 505, 42 L. ed. 255, 17 Sup. Ct. Rep. 896.

By every rule of construction the Interstate Commerce Act is necessarily exclusive as a rule or system of procedure for primary examination into the facts, and, in the language of the act, for "the execution and enforcement of its provisions."

Sutherland, Stat. Constr. §§ 204, 325, 326; *Fourth Nat. Bank* v. *Francklyn,* 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757.

No court of the United States has jurisdiction, right, or power to hear and determine causes, except such as is derived from Congress; and the only laws enforceable in such courts are such laws as are enacted by Congress in pursuance of the Constitution.

*United States* v. *Hudson,* 7 Cranch, 32, 3 L. ed. 259.

The hitherto uniform course of procedure in cases of this character is against the right to maintain the present suit.

*Interstate Commerce Commission* v *Northeastern R. Co.* 5 Inters. Com. Rep. 650, 74 Fed. 70; *Interstate Commerce Commission* v. *Louisville & N. R. Co.* 5 Inters. Com. Rep. 657, 73 Fed. 409; *Swift* v. *Philadelphia & R. R. Co.* 4 Inters. Com. Rep. 633. 58 Fed. 858, 5 Inters. Com. Rep. 116, 64 Fed. 59; *State* v. *Republican Valley R. Co.* 17 Neb. 647, 52 Am. Rep. 424, 24 N. W. 329; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 174, 42 L. ed. 425, 18 Sup. Ct. Rep. 45; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 495, 42 L. ed. 251, 17 Sup. Ct. Rep. 896; *Texas & P. R. Co.* v. *Interstate Commerce Commission,* 162 U. S. 204, 40 L. ed. 942, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

An original bill in equity will not lie against a railway company for discriminatory rates, unless the Commission has first investigated and acted.

*Vanderslice-Lynde Mercantile Co.* v. *Missouri P. R. Co.* (U. S. C. C. Kan., Jan. 7, 1902.)

In the absence of an express statute, a remedy by bill in equity is not the proper remedy to enforce the performance by a corporation of public duties prescribed by law, and especially to enforce by injunction penal statutes.

*Atty. Gen.* v. *Utica Ins. Co.* 2 Johns. Ch. 371; *People* v. *Utica Ins. Co.* 15 Johns. 358, 8 Am. Dec. 243; *Com.* v. *Commercial Bank,* 28 Pa. 389.

The remedy to compel performance of public duty by corporations is by mandamus, and not in equity.

*Walkley* v. *Muscatine,* 6 Wall. 481, 18 L. ed. 930; *Heine* v. *Levee Comrs.* 19 Wall. 655, 22 L. ed. 223; *Barkley* v. *Levee Comrs.* 93 U. S. 258, 23 L. ed. 893; *Thompson* v. *Allen County,* 115 U. S. 550, 29 L. ed. 472, 6 Sup. Ct. Rep. 140; *Rosenbaum* v. *Bauer,* 120 U. S. 450, 30 L. ed. 743, 7 Sup. Ct. Rep. 633; *Smith* v. *Bourbon County,* 127 U. S. 105, 32 L. ed. 73, 8 Sup. Ct. Rep. 1043; *Butterworth* v. *United States,* 112 U. S. 50, 28 L. ed. 656, 5 Sup. Ct. Rep. 25; *Re Sawyer,* 124 U. S. 200, 31 L. ed. 402, 8 Sup. Ct. Rep. 482; *Hannewinkle* v. *Georgetown,* 15 Wall. 547, 21 L. ed. 231; *Dows* v. *Chicago,* 11 Wall. 108, 20 L. ed. 65; Dill. Mun. Corp. §§ 826, 906–908.

There can be no case of equitable cognizance where there is a plain and adequate remedy at law.

*Ewing* v. *St. Louis,* 5 Wall. 413, 18 L. ed. 657.

*Mr.* **W. C. Perry** argued the cause, and, with *Assistant Attorney General Beck,* filed a brief for appellee:

The purpose of the Act to Regulate Commerce was to compel equality of treatment,

to provide a new remedy, and preserve all existing remedies.

*Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

Proceedings before the Commission are not exclusive of other remedies.

*State ex rel. Mattoon* v. *Republican Valley R. Co.* 17 Neb. 648; *State ex rel. Webster* v. *Nebraska Teleph. Co.* 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237; *Lowry* v. *Chicago, B. & Q. R. Co.* 46 Fed. 86; *Little Rock & M. R. Co.* v. *East Tennessee, V. & G. R. Co.* 4 Inters. Com. Rep. 261, 47 Fed. 771; *Vincent* v. *Chicago & A. R. Co.* 49 Ill. 33; Sutherland Stat. Const. § 202; *Smith* v. *Stevens*, 10 Wall. 321, 19 L. ed. 933; *United States* v. *Macon County*, 99 U. S. 590, 25 L. ed. 332; *Nashville* v. *Ray*, 19 Wall. 475, 22 L. ed. 168; *Thomas* v. *West Jersey R. Co.* 101 U. S. 72, 25 L. ed. 950; *South* v. *Maryland*, 18 How. 402, 15 L. ed. 435; *Hearne* v. *New England Mut. Marine Ins. Co.* 20 Wall. 493, 22 L. ed. 397; *Amy* v. *Salma*, 12 Fed. 414; *Oregon Short Line & U. N. R. Co.* v. *Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *Chicago & N. W. R. Co.* v. *Osborne*, 48 Fed. 49, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 912; *Union P. R. Co.* v. *Goodridge*, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; *Kentucky & I. Bridge Co.* v. *Louisville & N. R. Co.* 2 L. R. A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; *Wight* v. *United States*, 167 U. S. 512, 42 L. ed. 258, 17 Sup. Ct. Rep. 822; *Atty. Gen.* v. *Chicago & N. W. R. Co.* 35 Wis. 425; *Buck Mountain Coal Co.* v. *Lehigh Coal & Nav. Co.* 88 Am. Dec. 537, note; 2 Morawetz, Corp. § 1132; *Cumberland Valley R. Co.'s Appeal*, 62 Pa. 227; *Sparhawk* v. *Union Pass. R. Co.* 54 Pa. 421; *State ex rel. Circuit Attorney* v. *Saline County Ct.* 51 Mo. 350, 11 Am. Rep. 454; *State ex rel. Circuit Attorney* v. *Callaway County Ct.* 51 Mo. 395; High, Inj. §§ 1303, 1304, 1554; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896.

Even if the Commission has exclusive original jurisdiction of complaints made by individuals, the rule does not apply to the government.

*The Dollar Sav. Bank* v. *United States*, 19 Wall. 239, 22 L. ed. 82; *Booth* v. *United States*, 11 Gill. & J. 373; *Com.* v. *Baldwin*, 1 Watts. 54, 26 Am. Dec. 33; *United States* v. *Hoar*, 2 Mason, 314, Fed. Cas. No. 15, 373; *People* v. *St. Louis*, 10 Ill. 351, 48 Am. Dec. 339; *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900.

Section 12 specially authorizes this suit.

Sutherland, Stat. Const. § 240; *Wilkinson* v. *Leland*, 2 Pet. 627, 7 L. ed. 542.

In the following cases mandatory injunctions have been granted.

*Great North of England C. & H. Junction R. Co.* v. *Clarence R. Co.* 1 Colly. Ch. Cas. 507; *Lindsey* v. *Great Northern R. Co.* 10 Hare, 664; *Corning* v. *Troy Iron & Nail Factory*, 40 N. Y. 191; *Storer* v. *Great Western R. Co.* 2 Younge & C. Ch. Cas. 48; *Wilson* v. *Furness R. Co.* L. R. 9 Eq. 28; *Sanderson* v. *Cockermouth & W. R. Co.* 11 Beav. 497; *Great Northern R. Co.* v. *Manchester, S. & L. R. Co.* 5 DeG. & S. 138; *Greene* v. *West Cheshire R. Co.* L. R. 13 Eq. 44; *Hood* v. *North Eastern R. Co.* 8 Eq. 666; *Com.* v. *Eastern R. Co.* 103 Mass. 259, 4 Am. Rep. 555; *Harris* v. *Cockermouth & W. R. Co.* 3 C. B. N. S. 693; *Marriott* v. *London & S. W. R. Co.* 1 C. B. N. S. 489; *Vincent* v. *Chicago & A. R. Co.* 49 Ill. 37; *District Attorney* v. *Boston R. Co.* 16 Gray, 242; *Atty. Gen.* v. *Boston Wharf Co.* 12 Gray, 553; *Atty. Gen.* v. *Tudor Ice Co.* 104 Mass. 244, 6 Am. Rep. 232; *Atty. Gen.* v. *Cohoes Co.* 6 Paige, 133, 29 Am. Dec. 755; *Thompson* v. *Paterson & H. River R. Co.* 9 N. J. Eq. 526; *Com.* v. *Pittsburgh & C. R. Co.* 24 Pa. 159, 62 Am. Dec. 372; *Georgetown* v. *Alexandria Canal Co.* 12 Pet. 98, 9 L. ed. 1012; *Atty. Gen.* v. *Street R. Co.* 14 Grant Ch. (U. C.) 673; *Atty. Gen.* v. *Great Northern R. Co.* 1 Drew. & Sm. 154; *Atty. Gen.* v. *Leicester*, 7 Beav. 176.

Equity is equal to every emergency.

2 Redf. Railways, § 205; *Taylor* v. *Salmon*, 4 Myl. & C. 14; *Mare* v. *Malachy*, 1 Myl. & C. 559; *Wallworth* v. *Holt*, 4 Myl. & C. 619; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Chicago, R. I. & P. R. Co.* v. *Union P. R. Co.* 47 Fed. 24; *Joy* v. *St. Louis*, 138 U. S. 1, 34 L. ed. 843, 11 Sup. Ct. Rep. 243; *Atty. Gen.* v. *Chicago & N. W. R. Co.* 35 Wis. 425.

That there may be a remedy at law to persons for damages is no defense to this suit.

*Atty. Gen.* v. *Chicago & N. W. R. Co.* 35 Wis. 425; *United States* v. *Barker*, 1 Paine, 156, Fed. Cas. No. 14,517.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The violation of the Act to Regulate Commerce, complained of in the amended bill, was an asserted discrimination between localities by a common carrier subject to the act, averred to operate an unjust preference or advantage to one locality over another. The right to bring the suit was expressly rested upon a request made by the Interstate Commerce Commission to do so, in order to compel compliance with the provisions of the Act to Regulate Commerce relating to the matters complained of in the bill.

Bearing in mind that, prior to the request of the Commission upon which the suit was brought, no hearing was had before the Commission concerning the matters of fact complained of, and therefore no finding of fact whatever was made by the Commission, and it had issued no order to the carrier to desist from any violation of the law found to exist, after opportunity afforded to it to defend, the question for decision is whether, under such circumstances, the law officers of the United States at the request of the Commission were authorized to institute this suit.

Testing this question by the law which was in force at the time when the suit was begun and when it was decided below, *we[283

are of the opinion that the authority to bring the suit did not exist.

But this is not the case under the law as it now exists, since power to prosecute a suit like the one now under consideration is expressly conferred by an act of Congress adopted since this cause was argued at bar, that is, the act "to Further Regulate Commerce with Foreign Nations and among the States," approved February 19, 1903. By § 3 of that act it is provided:

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discrimination forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or is being committed in part in more than one judicial district or state, it may be dealt with, inquired of, tried, and determined in either such judicial district or state, whereupon it shall be the duty of the court summarily to inquire into the circumstances upon such notice and in such manner as the court shall direct, and without the formal pleadings and proceedings applicable to ordinary suits in equity. . . ."

And the same section, moreover, provides as follows:

"It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided by this act shall not preclude the bringing of suit for the recovery of damages by any party injured or any other action provided by said act approved February 4, 1887, entitled 'An Act to Regulate Commerce,' and the acts amendatory thereof."

Although by the 4th section of the act conflicting laws are repealed, it is provided, "but such repeal shall not affect causes now pending, nor rights which have already accrued, but *such causes shall be prosecuted [284] to a conclusion and such rights enforced in a manner heretofore provided by law [italics ours] *and as modified by the provisions of this act.*" We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, to enforce the provisions of the Act to Regulate Commerce. In the nature of things, it cannot be ascertained from the record whether the railroad company now exacts the rates complained of as being discriminatory and which it was the purpose of the suit to correct; but if it does, of course the power to question the legality of such rates by a suit in equity, brought like the one now here, clearly exists. Under these conditions we think the ends of justice will best be served by reversing the decrees below and remanding the cause to the circuit court for such further proceedings as may be consistent with the Act to Regulate Commerce as originally enacted and as subsequently amended,—especially with reference to the powers conferred and duties imposed by the act of Congress approved February 19, 1903, heretofore referred to.

*The decree of the Circuit Court of Appeals is reversed;* the decree of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.

Mr. Justice **Brown** concurs in the result.

Mr. Justice **Brewer**, dissenting:

I am unable to concur in either the opinion or the judgment in this case.

I think there was no final decree in the circuit court, and that, therefore, the court of appeals should have dismissed the appeal. After the cause had been once put in issue by bill, answer, and replication, a stipulation was filed as follows:

Whereas, after joining issue upon the pleadings heretofore filed in the above-entitled suit, to wit, the original bill of complaint, the demurrer thereto, the original answer, the amended *answer, and the repli- [285] cation thereto, it has been determined by all of the parties to, and all of the parties interested in, said suit, that it is desirable and best that the questions of law arising upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the circuit court of appeals of the United States and the Supreme Court of the United States;

Now, therefore, it is hereby agreed and stipulated by and between the above-named complainants, by their solicitors, W. C. Perry and M. Cliggitt, and the above-named defendant, by its solicitors, J. H. Richards and C. E. Benton, that said complainants shall file an amended bill of complaint in said suit, to which said defendant shall file a demurrer, and that, if the court before which said cause is now pending shall overrule said demurrer and allow the relief prayed for in said amended bill of complaint, then said defendant shall proceed to appeal said cause in due course, and that the party, complainants or defendant, against which said circuit court of appeals shall decide adversely, shall, if said party so desires, in due course appeal said cause for final determination to the Supreme Court of the United States.

And it is further hereby agreed and stipulated that pending said appeal and all the procedure incident thereto the decree and order of said courts, whether it be said circuit court of the United States for the district of Kansas, or said circuit court of appeals, or said Supreme Court of the United

States, if adverse to said defendant, allowing and decreeing the reliefs and remedies prayed for in said amended bill of complaint, shall be suspended and not enforced against said defendant the Missouri Pacific Railway Company, and when a decision has been rendered in said suit by said circuit court of appeals, or by the Supreme Court of the United States, if the cause is taken to that court, then it is further hereby agreed and stipulated that the decision and judgment of either or both of said courts, if adverse to said defendant the Missouri Pacific Railway Company, shall be vacated, set aside, and annulled, and shall not be regarded as of any force or effect against said defendant the Missouri [286] Pacific Railway Company except so far *as holding the amended bill to be sufficient, but that said the Missouri Pacific Railway Company shall have the right and shall be permitted to file an answer in said suit, to which said complainants the United States of America shall in due course file a replication thereto, and the issues shall be duly joined and the cause proceed to hearing and determination upon its merits in due course, the intention of this agreement being that the proceedings had upon the demurrer to said amended bill of complaint and the proposed appeal of said suit to a higher court shall in no manner prejudice the right of said defendant to a trial of said suit upon its merits.

Dated this 16th day of July, 1897.

W. C. Perry,
Morris C. Cliggitt,
Solicitors for Complainant.

On an application made by the complainant, supported by the affidavit of its solicitor, stating that the defendant consented thereto, an order was entered giving the complainant leave to file an amended bill, and also to the defendant, with consent of the complainant, like leave to file a demurrer. An amended bill of complaint and a demurrer thereto were filed, the demurrer was sustained, and, the defendant electing to stand on its demurrer, a decree was entered in behalf of the complainant. A transcript before us shows that all this, from the filing of the stipulation to the entering of the decree, took place on the same day, to wit, July 19. Obviously, all subsequently thereto was done in pursuance of the stipulation. That the stipulation was not signed by the solicitors for the defendant is immaterial, as it was for its benefit alone. In the brief for the government in this court, after a statement of preliminary proceedings, it is said:

"It being manifest that the great volume of testimony would have to be taken, and as the defendant had raised the serious question whether the United States could maintain the suit, or had the right, in its own name, and without a preliminary hearing before the Interstate Commerce Commission, to enforce, by injunction, the pro- [287] visions of the Interstate Commerce *Act which forbids discrimination, it was thought best to finally settle that question. Therefore, the stipulation on pages 53, 54 was entered into. That stipulation provides for the filing of an amended bill, the leveling of a demurrer thereat, and an appeal or appeals to the United States circuit court of appeals and to this court. The amended bill was filed (pp. 55–60); the defendant demurred (p. 61); the court overruled the demurrer, and the defendant, electing to stand on its demurrer, final decree was entered in favor of the complainant. (pp. 62–73.)"

And in the brief for the defendant and appellant it is in like manner said:

"After all this, the parties made the stipulation found on page 53, to the effect that 'it is desirable and best that the questions of law arising upon the bill of complaint as amended and a demurrer thereto be first, finally adjudicated and put at rest by the circuit court of appeals of the United States and the Supreme Court of the United States,' which it was stipulated might be done without prejudice to the right of the defendant if it were held that the bill was maintainable to a trial of the suit upon its merits.

"The amended bill was accordingly filed (Record, pp. 55–60); demurrer thereto was filed (p. 61), and a decree rendered in favor of the complainant."

Now, although it may be that the stipulation was not brought into the record by means of a bill of exceptions, and, although it does not affirmatively appear that the trial court was made aware of this stipulation, or acted in pursuance thereof, yet as the railway company brings here a record containing the stipulation, and as it is admitted by counsel for both parties that it was entered into, and that subsequent proceedings were had in pursuance of its agreements, I think notice should be taken of it by this court. Indeed, if nothing appeared of record, and counsel should admit before us that a stipulation had been entered into between the parties in respect to the finality of the decree, ought we not to act on such admission? Can parties stipulate that questions of law shall alone be presented to this court, and that if our decision be one way the case shall thereafter *proceed in the trial court for an inquiry [288] and decree upon the facts? I know that the statutes of some states permit the taking of a case to the appellate court upon a ruling made on a demurrer, but we have always held that the decree or judgment must be final before we are called upon to review it. When a case has once been decided by this court no further proceedings can be had in the trial court except upon our direction, whereas here the parties have stipulated that without such direction a new trial may be had. In other words, our decision is not to be final although we affirm the decree. It seems to me that the decree of the court of appeals should be reversed, and the case remanded to that court with directions to dismiss the appeal.

Upon the merits, also, I dissent. The

bill is an original bill in behalf of the United States, filed under the direction of the Attorney General, and the fact that the Interstate Commerce Commission requested him to cause this suit to be instituted in no manner adds to or affects the question of the government's right to maintain it. The Commission was not asking the Department of Justice to enforce any of its orders, in which case, as we held in *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516, it would become our duty to examine the proceedings had before the Commission. This is an independent suit instituted by the government, not to carry into effect any orders of the Commission, but to enforce a duty cast upon carriers of interstate commerce, and the right of the government to maintain such a suit does not depend upon the request of any individual or board. The 22d section of the Act to Regulate Commerce provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the act are in addition to such remedies." Every remedy, therefore, that the government or any individual had to compel the performance by carriers of interstate commerce of their legal obligations remains unaffected by that act.

We held in *Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900, that the United States had a right, even in the absence of a statute specially authorizing [289] *such action, to come into the Federal courts by an original bill to restrain parties from obstructing and interfering with interstate commerce. It seems to me singular that the government can maintain a bill to prevent others from obstructing and interfering with interstate commerce, and yet cannot maintain a bill to compel carriers to fully discharge their duties in respect to such commerce. Can it be that the government has power to protect the carriers of interstate commerce, and not power to compel them to discharge their duties?

It is said that this is a suit to compel the carrier to refrain from discriminating between places; that there was no common-law duty to abstain from such discrimination; that it is forbidden only by statute. But, confessedly, it was a common-law duty of a carrier to make no unreasonable charges. It is distinctly averred in the amended bill (Rec. 57, 59):

"And your orators further aver and show unto your honors that said defendant has established, and for a long time has maintained, and still maintains, in force on the line of its railroad between the city of St. Louis and the city of Wichita rates, rules, and regulations governing all freight traffic between said cities over the said railroad which are unjust and unreasonable, in this, that said charges for services rendered by said company in the transportation of property and freight of each and every classification between the said city of St. Louis and the city of Wichita is excessive, exorbitant, unreasonable, and unjust to the extent and amount that such rates and charges exceed the rates and charges on the line of said defendant's railroad between the cities of St. Louis and Omaha, all of which is to the great detriment and hindrance of commerce and trade between the said cities of St. Louis and Wichita, and between the localities to which said cities contribute as a supply point, and to the irreparable injury of the public and to the people of the United States.

. . . . . .

"And your orators further aver and show unto your honors that any schedule rates and freight charges for the various shipments and classifications, hereinbefore set forth between the said cities of St. Louis and Wichita, that are in excess of the *tariff [290] schedules and freight charges for shipments of the like kind and class of property between the cities of St. Louis and Omaha, are unreasonable, excessive, exorbitant, and unjust in and of themselves, and constitute an unreasonable discrimination against Wichita and the localities tributary thereto and the people living therein and against persons shipping freight between the cities of Wichita and St. Louis, and subject such persons and localities to an unjust and unreasonable prejudice and disadvantage."

The truth of these allegations is admitted by the demurrer. The charges for shipments for freight between St. Louis and Wichita are "unreasonable, excessive, exorbitant, and unjust in and of themselves." Surely, here is a disregard of what was at common law a plain and recognized duty of the carrier.

Further, while at common law a mere difference in the prices charged by the carrier to two shippers respectively might not have been forbidden, yet it may well be doubted whether, if the difference was so great as to amount to an unreasonable discrimination, the rule would not have been otherwise. In *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 263, 275, 36 L. ed. 699, 703, 4 Inters. Com. Rep. 92, 96, 12 Sup. Ct. Rep. 844, 847, we said:

"Prior to the enactment of the Act of February 4, 1887, to Regulate Commerce, commonly known as the Interstate Commerce Act (24 Stat. at L. 379, chap. 104), railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service. *Fitchburg R. Co.* v. *Gage*, 12 Gray, 393; *Baxendale* v. *Eastern Counties R. Co.* 4 C. B. N. S. 63; *Great Western R. Co.* v. *Sutton*, L. R. 4 H. L. 226, 237; *Ex parte Benson*, 18 S. C. 38, 44 Am. Rep. 564; *Johnson* v. *Pensacola & P. R. Co.* 16 Fla. 623, 26 Am. Rep. 731,

though the weight of authority in this country was in favor of an equality of charge to all persons for similar service."

But beyond this, the Interstate Commerce [291] Act itself forbids *unjust discrimination, and such discrimination is also clearly and fully set forth in the bill. Can it be that the government is powerless to compel the carriers to discharge their statutory duties? It is nowhere said in the Interstate Commerce Act that this duty or any other duty prescribed by statute is to be enforced only through the action of the Commission. On the contrary, as we have seen, it expressly provides that all other remedies are left unaffected by the act, and a duty cast by statute equally with a common-law duty may by the very language of the act be enforced in any manner known to the law.

Further, the Act to Regulate Commerce, as originally passed, in § 16, required the district attorneys of the United States, under the direction of the Attorney General, to prosecute suits to compel carriers to obey the orders of the Commission. If all remedies were to be secured only through action in the first instance by the commission that provision was all that was necessary, but in the amendatory act of 1889 (25 Stat. at L. 855, chap. 382), there was added in § 12 this clause: "The Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof." Clearly, that contemplates just such a case as the present, and when, in the judgment of the Commission, it is better that the proceedings should be had primarily in the courts, it may call upon the legal officers of the United States to bring the proper actions.

For these reasons, I am compelled to dissent, and I am authorized to say that Mr. Justice **Harlan** concurs in this opinion.

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[292] *THOMAS W. POTTER, *Appt.*,
*v.*
MARY HALL.

(See S. C. Reporter's ed. 292-301.)

*Public lands — right to participate in race for Oklahoma lands as affected by entry within prohibited period—conclusiveness of decision of Land Department.*

1. One who was outside the territory opened to settlement by the acts of March 1, 1889, (25 Stat. at L. 757, chap. 317), March 2, 1889 (25 Stat. at L. 980, 1005, chap. 412), and the President's proclamation of March 23, 1889 (26 Stat. at L. 1546), at the time of such opening, was not disqualified from participating in the race for the land, because, prior to that date and within the prohibited period, he had been within such territory, where no manifest advantage over his competitors resulted to him from his prior entry into such territory.
2. The final conclusion of the Land Department that no substantial advantage over others taking part in the race for land opened to settlement by the acts of March 1, 1889, March 2, 1889, and the President's proclamation of March 23, 1889, resulted to an entryman who made the start from the boundary line with the others, because of his prior entry into such territory some three or four hours before the start was made, involves but the finding of an ultimate fact, and not a conclusion of law, and is therefore not reviewable by the courts.

[No. 168.]

*Submitted February 24, 1903. Decided *April 6, 1903.*

APPEAL from the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a decree of the District Court of Canadian County in favor of defendant in a suit involving conflicting claims to a tract of land. *Reversed* and remanded for further proceedings.

See same case below, 65 Pac. 841.

Statement by Mr. Justice **White**:

This case involves conflicting claims to a tract of land in Oklahoma. Potter, the appellant, who was plaintiff below, claiming to be the owner by title derived under the homestead laws of the United States, sued to recover the property. Mrs. Hall, the appellee, the defendant below, by answer and cross petition averred that herself and husband, being duly qualified to enter the land under the homestead laws, were the first to enter upon and occupy it in the year 1889, when it was opened for settlement, and that they had resided on it as their homestead up to the time of the death of the husband, and she thereafter had *continued to reside [293] on it as a homestead up to the bringing of the suit. It was alleged that Potter, claiming that he had duly entered upon the land, contested the right of Hall to make entry thereof, on the ground that Hall did not possess the requisite qualifications and had abandoned the land, and that Hall, on the other hand, had contested the right of Potter on the ground that he had unlawfully entered upon the land prior to the time when it was open for settlement in violation of the act of 1889 and the proclamation of the President, carrying out the provisions of that act. It was, moreover, alleged that the result of these contests was a recommendation by the local land officers that Hall's application be approved and that Potter's be rejected. A copy of the report of the register and receiver was made a part of the cross petition. It was then

NOTE.—*On the conclusiveness and effect of the decisions of Land Department*—see notes to Hartman v. Warren, 22 C. C. A. 38; and Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 344.

averred that the Secretary of the Interior, in reviewing the action of the Commissioner of the General Land Office, passing on the recommendation of the register and receiver, had approved the finding of the local officers, but that subsequently the Acting Secretary had reviewed the previous decision of the Secretary, had rejected the claim of Hall and sustained the right of Potter, and that the patent of the United States had issued to Potter in consequence of such decision. The opinion of the Secretary on the first hearing and that on the second were also made part of the cross petition. Charging that the decision of the Secretary in favor of Potter involved error of law reviewable by the court, the prayer of the cross petitioner was that, as the widow of Hall, she be recognized as entitled to make entry of the land; that Potter be adjudged to hold the land under the patent of the United States for her benefit, and that a decree be awarded directing a conveyance. To the cross petition Potter demurred on the ground of no cause of action. The demurrer having been overruled, and Potter declining to plead further, a decree was entered in favor of the defendant Hall, adjudging the land to her and decreeing a conveyance. The supreme court of the territory affirmed the decree. The material facts found by the Land Department are these: Potter entered on the land the 22d of April, 1889, the day upon which it was open for settlement, and continuously main-[294] tained *his residence thereon. Hall first entered upon a part of the land about six months after, that is, in October, 1889. The facts concerning Potter's entry were stated by the Secretary in his opinion on the first hearing as follows:

"The history of the case and the material facts are set out in the decision appealed from and need not be restated in detail. The tract in question formed a part of the lands in Oklahoma which were opened to settlement at noon on April 22, 1889; shortly before this date Potter had been appointed by the Indian agent of the Cheyenne and Arapahoe agency as assistant chief of police, with instructions to proceed to the east line of the reservation, preserve order and prevent any settlement on the same. The east line of the Cheyenne and Arapahoe reservation is also the west line of the lands opened for settlement as aforesaid, and is within possibly a quarter of a mile from the tract in question. On this morning of April 22, 1889, some three or four hours before the hour of noon, Potter, who it seems was at said line, seeing some freighters camped on the land involved, went thereon to order them off; he then returned to the line, and (at) the hour of noon started in the race for a claim; he reached the land before any of his competitors, and, as he states, commenced his settlement at one-half or one minute after twelve o'clock."

The deduction which the Secretary drew from these facts was thus stated by him:

"In my opinion the facts just stated sustain the conclusion reached by the local officers to the effect that Potter was not qualified to enter the tract in question by going into the territory on the morning of April 22, 1889, before the hour when the lands therein were opened to settlement; he necessarily secured an opportunity to observe the various tracts lying near the line and the ways of reaching them, and this, taken in connection with the fact that at the said hour he went directly from the line to the land in question, makes it plain in my mind that if he did not previously select the tract of land in dispute, he obtained information that gave him an advantage over rival claim seekers. It follows under the prevailing rulings (*Dean* v. *Simmons*, 17 Land Dec. 526), and cases cited, that *Potter is[295] not qualified to make entry of land in Oklahoma, and that his application to enter the tract in question must be rejected."

The Acting Secretary, when he came to consider the case on a rehearing or review, whilst accepting the facts concerning Potter's entry as stated in the previous opinion, drew from them a different conclusion from that which had previously been deduced. He said:

"Accepting this statement as correct, and a re-examination of the record satisfies me of its correctness so far as it goes, I scarcely think the conclusion warranted that he necessarily secured an opportunity to observe the various tracts of land lying near the land and the way of reaching them, so that he obtained information that gave him an advantage over rival claim seekers. He had been employed at the Cheyenne and Arapahoe agency near by since 1883, and for six years before the opening of the country to settlement he had lived in close proximity to the land in dispute. He had nothing to gain or to learn. Therefore, by the short excursion with which he is charged, and which, it cannot be denied, was made in the performance of duty devolved upon him by the orders of the agent who appointed him to the command of the police at that point, he neither gained nor sought advantage, and it was error to hold that under the circumstances of entry into the territory he was disqualified thereby."

*Messrs.* **J. W. Shartell** and **J. H. Everest** submitted the cause for appellant:

The act of the plaintiff in entering the Oklahoma country on the morning of the day those lands were thrown open to settlement did not disqualify him from making entry on any of such lands.

*Donnell* v. *Kittrell*, 15 Land Dec. 580; *Roff* v. *Coplin*, 18 Land Dec. 128; *Higgins* v. *Adams*, 18 Land Dec. 598; *Curnutt* v. *Jones*, 21 Land Dec. 40; *Tipton* v. *Maloney*, 23 Land Dec. 186; *Metz* v. *Seely*, 21 Land Dec. 148; *McCormick* v. *Turner*, 21 Land Dec. 151; *Jackson* v. *Garrett*, 25 Land Dec. 273; *Hensley* v. *Waner*, 24 Land Dec. 92; *Blanchard* v. *White*, 13 Land Dec. 66; *Guthrie Townsite* v. *Paine*, 13 Land Dec. 562; *White* v. *Marvel*, 18 Land Dec. 560; *Mullen* v. *Porter*, 20 Land Dec. 334.

The finding of the Secretary of the Inter-

ior that Potter, in the discharge of his duty in charge of the border police, went into the country to warn campers who had gone over the line, to get out, was, at least, a mixed conclusion of law and fact, if not strictly a finding of fact, which the courts must recognize as final and accept as conclusive.

*Marquez* v. *Frisbie*, 101 U. S. 473-479, 25 L. ed. 800-802; *Lee* v. *Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; *Johnson* v. *Towsley*, 13 Wall. 72, 20 L. ed. 485; *Warren* v. *Van Brunt*, 19 Wall. 646, 22 L. ed. 219; *United States* v. *Minor*, 114 U. S. 233, 29 L. ed. 110, 5 Sup. Ct. Rep. 836.

*Mr.* **Charles P. Lincoln** submitted the cause for appellee. *Mr. Mark D. Libby* was with him on the brief:

As there is no exception in the language of the statute, there can be none in its enforcement.

*Smith* v. *Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634.

That portion which describes the qualification for entry must be liberally construed, in order that no one be permitted to avail himself of the bounty of Congress, unless evidently in one of the classes Congress intended should enjoy that bounty.

*Ibid.*; *Payne* v. *Robertson*, 169 U. S. 323, 42 L. ed. 764, 18 Sup. Ct. Rep. 337; *Calhoun* v. *Violet*, 173 U. S. 60-65, 43 L. ed. 614-616, 19 Sup. Ct. Rep. 324.

The doctrine of "no advantage gained," contended for in this case, has no place within the meaning of the statute.

*Patterson* v. *Wilson*, 11 Okla. 75, 65 Pac. 921.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The supreme court of the territory disregarded the final action of the Land Department as expressed in the opinion of the Acting Secretary on the rehearing, and decreed that Potter held the land in trust for the [296] defendant and appellee on two *grounds: First, because the final action of the Department was held to be a violation of the provisions of the law opening the land in question to settlement; and second, because, as stated by the court, "We feel the less hesitation in reversing the conclusion of the last tribunal of the Land Department 'on review,' not only because the conclusion we now arrive at is that *which must necessarily be arrived at upon the facts* (italics ours), but also because it was the one accepted by the Secretary of the Interior, as well as the Commissioner of the General Land Office." The conclusion of the court, that the final action of the Land Department was contrary to law, was rested upon what was deemed to be the controlling effect of the rulings in *Smith* v. *Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634; *Payne* v. *Robertson*, 169 U. S. 323, 42 L. ed. 764, 18 Sup. Ct. Rep. 337, and *Calhoun* v. *Violet*, 173 U. S. 60, 43 L. ed. 614, 19 Sup. Ct. Rep. 324. But the decisions relied upon do not sustain the conclusion which the court deduced from them. In all three of the cases the only question decided was the validity of an entry made by one who was within the inhibited territory at the time when the land was opened by law for settlement. The cases, therefore, did not involve whether one who was outside of the territory at the moment of time when the land was opened lost his right to take part in the race into the territory because, at a time previous to that moment, he had been within the territory in question. Indeed, not only was the question which this case presents not embraced within the decisions upon which the court below based its conclusion, but it was expressly excluded from the rulings made in the cases in question. Thus, in *Smith* v. *Townsend*, in referring to the statute and the President's proclamation opening the land for settlement, it was said in the concluding passage of the opinion (p. 501, L. ed. p. 536, Sup. Ct. Rep. p. 638):

"It may be said that if this literal and comprehensive meaning is given to these words it would follow that anyone who after March 2 and before April 22 should chance to step within the limits of the territory would be forever disqualified from taking a homestead therein. Doubtless he would be within the letter of the statute; but if, at the hour of noon on April 22, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the territory, it may perhaps be *said that if within the letter he was not [297] within the spirit of the law, and, therefore, not disqualified from taking a homestead. Be that as it may,—and it will be time enough to consider that question when it is presented,—it is enough now to hold that one who was within the territorial limits at the hour of noon April 22 was, within both the letter and the spirit of the statute, disqualified to take a homestead therein."

The court below having, then, erroneously held that the case was controlled by the previous adjudications of this court, we are called upon to determine the question which was expressly reserved in *Smith* v. *Townsend*; that is, whether one who was outside of the legal barrier at twelve o'clock M. on April 22, the day and time when that barrier was removed by operation of law and the terms of the proclamation of the President, was disqualified from participating in the race for the land because, prior to that date and within the prohibited period, he had been within the territory which was thereafter to be opened for settlement. The statutes and proclamation of the President by which this question is controlled were fully set out in *Smith* v. *Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634, and need not be at length restated. Suffice it to say, that the provisions opening the land for settlement, regulating the mode of settlement, and the President's proclamation executing these statutes, are found in the act of March 1, 1889 (25 Stat. at L. 757, chap. 317), the act of March 2, 1889 (25 Stat. at L. 980 and 1005, chap. 412), and the proclamation of the President of March

23, 1889 (26 Stat. at L. 1546). The first of these acts contained the provision that "any person who may enter upon any part of said lands in said agreement mentioned prior to the time that the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands or lay any claim thereto." The act of the subsequent day (March 2, 1889) contained the following provision:

"But until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any rights thereto."

The proclamation of the President contained these words:

[298] *"Warning is hereby again expressly given, that no person entering upon and occupying said lands before said hour of twelve o'clock, noon, of the 22d day of April, A. D. 1889, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto."

Doubtless, as observed in *Smith* v. *Townsend*, a rigorous adherence to the mere letter of these statutes and the terms of the proclamation would exclude every person from the right to enter and occupy land within the prohibited territory, even although such person was outside of the territory, and, therefore, on an equality with all others, if, perchance, such persons had accidentally or otherwise gone into the prohibited territory between the 2d day of March and the 22d day of April. But it is also true that if the provisions of the statute and proclamation be enforced, not according to their mere letter, but in harmony with the intention which may be fairly deduced from them, a contrary rule would result. Whilst, as held in *Smith* v. *Townsend* and the cases referred to which have followed it, obviously the purpose of the statute was to exclude anyone from entering land who was within the territory at the period fixed for the opening, it may well be doubted whether the words "enter upon and occupy," as used in the act of 1889 and in the President's proclamation, embrace the mere accidental or casual presence in the prohibited territory subsequent to the 2d of March and prior to the 22d of April of one who was outside on the 22d of April, and, therefore, in a position of substantial equality with others seeking to make the race for the land.

The Land Department, charged with the execution of the act, was early called upon to determine whether one who was outside of the territory at the time of the opening, and took part in the race for land, was disqualified because, subsequent to the 2d of March, and before the opening, he had been within the limits. In the case referred to the entryman had, on the 20th of April, crossed the line accidentally and gone two miles into the territory; but, on being informed of the fact, had retired and waited with others on the line until the 22d, the day *of opening. After considering the [299] terms of the statute the conclusion was reached that an entry of this kind was not within the spirit of the prohibition of the statute, and the entry was confirmed. *Donnell* v. *Kittrell* (1892) 15 Land Dec. 580. This ruling was followed in *Higgins* v. *Adams*, 18 Land Dec. 598, where it was held that one who had gone into the disputed territory on the morning of the day of the opening for the purpose of watering his team, and who, on completing this object, had returned to the boundary and made a start with the others, did not come within the spirit of the statute. In *Curnutt* v. *Jones* (1895) 21 Land Dec. 40, the whole subject was elaborately reviewed and many prior cases referred to. Briefly, the facts in the case were these: The entryman had resided for several years in the vicinage of the prohibited territory, and had habitually entered therein for the purpose of getting his mail. On the day, however, of the opening he was at the line with others and took part in the race for land. It was held that the prior entry did not deprive him of the right to enter land; that whether entry prior to the day of the opening affected the right to make entry would depend upon the facts of each particular case, and upon whether, in considering them, it was concluded that the prior entry placed the one who had made it in such a position of advantage over others as to render it unjust and inequitable to allow him to make an entry of land. In summing up the case, Mr. Secretary Smith, in his opinion, said:

"Jones, the defendant in this case, had lived for some time on the border of the territory, within less than a mile from the line, and, almost from the necessity of his situation, was familiar with the lands in the immediate vicinity. His information respecting them, and particularly respecting the tract subsequently entered by him, is shown to have been acquired long prior to March 2, 1889, and, as was well said in the case of *Golden* v. *Cole*, 16 Land Dec. 375, 'it was impossible to deprive people who had been over the territory of a knowledge that they had thus acquired.' His periodical visits to Oklahoma City, which was at once his postoffice, his most convenient and accessible railway station, and his market town, do not appear to have brought him any advantage over other persons seeking lands in the territory."

*In *Tipton* v. *Maloney* (1896) 23 Land [300] Dec. 186, it was held that one who within the prohibited period had passed along the highways in the territory was not disqualified for making an entry, provided he was outside of the line on the day of the opening and took part on an equality with others in the effort to secure land. And rulings to the like effect were made in *Hensley* v. *Waner*, 24 Land Dec. 92, and *Henderson* v. *Smith*, 28 Land Dec. 303. The settled rule

then applied by the Land Department in the execution of the statute is that one who took part in the race for land on the day of the opening was not prohibited from taking land because of a prior entry into the territory unless it be shown that manifest advantage resulted to the entryman from his previous going into the territory. The rule thus for a long period and consistently enforced must obviously have become the foundation of many rights of property. And, as we consider that the rule thus applied in the practical administration of the statute by the officials by law charged with its execution conforms to its intention, we are unwilling to overthrow it by a resort to a narrow and technical construction. It remains only to consider whether error was committed by the Department in finally ruling that the entry made by Potter on the morning of the 22d, before he returned to the line to take part in the race, which involved error of law reviewable by the courts. But as such entry did not, as a matter of law, preclude Potter's right to go outside of the territory and take part in the race for land, but depended upon whether, as a matter of fact, he obtained by his previous going into the territory a substantial advantage over others, which he would not have otherwise possessed, it follows that the final conclusion of the Department that no such advantage resulted involved but the finding of an ultimate fact, and not a conclusion of law, and it is therefore not reviewable. If the facts found by the Secretary had no tendency to sustain the conclusion reached by him, it might be that a question of law would arise, but such is not the case. Indeed, in view of the finding that Potter had been for a long period of time living across the line, in close proximity to the land which he entered, and which was only a quarter of a mile distant from the place [1]where the *race began, and that he reached the land in two minutes from the time when the start was made, it might well be argued that his going into the territory, as stated, had no tendency to establish that he obtained an advantage by reason of acquiring information which he had not previously possessed. But so to say would lead only to the conclusion that, as a matter of law, the Department rightly held that Potter was a qualified entryman. The fact that the final conclusion as to the ultimate facts reached by the Department differed from the conception of such ultimate facts entertained by the Department in previous stages of the controversy, affords no ground for disregarding the conclusion of ultimate fact finally reached, which was binding between the parties.

*The judgment of the Supreme Court of the Territory must be reversed,* and the cause remanded for further proceedings in accordance with this opinion.

And it is so ordered.

## FARMERS' & MERCHANTS' INSURANCE COMPANY, *Plff. in Err.,*
*v.*
## FRANK DOBNEY.

(See S. C. Reporter's ed. 301-306.)

*Error to state court—Federal question—constitutional law — equal protection of the laws—validity of state statute allowing attorneys' fees in successful actions on insurance policies.*

1. A Federal question was not set up too late to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court, where it was raised by the assignments of error in the state supreme court, and was considered and decided by a commission appointed to aid that court in the discharge of its duties, and the judgment of such commission was, for the reasons stated in its report, affirmed by the state supreme court.
2. The equal protection of the laws is not denied insurance companies by the provisions of Neb. Comp. Stat. chap. 43, §§ 43-45, allowing a reasonable attorney's fee to plaintiff in case of the unsuccessful defense by an insurance company of a suit on a policy of insurance covering real property which has been totally destroyed by the causes insured against.

[No. 189.]

*Submitted March 9, 1903. Decided April 6, 1903.*

IN ERROR to the Supreme Court of the State of Nebraska to review a judgment which affirmed, for the reasons stated in the report of a commission appointed to aid

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*As to the validity of class legislation*—see State v. Goodwill (W. Va.) 6 L. R. A. 621, and note; and State v. Loomis (Mo.) 21 L. R. A. 789, and note.

*As to constitutional equality of privileges, immunities, and protection*—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, and note.

*Unconstitutional inequality or discrimination in statutes allowing attorneys' fees.*

The question first came before the Supreme Court of the United States on a writ of error to the supreme court of Texas to review a judgment of that court sustaining the validity of a statute of that state which allowed an attorney's fee of $10 to the successful plaintiff in suits against railroad companies founded upon certain classes of claims, not exceeding $50 in amount, which the company had omitted to pay within a certain time after presentation. The judgment of the state court was reversed, and the statute held unconstitutional as a denial of the equal protection of the laws to a certain class of debtors arbitrarily singled out and penalized for failure to pay certain debts. Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, Reversing 87 Tex. 19, 26 S. W. 985. (The state court had also sustained the validity of this statute in Gulf,

such court in discharging its duties, a judgment of the District Court of Holt County in favor of plaintiff in a suit on a policy of fire insurance. *Affirmed.*

See same case below, 62 Neb. 213, 86 N. W. 1070.

The facts are stated in the opinion.

*Mr.* **Halleck F. Rose** submitted the cause for plaintiff in error.

The provision of the valued policy law of Nebraska, directing the taxation of an attorney's fee to plaintiff on rendition of judgment on a policy insuring real estate, is violative of the equality of the 14th Amendment of the Constitution of the United States.

*Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150–165, 41 L. ed. 666–671, 17 Sup. Ct. Rep. 255; *Atchison, T. & S. F. R. Co.* v. *Matthews,* 174 U. S. 97, 43 L. ed. 910, 19 Sup. Ct. Rep. 609; *South & North Ala. R. Co.* v. *Morris,* 65 Ala. 199.

The Nebraska court, in analogous cases, has itself upheld the position contended for by plaintiff in error.

*Moore* v. *Herron,* 17 Neb. 703, 24 N. W. 451; *Garneau* v. *Omaha Printing Co.* 42 Neb. 847, 61 N. W. 100; *Coburn* v. *Watson,* 48 Neb. 257, 67 N. W. 171; *Atchison & N. R. Co.* v. *Baty,* 6 Neb. 47; *Grand Island & W. C. R. Co.* v. *Swinbank,* 51 Neb. 521, 71 N. W. 48.

A law of Texas imposing, as a condition of perfecting appeals by receivers, special provisions in all cases touching appeal bonds, was held void by the supreme court of that state.

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C. & S. F. R. Co. v. Ellis (Tex.) 17 L. R. A. 286, 18 S. W. 723.)

It has been held in Michigan that a statute allowing plaintiff, if successful, to tax an attorney's fee as part of his costs in an action against a railroad company to recover damages for killing cattle was an unconstitutional discrimination between suitors, where no such advantage is conferred on the defendant if successful. Wilder v. Chicago & W. M. R. Co. 70 Mich. 382, 38 N. W. 289; Schut v. Chicago & W. M. R. Co. 70 Mich. 433, 38 N. W. 291; Rinear v. Grand Rapids & I. R. Co. 70 Mich. 620, 38 N. W. 599; Lafferty v. Chicago & W. M. R. Co. 71 Mich. 35, 38 N. W. 660.

So, in Washington, the allowance of attorneys' fees, which was provided for by Wash. Laws 1893, p. 418, § 4, in favor of successful plaintiffs in actions for injuries to stock by collision with moving railroad trains, was held an invalid attempt to grant special privileges to one class of litigants at the expense and detriment of another. Jolliffe v. Brown, 14 Wash. 155, 44 Pac. 149.

In deference to the decision in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, the supreme court of Missouri held unconstitutional a statute which authorized an allowance of attorneys' fees to the successful plaintiff in a suit to recover damages from the railroad company for the loss of stock due to its failure to furnish for the shipment of the stock cars with trap doors in the roof, as required by such statute. Paddock v. Missouri P. R. Co. 155 Mo. 524, 56 S. W. 453.

The court overruled Perkins v. St. Louis, I. M. & S. R. Co. 103 Mo. 52, 11 L. R. A. 426, 15 S. W. 320, which upheld a statute allowing an attorney's fee on recovery against a railroad company for injury to live stock because of a defective fence, and must be deemed likewise to have overruled Briggs v. St. Louis & S. F. R. Co. 111 Mo. 168, 20 S. W. 32, which reaffirmed the former holding.

But the Missouri court seems to have given greater effect to the decision in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, than the court announcing that decision was willing to accord it; for when the Kansas statute, which allows a reasonable attorney's fee to the successful plaintiff in an action against a railroad company for damages from fire caused by operating the railroad came before it for adjudication as to its constitutionality, it laboriously distinguished its former decision, and upheld the statute. Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609. The object of the statute under consideration, the court said, was protection against fire,—a matter in the nature of a police regulation,—while the object of the Texas statute was simply to compel the payment of small debts, and compelling the payment of indebtedness does not come within the purpose of police regulations.

The Kansas statute had previously been upheld in Missouri P. R. Co. v. Merrill, 40 Kan. 404, 19 Pac. 793, which decision was also followed in Clark v. Ellithorpe, 7 Kan. App. 337, 51 Pac. 940, though the court apparently saw no ground for distinguishing Gulf, C. & S. F. R. Co v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, which it regarded as having decided that "a similar statute in the state of Texas was unconstitutional."

A statute allowing attorneys' fees to successful plaintiffs in actions to recover for damages done to live stock by railroad trains was held constitutional in Illinois on the ground that such attorneys' fees may be upheld as a penalty for failure to fence. Peoria, D. & E. R. Co. v. Duggan, 109 Ill. 537, 50 Am. Rep. 619.

So, the imposition of an attorney's fee upon a railroad company which unsuccessfully defends an action to recover the value of stock killed upon or near its unfenced tracks does not violate the constitutional rule of equality of right, privilege, and exemption by imposing a burden upon one class of litigants in favor of another, since the legislation is intended to compel railroad companies to fence in their tracks, and the liability imposed is a consequence of their neglect to take such precaution. Illinois C. R. Co. v. Crider, 91 Tenn. 489, 19 S. W. 618.

The provision for an attorney's fee for the successful prosecution of an action, under Kan. Laws 1893, chap. 100, for failure of a carrier to safely transport and deliver goods committed to its charge, is constitutional. Missouri, K. & T. R. Co. v. Simonson, 64 Kan. 802, 57 L. R. A. 765, 68 Pac. 653.

So, in Arkansas an attorney's fee provided for by statute as part of the penalty for an overcharge by a carrier does not violate a constitutional provision against partial and unequal legislation. Dow v. Beidelman, 49 Ark. 455, 5 S. W. 718.

And in Iowa, permitting the allowance of attorneys' fees on recovery against a railroad company for violation of a statute regulating rates does not violate the constitutional provision as to equality. Burlington, C. R. & N. R.

*Dillingham* v. *Putnam* (Tex.) 14 S. W. 303. To the same effect are *Durkee* v. *Janesville*, 28 Wis. 465, 9 Am. Rep. 500; *South & North Ala. R. Co.* v. *Morris*, 65 Ala. 199; *St. Louis, I. M. & S. R. Co.* v. *Williams*, 49 Ark. 492, 5 S. W. 883; *Chicago, St. L. & N. O. R. Co.* v. *Moss*, 60 Miss. 641.

A statute which declared that no costs should be recovered against the city in any action where the same is commenced to set aside any tax assessment or tax deed, or to prevent the collection of taxes or assessments in said city, has been held invalid.

To the same effect are *Durkee* v. *Janesville*, 28 Wis. 465, 9 Am. Rep. 500; *Calder* v. *Bull*, 3 Dall. 387, 388, 1 L. ed. 648, 649; *Fletcher* v. *Peck*, 6 Cranch, 143, 3 L. ed. 180; *Wilkinson* v. *Leland*, 2 Pet. 656, 658, 7 L. ed. 552, 553; *Terret* v. *Taylor*, 9 Cranch, 50, 3 L. ed. 653.

An act allowing a plaintiff in a suit against a railroad company to recover for killing cattle, to tax as part of his costs an attorney's fee of $25, is unconstitutional.

*Wilder* v. *Chicago & W. M. R. Co.* 70 Mich. 382, 38 N. W. 289; *Lafferty* v. *Chicago & W. M. R. Co.* 71 Mich. 37, 38 N. W. 660; *Jolliffe* v. *Brown*, 14 Wash. 159, 44 Pac. 149; *Grand Rapids Chair Co.* v. *Runnels*, 77 Mich. 104, 111, 43 N. W. 1006; *Chicago, St. L. & N. O. R. Co.* v. *Moss*, 60 Miss. 641; *Denver & R. G. R. Co.* v. *Outcalt*, 2 Colo. App. 406, 31 Pac. 177.

A statute declaring that in the event of a railroad company's refusing to pay an employee within fifteen days of demand, "it shall be liable to pay such employee 20 per cent on the amount due him as damages," is invalid and unconstitutional because "not protecting alike the interest of employer and employee."

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Co. v. Dey, 82 Iowa, 312, 12 L. R. A. 436, 3 Inters. Com. Rep. 584, 48 N. W. 98.

The decision in Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, was held by the Georgia supreme court to be conclusive as to the unconstitutionality of the provision of Ga. Civ. Code, § 2140, allowing damages and attorneys' fees to plaintiff in an action upon an insurance policy in case of the refusal of the insurance company to pay a loss within sixty days after demand, where it shall appear to the jury that the refusal to pay was in bad faith. Phenix Ins. Co. v. Hart, 112 Ga. 765, 38 S. E. 67; Phoenix Ins. Co. v. Schwartz, 115 Ga. 113, 57 L. R. A. 752, 41 S. E. 240.

But when the question came before the Supreme Court of the United States, that court again refused to sanction the state court's interpretation of Gulf, C. & S. F. R. C. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 18 Sup. Ct. Rep. 255, but still further refined away that decision, and held that the equal protection of the laws was not denied to life or health insurance companies by the provision of Tex. Rev. Stat, art. 4071, imposing on such companies, upon failure to pay a loss within the time specified in the policy after demand therefor, a liability to the holders of the policy for damages and reasonable attorneys' fees, although such obligation was not imposed upon other classes of insurance companies or associations. Fidelity Mut. Life Asso. v. Mettler, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662.

And this ruling was reaffirmed in Iowa L. Ins. Co. v. Lewis, 187 U. S. 335, *ante*, 204, 23 Sup. Ct. Rep. 126.

The Texas courts, with the exception of a decision on rehearing in New York L. Ins. Co. v. Smith (Tex. Civ. App.) 41 S. W. 684, in which the court said that the decision in Gulf, C. & S. F. R. Co. v. Ellis was conclusive against the validity of the statute, uniformly upheld the validity of such legislation. Union Cent. L. Ins. Co. v. Chowning, 86 Tex. 654, 24 L. R. A. 504, 26 S. W. 982, 8 Tex. Civ. App. 455, 28 S. W. 117; Mutual L. Ins. Co. v. Blodgett, 8 Tex. Civ. App. 45, 27 S. W. 286; Washington L. Ins. Co. v. Gooding, 19 Tex. Civ. App. 490, 49 S. W. 123; Sun L. Ins. Co. v. Phillips (Tex. Civ. App.) 70 S. W. 603; Fidelity & C. Co. v. Allibone, 90 Tex. 660, 40 S. W. 399; Mutual L. Ins. Co. v. Walden (Tex. Civ. App.) 26 S. W. 1012; New York L. Ins. Co. v. Orlopp (Tex. Civ. App.) 61 S. W. 336. And the same conclusion was reached in Merchants' Life Asso. v. Yoakum, 98 Fed. 251, 39 C. C. A. 56.

Similar legislation in Kansas allowing attorneys' fees to plaintiffs in suits upon fire insurance policies has been held not to deny the equal protection of the laws. British America Assur. Co. v. Bradford, 60 Kan. 82, 55 Pac. 335; Shawnee F. Ins. Co. v. Bayha, 8 Kan. App. 169, 55 Pac. 474.

And the Nebraska legislation assailed in FARMERS' & M. INS. CO. v. DORNEY had been sustained by the state courts in prior litigation. Insurance Co. of North America v. Bachler, 44 Neb. 549, 62 N. W. 911; Lancashire Ins. Co. v. Bush, 60 Neb. 116, 82 N. W. 313.

The imposition of attorneys' fees upon unsuccessful appellants in particular kinds of actions has been held unconstitutional as unequal, partial, and discriminatory legislation.

For this reason the supreme court of Alabama declared invalid a statute allowing attorneys' fees against unsuccessful appellants from judgments of justices of the peace in suits to enforce the liability of railroads for damages to live stock. South & North Ala. R. Co. v. Morris, 65 Ala. 193.

And for a like reason the provision of Miss. Acts 1882, p. 110, imposing a reasonable attorney's fee upon unsuccessful appellants from the "judgment of any court in any action for damages brought by any citizen of this state against any corporation," was held invalid in Chicago, St. L. & N. O. R. Co. v. Moss, 60 Miss. 641.

An analogous case is St. Louis, I. M. & S. R. Co. v. Williams, 49 Ark. 492, 5 S. W. 883, holding invalid a statute which in effect provided for the assessment of attorneys' fees as a penalty for refusing to abide by the decision of a board appointed to assess the damages for the killing of stock by railway trains, in the event that the dissatisfied party did not recover in the courts a more favorable judgment than the award of the board.

But in Iowa a statute requiring a railroad company seeking to condemn a right of way to pay an attorney's fee to the landowner in case of his successful appeal from the award of the sheriff's jury is held not to be an unconstitutional discrimination against the company, a denial to it of the equal protection of the law, or the conferring of an illegal special privilege on the landowner. Gano v. Minneapolis & St. L. R. Co. 114 Iowa, 713, 55 L. R. A. 263, 87 N. W. 714. The court rests its decision on the ground that the condemnation proceedings not being a common or natural right, but a remedy created by the legislature, that body might impose conditions on its exercise.

*San Antonio & A. P. R. Co.* v. *Wilson* (Tex. App.) 19 S. W. 910.

An act directing dismissal of certain classes of suits growing out of the reservations of land to heads of Indian families, upon a certain state of facts being made to appear, was held unconstitutional.

*Wally* v. *Kennedy*, 2 Yerger, 554, 24 Am. Dec. 511.

To the same effect are *Bank of the State* v. *Cooper*, 2 Yerger, 605; *Jones* v. *Perry*, 10 Yerger, 71, 30 Am. Dec. 430; *Budd* v. *State*, 3 Humph. 491, 39 Am. Dec. 189.

An act which provides for the appointment of a board to assess damages, and that if either party refuses to abide by such assessment, and makes it necessary for the other to sue, he shall be taxed with an attorney's fee in the event the judgment of the court is not more favorable than the award, is invalid.

*St. Louis, I. M. & S. R. Co.* v. *Williams*, 49 Ark. 492, 5 S. W. 883.

*Mr.* **M. P. Kinkaid** submitted the cause for defendant in error. *Mr. M. F. Harrington* was with him on the brief:

It is the settled law of Nebraska that, unless the attention of the trial court is called to it, a question cannot be raised for the first time in the supreme court.

*Dunham* v. *Courtnay*, 24 Neb. 629, 39 N. W. 784; *Dayton Spice-Mills Co.* v. *Sloan*, 49 Neb. 622, 68 N. W. 1040; *Hyde* v. *Hyde*, 60 Neb. 502, 83 N. W. 673; *Chicago, R. I. & P. R. Co.* v. *O'Neill*, 58 Neb. 239, 78 N. W. 521; *Broadwater* v. *Foxworthy*, 57 Neb. 406, 77 N. W. 1103; *Union P. R. Co.* v. *James*, 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109; *Backus* v. *Ft. Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

No exception having been saved to the interlocutory order directing taxation of attorney's fees as costs, the question could not be reviewed in Nebraska by the supreme court. The order having been made without objection or exception on the part of the insurance company, it must stand.

*Reynolds* v. *State*, 58 Neb. 49, 78 N. W. 483; *Tuomey* v. *Willman*, 43 Neb. 28, 61 N. W. 126; *Lowrie* v. *France*, 7 Neb. 191; *Murray* v. *School Dist. No. 3*, 11 Neb. 438, 9 N. W. 573; *Hosford* v. *Stone*, 6 Neb. 378; *Morgan* v. *State*, 51 Neb. 672, 71 N. W. 788.

It has been held by this court that an order of the judge of a state court at chambers cannot be regarded as an order of the court.

*McKnight* v. *James*, 155 U. S. 685, 39 L. ed. 310, 15 Sup. Ct. Rep. 248.

A reference to the "Constitution" must be construed as a reference to the Nebraska Constitution alone, and not the 14th Amendment to the Federal Constitution.

*Kipley* v. *Illinois*, 170 U. S. 182, 42 L. ed. 998, 18 Sup. Ct. Rep. 550; *Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34.

The Federal question was raised too late to be available in this court.

*Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Re Buchanan*, 158 U. S. 31, 39 L. ed. 884, 15 Sup. Ct. Rep. 723.

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To the objection that the statute did not impose the obligation on corporations other than railway companies exercising the power of eminent domain, the court replied that because of the special privileges granted to railroad companies they formed a special class upon which peculiar burdens might be imposed as a condition of exercising the powers granted; and that, even were the objections valid, the unconstitutionality of the statute could not be insisted upon by a corporation attempting to exercise rights under it.

A Minnesota statute allowing reasonable attorneys' fees in an action to recover the possession of land taken without compensation by a railroad company for its right of way, in cases where the company does not elect to convert the action into condemnation proceedings, is not unconstitutional as class discrimination. Cameron v. Chicago, M. & St. P. R. Co. 63 Minn. 384, 31 L. R. A. 553, 65 N. W. 652; Pfaender v. Chicago & N. W. R. Co. 86 Minn. 218, 90 N. W. 393.

In a number of cases, statutes allowing attorneys' fees to successful plaintiffs in suits to foreclose liens have been held invalid as discriminating and class legislation. Randolph v. Builders & Painters Supply Co. 106 Ala. 501, 17 So. 721; Los Angeles Gold Mine Co. v. Campbell, 13 Colo. App. 1, 56 Pac. 246; Davidson v. Jennings, 27 Colo. 187, 48 L. R. A. 340, 60 Pac. 354; Brubaker v. Bennett, 19 Utah, 401, 57 Pac. 170.

On the other hand, such provisions have been upheld in Dell v. Marvin, 41 Fla. 221, 45 L. R. A. 201, 26 So. 188; Duckwall v. Jones, 156 Ind. 682, 58 N. E. 1055, 60 N. E. 797; Wortman v. Kleinschmidt, 12 Mont. 316, 30 Pac. 280; Ivall v. Willis, 17 Wash. 645, 50 Pac. 467.

The provision of Utah Rev. Stat. § 2006, for the allowance of attorneys' fees to a successful plaintiff in a suit to cancel a mortgage which the mortgagee fails to release or discharge after it has been fully satisfied, with no provision for a like allowance to the defendant if he succeeds, is unconstitutional as discriminating and special legislation. Openshaw v. Halfin, 24 Utah, 426, 68 Pac. 138.

A statute authorizing an attorney's fee to be taxed by a justice in entering judgment for personal services in favor of the plaintiff only violates a constitutional prohibition against class legislation. Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006.

And the provision for an attorney's fee to a successful plaintiff in an action for wages, which is made, by Ohio Rev. Stat. § 6563*a*, in case the wages have not been paid within three days after a demand in writing, is an unconstitutional denial of the equal protection of the laws, since the statute imposes the restriction against invoking the courts except at the peril of being mulcted in an attorney's fee if unsuccessful, upon one class of citizens only. Hocking Valley Coal Co. v. Rosser, 53 Ohio St. 12, 29 L. R. A. 386, 41 N. E. 263.

A similar statute in Illinois was, however, upheld in Vogel v. Pekoc, 157 Ill. 339, 30 L. R. A. 491, 42 N. E. 386, over an objection that it was obnoxious as special legislation.

A Texas statute requiring the appointment of an attorney for the defense in suits against nonresidents, with an allowance of reasonable compensation to be taxed as costs, is not unconstitutional because imposing on plaintiffs in suits against nonresidents a burden not imposed in suits against other persons. Williams v. Sapieha (Tex. Civ. App.) 59 S. W. 947.

That the legislature may prescribe the conditions under which an insurance corporation may do business within a state has been recognized by this court.

*Fidelity Mut. Life Asso.* v. *Mettler*, 185 U. S. 316, 46 L. ed. 929, 22 Sup. Ct. Rep. 662; *Waters-Pierce Oil Co.* v. *Texas*, 177 U. S. 42, 44 L. ed. 663, 20 Sup. Ct. Rep. 518; *New York L. Ins. Co.* v. *Cravens*, 178 U. S. 395, 44 L. ed. 1122, 20 Sup. Ct. Rep. 962.

The term "citizen" does not include a corporation.

*Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Blake* v. *McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357.

The right of the Nebraska legislature to enact the statute in question is fully recognized, by implication at least, by this court in the following cases:

*John Hancock Mut. L. Ins. Co.* v. *Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 29 Sup. Ct. Rep. 609.

Mr. Justice **White** delivered the opinion of the court:

Having been adjudged to pay the amount of a fire policy written on the dwelling house of the defendant in error, which was totally destroyed by fire, the plaintiff in error prosecutes this writ. The judgment was for $861.40 with interest, costs, and $150 as a reasonable attorney's fee. This latter amount was fixed under authority conferred on the court by §§ 43, 44, and 45 of chapter 43 of the Compiled Statutes of Nebraska, which are a reproduction of chapter 48 of the Laws of Nebraska for 1899. The sections in question are reproduced in the margin.† The allowance of the attorney's fee is the basis of the Federal right asserted. It is moved to dismiss the writ on the ground that the Federal right was not specially set [303] up below as required by Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), or was, in any event, alleged too late to enable the supreme court of Nebraska to consider it. Among the assignments of error contained in the petition in error filed before the hearing in the supreme court of Nebraska was the following:

"Section 45 of chapter 43 of the Compiled Statutes, under which the court assumed to allow and order an attorney fee to be taxed, is unconstitutional and void for want of mutuality of the provisions, and for excluding defendant from the benefits and privileges thereby given to plaintiff, and for depriving defendant of the equal protection of the laws; in each of which particulars the said section is in conflict with § 1 of the 14th Amendment to the Constitution of the United States, and in conflict with § 3 of article 1 and § 15 of article 3 of the Constitution of Nebraska."

The case was considered by commissioners appointed pursuant to the Nebraska law to aid the supreme court of the state in the discharge of its duties. The commission in an elaborate opinion recommended the affirmance of the judgment. In such opinion the assignment of error concerning the attorney's fee, above quoted, was considered and numerous cases decided by the supreme court of Nebraska sustaining its allowance under the statute in question were referred to. It was said in the opinion that the legality of the attorney's fee "was not an open question in this state" because the right to allow the fee had been previously sustained by the supreme court of the state in many cases. A passage from the case of *Lancashire Ins. Co.* v. *Bush*, 60 Neb. 116, 82 N. W. 313, expressly declaring that the statute concerning the allowance of the attorney's fee was consistent both with the Constitution of the United States and of the state of Nebraska, was approvingly cited, the passage in question being as follows:

"These decisions are vigorously attacked, but we are convinced, as a result of further investigation of the subject, that they are sound and should be adhered to. There is nothing in the Constitution of the United States or of this state which forbids classification of subjects for the purpose of legislation."

The supreme court of Nebraska, for the reasons stated in the report of the commis- [304] sion, affirmed the judgment. It results that not only was the Federal question relied upon specially called to the attention of the supreme court of the state of Nebraska, but it was by that court expressly decided. The grounds upon which the motion to dismiss is predicated are, therefore, without merit, and it is overruled.

All the grounds relied upon to demonstrate that the statute allowing a reasonable attorneys' fee in case of the unsuccessful defense of a suit to enforce certain insurance policies is repugnant to the equality clause of the 14th Amendment are embraced in the following propositions: First, because it arbitrarily subjects insurance companies to a liability for attorneys' fees when other defendants in other classes of cases are not subjected to such burden; second, because,

†Compiled Statutes of Nebraska, chapter 43.

Sec. 43 Whenever any policy of insurance shall be written to insure any real property in this state, against loss by fire, tornado, or lightning, and the property insured shall be wholly destroyed, without criminal fault on the part of the insured or his assigns, the amount of the insurance written in such policy shall be taken conclusively to be the true value of the property insured and the true amount of loss and measure of damages.

Sec. 44. This act shall apply to all policies of insurance hereafter made or written upon real property in this state, and also to the renewal, which shall hereafter be made, of all policies heretobefore written in this state, and the contracts made by such policies and renewals shall be construed to be contracts made under the laws of this state.

Sec. 45. The court, upon rendering judgment against an insurance company upon any such policy of insurance, shall allow the plaintiff a reasonable sum as an attorney's fee, to be taxed as part of the costs.

whilst the obligation to pay attorneys' fees is imposed on insurance companies in the cases embraced by the statute, no such burden rests on the plaintiff in favor of the insurance companies where the suit on a policy is successfully defended; and, third, because the statute arbitrarily distinguishes between insurance policies by allowing an attorney's fee in case of a suit on a policy covering real estate, where the property has been totally destroyed, and excluding the right to such fees in suits to enforce policies on other classes of property, or where there has not been a total destruction of the property covered by the insurance. Each and all of these propositions must rest on the assumption that contracts of insurance, generically considered, do not possess such distinctive attributes as to justify their classification separate from other contracts, and that contracts of insurance, as between themselves, may not be classified separately depending upon the nature of the insurance, the character of the property covered, and the extent of the loss which may have supervened. But the unsoundness of these propositions is settled by the previous adjudications of this court. *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *John Hancock Mut. L. Ins. Co.* v. *Warren*, 181 U. S. 73, 45 L. ed. 755, 21 Sup. Ct. Rep. 535; *Fidelity Mut. Life Asso.* v. *Mettler*, 185 U. S. 308, 46 L. ed. 922, 22 Sup. Ct. Rep. 662. In the *Orient Case*, a statute of the state of Missouri, which subjected fire insurance contracts to an exceptional rule, was upheld, [305]*not only on the ground of the right of the state to prescribe the conditions upon which an insurance company should transact business within its borders, but also because the rule in question was the lawful exercise of the power to classify. In the *Warren Case* a like principle was applied to a statute of the state of Ohio establishing a particular regulation as to life insurance companies. In the *Mettler Case* a statute of the state of Texas was sustained, applicable, alone, to life insurance policies, which authorized the enforcement, not only of a reasonable attorney's fee, but also of 12 per cent damages after demand in case of the unsuccessful defense of a suit to enforce a life insurance policy. In all three of the cases referred to, therefore, it was necessarily held that insurance contracts were so distinct as to justify legislative classification apart from other contracts or to authorize a classification of insurance contracts so as to subject one character of such contracts when put in one class to one rule and other varieties of such contracts when placed in another class to a different rule. The only claimed distinction between the cases previously decided and the present one is that in this case the classification is made to depend, not alone upon the general character of the contract, but upon the kind of property insured and the extent of the loss. This, it is elaborately argued, takes this case out of the rule established by the previous cases, and causes the statute to be repugnant to the 14th Amendment. But as the rule settled by the previous cases is that contracts of insurance from their very nature are susceptible of classification, not only apart from other contracts, but from each other, it must follow, as the lesser is included in the greater, that the character of the property insured and the extent of the loss afford reasons for subclassification.

It is, however, argued that no reason could have existed for classifying losses on real estate separately from losses on other property. And by what process of reasoning, it is asked, could the legislative mind have discovered the foundation for allowing the recovery of a reasonable attorney's fee in case of a total loss of real estate insured, and not permit recovery of such fee when the property insured has been only partially destroyed? *The distinction between real and [306] personal property has in all systems of law constantly given rise to different regulations concerning such property. The differences of relation which may arise between the insurer and the insured, depending upon whether the property insured has been only partially damaged or has been totally destroyed, needs but to be suggested. In the one case, the amount of the damage affords possibilities for a reasonable difference of opinion between the parties in adjusting the payment under the policy. In the other, the amount being determined under the statute by the value fixed by both parties in the policy, the question of legal liability under the policy would be, as a general rule, the only matter to be considered in determining whether payment under the contract will be made. Besides, it is obvious that the total destruction of real estate covered by insurance necessarily concerns the homes of many of the people of the state. If, in regulating and classifying insurance contracts, the legislature took the foregoing considerations into view and provided for them, we cannot say that in doing so it acted arbitrarily and wholly without reason.

*Affirmed.*

Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **Brown** dissented.

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ONONDAGA NATION *et al., Plffs. in Err.*,
*v.*
JOHN BOYD THACHER.

(See S. C. Reporter's ed. 306–311.)

*Error to state court — Federal question — dismissal.*

A writ of error from the Supreme Court of the United States to a state court will be dismissed for want of jurisdiction, where no claim of Federal right was specially set up or

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; *Re* Buchanan, 39 L. ed. U. S. 884.

called to the attention of the state court in any way.

[No. 234.]

*Argued April 8, 9, 1903. Decided April 27, 1903.*

IN ERROR to the Supreme Court of the State of New York to review a judgment establishing defendant's absolute ownership of certain Indian wampum belts, entered in pursuance of the mandate of the Court of Appeals of that State, which had affirmed a judgment of the Appellate Division of the Supreme Court of New York for the Fourth Judicial Department affirming the judgment of the Special Term of the Supreme Court of Onondaga County. *Dismissed.*

See same case below, 53 App. Div. 561, 65 N. Y. Supp. 1014.

Statement by Mr. Justice **White:**

This action was originally brought by the Onondaga Nation and Te-has-ha, an Onondaga Indian. Subsequently, several other Onondaga Indians, one Seneca Indian, a [307] Cayuga Indian, *and the University of the State of New York were made additional plaintiffs. The ultimate object of the action was to recover from the defendant four wampum belts to which defendant asserted ownership by purchase, but which were averred by the plaintiffs to be the property of a league, or confederacy of Indian tribes, known as the "Ho-de-no-sau-nee." The Onondaga Nation, through an officer selected by it, was averred to be the lawful keeper, or custodian, of said belts. The league, or confederacy, referred to was also at one time known as the Iroquois Confederacy, as the Five Nations (consisting of the Mohawk, Onondaga, Seneca, Oneida, and Cayuga tribes), and after the Tuscarora Nation of Indians came into the league, as the Six Nations. By an amendment to the complaint it was alleged that on February 26, 1898, "the Onondaga Nation elected the University of the State of New York to the office of wampum keeper, and, by bill of sale, sold and transferred to the University of the State of New York all its interest in the said wampums;" and the right to the custody of the belts was alleged to be in said university. These wampum belts were thus described:

"One belt of dark wampum beads, representing the confederation organization of the Five Nations under Hiawatha; one belt representing the first treaty stipulation between the Six Nations and General George Washington, picturing in wampum beadwork the council house, General Washington, the O-do-ta-ho, or president of the tribes, and thirteen representatives of the colonies; also two fragments of other belts, one representing the first approach to the Indians of the 'people with white faces,' and the other, a narrow belt, representing the unity of the Five Nations."

The complaint contained no allusion to the Constitution, treaties, or statutes of the United States.

In substance the answer contained a recital of the facts connected with the purchase of the belts, and it was asserted that absolute ownership thereof existed in the defendant.

The action was tried at a special term of the supreme court of Onondaga county, New York. After the introduction of oral and documentary evidence, the court filed findings of fact *and conclusions of law. The de- [308] fendant was found to be the absolute owner of the property in question; the Onondaga Nation was held not to have legal capacity to sue; the University of the State of New York was decided not to have such interest in the subject-matter of the action as entitled it to bring an action for the recovery of any or either of the wampum belts; and the individual Indians made parties plaintiff were adjudged not to possess such a community of interest with the members of the various tribes constituting the league, or confederacy, which, it was alleged, originally owned the belts, as to permit the maintenance by them of the action. Beyond statements made in testimony or in recitals of historical facts, showing that the general government had made treaties with the confederacy of the Six Nations and with certain of the tribes which had composed the confederacy, and that said treaties had been evidenced by the exchange of belts of wampum, there was not contained in the evidence, or in the findings referred to, or in the judgment rendered, or in the exceptions thereafter filed by the plaintiffs to the findings of the court, any allusion to the Constitution, treaties, or statutes of the United States.

On appeal the appellate division of the supreme court of New York for the fourth judicial department affirmed the judgment of the trial court. An appeal was then taken to the court of appeals of the state of New York, and that court affirmed the judgment (169 N. Y. 584, 62 N. E. 1098) upon the following *per curiam* opinion:

"We think the judgment appealed from should be affirmed, upon the ground that neither the Onondaga Nation nor the individual Indians named as plaintiffs had legal capacity to bring and maintain the action. *Strong* v. *Waterman*, 11 Paige, 607; *Seneca Nation* v. *Christie*, 126 N. Y. 122, 27 N. E. 275; *Johnson* v. *Long Island R. Co.* 162 N. Y. 462, 56 N. E. 992.

"As to the University of the State of New York, one of the plaintiffs, the finding of fact by the trial judge 'that the University of the State of New York never purchased any or either of the wampum belts mentioned and described in the complaint, and that said University of the State of New York never was selected or "raised up" to the position or office of "wampum *keeper," [309] and no official proceedings were ever begun on the part of any of the tribes of Indians which formerly composed the Iroquois Confederacy for the purpose of conferring any such position or office upon said University of the State of New York, assuming that there is or was, at the time of said alleged

proceedings, any such official position,' is supported by evidence, and the judgment having been affirmed at the appellate division, it is, therefore, conclusive upon us."

The record and the proceedings in the cause having been remitted to the supreme court of Onondaga county, and the judgment of the court of appeals having been made the judgment of the lower court, a writ of error was allowed to review this latter judgment.

*Mr.* **Edward Winslow Paige** argued the cause and filed a brief for plaintiffs in error.

*Mr.* **John A. Delehanty** argued the cause and filed a brief for defendant in error.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The jurisdiction of this court to review the judgment complained of is controlled by § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). Now, so far as we have been able to ascertain from a careful examination of the record, there was not drawn in question in the courts of the state of New York in the case at bar, in any manner, the validity of a treaty or statute of, or an authority exercised under, the United States, and the courts of the state of New York rendered no decision against the validity of any such treaty, statute, or authority. Nor is there anything contained in the record to indicate that there was drawn in question in the state courts the validity of any statute of, or the validity of an authority exercised under, a state, and necessarily there was no decision sustaining the validity of any state statute or authority exercised under a state, alleged to be repugnant to the Constitution, treaties, or laws of the United States. Neither can we find anything in the record to warrant the contention that the plaintiffs in error ever, spe-
[310] cially or otherwise, *set up the claim, in the course of the litigation in the courts of New York which is under review, of any title, right, privilege, or immunity under the Constitution, or a treaty or statute of, or commission held or authority exercised under, the United States.

There are no formal assignments of error in the record or in the brief of counsel for plaintiffs in error. It is, however, asserted in such brief that a Federal question arises upon the record because of the ruling by the court of appeals of the state of New York, that there was evidence supporting "the finding of fact by the trial judge 'that the University of the State of New York never purchased any or either of the wampum belts mentioned and described in the complaint, and that said University of the State of New York never was selected or "raised up" to the position or office of "wampum keeper," and no official proceedings were ever begun on the part of any of the tribes of Indians which formerly composed the Iroquois Confederacy for the purpose of conferring any such position or office upon said University of the State of New York, assuming that there is or was, at the time of said alleged proceedings, any such official position.'"

Referring to this ruling of the court of appeals of New York, counsel for plaintiffs in error say:

"It is plain that this is a holding that the council of the Onondagas *had no power* to select a depositary for the wampums. It is not that the University could not take, could not act, and could not sue, but '*that it never was selected*' for the position of wampum keeper. As the action of the council *selecting* it, or *voting its selection*, is admitted on the record, this can only mean that the action of the council of the Onondagas *was void as beyond its power*, and thus the Federal question is right up, because the case was decided by the court of appeals upon that question *solely*."

But, even if the quoted matter is susceptible of the construction that it adjudged that the council of the Onondaga Nation of Indians did not possess the power which it is claimed they attempted to exercise in 1898, to select the University of the State of New York as the depositary for the wampums, it is not apparent, and no reason has been advanced which enables *us to discover, [311] how a Federal question can be evolved from the holding referred to which would entitle us to review the judgment below. Certainly, the court of appeals of New York did not suppose that a Federal question was lurking in the record presented for its consideration.

In any event, as we find that no claim of Federal right was specially set up, or called to the attention of the state court in any way, we are without jurisdiction to review the judgment of the state court. *Telluride Power Transmission Co.* v. *Rio Grande Western R. Co.* 187 U. S. 569, 580, *ante*, 307, 312, 23 Sup. Ct. Rep. 178.

*Writ of error dismissed for want of jurisdiction.*

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FERDINAND N. SHURTLEFF, *Appt.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 311-319.)

*Officers—removal by President.*

1. A Federal official sought to be removed from office by the President for any of the causes specified by Congress as grounds for such removal is entitled to notice and hearing.
2. The removal of a Federal official by the President without notice or opportunity to defend will be presumed to have been made for other causes than those specified by Congress as grounds for his removal.
3. The general power of the President to remove a Federal official for any reason he may think sufficient, even though such official was

NOTE.—*On the right to remove officers summarily*—see note to Trainor v. Wayne County (Mich.) 15 L. R. A. 95.

appointed by and with the advice and consent of the Senate, is not restricted, as regards general appraisers of merchandise, to a removal for "inefficiency, neglect of duty, or malfeasance in office" by the provision in the customs administrative act of June 10, 1890, § 12 (26 Stat. at L. 131, 136, chap. 407, U. S. Comp. Stat. 1901, pp. 1886, 1922, 1895, 1924, 1931), which authorizes the appointment of such officials, that they "may be removed from office at any time by the President" for those causes.

[No. 76.]

*Argued January 20, 1903. Decided April 6, 1903.*

APPEAL from the Court of Claims to review a judgment denying the right of a general appraiser of merchandise to be paid his salary after he was removed from office by the President. *Affirmed.*

See same case below, 36 Ct. Cl. 34.

Statement by Mr. Justice **Peckham:**

The appellant seeks to review a judgment of the court of claims denying his right to [312] be paid the salary pertaining to *the office of a general appraiser of merchandise and accruing between May 15 and November 1, 1899. The court refused to decree payment of the claim on the ground that he was not one of the appraisers during the time for which he demanded such salary.

The facts, as they appear in the findings of the court of claims, are that the appellant was nominated on July 17, 1890, to be one of the general appraisers of merchandise under the act of June 10, 1890, chapter 407 (26 Stat. at L. 131, U. S. Comp. Stat. 1901, p. 1886), and that nomination was consented to on the following day by the Senate, and the appellant was thereupon commissioned to be such general appraiser of merchandise. He accepted that office and took the oath required on July 24, 1890, and remained in such office and was paid the salary attached thereto up to May 15, 1899. On May 3 of that year he received the following communication from the President:

Executive Mansion,
Washington, D. C., May 3, 1899.

Sir:—

You are hereby removed from the office of general appraiser of merchandise, to take effect upon the appointment and qualification of your successor.

William McKinley.

The appellant never resigned his office nor acquiesced in any attempted removal therefrom, and he was never notified or informed of any charges made against him, either of inefficiency, neglect of duty, or malfeasance in office, and he knows of no cause for his removal from the office having been ascertained or assigned by the President.

Since May 15, 1899, he has been ready and willing and offered to discharge the duties of the office, and has not been paid any salary since that date. He has made monthly demand upon the Treasury Department for the salary attaching to the office from May 15 to November 1, and such demand has been refused.

On May 12, 1899, an appointment was made during the recess of the Senate to fill the vacancy caused by the removal of the petitioner from his office, and such appointment was to be *in effect not longer than to [313] the end of the next session of the Senate of the United States. The appointee under that commission took the oath of office and entered upon the duties thereof on May 12, 1899, and has received pay as such officer, beginning on May 19, 1899, up to the present time. On December 15, 1899, he was nominated to the Senate and the nomination to that office was confirmed on January 17, 1900, and he was commissioned by the President under the above confirmation on January 22, 1900, and took the oath of office under that appointment on January 26, 1900, and since that time has remained in the office to which he was so appointed.

Upon these findings the court of claims decided as a conclusion of law that the appellant was not entitled to recover, and his petition was therefore dismissed.

*Mr.* **Edwin B. Smith** argued the cause, and, with *Messrs. Smith & Barker*, filed a brief for appellant:

Where causes of removal are specified by the Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential.

*Reagan* v. *United States*, 182 U. S. 425, 45 L. ed. 1164, 21 Sup. Ct. Rep. 842.

Congress can restrict removals from such inferior offices as it may establish.

*Ex parte Hennen*, 13 Pet. 229, 10 L. ed. 136; *Marbury* v. *Madison*, 1 Cranch, 162, 2 L. ed. 60; *United States ex rel. Goodrich* v. *Guthrie*, 17 How. 306, 15 L. ed. 107.

Those who control the right of appointment to an office may declare its terms and tenure. This has been many times decided in states whose Constitutions in this respect were like that of the United States.

*Fox* v. *McDonald*, 101 Ala. 72, 74, 21 L. R. A. 529, 13 So. 416; *People ex rel. Dunham* v. *Morgan*, 90 Ill. 562; *Baltimore* v. *State*, 15 Md. 455, 74 Am. Dec. 572; *People ex rel. Waterman* v. *Freeman*, 80 Cal. 233, 22 Pac. 173; *People ex rel. Le Roy* v. *Hurlbut*, 24 Mich. 63, 9 Am. Rep. 103; *People ex rel. Brown* v. *Woodruff*, 32 N. Y. 364; *State* v. *Constantine*, 42 Ohio St. 441, 51 Am. Rep. 833; *Long* v. *New York*, 81 N. Y. 425; *Taft* v. *Adams*, 3 Gray, 130; *People* v. *Osborne*, 7 Colo. 608, 4 Pac. 1074; *State ex rel. Atty. Gen.* v. *Hawkins*, 44 Ohio St. 114, 5 N. E. 228; *State ex rel. Kennedy* v. *McGarry*, 21 Wis. 498.

Where the Constitution confers the power, it imposes the only limitations of it. Where it is only derived from a law establishing the office, that law may prescribe the requirement for the appointment, and, necessarily, the conditions for removal from the office.

*Hovey* v. *State*, 119 Ind. 403, 21 N. E. 21;

*Collins* v. *State*, 8 Ind. 344; *State ex rel. Rosenstock* v. *Swift*, 11 Nev. 137; *Field* v. *People*, 3 Ill. 79; *People ex rel. Hatfield* v. *Comstock*, 78 N. Y. 361; *People ex rel. Ward* v. *Scheu*, 167 N. Y. 296, 60 N. E. 650.

The distinction is one that has been frequently recognized by the courts.

*People ex rel. Ward* v. *Scheu*, 60 App. Div. 594, 69 N. Y. Supp. 597; *People ex rel. Burby* v. *Howland*, 155 N. Y. 270, 41 L. R. A. 838, 49 N. E. 775; *People ex rel. Le Roy* v. *Foley*, 148 N. Y. 677, 43 N. E. 171; *People ex rel. Mitchell* v. *Sturges*, 156 N. Y. 580, 51 N. E. 295, 27 App. Div. 387, 50 N. Y. Supp. 5, 21 Misc. 605, 47 N. Y. Supp. 999.

The legislature can do what it thinks best with a public office, or public officer. All statutory offices are taken subject to legislative action.

*People ex rel. Mitchell* v. *Sturges*, 21 Misc. 607, 47 N. Y. Supp. 999.

The power which creates an office can regulate the incidents to its creation and existence.

2 Story, Const. § 1537; *People ex rel. Hatfield* v. *Comstock*, 78 N. Y. 361; *People ex rel. Ward* v. *Scheu*, 167 N. Y. 296, 60 N. E. 650.

"Tenure" means the other terms, manner, and conditions of holding an office, as well as the calendar time prescribed for it.

*United States* v. *Hartwell*, 6 Wall. 393, 18 L. ed. 832; *People* v. *Waite*, 9 Wend. 58; *Ex parte Herrick*, 78 Ky. 32.

When Congress by law vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress thus to vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.

*United States* v. *Perkins*, 116 U. S. 485, 29 L. ed. 700, 6 Sup. Ct. Rep. 449.

Having the power to confer the right of nomination upon the President, or head of a department, or a court, or to leave it to the President subject to the Senate's approval, the correlative power existed to restrict the original selection or limit the power of removal. Determining where these powers shall be lodged has naught to do with the restrictions to be placed upon their exercise.

*Marbury* v. *Madison*, 1 Cranch, 167, 2 L. ed. 60; *People ex rel. Peck* v. *Departments of Fire & Bldgs. Comrs.* 106 N. Y. 68, 12 N. E. 641; *Biggs* v. *McBride*, 17 Or. 651, 5 L. R. A. 115, 21 Pac. 878.

The formulation of charges and an investigation of them are conditions precedent to any removal from the office in question.

Mechem, Pub. Off. § 454; Throop, Pub. Off. § 364; 25 Am. Law Rev. 212; *Denver* v. *Darrow*, 13 Colo. 460, 22 Pac. 784; *Com. ex rel. Bowman* v. *Slifer*, 25 Pa. 23, 64 Am. Dec. 680; *Field* v. *Com.* 32 Pa. 478; *State, Clark, Prosecutor*, v. *Cape May*, 50 N. J. L. 558, 14 Atl. 581; *State ex rel. Campbell* v. *Police Comrs.* 14 Mo. App. 305, Affirmed in 88 Mo. 144; *Biggs* v. *McBride*, 17 Or. 651, 5 L. R. A. 115, 21 Pac. 878.

Removal for cause, though no particular cause is statutorily specified, by implication imposes investigation before action.

*People ex rel. Gere* v. *Whitlock*, 92 N. Y. 191.

Where the statute states causes for dismissal, the plain implication is that they cannot be made in any other cases or for any other causes.

*People ex rel. Peck* v. *Departments of Fire & Bldgs. Comrs.* 106 N. Y. 68, 12 N. E. 641.

An officer has the right to be heard before being removed for cause, whether the statute expressly requires a hearing or not. If not expressed, it is implied.

*Bagg's Case*, 11 Coke, 98; *King* v. *Gaskin*, 8 T. R. 209; *Ex parte Ramshay*, 18 Q. B. 190; *Queen* v. *Canterbury*, 1 El. & El. 545; *Capel* v. *Child*, 2 Cromp. & J. 574; *Williams* v. *Bagot*, 3 Barn. & C. 786; *Re Brook*, 16 C. B. N. S. 416; *Dullam* v. *Willson*, 53 Mich. 402, 51 Am. Rep. 128, 19 N. W. 112; *Page* v. *Hardin*, 8 B. Mon. 672; *Willard's Appeal*, 4 R. I. 601; *Com. ex rel. Bowman* v. *Slifer*, 25 Pa. 28, 64 Am. Dec. 680; *People ex rel. Andrews* v. *Lord*, 9 Mich. 227; *People ex rel. Mead* v. *Ingham County*, 36 Mich. 418; *State ex rel. Atty. Gen.* v. *Hawkins*, 44 Ohio St. 115, 5 N. E. 228; *State ex rel. Kennedy* v. *McGarry*, 21 Wis. 496; *Biggs* v. *McBride*, 17 Or. 651, 5 L. R. A. 115, 21 Pac. 878; *Ham* v. *Boston Bd. of Police*, 142 Mass. 90, 7 N. E. 540; *West River Bridge Co.* v. *Dix*, 6 How. 548, 12 L. ed. 552.

In ascertaining and determining whether charges such as require or justify removal are sustained, the President acts judicially, and his jurisdiction to remove is not to be inferred argumentatively.

*Runkle* v. *United States*, 122 U. S. 556, 30 L. ed. 1170, 7 Sup. Ct. Rep. 1141; *Re Guden*, 171 N. Y. 531, 64 N. E. 451.

*Assistant Attorney General* **Pradt** argued the cause and filed a brief for appellee:

The incumbents of these offices are removable from office at the pleasure of the President, although no limitation in respect to the tenure of the offices has been prescribed by law.

*Parsons* v. *United States*, 167 U. S. 324, 42 L. ed. 185, 17 Sup. Ct. Rep. 880.

The greatest force that can be given to the words, "and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office" is to regard them as directory, and therefore not intended as an encroachment upon the executive power of removal.

*Blake* v. *United States*, 103 U. S. 232, 26 L. ed. 464; *Keyes* v. *United States*, 109 U. S. 336, 27 L. ed. 954, 3 Sup. Ct. Rep. 202.

Even in cases where the statute has expressly provided for a four years' term of office, this court has held that the fixing of a definite term of years does not grant any tenure of the office against the President's will. The court holds that the purpose of

such legislation is to limit the duration of the term of office, and not to secure to the incumbent a term of office for that period. *Parsons* v. *United States*, 167 U. S. 338, 42 L. ed. 190, 17 Sup. Ct. Rep. 880.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The office of general appraiser of merchandise was created by the 12th section of the act of Congress approved June 10, 1890, commonly called the customs administrative act. 26 Stat. at L. 131, 136, chap. 407, U. S. Comp. Stat. 1901, pp. 1886, 1922, 1895, 1924, 1931. The material portion of that section reads as follows:

"Sec. 12. That there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise, each of whom shall receive a salary of seven thousand dollars a year. Not more than five of such general appraisers shall be appointed from the same political party. They shall not be engaged in any other business, avocation, or employment, and may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office. . . ."

There is, of course, no doubt of the power of Congress to create such an office as is pro-[314] vided for in the above section. Under *the provision that the officer might be removed from office at any time for inefficiency, neglect of duty, or malfeasance in office, we are of opinion that if the removal is sought to be made for those causes, or either of them, the officer is entitled to notice and a hearing. *Reagan* v. *United States*, 182 U. S. 419, 425, 46 L. ed. 1162, 1164, 21 Sup. Ct. Rep. 845. In speaking of causes of removal, Mr. Chief Justice Fuller said in that case:

"The inquiry is, therefore, whether there were any causes of removal prescribed by law March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient."

Various state courts have also held that, where an officer may be removed for certain causes, he is entitled to notice and a hearing. See *Dullam* v. *Willson*, 53 Mich. 392, 401, 51 Am. Rep. 128, 19 N. W. 112; *Page* v. *Hardin*, 8 B. Mon. 668, 672; *Willard's Appeal*, 4 R. I. 597; *Com. ex rel. Bowman* v. *Slifer*, 25 Pa. 23, 28, 64 Am. Dec. 680; *State ex rel. Atty. Gen.* v. *Hawkins*, 44 Ohio St. 98, 114, 5 N. E. 228; *Biggs* v. *McBride*, 17 Or. 640, 650, 5 L. R. A. 115, 21 Pac. 878; *Ham* v. *Boston Bd. of Police*, 142 Mass. 90, 7 N. E. 540.

It must be presumed that the President did not make the removal for any cause assigned in the statute, because there was given to the officer no notice or opportunity to defend. The question then arises, Can the President exercise the power of removal for any other causes than those mentioned in the statute? In other words, Is he restricted to a removal for those causes alone, or can he exercise his general power of removal without such restriction?

We assume, for the purposes of this case only, that Congress could attach such conditions to the removal of an officer appointed under this statute as to it might seem proper; and, therefore, that it could provide that the officer should only be removed for the causes stated, and for no other, and after notice and an opportunity for a hearing. Has Congress, by the 12th section of the above act, so provided?

It cannot now be doubted that, in the absence of constitutional *or statutory provi-[315] sion, the President can, by virtue of his general power of appointment, remove an officer, even though appointed by and with the advice and consent of the Senate. *Ex parte Hennen*, 13 Pet. 230; *Parsons* v. *United States*, 167 U. S. 324, 42 L. ed. 185, 17 Sup. Ct. Rep. 880, and cases cited. To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirmation by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication. Congress has regarded the office as of sufficient importance to make it proper to fill it by an appointment to be made by the President and confirmed by the Senate. It has thereby classed it as appropriately coming under the direct supervision of the President, and to be administered by officers appointed by him (and confirmed by the Senate) with reference to his constitutional responsibility to see that the laws are faithfully executed. Art. 2, § 3.

In *Blake* v. *United States*, 103 U. S. 227, 26 L. ed. 462, there were two constructions that might have been placed upon the act there under consideration, determining the tenure by which army and naval officers held their commissions in time of peace, and that construction was placed upon the 5th section of the act of July 13, 1866, chapter 176 (14 Stat. at L. 92), which left with the President his power to remove an officer of the Army or Navy, by the appointment of his successor, by and with the advice and consent of the Senate. Although the question was regarded as not free from difficulty, it was held that there was no intention on the part of Congress to deny or restrict the power of the President, with the consent of the Senate, to displace army and naval officers in time of peace by the appointment of others in their places. This indicates the tendency of the court to require explicit language to that effect before holding the power of the President to have been taken away by an act of Congress.

The appellant contends that, because the statute specified certain causes for which the officer might be removed, it thereby impliedly excluded and denied the right to remove for any *other cause, and that the Pres-[316] ident was therefore by the statute prohib-

ited from any removal excepting for the causes, or some of them, therein defined. The maxim, *Expressio unius est exclusio alterius*, is used as an illustration of the principle upon which the contention is founded. We are of opinion that, as thus used, the maxim does not justify the contention of the appellant. We regard it as inapplicable to the facts herein. The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by constitution or statute. It requires plain language to take it away. Did Congress, by the use of language providing for removal for certain causes, thereby provide that the right could only be exercised in the specified causes? If so, see what a difference in the tenure of office is effected as to this office, from that existing generally in this country. The tenure of the judicial officers of the United States is provided for by the Constitution; but, with that exception, no civil officer has ever held office by a life tenure since the foundation of the government. Even judges of the territorial courts may be removed by the President. *McAllister* v. *United States*, 141 U. S. 174, 35 L. ed. 693, 11 Sup. Ct. Rep. 949. To construe the statute as contended for by appellant is to give an appraiser of merchandise the right to hold that office during his life, or until he shall be found guilty of some act specified in the statute. If this be true, a complete revolution in the general tenure of office is effected, by implication, with regard to this particular office. We think it quite inadmissible to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. The rule which is expressed in the maxim is a very proper one and founded upon justifiable reasoning in many instances, but should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century, and the consequent curtailment of the powers of the Executive in such an un-[317] usual manner. *We can see no reason for such action by Congress with reference to this office or the duties connected with it.

The appellant has cited some cases in the state courts, where, under the peculiar circumstances therein set forth, and with regard to the particular provisions of the statutes, it has been held that the power to remove is restricted to the causes stated in such statutes. We do not regard them as applicable to a case like this.

In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient.

By the 4th section of article 2 of the Constitution it is provided that all civil officers shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors. No one has ever supposed that the effect of this section was to prevent their removal for other causes deemed sufficient by the President. No such inference could be reasonably drawn from such language.

We are not unmindful of the force of the contention that, if the power of removal is not limited to the causes specified in the statute, that then those words providing for a removal for inefficiency, neglect of duty, or malfeasance in office fulfil no function, because without them the President has unlimited power of removal, and with them he still has the same power.

It may be said, however, that there is some use for the provision for removal for the causes named in the statute. A removal for any of those causes can only be made after notice and an opportunity to defend; and therefore, if a removal is made without such notice, there is a conclusive presumption that the officer was not removed for any of those causes, and his removal cannot be regarded as the least imputation on his character for integrity or capacity. Other causes for removal may, however, exist, and be demanded by the interests of the *service,[318] in order that the office may be better conducted, although the officer may not be proved guilty of conduct coming within the statute as a cause for removal. It is true that, under this construction, it is possible that officers may be removed for causes unconnected with the proper administration of the office. That is the case with most of the other officers in the government. The only restraint in cases such as this must consist in the responsibility of the President, under his oath of office, to so act as shall be for the general benefit and welfare.

It may be, perhaps, that the suggestion above indicated, of the purpose of the statute as evidenced by this language is not entirely satisfactory as a reason for its employment. We by no means overlook the objections to it. But we are called upon to place a meaning upon language which, as used in this section of the statute, gives rise to doubts as to what its true meaning is. We are asked not alone to interpret the language actually used, but to infer or imply therefrom a further meaning as to its effect, which does not necessarily flow from the language itself, and, if adopted, results in the creation of a tenure of this particular office, not attached to a single other civil office in the government, with the exception of judges of the courts of the United States. We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt. But we are not shut up to the necessity of finding some

other and more plausible reason for the use of this language, or else to adopt the meaning contended for by the appellant. The right of removal, as we have already remarked, would exist as inherent in the power of appointment unless taken away in plain and unambiguous language. This has not been done, and although language has been used from which we might speculate or guess that possibly Congress did intend the meaning contended for by appellant, yet it has not in fact expressed that meaning in words plain enough to call upon the courts to determine that such intention existed.

The claim made by the appellant, it will be seen, is for salary accruing prior to the appointment and confirmation of his successor by the President and Senate; but hold-
[19] ing, as we do, that *the President had the power to remove on other grounds than those mentioned in the act, he exercised that power by appointing the appellant's successor for the time which elapsed between such appointment and his reappointment after the meeting of the Senate and his confirmation by that body.

We are of opinion that *the judgment of the Court of Claims should be affirmed.*

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JOHN E. SEXTON, *Plff. in Err.*,
*v.*
PEOPLE OF THE STATE OF CALIFORNIA.

(See S. C. Reporter's ed. 319-325.)

*Federal courts—exclusive jurisdiction over crimes against Federal laws—exceptions.*

The offense of extorting money under a threat to accuse a person of a criminal violation of a Federal internal revenue law, though made a crime by U. S. Rev. Stat. § 5484 (U. S. Comp. Stat. 1901, p. 3702), is excepted from the exclusive jurisdiction conferred on the Federal courts by §§ 629, 711 (pp. 507, 577), of "all crimes and offenses cognizable under the authority of the United States," by the provision of § 5328 (p. 3622), that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof."

[No. 155.]

*Argued and submitted January 28, 1903. Decided April 6, 1903.*

IN ERROR to the Supreme Court of the State of California to review a judgment which affirmed a judgment of conviction, in the Superior Court of the County of El Dorado in that State, of the crime of extortion. *Affirmed.*

See same case below, 132 Cal. 37, 64 Pac. 107.

NOTE.—*On concurrent jurisdiction of Federal and state courts*—see Copp v. Louisville & N. R. Co. (La.) 12 L. R. A. 725, and note.

Statement by Mr. Justice **Peckham:**

Plaintiff in error was convicted in the superior court of the county of El Dorado, California, of the crime of extortion. Judgment was entered, and, upon appeal to the supreme court of California, it was there affirmed, and the plaintiff in error brings the case here for review.

The indictment upon which the conviction was had alleged that on June 20, 1898, at the county of El Dorado, state of California, one S. H. Briggs and the plaintiff in error—" . . . did wilfully, unlawfully, and feloniously obtain from one C. Greenwald certain personal property consisting of money, the property of the said C. Greenwald, to the amount and value of $30, with the consent of said Greenwald, induced by the wrongful use and exercise upon him of fear by means of a threat then and there made by the said John E. Sexton and S. H. Briggs to accuse him, the said Greenwald, of *the [320] crime of having, in violation of the laws of the United States of America, sold and delivered cigars in a form other than in a new box not before used for the purpose of packing cigars therein, contrary to the form, force, and effect of the statute in such case made and provided."

After the finding of this indictment the defendant Sexton moved the court to set it aside on various grounds, the ninth being that the court had no jurisdiction of the offense charged in the indictment, nor of the person of the defendant, and it was contended that the Federal court alone had jurisdiction over the act for which he was indicted in the state court. The motion was denied, and the defendant then pleaded not guilty. Upon the trial the jury found the defendant guilty, as charged in the indictment, and he was sentenced to be imprisoned in the state's prison for the term of two years.

*Mr.* **James Parker** argued the cause and filed a brief for plaintiff in error.

*Messrs. John E. Sexton* and *George D. Collins* also filed briefs for plaintiff in error.

*Mr.* **Henry H. Glassie** submitted the cause for defendant in error. *Messrs. R. Woodland Gates, U. S. Webb,* and *George A. Sturtevant* were with him on the brief.

*Messrs. Tirey L. Ford* and *C. N. Post* also filed a brief for defendant in error.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **Peckham,** after making the foregoing statement of facts, delivered the opinion of the court:

The record now before us raises but a single question for our determination, and that is whether the state court, upon the facts alleged in the indictment, had any jurisdiction over the subject-matter.

The plaintiff in error contends that the right of the general government to exercise jurisdiction over the crime of which he was convicted is exclusive, and therefore the

state court had no right to try him upon the indictment found in that court.

The act which the plaintiff in error is alleged to have threatened to accuse Greenwald of committing is mentioned in § 3392 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 2219), which makes it an offense to sell cigars unless in [321] new boxes, with the *exception therein detailed. Having created the offense above described, Congress also provided for the punishment of the offense of extortion by threats to accuse an individual of a violation of the provisions of that among other sections of the internal revenue law.

Sec. 5484, Revised Statutes (U. S. Comp. Stat. 1901, p. 3702), provides that—

"Every person who shall receive any money or other valuable thing under a threat of informing or as a consideration for not informing against any violation of any internal revenue law shall, on conviction thereof, be punished by a fine not exceeding two thousand dollars, or by imprisonment not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

The provision prohibiting the sale of cigars in any but new boxes is part of the internal revenue law.

By the 20th subdivision of § 629, Revised Statutes (U. S. Comp. Stat. 1901, p. 507), there is given to the United States circuit courts—

"Exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the district courts of crimes and offenses cognizable therein."

The Revised Statutes also provide:

"Sec. 711. The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states:

"First. Of all crimes and offenses cognizable under the authority of the United States." (U. S. Comp. Stat. 1901, p. 577.)

Upon these various statutes the plaintiff in error founds his contention that, as the offense which it is alleged in the indictment he threatened to accuse Greenwald of having committed is one which exists solely under § 3392 of the Revised Statutes which creates it, and as § 5484 provides the penalty for extorting money by threatening to inform or as a consideration for not informing against any violation of that law, the authority to punish for extorting upon such grounds is exclusively in the Federal courts.

On the other hand, it is claimed upon the [322] part of the state *that the offense of which the plaintiff in error has been convicted was one against the state, under §§ 518 and 519 of the Penal Code of the state of California.

Those sections provide that—

"Sec. 518. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right.

"Sec. 519. Fear such as will constitute extortion may be induced by a threat, either:

. . . . .

"2. To accuse him, or any relative of his or member of his family, of any crime."

Upon this subject the supreme court of California said:

"In substance it may be said that defendant threatened to accuse Greenwald of violating the United States revenue laws, and under fear induced by such threat secured from Greenwald the aforesaid sum of $30. It is insisted that the facts alleged do not constitute an offense against the laws of the state of California, but, upon the contrary, constitute a crime exclusively within the jurisdiction of the Federal courts. We find nothing in this contention. The defendant is charged with the crime of extortion,—an offense directly within the jurisdiction of the state courts. He is not charged with a violation of a Federal statute, but with a violation of a state statute. He threatened to accuse a man with the commission of a crime. It makes no difference if that crime be one solely triable in the Federal courts, for defendant is not being tried for that crime. If he had threatened to have Greenwald arrested upon the charge of counterfeiting the money of this country, and was charged with the crime of extortion for that reason, clearly his offense would be one against the laws of this state. It would be extortion as defined by the Penal Code of this state, and this court would not be concerned as to whether or not defendant's crime was also punishable under Federal laws. The court finds no substantial defect in the indictment, and the demurrer thereto is not well taken."

The case of counterfeiting the money of the United States is excepted by statute from the law giving exclusive jurisdiction *to the United States courts of offenses [323] against the laws of the United States. *Fox* v. *Ohio*, 5 How. 410, 12 L. ed. 213; *Houston* v. *Moore*, 5 Wheat. 26, 5 L. ed. 25. It has also been held that the United States could punish the crime of counterfeiting coin under the Federal statute. The same act may be an offense both against the state and the United States, punishable in each jurisdiction under its laws.

The foundation of the claim of counsel for the state is the statement that the defendant was not tried for or convicted of an offense under the Federal statute, but the indictment simply alleged that he extorted money by threatening to accuse Greenwald of an offense under the Federal statute. It was the extorting of the money by reason of fear induced by the threat that constituted the crime, and that was a crime provided for by the state statute, and it is insisted that the state is not prevented from trying the individual under that statute because he might have been proceeded against in the Federal court under a Federal statute (§ 5484 [U. S. Comp. Stat. 1901, p. 3702]) of a somewhat similar nature; that the threat to accuse another of crime is the material matter in the state statute, and it

is not material that the threat was pointed at a crime made such only by the Federal statute.

It is true that the offense of extortion by threats to accuse a person of a violation of any part of the internal revenue law is made a crime by virtue of the Federal statute. If there were no statute in regard to the sale of cigars other than in new boxes, as provided for in § 3392 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2219), a threat to accuse a person of doing such an act would not be a threat to accuse him of any crime, and hence would not be punishable. As the crime itself exists only by virtue of the above section, and as the threat to accuse one of the commission of such an act is also provided for by another section, there might be some plausibility in the contention of the plaintiff in error that, under the Federal statutes above cited, jurisdiction of the United States courts was exclusive. We do not decide that such contention is well or ill founded, nor do we express an opinion thereon, because we do not regard it as necessary for our decision in this case.

[324] *The section which makes it an offense to extort money under a threat of informing in regard to an alleged violation of any internal revenue law (§ 5484) is contained in title 70, denominated *Crimes*, in the United States Revised Statutes, and in that title is found another section, which provides that—

"Sec. 5328. Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." (U. S. Comp. Stat. 1901, p. 3622.)

Assuming that, but for this section, the state court would be without jurisdiction, we are of opinion that it takes the case out of the provisions of the other sections of the Revised Statutes above cited, namely, the 20th subdivision of § 629 (U. S. Comp. Stat. 1901, p. 507), and § 711 (U. S. Comp. Stat. 1901, p. 577). Sec. 5328 must be construed as creating an exception to the general rule declared in these other sections in regard to the jurisdiction of the Federal courts. The New York court of appeals placed the same construction on that section, in a very well reasoned opinion prepared by Andrews, Ch. J., in the case of *People* v. *Welch*, 141 N. Y. 266-277, 24 L. R. A. 117, 36 N. E. 328. Although § 3392 (U. S. Comp. Stat. 1901, p. 2219) is the sole foundation for the creation of the offense which the plaintiff in error threatened to accuse Greenwald of having committed, yet the jurisdiction of the state courts is neither taken away nor impaired on that account. The state statute provides for the punishment of the crime of extortion, committed as therein described, and, when the Federal statute creates the crime, the threat to accuse a person of the commission of such crime becomes of itself a crime under the state statute, and the Federal statute which provides for extortion does not take away or impair the jurisdiction of the courts of the several states under their laws to proceed and punish as is therein provided for.

The jurisdiction of the state court over the crime of extortion when perpetrated under the circumstances stated in the indictment is at least concurrent with that of the courts of the United States.

The section (5328) was not intended to merely permit a state court to punish a different offense involved in the one act. It was intended to leave with the state court, unimpaired, the *same jurisdiction over the [325] act that it would have had if Congress had not passed an act on the subject.

There is, also, as we think, considerable weight to be attached to the contention that the Federal statute is not essentially the same as the state statute regarding extortion. In the state statute it is specified that the property must be obtained from another with his consent, and that such consent must be induced by a wrongful use of force or fear, while those words are lacking in the other statute. Without expressing an opinion upon the question whether the indictment and conviction could be sustained without the provisions of § 5328, Revised Statutes, we hold that, taking such section into consideration, the state court had jurisdiction in this case. *The judgment, therefore, must be affirmed.*

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GEORGE A. FOSTER, Sheriff of Noble County, Oklahoma Territory, *et al.*, *Appts.*,

*v.*

I. T. PRYOR *et al.*

(See S. C. Reporter's ed. 325-335.)

*Taxes—uniformity throughout taxing district—Indian reservation attached to county.*

An Indian reservation attached to a county for judicial purposes by order of the supreme court of the territory of Oklahoma pursuant to the organization act of May 2, 1890, § 9 (26 Stat. at L. 81, 85, chap. 182), was not, by Okla. Sess. Laws 1895, chap. 43, art. 6, making personal property in such reservations subject to taxation in the counties to which they were so attached, so made a part of the same taxing district as the county as to render invalid for want of uniformity Okla. Sess. Laws 1899, p. 216, limiting the right of taxation in such reservations to taxes for territorial and court purposes.

[No. 173.]

*Argued and submitted February 25, 1903. Decided April 6, 1903.*

APPEAL from the Supreme Court of the Territory of Oklahoma to review a judgment which reversed a judgment of the trial court dismissing a petition in an action to enjoin the payment of certain taxes levied

NOTE.—*On uniformity in taxation*—see notes to Chaddock v. Day (Mich.) 4 L. R. A. 809; Cook v. Port of Portland (Or.) 13 L. R. A. 533

on property situated in an Indian reservation. *Affirmed.*

See same case below, 66 Pac. 348.

Statement by Mr. Justice **Peckham:**

This is an action to enjoin the payment of certain taxes levied upon property belonging to the appellees (plaintiffs below) [326] and *situated in an Indian reservation within the territory of Oklahoma. The appellee, Hite, resides in the Ponca and Otoe Indian reservation within that territory; the Stafford Land & Cattle Company is a corporation organized under the laws of the state of Texas and doing business in the above-named territory; and the 101 Live Stock Cattle Company is a corporation organized under the laws of the state of Kansas. The appellees, severally, owned large numbers of cattle which were grazing in the Indian reservation, and they were assessed therein for purposes of taxation by the taxing officer of Noble county, to which such reservation had been attached for judicial purposes. The reservation is without the boundaries of Noble county and is not within those of any organized county of the territory, and it comprises land owned and occupied by Indian tribes, consisting principally of wild, unimproved, and unallotted land used for grazing purposes. The reservation was duly attached to the county of Noble for judicial purposes by order of the supreme court of the territory, pursuant to the provisions of § 9 of the act organizing the territory, approved May 2, 1890 (26 Stat at L. 81, 85, chap. 182).

By art. 6, chap. 43, Session Laws of Oklahoma, 1895, it is provided:

"That § 13, art. 2, chap. 70, of the Oklahoma statutes relating to revenue, be and the same is hereby amended so as to read as follows: § 13. That when any cattle are kept or grazed, or any other personal property is situated in any unorganized country, district or reservation of this territory, then such property shall be subject to taxation in the organized county to which said country, district or reservation is attached for judicial purposes, and the board of county commissioners of the organized county or counties to which such unorganized country, district or reservation is attached shall appoint a special assessor each year, whose duty it shall be to assess such property thus situated or kept; such special assessor shall have all the powers and be required to perform all the duties of a township assessor, and shall give a similar bond and take the same oath as required of such township assessor, and receive the same fees as a township assessor, and the officer whose [327] duty *it shall be to collect the taxes in the organized county to which such country, district or reservation is attached shall collect the taxes, and is vested with all the powers which he may exercise in the organized county, and his official bond shall cover such taxes," etc.

In 1899 (p. 216, Session Laws), the Oklahoma legislature passed an act which provided—

"That from and after the passage and approval of this act no taxes shall be assessed, levied or collected in any unorganized country, district or reservation which shall be or which may hereafter be attached to any county for judicial purposes, except taxes for the territorial and court funds. All acts and parts of acts in conflict herewith are hereby repealed."

The tax assessor of Noble county being of opinion that the law of 1899 was void for reasons hereafter stated, proceeded to assess for taxation under the act of 1895, *supra*, the cattle of the appellees which were grazing in the Indian reservation, instead of assessing such property for territorial and court funds only, as provided for in the act of 1899. The assessment for all purposes was at the rate of 26.2 mills on the dollar of valuation, divided as follows: For territorial purposes 5.2 mills, for court purposes 3 mills, for salaries 6 mills, for road and bridge fund 2 mills, for sinking fund 4 mills, for poor and insane 1 mill, for supplies 2 mills, for county school fund 2 mills, and for contingent purposes 1 mill, making a total of 26.2 mills. If the assessment had been for territorial and court purposes only it would have been at the rate of 8.2 mills on the dollar of valuation.

The appellees insisted that the taxing officer had no right to assess them upon their property in the reservation at any greater rate than 8.2 mills for territorial and court purposes, as provided for by the act of 1899, while the appellants contended that the act of 1899 was void, and that the tax assessor had the power, and it was his duty under the act of 1895, to assess the property of the appellees situated in the reservation, for all purposes; or, in other words, for the whole 26.2 mills.

The trial court held in favor of the tax officials and dismissed the petition of the appellees, but upon appeal the judgment of *dismissal was reversed by the territorial su- [328] preme court and the tax declared invalid for more than 8.2 mills, assessed for territorial and court purposes. The tax authorities have brought the case here by appeal.

*Mr.* **Horace Speed** argued the cause and filed a brief for appellants.

*Messrs. Horace Speed, William J. Hughes,* and *William R. Harr* also filed a brief for appellants.

*Mr.* **Henry E. Asp** submitted the cause for appellees. *Messrs. S. H. Harris* and *W. L. Burnum* were with him on the brief.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **Peckham,** after making the foregoing statement of facts, delivered the opinion of the court:

If the statute of 1899, limiting the right of assessment, is valid, it follows that the judgment of the supreme court of the territory, setting aside an assessment for more than such limited amount, must be affirmed. But it is urged that the act of 1899 is void, and that, being void, the taxing officer was

justified and required by the act of 1895 to make the assessment he did. The grounds upon which the appellants base their claim that the act of 1899 is invalid rest upon the provisions of § 6 of the organic act, approved May 2, 1890 (26 Stat. at L. 81, chap. 182), and upon § 1 of the act approved July 30, 1886 (24 Stat. at L. 170, chap. 818).

That portion of the 6th section of the act of May 2, 1890, material to the present inquiry, reads as follows:

"That the legislative power of the territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States, nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value."

§ 1 of the act approved July 30, 1886 (24 Stat. at L. 170, chap. 818), provides:

[329] *"That the legislatures of the territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

. . . . . .

"For the assessment and collection of taxes for territorial, county, township or road purposes."

The main objection offered to the act of 1899 is that it results in a violation of the rule of uniformity which, as appellants allege, must exist in the same taxing district with reference to the same kind of property. The appellants contend that the Indian reservation is, for taxing purposes, a part of the county of Noble, and, therefore, part of the same taxing district as that county, and that the taxation under the act of 1899, for that reason, violates the rule of uniformity above referred to. As a basis for the contention that it is the same taxing district, it is maintained that the order of the supreme court made by virtue of § 9, of the act of 1890, attaching the reservation to Noble county for judicial purposes, made it a part of the judicial district of that county, and that the subsequent act of the legislature in substance placed the reservation under the general taxing jurisdiction of Noble county, and therefore made it a part of the same taxing district, and, being a part of the same district, the personal property in the reservation must be taxed at the same rate, and for all the purposes that personal property is taxed in the organized county of Noble.

It must be remembered at the outset that the reservation was never any part of Noble county, for the legislature had no power to make it such. *Thomas* v. *Gay*, 169 U. S. 264, 275, 42 L. ed. 740, 744, 18 Sup. Ct. Rep. 340. It was, as its name implies, a reservation set apart by the general government as a home for the Indians, and as such it formed no part of any organized county. Although, by reason of the act of 1895, the personal property in the reservation was subject to taxation in the organized county to which it was attached for judicial purposes, but of which it formed no part, yet that act did not thereby make the reservation a part of the same taxing district as the county. The act of 1895 (and that of 1899) reached for taxation the owners of *cattle, or any other personal property sit- [330] uated in the reservation, and that was the full effect of each act. All other property than above described was left untouched, and, we assume, could not have been taxed if owned by Indians, by reason of the treaties or agreements under which the reservation was set apart for the use of such Indians. The right of taxation in the reservation was not as full and entire, even under the act of 1895, as it is in an organized county. This is a most important, if not conclusive, distinction, between the organized county and the reservation, when considering whether one and the same taxing district has been created by legislation which does not in terms purport to create it. That legislation was only for the purpose of thereby reaching for taxation a certain class of property in the reservation, and the whole balance that was in the reservation was left untouched. What is there in such legislation which necessarily creates a single taxing district, within which all property must be taxed alike?

Then, too, the property under the act of 1895 was assessed by a separate officer, and although the same officer who collected the taxes in the organized county was authorized and required to collect the taxes in the reservation, yet that fact did not make it part of the same taxing district so as to prevent the legislature from altering the proportion of the taxes which the owner of property in the reservation should be liable to pay as compared with the owner of property in the organized county to which it was attached for certain purposes only. It was simply a convenient method of collecting the taxes on property in the reservation; but the legislature was not thereby prevented from exercising the right to recognize the difference between property situated within an organized county and that which was situated in a reservation, and to make a difference in the rate of taxation in the two cases. If a separate taxing district was not created under the act of 1895, still less can it be contended that one was created by the act of 1899, which enacted a different rate of taxation than prevailed in Noble county.

Even the assessment of the same amount of taxes and their collection by the same officers that acted for the organized *county [331] would not necessarily render the reservation part of the same taxing district as the organized county. The material and important fact remains that the reservation is no part of the county, but is a totally distinct and separate domain, set apart for a home

for Indians under the care and custody of the general government, and that taxation therein is permitted only to a limited extent and upon certain kinds of property, not including Indians or their property; and the imposition and collection of those taxes which are permitted do not thereby render the reservation a part of the same taxing district as the organized county to which it is attached for judicial purposes. The difference between the two domains, the reservation and the organized county, is radical and wide. The lands in the former are, as we have said, mostly wild and uncultivated and used principally for grazing purposes, and the domain is the home of a different and distinct race from that occupying the organized county, the inhabitants of which are of civilized races, following the customs of civilized life, and in almost everything differing from their Indian neighbors. Property therein is clearly very differently placed than the same kind in an organized county. Those who live and own property in an organized county receive more benefit from the taxes levied for general purposes than do the owners of property located in a reservation. The act of 1899 makes certain personal property in the reservations bear its proportion of the burdens of taxation for territorial and court purposes, from which such property derives some benefit. The owners of such personal property can derive very little, if any, benefit from the taxes raised for other purposes than those just mentioned. There is no township government existing there; no provision for the organization of school and road districts or for the establishment of other municipal governments, and hence it may be seen that, even assuming the power of the legislature to tax for all such purposes at the same rate as in an organized county, and to provide for the collection and payment of such taxes into the county treasury for disbursement for county purposes, yet still the injustice of such a rate of taxation would naturally appeal to the legisla-[332]ture and result in *some legislation of the kind passed in 1899. The territorial legislature has evidently recognized that fact and enacted that statute in consequence.

All this goes to show the legislature never intended to create a single taxing district of an organized county and a reservation composed of such different materials. As further evidence of the substantial difference between the two places, attention is called to the fact that the general laws providing for taxation in an organized county do not authorize such taxation in a reservation, even after it has been attached to a county for judicial purposes. There must be special legislative authority for it. *Wagoner* v. *Evans*, 170 U. S. 588, 592, 42 L. ed. 1154, 1156, 18 Sup. Ct. Rep. 730.

Whether the legislature, by the act of 1897, providing the method of thereafter making assessments in townships by means of one assessor for each county, did thereby repeal the provision in the act of 1895, in relation to a special assessor for the Indian reservations, we do not determine, because, even if such were the case, and the assessor for the county were the one to make the assessment in the reservations also, the mere fact of the change of the officer who was to make the assessment did not on that account make a reservation part of the same taxing district as the county to which it was attached for judicial purposes, within the meaning of the rule requiring uniformity of taxation within the same taxing district, assuming such rule to apply to the territory named.

The foundation of the rule which may be said generally to obtain, that there shall be uniformity in taxation of the same kind of property in the same taxing district, rests on the assumption that in such district the circumstances regarding the property to be taxed are ordinarily the same in substance, although there may, and necessarily must be, some differences as to the extent to which the different owners of property may be benefited by the taxes collected thereon, and it is to be assumed that an alteration as to rate would work an unjust and illegal discrimination in taxing property situated alike. When the difference is deep and radical between the two domains in which the same kind of property may be situated, the law which makes them one district for taxation, so that all the property *of the same[333] kind in the same district must be taxed alike, and no reasonable distinction be permitted, must itself be so plain and urgent that no other intention can be suggested. No such case is now before us.

It is true the taxation in the reservation under the act of 1895 was for all purposes, and this court held that the act was not for that reason an illegal exercise of legislative power. It was recognized that there were differences in the amount of benefits derived from such taxation by the organized county as compared with the reservation, but it was not thought that, for that reason, the law was invalid. *Thomas* v. *Gay*, 169 U. S. 264, 275, 42 L. ed. 740, 744, 18 Sup. Ct. Rep. 340. It was a matter of legislative discretion with which the courts had in general no concern.

It has not, however, been held that the legislature could not recognize the difference in circumstances and provide for a different rate of taxation for property in the reservation from that levied on property in the organized county to which the reservation was attached for judicial purposes. The power to make this distinction does not depend upon the existence of a separate officer to assess or to collect the tax.

If it required special legislative authority to tax at all, how can it reasonably be maintained by the taxing officer that the act which provides for the taxation, although at a reduced rate, is illegal? And if an act were once passed which authorized the same rate of taxation as in the organized county, could not the legislature repeal it? And if it could repeal, why could it not modify it by reducing the rate of taxation, although not totally exempting property from all tax-

ation? If the legislature had repealed the act of 1895, and had passed no other, there plainly would be in that case no law for taxing the property in the reservation. If subsequently it passed an act for the taxation of such property at a reduced rate from that existing in the organized county, it could not be said there was any exemption from taxation, but, on the contrary, it would be the case of an act providing for taxation.

The only answer made by the appellants is the assumed fact that all property of the same kind in the same taxing district of this territory must, in all circumstances, be 34]taxed at the *same rate or must be wholly exempted, and that no discrimination can, in any event or under any circumstances, be permitted; otherwise there is a discrimination which is illegal. But if it be not in the same taxing district the reasoning fails, even if otherwise good.

The recognition by the legislature of the difference in the situation between Noble county proper and the Indian reservation attached to it for judicial purposes, and the taxation of the property in the latter at a different rate from that in the county, may be upheld upon the same principle as in the case of general city taxation, where the whole of the city is first assessed equally as a taxing district and then the more compact portions thereof are assessed at a greater rate and required to pay a greater proportionate share of the expense of the city government, because of the fact of the greater proportionate protection and benefit afforded by the police and fire departments and other like matters, to the portions of the city thus subjected to greater taxation.

Cooley, in his work on Taxation (p. 118), affirms the validity of such legislation, and refers in a note (3) to cases which establish it, and he dissents from the view taken by the Wisconsin court in *Knowlton* v. *Rock County*, 9 Wis. 410, 421. Where the difference between the different portions of territory is plain and palpable, the right of the legislature to recognize that difference and to provide for a difference in taxation cannot be denied without imposing, as said by Judge Cooley, restraints upon the constitutional power of the legislature which cannot in reason be justified. Whether there is such a difference would generally be for the legislature to determine, although we would not say that the courts could not in any possible state of facts, review that determination. In the case before us the legislative act providing for this difference in taxation amounts, in itself, to a provision for a different taxing district within the principles just stated, and certainly no one would say that it was not a most reasonable and just recognition of a plain difference in circumstances, which ought to lead to a difference in the proportion of taxation between the two places.

Whether the proper officer made the as-35]sessment or not is immaterial *in this case. The defendants in error have not only not appealed from the decree of the supreme court, but they have paid the taxes assessed for the purposes mentioned in the act of 1899, and do not seek to recover them back in this case, and the question is of no consequence to them.

In the view we take of the case we are unable to see that any provision of the act of Congress of 1890, organizing the territory, or the other act of 1886, in regard to territories then or thereafter to be organized, has been violated by the territorial act of 1899, and *the judgment of the Supreme Court of Oklahoma is therefore affirmed.*

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A. C. FINNEY, as Receiver, *et al.*, *Plffs. in Err.*,
*v.*
MARY A. GUY, etc.

(See S. C. Reporter's ed. 335-346.)

*Judgments—full faith and credit—enforcement of stockholders' liability outside state of incorporation—pleadings—construction of statutes of other state not admitted by demurrer—comity.*

1. Full faith and credit are not denied to a judgment of a Minnesota court against resident stockholders of a domestic corporation in an action to enforce their statutory liability, by the judgment of a court of another state denying the right to maintain a further action to enforce such liability outside the state of incorporation, where, under the Minnesota laws as construed by its courts, the only remedy provided for the enforcement of the liability of stockholders in domestic corporations is a suit in equity in that state by a creditor in behalf of himself and all other creditors against the stockholders who can be served with process.
2. A state court is not concluded as to the proper construction of the statutes of another state and the decision of its courts construing them, on the theory that defendant, by demurring to the complaint, which contained an allegation in the form of an averment of fact as to the meaning of such laws and decisions set forth therein, admitted that such was the correct conclusion to be drawn from them.
3. Whether a state court should permit an action to be maintained therein on the principle of comity between the states is a question exclusively for the courts of that state to decide.

[No. 180.]

*Argued February 27, March 2, 1903. Decided April 6, 1903.*

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NOTE.—*As to full faith and credit to be given to state records and judicial proceedings*—see Lindley v. O'Reilly (N. J. L.) 1 L. R. A. 79, and note; Cummington v. Belchertown (Mass.) 4 L. R. A. 131, and note; Rand v. Hanson (Mass.) 12 L. R. A. 574, and note. And see notes to Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 578; Darby v. Mayer, 6 L. ed. U. S. 367; and Mills v. Duryee, 3 L. ed. U. S. 411.

*On the right to enforce stockholder's liability outside of state of incorporation*—see note to Cushing v. Perot (Pa.) 34 L. R. A. 737.

IN ERROR to the Supreme Court of the State of Wisconsin to review a judgment which reversed a judgment of the Circuit Court of Pierce County in favor of plaintiff in an action to enforce the liability of stockholders in a foreign corporation. *Affirmed.*

See same case below, 111 Wis. 296, 87 N. W. 255.

Statement by Mr. Justice **Peckham:**

[336] *This action was commenced in the proper court of the state of Wisconsin to enforce the shareholders' liability under a Minnesota statute, in a corporation of Minnesota and doing business in that state. The defendant demurred to the complaint on the ground, among others, that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled by the trial court and judgment given for the plaintiff, which was reversed by the supreme court of the state, and the case has been brought here by plaintiff to review the judgment of reversal.

The facts alleged in the complaint are in substance these: That during all the times therein mentioned the American Savings & Loan Association, one of the plaintiffs herein, was a corporation organized under the laws of the state of Minnesota, and on June 18, 1896, William D. Hale, another plaintiff in this action, was appointed receiver thereof; that the Farmers' & Merchants' State Bank was on June 6, 1888, a banking organization, by virtue of the laws of the state of Minnesota, and doing business as such; that the bank became insolvent in June, 1893, and the entire net proceeds of the bank's assets amounted to the sum of $12,539.95, all of which had been paid over to the state of Minnesota on account of the indebtedness of the bank to the state of over $28,000, which was a preferred claim under the laws of that state; that its other debts amounted to the sum of more than $100,000, and it had no property to satisfy the same; that the defendant, Mary A. Guy, a resident of the state of Wisconsin, was the owner of three shares of the capital stock of the bank in her own right, and that she owned sixteen shares of the stock of the bank as executrix of the will of her husband and as legatee thereunder.

It was then averred that suit had been commenced in Minnesota in 1894 to enforce the liability of the stockholders of the bank under and by virtue of the laws and Constitution of the state of Minnesota; that such suit had been commenced by the American Savings & Loan Association, which was a creditor of the bank, in behalf of itself and all other creditors who should come in and make themselves parties to the suit and [337] prove *their claims therein, and against all the stockholders of the bank; process was, however, not served on this defendant, but only on those residing within the state; that such proceedings were had in the suit that judgment was duly rendered therein on April 28, 1897, in favor of the complainant, the American Savings & Loan Association, for the amount of the indebtedness of the bank to it, and also in favor of the other creditors of the bank, who had duly intervened, for the various amounts due them from the bank. It was also adjudged that the amount of the debts of said bank aggregated the sum of $106,471.71.

It was then further averred in the complaint that Finney (one of the plaintiffs herein) was appointed receiver in the Minnesota suit for the purpose of collecting and enforcing the respective liabilities of the defendant stockholders, and that an order had been made authorizing and empowering him to proceed against those of the defendant shareholders residing in other jurisdictions in such other jurisdictions, for the purpose of enforcing the liabilities of such shareholders, and with full power and authority to distribute the proceeds of such action among the parties entitled thereto, after final payment in full, out of the proceeds, of the costs and expenses incurred, etc. It was then averred that, pursuant to the instructions of the Minnesota court, Finney, as receiver therein, commenced this action against Mary A. Guy, and joined with him as plaintiffs all the creditors of the bank who had proved their claims in the Minnesota suit, and it was also averred that Mrs. Guy was liable to the creditors of the bank in the sum of $3,800, double the amount of the par value of the three shares owned by her individually and of the sixteen shares formerly owned by her husband, and that she was the only stockholder who was a resident of Wisconsin, and therefore the only defendant in the case, and that the full amount of her double liability, if recovered, would be wholly insufficient to pay the indebtedness of the bank after applying everything that could be collected from all the other stockholders, some of whom were insolvent, some had been compromised with, and from others nothing could be collected.

*The complaint then set forth several sec- [338] tions of the General Statutes of the State of Minnesota of 1878, among them being §§ 5905-5907 and 5911, and it was averred that this action could be maintained by reason of such sections. They are the same as are set forth in *Hale* v. *Allinson*, 188 U. S. 56, *ante*, 380, 23 Sup. Ct. Rep. 244. It was then averred that decisions in the courts of the state of Minnesota had been rendered relating to the liability of stockholders under those statutes, in corporations organized under the laws of that state, as to the proper method of enforcing such liability. The complaint then referred to some twenty different decisions in the state courts of Minnesota by titles, and gave a reference to the volumes in which they were reported, and it then stated what the law of Minnesota was under those decisions and statutes as to the liability of stockholders and the manner in which that liability could be enforced, and the effect of a judgment recovered in a state court by a creditor in his own behalf and in behalf of all others similarly situated, and it averred that a judgment such as was obtained in the Minnesota suit was conclusive upon stockholders, even though

they were not parties thereto, as to all questions of indebtedness of the bank and who were its creditors, and that defendant, though not served with process in that suit, was concluded by the judgment as to her liability as shareholder, except as therein stated. It also averred that, after such a judgment had been obtained, the Minnesota decisions held that under those statutes a suit could be maintained in the courts of another jurisdiction, similar to the one before us, and the complaint ended with a prayer for judgment that the defendant should pay the plaintiff the sum of $3,800, with interest thereon since April 28, 1897, and that A. C. Finney, one of the plaintiffs, be appointed receiver herein, to collect the amount and distribute the same *pro rata* among the other plaintiffs.

*Mr.* **Frederick W. Reed** argued the cause, and, with *Mr. Fred G. Coldren*, filed a brief for plaintiffs in error:

Such provisions as those of the Minnesota Constitution are not merely directory to the legislature, but themselves declare and fix a liability and are self-executing.

*Willis* v. *Mabon*, 48 Minn. 150, *sub nom. Willis* v. *St. Paul Sanitation Co.* 16 L. R. A. 281, 50 N. W. 1110; *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477.

The liability, however, whether depending on the constitutional provisions as well as statutes, or on statutes alone, is, though statutory in its origin, contractual, and not penal, in its nature.

*Pinney* v. *Nelson*, 183 U. S. 144, 46 L. ed. 125, 22 Sup. Ct. Rep. 52; *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Bagley* v. *Tyler*, 43 Mo. App. 195; *Dennis* v. *Los Angeles County Super. Ct.* 91 Cal. 548, 27 Pac. 1031; *Hodgson* v. *Cheever*, 8 Mo. App. 318; *Guerney* v. *Moore*, 131 Mo. 650, 32 S. W. 1132; *Tinker* v. *Van Dyke*, 1 Flip. 521, Fed. Cas. No. 14,058; *Hawthorne* v. *Calef*, 69 U. S. 10, 17 L. ed. 776; *Hobart* v. *Johnson*, 19 Blatchf. 359, 8 Fed. 493; *Flash* v. *Conn*, 109 U. S. 371, 27 L. ed. 966, 3 Sup. Ct. Rep. 263; *Howarth* v. *Angle*, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489; *Bell* v. *Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346; *Western Nat Bank* v. *Reckless*, 96 Fed. 70; *Coleman* v. *White*, 14 Wis. 700, 80 Am. Dec. 797; *Gianella* v. *Bigelow*, 96 Wis. 185, 71 N. W. 111; *Rehbein* v. *Rahr*, 109 Wis. 137, 85 N. W. 315; *First Nat. Bank* v. *Gustin Mineral Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676, 44 N. W. 198; *Hencke* v. *Twomey*, 58 Minn. 550, 60 N. W. 667; *Hanson* v. *Davison*, 73 Minn. 454, 76 N. W. 254; *Evans* v. *Nellis*, 101 Fed. 920; *Deweese* v. *Smith*, 45 C. C. A. 408, 106 Fed. 438; *Brown* v. *Hitchcock*, 36 Ohio St. 667; *Judson* v. *Stewart*, 7 Ohio N. P. 160; *First Nat. Bank* v. *Hawkins*, 174 U. S. 365, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *Western Nat. Bank* v. *Lawrence*, 117 Mich. 669, 76 N. W. 105; *Howarth* v. *Lombard*, 175 Mass. 570, 49 L. R. 301, 56 N. E. 888; *Kirtley* v. *Holmes*, 52 L. R. A. 738, 46 C. C. A. 102, 107 Fed. 1; *Richmond* v. *Irons*, 121 U. S. 27, 30 L. ed. 864, 7 Sup. Ct. Rep. 788.

As regards its enforcement in foreign jurisdictions, there is no essential difference between this liability and the liability for assessments for unpaid subscriptions for stock.

*Howarth* v. *Angle*, 162 N. Y. 179, 47 L. R. A. 725, 56 N. E. 489; *Howarth* v. *Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Holland* v. *Duluth Iron Min. & Development Co.* 65 Minn. 324, 68 N. W. 50; *Hanson* v. *Davison*, 73 Minn. 454, 76 N. W. 254.

The right to enforce this liability is not a mere matter of comity, but it is a right under the general principles of jurisprudence to enforce a contract.

*Dennick* v. *Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Western Nat. Bank* v. *Reckless*, 96 Fed. 70; Morawetz, Priv. Corp. § 875; *Western Nat. Bank* v. *Lawrence*, 117 Mich. 669, 76 N. W. 105; *Judson* v. *Stewart*, 7 Ohio N. P. 160; *Bell* v. *Farwell*, 176 Ill. 489, 42 L. R. A. 804, 52 N. E. 346; *First Nat. Bank* v. *Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676, 44 N. W. 198.

The construction of the statute by the home court is binding on all other courts.

*W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *Howarth* v. *Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *James H. Rice Co.* v. *Libbey*, 45 C. C. A. 78, 105 Fed. 825; *Hancock Nat. Bank* v. *Ellis*, 166 Mass. 414, 44 N. E. 349; *Brunswick Terminal Co.* v. *National Bank*, 48 L. R. A. 625, 40 C. C. A. 22, 99 Fed. 635; *Bank of North America* v. *Rindge*, 57 Fed. 279; *Rhodes* v. *United States Nat. Bank*, 34 L. R. A. 742, 13 C. C. A. 612, 24 U. S. App. 607, 66 Fed. 512; *McVickar* v. *Jones*, 70 Fed. 754; *Eau Claire Nat. Bank* v. *Benson*, 106 Wis. 624, 82 N. W. 604.

The proceedings in the home court are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation.

*Childs* v. *Cleaves*, 95 Me. 498, 50 Atl. 714; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Howarth* v. *Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888; *Sheafe* v. *Larimer*, 79 Fed. 921; *Howarth* v. *Ellwanger*, 86 Fed. 54; *Hanson* v. *Davison*, 73 Minn. 454, 76 N. W. 254; *Holland* v. *Duluth Iron Min. & Development Co.* 65 Minn. 324, 68 N. W. 50; *Hinckley* v. *Kettle River R. Co.* 80 Minn. 32, 82 N. W. 1088; *Gaw* v. *Glassboro Novelty Glass Co.* 20 Ohio C. C. 416; *Dexter* v. *Edmands*, 89 Fed. 467; *Hawkins* v. *Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739; *Hale* v. *Hardon*, 37 C. C. A. 240, 95 Fed. 747.

This does not mean that it is conclusive against any stockholder that he is such, or

that he has not discharged his liability, or that he has not offsets against the claim; but he is so far a part of the corporation that it is in other respects an adjudication against him.

*Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Hanson* v. *Davison*, 73 Minn. 454, 76 N. W. 254.

Where the home court has thus construed the nature of the liability, and determined such to be the effect of the proceedings there, to refuse to give the same effect to such contract and proceedings in the courts of another state is contrary to the Constitution and laws of the United States.

*Huntington* v. *Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506.

*Messrs. W. E. Hale and Frederick W. Reed* also filed a brief in support of the petition for certiorari.

*Mr.* **Robert M. Bashford** argued the cause and filed a brief for defendant in error:

The demurrer admits the existence of the decisions and statutes of Minnesota specifically referred to in the complaint, but it does not admit the interpretation placed upon the law of Minnesota by the pleader, or his legal conclusions therefrom.

*State ex rel. Veeder* v. *Collins*, 5 Wis. 339; *Brown* v. *Phillips*, 71 Wis. 239, 36 N. W. 242; *Stedman* v. *Berlin*, 97 Wis. 505, 73 N. W. 57; 6 Enc. Pl. & Pr. 336.

Where a special remedy is provided,—and especially if it contemplates a joint action in favor of all creditors against all stockholders,—it can be enforced only in the courts of the state which creates the liability, and where the corporation is organized to carry on business.

*Pollard* v. *Bailey*, 87 U. S. 520, 22 L. ed. 376; *May* v. *Black*, 77 Wis. 102, 45 N. W. 949; *Fourth Nat. Bank* v. *Francklyn*, 120 U. S. 747, 30 L. ed. 825, 7 Sup. Ct. Rep. 757; Thomp. Corp. § 3055.

The courts of Minnesota have enforced the statutory liability there created, within their own jurisdiction, but they have not enforced a statutory liability created by the legislature of another state against citizens of their own state, or even the common-law liability of the stockholders of a foreign corporation, resident in that state.

*First Nat. Bank* v. *Gustin Minerva Consol. Min. Co.* 42 Minn. 327, 6 L. R. A. 676, 44 N. W. 198; *Rule* v. *Omega Stove & Grate Co.* 64 Minn. 326, 67 N. W. 60.

The remedy prescribed by the Minnesota statute is by a single action in which all the creditors shall be joined or represented, against all the stockholders.

*Allen* v. *Walsh*, 25 Minn. 543.

The unpaid subscription is an obligation arising from contract, and must be recovered in the right of the corporation.

*Gager* v. *Paul*, 111 Wis. 638, 87 N. W. 875.

The statutory liability cannot be enforced by the corporation, or through its right, or by its assignee or receiver. It is an obligation of the stockholders to the creditors, and must be enforced for the benefit of the latter in a proper proceeding instituted for that purpose, to which all the stockholders and creditors must be made parties.

*Coleman* v. *White*, 14 Wis. 700, 80 Am. Dec. 797; *Gager* v. *Marsden*, 101 Wis. 598, 77 N. W. 922; *Booth* v. *Dear*, 96 Wis. 516, 71 N. W. 816; *Terry* v. *Little*, 101 U. S. 216, 25 L. ed. 864.

The settled construction of a statute, so far as contract rights thereunder are acquired, is as much a part of the statute as the text itself; and a change of decision is the same in its effect on pre-existing contracts as a repeal or an amendment of a legislative enactment.

*Douglass* v. *Pike County*, 101 U. S. 677, 25 L. ed. 968; *Rowan* v. *Runnels*, 5 How. 134, 12 L. ed. 85; *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 L. ed. 520; *Chicago* v. *Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Olcott* v. *Fond du Lac County*, 16 Wall. 678, 21 L. ed. 382; *Chicago L. Ins. Co.* v. *Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Anderson* v. *Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Johnson* v. *Keith*, 117 U. S. 199, 29 L. ed. 888, 6 Sup. Ct. Rep. 669; *German Sav. Bank* v. *Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159; *Knox County* v. *Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Bacon* v. *Texas*, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; *Wade* v. *Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715; *Loeb* v. *Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

The question here involved is not one of local law, to be settled by the decisions of the Minnesota court; but it is one of general law, to be determined by reference to all the authorities and a consideration of the principles underlying the contract relations between the parties.

*Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914.

Plaintiffs have not the legal capacity to sue.

*Hilliker* v. *Hale*, 54 C. C. A. 252, 117 Fed. 220; *Booth* v. *Clark*, 17 How. 322, 15 L. ed. 164; *Filkins* v. *Nunnemacher*, 81 Wis. 91, 51 N. W. 79.

A suit to reach equitable assets can only be maintained by a creditor who has recovered judgment and whose execution has been returned unsatisfied, under the Wisconsin Code and practice.

*North Hudson Mut. Bldg. & L. Asso.* v. *Childs*, 86 Wis. 292, 56 N. W. 870; *Weber* v. *Weber*, 90 Wis. 467, 63 N. W. 757; *Northwestern Iron Co.* v. *Central Trust Co.* 90 Wis. 570, 63 N. W. 752, 64 N. W. 323.

The same rule has been recognized and enforced by this court.

*Case* v. *Beauregard*, 99 U. S. 119, 25 L. ed. 370; *National Tube Works Co.* v. *Ballou*, 146 U. S. 517, 36 L. ed. 1070, 13 Sup. Ct. Rep. 165.

Jurisdictional facts must be pleaded.

*Northern Trust Co.* v. *Snyder*, 113 Wis. 516, 89 N. W. 460; *Eldred* v. *Leahy*, 31 Wis. 546; *Canfield* v. *Smith*, 34 Wis. 381; *Hawes* v. *Oakland*, 104 U. S. 450, *sub nom. Hawes* v. *Contra Costa Water Co.* 26 L. ed. 827; *Hanford* v. *Davies*, 163 U. S. 273, 41 L. ed. 157, 16 Sup. Ct. Rep. 1051.

The laws of one state have no operation in other states.

*Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Norfolk & W. R. Co.* v. *Pennsylvania*, 136 U. S. 114, 34 L. ed. 394, 3 Inters. Com. Rep. 178, 10 Sup. Ct. Rep. 958.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The demurrer raises the question whether the complaint states facts sufficient to constitute a cause of action. The plaintiffs contend that their cause of action is based upon the decisions and judgments of the courts of the state of Minnesota, and upon the statutes of that state, and that the Wisconsin supreme court, in sustaining the demurrer, has thereby failed to give that full faith and credit to the laws and judgments of the state of Minnesota and its courts which they receive in that state and which they are entitled to under the Constitution and laws of the United States, and that by reason thereof a Federal right has been denied them.

They urge that, under the judgment of the *American Sav. & L. Asso.* v. *Farmers' & M. State Bank*, which was recovered in the Minnesota court, and is referred to in the foregoing statement of facts, the defendant is concluded as to her defense to the same extent she would have been had she appeared and contested her liability in the Minnesota courts, and that, as a consequence, the Wisconsin courts are bound to give the same effect to that judgment in their courts that it has in the courts of Minnesota; that if such effect had been awarded that judgment, then this action could have been maintained; and the Wisconsin court, in sustaining the demurrer, denied such effect to the judgment, which was a violation of a right founded upon the Federal Constitution.

It is stated by the supreme court of Wisconsin that that state for many years has had a statute for the enforcement of the liability of stockholders in corporations similar to that which exists in Minnesota, and that it had been frequently decided under such statute that an action of the nature of the one at bar could not be maintained in her courts, and also that it was against the public policy of Wisconsin to permit it; that the remedy under the Wisconsin statute was exclusive, and consisted in a *suit in equity at the home of the corporation, in the nature of a partnership accounting, the parties to which would be all the creditors or a creditor in his own behalf and in behalf [340] of all *others similarly situated who would come in and make themselves parties, and the stockholders who could be served with process in the state.

Whether a cause of action is stated in a pleading is generally to be decided with reference to the law of the state where the action is pending. If the state court hold that no cause of action is set forth in the pleading, and that it is against the public policy of the state to permit an action for such a purpose, we should generally hold that there was no Federal question involved in such determination. The plaintiffs, however, urge that there is here an exception to that rule, founded upon the considerations just stated, and that if under the Minnesota law this action could be maintained, the courts of Wisconsin are bound to entertain jurisdiction to the same extent. It is not, however, the case that every decision regarding the proper construction of the statute of another state involves a Federal question. Where the case turns upon the construction, and not the validity, of the statute, a decision of that question is not necessarily of a Federal character. *Johnson* v. *New York L. Ins. Co.* 187 U. S. 491, 496, *ante*, 273, 275, 23 Sup. Ct. Rep. 194, 196. Without precisely determining just how far questions of this kind can in all cases be regarded as coming under the rule giving full faith and credit to the public acts, records, and judicial proceedings of another state, depending, as such questions must, upon the particular facts of each case, and the manner in which they are presented, we may, nevertheless, examine the contentions of the plaintiffs in error to see how far they are justified in the law.

After quite a full examination of the Minnesota decisions on the question, we have just decided in *Hale* v. *Allinson*, 188 U. S. 56, *ante*, 380, 23 Sup. Ct. Rep. 244, that a receiver appointed in Minnesota, under these same statutes, could not maintain an action outside of that state to enforce the liability of a stockholder; and it was said that the courts of Minnesota had held the same thing for many years. An examination of the decisions of the Minnesota courts shows that they had held that the remedy provided by the statutes of the state for the enforcement of stockholders' liability was a suit in equity in that state by a creditor in his own behalf and that of all other creditors, against all the stockholders of the *corporation, or so many of them as could [341] be served with process, and that it was exclusive, and no other remedy could be availed of even within the jurisdiction of the courts of Minnesota. That being the law of Minnesota, it would, of course, prevent an action outside the state by a receiver, as well as by any other plaintiff, to enforce the stockholders' liability. Hence, in the *Hale-Allinson Case*, we held the receiver could not maintain such an action in a foreign jurisdiction and in a Federal court.

The case of *Allen* v. *Walsh*, 25 Minn. 543, has been cited as sustaining this rule. Many other cases have been cited as holding the same rule, an exclusive remedy under the statute, and to be pursued only in the courts of the state. *Allen* v. *Walsh* does hold (and it has been followed by many others

to the same effect) that the only remedy is that created by the statute, and that remedy is an action in equity in the home courts wherein all the creditors and all the stockholders are parties, or as many of the latter as can be served, and in that action all the rights of the different parties can be adjusted. The remedy being exclusive, the statute must be followed, and the result is that no other action to enforce the liability can be availed of in another state. This would call for an affirmance of the judgment but for the claim now urged by counsel for plaintiffs, that the case of *Allen* v. *Walsh* has been overruled by subsequent cases in Minnesota, and that the law is correctly set forth in the complaint. He calls attention to the fact that this case has not gone to trial upon an issue of any question of fact, but the questions to be determined have arisen on demurrer to the complaint; that the complaint avers as a fact that by the law of Minnesota such an action as this can be maintained in the courts of a foreign jurisdiction after a judgment has been recovered in an action in the state court, such as is referred to in the complaint, and that the defendant by demurring admits that the law is as stated in the complaint, and therefore the court is bound to give effect to the law of Minnesota such as is set forth in that pleading. This is too broad a claim to be maintained.

If the case had been on trial upon issues [342] of fact, among them *being one as to what the law of Minnesota was, and the statutes as well as the decisions above mentioned had been proved, and a witness learned in the law of Minnesota had testified what such law was, as deduced by him from those statutes and decisions, his testimony would not, even though uncontradicted, conclude the court upon that issue. Although the law of a foreign jurisdiction may be proved as a fact, yet the evidence of a witness stating what the law of the foreign jurisdiction is, founded upon the terms of a statute, and the decisions of the courts thereon as to its meaning and effect, is really a matter of opinion, although proved as a fact, and courts are not concluded thereby from themselves consulting and construing the statutes and decisions which have been themselves proved, or from deducing a result from their own examination of them that may differ from that of a witness upon the same matter. In other words, statutes and decisions having been proved or otherwise properly brought to the attention of the court, it may itself deduce from them an opinion as to what the law of the foreign jurisdiction is, without being conclusively bound by the testimony of a witness who gives his opinion as to the law, which he deduces from those very statutes and decisions.

It was stated by Mr. Justice Brewer, speaking for the court in *Eastern Bldg. & L. Asso.* v. *Williamson*, 189 U. S. 122, *ante*, 735, 23 Sup. Ct. Rep. 527, a case just decided and where the same question in substance was before us, as follows:

"But it is contended that the construction of the New York statutes as applicable to this contract was shown by the decisions of the courts of that state and the opinion of one learned in its laws; that there was no contradictory testimony, and, therefore, it was the duty of the South Carolina courts to find as a fact that such was the true construction."

This was the contention of the defendant, and then, after referring to the construction of the contract as contended for by the plaintiff, the justice continued:

"It is said that the promise made in the certificate is expressly based upon 'full compliance with the terms, conditions, and by-laws printed on the front and back of this certificate;' *that one of the conditions ex- [343] pressed on the face of the certificate is: 'The shareholder agrees to pay, or cause to be paid, a monthly instalment of $.75 on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn;' that it contained this further stipulation: 'Payable in the manner and upon the conditions set forth in said terms, conditions, and by-laws hereto attached,' and that these matters thus referred to had the effect of changing the absolute promise to a conditional one. All these were received in evidence, and when so received it became a matter of judicial construction to determine whether they had such effect, and that was a question which, nothing else being shown, was for the consideration of the courts in which the litigation was pending. In like manner, after the decisions of the courts of New York were received in evidence, their meaning and scope became matters for the same consideration. While statutes and decisions of other states are facts to be proved, yet, when proved, their construction and meaning are for the consideration and judgment of the courts in which they have been proved. Nor is the rule changed by the testimony given in the deposition of defendant's counsel; for, as he states, his opinion is based on the statutes, the articles of incorporation, and the decisions admitted in evidence, together with similar decisions of other states under like statutes, articles of incorporation, and by-laws. No witness can conclude a court by his opinion of the construction and meaning of statutes and decisions already in evidence. *Laing* v. *Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366. The duty of the court to construe and decide remains the same."

This right and duty of the courts to themselves construe the statutes and decisions are not altered because the law of the foreign state and the various decisions of its courts are alleged to be as set forth in a pleading which is demurred to, instead of being proved, on a trial.

In this case the statutes, together with references to the decisions of the state courts, are given in the complaint, and the pleader, by making an averment in the form of a fact, assumes to give a meaning to them

[344] such as he thinks to be correct; but *the duty still remains with the courts to themselves determine from those statutes, and decisions what is in truth the law of the foreign jurisdiction. The courts are not concluded by an averment of what is the law in a foreign jurisdiction, contained in a pleading which is demurred to, any more than they would be by the testimony of a witness to the same effect upon a trial; certainly not when the statute upon which the case rests is set forth and the decisions under it are also referred to as evidence of the law. The demurrer does not admit as a fact that the construction (in the form of an averment of fact) which the pleader may choose to put upon those statutes or decisions is the right conclusion to be drawn from them. Notwithstanding the averments in the complaint, we are brought to an examination of the statutes and decisions referred to, in order to ourselves determine what the law of Minnesota is.

We are unable to see that the case of *Allen* v. *Walsh*, 25 Minn. 543, has been overruled upon the material point in this case by *Hanson* v. *Davison*, 73 Minn. 454, 76 N. W. 254, so as to call for a different decision than would be made under *Allen* v. *Walsh*, and the many similar cases. We have already referred to the *Hanson Case* in *Hale* v. *Allinson*, 188 U. S. 56, *ante*, 380, 23 Sup. Ct. Rep. 244, and do not regard it as necessary to continue the discussion here. It is enough to say that it is no authority for the contention that the former cases are overruled further than the issue presented in the case called for. The right to bring into the original case in equity in the state court after judgment had been obtained therein, a stockholder who was not served with process in that suit, but who appeared after judgment and after his property had been attached, was asserted in and decided by the state court, but it did not decide that the remedy in the state court as provided in the statute did not continue to be exclusive, nor did the state court assume to decide that any further action could be maintained in the courts of a foreign jurisdiction to enforce the stockholders' liability. No such issue was involved in the *Hanson Case*, and the opinion regarding such question is only the opinion of the very able judge who gave it, upon an abstract proposition, as distinguished from an adjudication upon a point actually in issue, and in [345] that case, in *speaking to that point, the judge only said he saw nothing in the statute to prevent such an action in the courts of another state, provided such courts would permit it. We think the law of Minnesota still remains upon this particular matter as stated in the former cases which have not been overruled by *Hanson* v. *Davison*. This, in effect, has been held in the *Hale-Allinson Case*, which we have just decided.

Nor is this case controlled or covered by *Whitman* v. *National Bank*, 176 U. S. 559, 44 L. ed. 587, 20 Sup. Ct. Rep. 477, and *Hancock Nat. Bank* v. *Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506. In the former case the special provisions of the Kansas statutes were referred to. It was stated to be the law in Kansas that it only required a judgment against the corporation and an unsatisfied execution returned, after which any creditor could sue any shareholder wherever he could be found. There was no suit in equity in the nature of a partnership accounting necessary. The liability of the shareholder, although statutory in origin, was held contractual in its nature, and under the statute the cause of action was transitory and could be maintained in any tribunal having jurisdiction where process could be served upon the individual shareholder, and in such an action the latter could set off debts due him from the company. The Kansas cases, expressing these views, were referred to in the opinion.

In the second case it was again held that under the statute and the decisions of the Kansas courts, after a judgment had been obtained against the corporation and an execution returned unsatisfied, the individual creditor could maintain an action against a single stockholder in any court of competent jurisdiction. Having the right to maintain such action, it was held that when it was commenced in another state and in a proper court thereof, the judgment which was obtained in Kansas must have the same faith and credit given it in the courts of another state that was given it in Kansas. Neither case is applicable to the one before us. The statutes are radically different, and no one creditor can maintain the action under the Minnesota statute, and if all unite, they must sue in the courts of that state.

Whether, aside from the Federal considerations just discussed, *the Wisconsin court [346] should have permitted this action to be maintained, because of the principle of comity between the states, is a question exclusively for the courts of that state to decide. The right to maintain it under the facts of this case is not founded upon any provision of a Federal nature, and we cannot supervise the action of the Wisconsin court in this particular.

*The judgment of the Supreme Court of Wisconsin must be affirmed.*

Mr. Justice **McKenna** did not hear the argument and took no part in the decision of this case.

Mr. Justice **Brewer** dissented.

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G. H. THAYER, Administrator, etc., *et al.*, *Plffs. in Err.*,
*v.*
A. N. SPRATT.

(See S. C. Reporter's ed. 346-354.)

*Public lands — entry under timber act —*

NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*cancelation of entry certificate—conclusiveness on transferee — error to state court — review of evidence.*

1. Public land covered by a heavy growth of timber, which constituted its chief value, was subject to entry under the timber act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), although it would have been fit for cultivation when the timber had been removed.
2. The cancelation of a certificate of entry under the timber act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), is not conclusive as against a transferee who had no notice and no opportunity to be heard upon the question of the original validity of such entry, but he is left free to prove the validity of the entry by any means other than the certificate.
3. The evidence upon which the findings of fact in a state court rest cannot be reviewed by the Supreme Court of the United States on writ of error to the state court.

[No. 207.]

*Argued March 12, 1903. Decided April 6, 1903.*

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court for the County of Cowlitz in that State in favor of plaintiff in a suit to quiet title. *Affirmed.*

See same case below, 25 Wash. 62, 64 Pac. 919.

Statement by Mr. Justice **Peckham:**

The plaintiffs in error in December, 1898, brought this action in the state court against the defendant for the purpose of quieting their title to certain land described as section 32 in township 9, etc., situated in Cowlitz county, state of Washington. They obtained judgment in their favor for the northwest and southwest quarters of the section, but the court gave judgment in favor of the defendant for the northeast and the southeast quarters of the same section, and directed that the patents for the two quarters of the section, which had been issued on June 25, 1890, to plaintiffs' grantors, should be held by the plaintiffs in trust for the defendant, and that the plaintiffs should execute a proper deed therefor, and, in default of such deed of conveyance, the decree of the court was to stand and be treated in the place of such deed. The plaintiffs appealed from that portion of the judgment just described to the supreme court of the state, where it was affirmed, and they have brought the case here for review.

The northeast and the southeast quarters of the section were entered in the proper land office in Washington under the act of Congress approved June 3, 1878, and entitled "An Act for the Sale of Timber Lands in the States of California, Oregon, Nevada, and in Washington Territory." 20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545. These entries were made on May 26, 1883, and the entrymen, after payment for the land by them to the land office and the receipt of a certificate of such payment, and about six months thereafter, assigned and transferred the certificates to the defendant for a valuable consideration paid to them by him. After such transfers had been made and a record of the deeds of conveyance had also been made in the records of Cowlitz county, which was the proper office, the Land Department informed the register and receiver of the land office at Vancouver, Washington, that action had been suspended upon the entries, based upon the report of the special agent regarding the lands, and the Department directed the register and receiver to give notice to the original entrymen of a time and place when and where they *might be heard, and, in default, that [348] their entry would be canceled. The Department also stated that it appeared from the report of its special agent that the lands had been transferred by warranty deed of March 13, 1884, to the defendant, and it therefore directed that notice should be given him as the transferee; but for some reason this direction was overlooked and no notice was ever given defendant of the pendency of any proceedings towards the cancelation of the certificates or either of them which had been transferred to him.

At the time he purchased the certificates, the defendant resided in Alpena, Michigan, and resided there for thirty years, and the deeds to defendant, which were on record, showed his residence to be in that place.

The notices by mail to the entrymen were not received, the letters to them being returned as "uncalled for," and so it happened that there was no hearing before the Land Department upon the return of the order, and the entry was canceled in the absence of both of the entrymen and the defendant, the transferee.

The action of the Department was taken upon the report of one of its inspectors, which was founded, as stated in the report of such inspector, upon the fact that the land was not of the character provided for in the act, for the reason that, although covered by a heavy growth of valuable timber and chiefly valuable as such at that time, yet, as it would be fit for cultivation when the timber should be removed, it was on that ground held that the land was not subject to entry under the timber act of 1878, *supra.* This was the sole and only reason upon which the Land Department rested its action in canceling the entries and certificates.

After their cancelation, certain homestead entries were made upon these two quarter sections by Benjamin L. Hennis for the northeast quarter, and by Ellis Walker for the southeast quarter, patents were issued to them, and the plaintiffs deraign title from those patentees.

Upon the trial, evidence was given by the defendant as to the character of his ownership; that he purchased the different quarter sections in good faith from each of the parties who *had entered them, and without [349] any agreement in reference to the purchase

before final proof, etc., and that he had never heard of the entrymen before he made the purchase from them through his agent, and paid them the sum of $800 for each quarter section (double the price paid for the land by the entrymen to the government), and that the total cost of the land, including his expenses paid to his agent and to the parties who made the locations, etc., amounted, as the defendant testified, to about $4,400.

The defendant on the trial also gave evidence tending to show that the land in question had the finest quality of timber on it, and that in its then existing condition the land was chiefly valuable for timber and would probably run 200,000 feet to the acre. The land would have to be cleared and then it might be cultivated, but it would all have to be cleared first.

It was stipulated between the parties, on the trial, that certain papers named and on file in the office of the Commissioner of the General Land Office, and certain exhibits from the land office in Vancouver, in the state of Washington, relating to the proceedings in making the entry for the lands in question by the defendant's grantors, might be regarded as in evidence in the case and be considered by the court, and the copies of such papers then presented to the court were admitted to be "correct, full, true, and complete transcripts of all proceedings of the land office at Vancouver, Washington, and of the General Land Office, Department of the Interior, Washington, D. C., touching . . . the timber land entry of Frank Smith, for the northeast quarter of section 32 (etc.), and also the timber land entry for the southeast quarter of section 32," etc. These papers showed that the entrymen for the northeast and the southeast quarters were entitled to enter the lands under the timber act, and that all the necessary facts required by the act and the Land Department officials had been proved by them to entitle them to enter the specific lands.

The finding of the court shows there has never been any dispute as to the actual condition of the land, but the entries were vacated and the certificates canceled because the Land Department held the land was not of the kind to be entered under *the timber act of 1878, for the reason that, after the timber should be cleared, the land would be good agricultural land.

*Mr.* **Joseph Simon** argued the cause, and, with *Mr. John M. Gearin* and *Messrs. Dolph, Mallory, Simon, & Gearin,* filed a brief for plaintiffs in error:

An equity was all that Spratt got or could get by his purchase from Smith and Radcliffe. He could not get the legal title, because that was still in the government. He got only such right as Smith and Radcliffe had, and he bought at his peril.

*American Mortg. Co.* v. *Hopper,* 12 C. C. A. 293, 29 U. S. App. 12, 64 Fed. 559; *California Redwood Co.* v. *Little,* 79 Fed. 856; *Cooke* v. *Blakely,* 6 Kan. App. 707, 50 Pac. 981.

That the department had a right to cancel the Smith-Radcliffe certificates cannot be questioned.

*Guaranty Sav. Bank* v. *Bladow,* 176 U. S. 457, 44 L. ed. 543, 20 Sup. Ct. Rep. 425.

The court does not interfere with the title of a patentee when the alleged mistake relates to a matter of fact concerning which those officers may have drawn wrong conclusions from the testimony.

*Lee* v. *Johnson,* 116 U. S. 49, 29 L. ed. 570, 6 Sup. Ct. Rep. 249.

The application to purchase only initiates the proceeding. The statements contained in it may or may not be true. And the department may at any time cause the truth of these statements to be inquired into

*Hawley* v. *Diller,* 178 U. S. 488, 44 L. ed. 1161, 20 Sup. Ct. Rep. 986.

If notice had been served upon Spratt of the proceedings to cancel these entries, and if he had appeared before the register and receiver, the burden would have been upon him to show the good faith of the entry in each case, and a full compliance with the statute and in the manner provided by the statute.

*United States* v. *Steenerson,* 1 C. C. A. 552, 4 U. S. App. 332, 50 Fed. 508; *Guaranty Sav. Bank* v. *Bladow,* 6 N. D. 108, 69 N. W. 43; *Parsons* v. *Venzke,* 4 N. D. 452, 61 N. W. 1041.

*Mr.* **George C. Stout** argued the cause, and, with *Messrs. John H. Mitchell* and *T. H. Ward,* filed a brief for defendant in error:

The Land Department having canceled the entries without notice to the transferree Spratt, it would not conclude him, and he would, notwithstanding the decision, have the right to show, by proof other than the canceled certificate, that the entries were valid.

*Guaranty Sav. Bank* v. *Bladow,* 176 U. S. 448, 44 L. ed. 540, 20 Sup. Ct. Rep. 425; *Hawley* v. *Diller,* 178 U. S. 488, 44 L. ed. 1161, 20 Sup. Ct. Rep. 986; *American Mortg. Co.* v. *Hopper,* 12 C. C. A. 293, 29 U. S. App. 12, 64 Fed. 559; *Guaranty Sav. Bank* v. *Bladow,* 6 N. D. 108, 69 N. W. 41.

It is a settled rule in the Land Department, that if it appears from a special agent's report (as it did in this case), or by other evidence, that the land had been transferred to a third party by the original entrymen, then it becomes the imperative duty of the officers of the government to give such transferee notice of the proceedings relative to the cancelation of such entry.

*United States* v. *Copeland,* 5 Land Dec. 170; *United States* v. *Richardson,* 5 Land Dec. 253; *Windsor* v. *Sage,* 6 Land Dec. 440; *United States* v. *Thomas,* 9 Land Dec. 576; *Fleming* v. *Bowe,* 13 Land Dec. 78; *United States* v. *Newman,* 15 Land Dec. 224.

In order to defeat the holder of the equitable title, on the ground of having purchased on the faith of the record title in

good faith, it must be specially pleaded and proved.

2 Pom. Eq. Jur. §§ 784, 785; Story, Eq. Pl. 8th ed. § 805a.

The trial court having made full findings of fact which were approved by the supreme court of the state, such findings are conclusive on a writ of error to such courts from the Supreme Court of the United States.

*Jenkins* v. *Neff*, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905; *E. Bement & Sons* v. *National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

This court can look beyond the Federal question only when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to maintain the judgment notwithstanding the error in the decision of the Federal question.

*McLaughlin* v. *Fowler*, 154 U. S. 663, and 26 L. ed. 176, 14 Sup. Ct. Rep. 1192.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The decision of the Land Department as to the character of the land in question resulted from an erroneous construction of the timber act of June 3, 1878. There was no dispute as to the actual condition of the land, but the Department held that land so situated could not be entered under the timber act. In this construction the Department made a legal error. It has been held by this court that the act included lands covered with timber, but which might be made fit for cultivation by removing the timber and working the land. *United States* v. *Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575. Mr. Justice Brewer, in delivering the opinion of the court in the above case, states as follows:

"Lands are not excluded by the scope of the act because in the future, by large expenditures of money and labor, they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present. Many rocky hill-slopes or stony fields in New England have been, by patient years of gathering up and removing the stones, made fair farming land; but surely no one, before the commencement of these labors, would have called them fit for cultivation. We do not mean that the mere existence of timber on land brings it within the scope of the act. The significant word in the statute is 'chiefly.' Trees growing on a tract may be so few in number or so small in size as to be easily cleared off, or not seriously to affect its present and general [351] fitness for *cultivation. So, on the other hand, where a tract is mainly covered with a dense forest, there may be small openings scattered through it susceptible of cultivation. The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation."

The lands in this case are within that description. The evidence shows that the timber was excellent; as good as any in that section of the country. It was as good as any ever examined by the witness, who had had large experience. In fact, he said there was none better in that part of the country, and the quality of the timber was large to the acre, but the land was not especially valuable for cultivation until it had been cleared.

Even though the decision of the Land Department was erroneous, yet having been made, and the entries and certificates canceled, although without notice to defendant, they could not thereafter be used even as prima facie evidence of the validity of the original entries. It was perfectly easy to have given defendant notice of the proposed cancelation. He resided in Alpena, Michigan, and the deeds showed that fact, and the record shows the Department was aware of their existence through the report of its special inspector. There is no hardship or inconvenience, therefore, in holding that, in a case, at least, where the residence is known, the transferee has the right to notice. If not known, a publication of notice ought at least to be made. It seems this is the practice of the Land Department.

It has been held in this court, in *Guaranty Sav. Bank* v. *Bladow*, 176 U. S. 448, 44 L. ed. 540, 20 Sup. Ct. Rep. 425, and *Hawley* v. *Diller*, 178 U. S. 476, 488, 44 L. ed. 1157, 1162, 20 Sup. Ct. Rep. 986, that a cancelation of a certificate of entry was not conclusive as against a transferee who had no notice and no opportunity to be heard upon the question of the original validity of the entry, but that it left the transferee without the right to use the entry certificate as prima facie evidence of the validity of the entry or of his subsequent claim. The transferee is, however, left free to prove the validity of the entry by any means other than the certificate. Although the assignment or conveyance of the certificates did not transfer the legal title to the *lands de- [352] scribed therein, yet the transferee or grantee thereby became possessed of an equitable interest in the lands which could not be taken from him without some notice. The character of the certificates as a mere means of evidence could be, and was, destroyed; but the transferee was, nevertheless, not thereby deprived of his right to show the validity of the former entry.

In this case we think he has done so. He proved by his own evidence that he was a bona fide purchaser of the property for value paid to the entrymen and that he had no agreement or understanding of any kind with them prior to the time that he purchased the land from them.

We do not refer to the bona fide character of the purchase by defendant from the entrymen for the purpose of thereby showing the defendant to be entitled to the benefit of that character under § 2 of the timber act of 1878. The reason that he is not so en-

titled is that by the assignment of the certificates he did not become clothed with the strict legal title to the land, but simply with an equity, and the act does not cover such a case. *Hawley* v. *Diller*, 178 U. S. 476, 487, 44 L. ed. 1157, 1161, 20 Sup. Ct. Rep. 986. We refer to the bona fide character of the purchase by defendant, for the purpose only of showing it was without any prior agreement or understanding with the entrymen, and was not in violation of the provisions of the timber act.

The stipulation between counsel, that the papers on file in the Land Department might be regarded as in evidence and considered by the court, permitted the court to regard those papers as properly introduced in evidence and competent to be considered by it in the further consideration of the case. Those papers show a compliance on the part of the entrymen with all the provisions of the timber act, and a valid entry under it in regard to the lands in question. As the entries had not been canceled for any fraud in fact, but only upon an erroneous interpretation of the law by the Department, the evidence of such error being apparent on the trial, the defendant did all he was required to do in order to show the entries valid; and if the plaintiffs wished to show any fraud in fact, to overcome the case made by the defendant, they were called upon to do so; [353] *otherwise, the original proof being sufficient to warrant the issuing of the certificates, that proof would be regarded as sufficient on the trial of this suit.

There is not a word of any proof showing any fraudulent act on the part of the entrymen or of their transferee, the defendant herein, and, on the contrary, there is proof of an absence of any fraud and the bona fide purpose on the part of the entrymen to properly avail themselves of the act of 1878.

But, however this may be, we are precluded by the finding of facts in the state court from looking at the evidence upon which such findings may rest. Upon a writ of error to a state court this court has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence. *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Gardner* v. *Bonestell*, 180 U. S. 362, 370, 45 L. ed. 574, 577, 21 Sup. Ct. Rep. 399; *Bement & Sons* v. *National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *Jenkins* v. *Neff*, 186 U. S. 230, 235, 46 L. ed. 1140, 1143, 22 Sup. Ct. Rep. 905.

By the findings in this case it appears that the entrymen at the time of making their entries were entitled to purchase the lands under the act of Congress of 1878, and that they duly made such application, duly verified by the oath of the applicants before the register of the land office, and that in the purchase of the land they fully complied with the laws of the United States and the rules and regulations of the Land Department, and that all the requirements of the timber and stone act in regard to making a legal and valid entry and purchase thereunder were fully complied with by the entrymen, and that thereafter the applications were allowed and certificates duly issued as applied for, and the lands included in the entries were at all times chiefly valuable for the timber thereon, and at that time unfit for cultivation. It was also found that the action of the land office in canceling the timber entries was based upon a misconstruction of the act of 1878, and that the department, by reason of such misconstruction, erroneously held that land covered with a heavy growth of valuable timber, if it could be successfully cultivated after the timber was removed, was not subject to entry as timber land under that act, although the timber on the land might be itself the chief element of the value *of the [354] land, and the land could not be cultivated at all in its then condition.

Upon these findings it is apparent that the defendant showed the validity of the entries by his grantors, and that their conveyances to him passed a good equitable title to the lands in question for which he was entitled to a patent from the United States; and that, as such patent was granted to appellants, the defendant was entitled to the relief given him by the judgment.

*The judgment of the Supreme Court of the state of Washington is therefore affirmed.*

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## TEXAS & PACIFIC RAILWAY COMPANY, *Plff. in Err.*, *v.* MICHAEL CARLIN.

(See S. C. Reporter's ed. 354-363.)

*Master and servant—negligence of vice principal—trial—question for jury.*

1. The neglect, by the foreman of a railway bridge gang, of his special duty to see that the workmen under him performed their duty to leave a clear track for an approaching train, is the neglect of a duty which he owes, not as a fellow servant with such workmen, but as a vice principal of the railroad company, under Sayles's (Tex.) Civ. Stat. 1897, art. 4560*g*, providing that railroad employees intrusted with the control or command of other employees, or with the authority to direct any other employee in the performance of his duty, are vice principals of the railway company, and not fellow servants with their coemployees.
2. The question of the negligence of the foreman of a railway bridge gang in failing to discover a spike maul upon or near the bridge,

NOTE.—*On vice principalship considered with reference to the superior rank of a negligent servant*—see note to Stevens v. Chamberlin (C. C. App. 1st C.) 51 L. R. A. 513.

*As to vice principalship as determined with reference to the character of the act which caused the injury*—see note to Lafayette Bridge Co. v. Olsen (C. C. App. 7th C.) 54 L. R. A. 33.

*As to who are fellow servants*—see note to Central R. Co. v. Keegan, 49 L. ed. U. S. 418.

*On the statutory liability of employers for the negligence of employees exercising superintendence*—see note to Canney v. Walkeine (C. C. App. 1st C.) 58 L. R. A. 33.

immediately prior to the passage of a train, is for the jury in an action to recover damages from the railroad company for personal injuries received by a member of such gang, for which there is no other cause assignable than that the train in passing struck the maul and threw it against the workman, although the foreman testified that he looked for and did not discover any obstruction to the approaching train, where there was nothing to prevent its discovery if it was there and the glance of the foreman was anything more than a casual or formal one.

[No. 222.]

*Argued and submitted March 20, 1903. Decided April 6, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Texas entered upon a verdict of a jury in favor of plaintiff in an action to recover damages from a railway company for personal injuries. *Affirmed.*

See same case below, 111 Fed. 777.

Statement by Mr. Justice **Peckham:**

The plaintiff in error brings this case here to review the judgment of the United States circuit court of appeals for the fifth circuit, affirming the judgment in the circuit court for the northern district of Texas, entered [355] *upon the verdict of a jury in favor of defendant in error on the trial of this action brought by him against the railway company to recover damages for personal injuries. On the trial it appeared that Carlin, the plaintiff below, was in the employment of the railway company in September, 1898, as a bridge carpenter. On that day he, with a number of others forming what is termed the bridge gang, of which George Welsh was foreman, was employed in making some repairs on a bridge near the Aledo water tank, not far from Weatherford, Texas. The bridge was over a creek, and was 60 to 65 feet long. The force got to work on the bridge about ten minutes after 8 o'clock in the morning under Welsh, the foreman. The surface of the bridge was plain; the ties were about 8 inches apart, and there was nothing on top of them except the rails and the guard rails, the rails being of ordinary size, and the guard rails about 10 inches from the rails and parallel with them. The guard rails were 8 inches wide and stood 4 inches above the ties, being let down over the ties about 2 inches, and were of wood. Some time after the men had been working on the bridge a freight train was seen approaching at the rate of from 30 to 40 miles an hour. Within a very few minutes before the train was seen one of the workmen on the bridge had in his hand what is called a spike maul, used for the purpose of driving spike. The maul was of iron with a handle about 3 feet long, the hammer being 6, 8, or perhaps 10 inches in length, and the handle went into the middle of the head, which had a double face. Carver was the man who was using the maul a few minutes before the train came. The maul weighed about 10 pounds. At the time Carver was using the maul, he had it out on the bridge with him. A witness for the defendant stated that he had been using the maul on the south side of the bridge for putting up the staging or scaffolding, and when he finished he handed it to someone on the top of the bridge, who handed it to Carver on the north side of the bridge, to spike on a brace. It was used but ten or fifteen minutes before the passage of the train. Carver stated he did not remember where he had put the maul when he had finished using it, but he said *he was always careful to put it out of the [356] way so there would be no accident. He had nailed the last piece of timber on the bridge and got down on the ground and was about 10 feet from the plaintiff, and had not been there over three or four minutes when the train passed. The witness saw no other spike maul or hammer there that morning than the one which he used, which was the regular spike maul described by the witness, and which he found after the train passed.

The train coming from the west was seen some little distance before it reached the bridge, and the people on the bridge got out of its way, and, as the train passed over the bridge towards the east the plaintiff, who was standing a short distance from the east end of the bridge, was struck by the spike maul on the leg, and was so badly injured that amputation of the leg above the knee was necessary, and was performed. The train on its passage across the bridge struck the spike maul and threw it in the direction that the train was going with such force toward the plaintiff as to effect the injury mentioned, although the train was not seen to strike the maul, nor was the maul seen to strike the plaintiff. All that is known is that the train passed the bridge, and as it passed the maul struck the plaintiff, and the handle was broken close up to the head.

It was customary when workmen were engaged in repairing a bridge for the foreman to see that the bridge was cleared and unobstructed whenever a train was about to pass. It was the duty of the workmen to put their tools out of the way when a train was coming, but it was specially the duty of the foreman to see that the bridge was clear, and "that was his business and that was what he was for." Welsh, the foreman of the bridge gang, testified that he had no recollection of seeing anyone using the spike maul that morning; that he had been around all parts of the bridge, both on top and underneath it, before the train had passed. He says when he saw the train coming he looked up and down the track to see if everything was clear, and did not see anything, and stepped one side when the train was 300 or 400 yards from him. He said he had plenty of time if there had been anything on the bridge to have taken it off; that when a man was using tools and got *through with [357] them he was supposed to take care of them and put them out of the way; that the foreman was liable to be anywhere about the bridge at any time, and could not be de-

pended upon to be at any particular place; but if there were men working on top of the bridge it would be their duty to be on the lookout always, as they must expect a train at any time. He also said that he was foreman, and that as bridge foreman he had employed Carlin and had supervision over him, and had power to employ and discharge him as well as the other bridge men who were working there that morning.

The evidence was not disputed that, although it was the business of each workman to see to it that his tools were not in the way of an approaching train, yet that it was particularly the duty of the foreman to see that the bridge was cleared from all obstacles when a train came.

This is in substance the evidence submitted to the jury upon the question of the negligence of the defendant.

The judge charged that the burden of proof was upon the plaintiff to show that the defendant was negligent, and that the plaintiff was injured thereby; that the defendant was bound to exercise ordinary care to furnish a reasonably safe place within which employees could perform their duties; that the foreman of the bridge gang was, under the evidence, the vice principal of the defendant company, and that the negligence of which the defendant was accused consisted in the failure on the part of the foreman of the bridge gang to use ordinary care to remove, or to see and remove, the spike maul before the arrival of the train at the bridge.

The court also charged that, if the jury believed from the evidence that the spike maul was left on the bridge by a fellow servant of the plaintiff, and that, at the time the train approached, the foreman of the bridge gang was the only person upon the bridge, and that he could, by the exercise of ordinary care have seen the spike maul and removed it from the track and from proximity thereto; and if they believed it was on the track or within proximity thereto; and if the jury believed that it was the duty of the foreman to use such care to see that the track was clear and no obstructions on it, [3]or so near to it as to *be struck by a passing train; and if the jury believed that the foreman did not use that care, and that the spike maul was struck by the train and hurled against the plaintiff and caused the injuries; and if the jury believed it was the negligence of the foreman in failing to see and remove the spike maul; and if his negligence in that respect was the direct and proximate cause of the injuries sustained by the plaintiff,—then the court charged that the plaintiff was entitled to recover; but that, if the injury was caused by the negligence of a fellow servant, and the foreman in charge of the bridge gang was not guilty of negligence which directly and proximately contributed to the injury of the plaintiff, then the verdict should be for the defendant.

The court further charged that the defendant should not be held responsible for the consequences of an act of negligence which could not reasonably be foreseen, and that it was not actionable negligence to fail to do an act when it would not have been anticipated by a man of ordinary care and prudence that such failure to perform the act would result in injury to anyone.

Various requests to charge were made by counsel for the defendant and refused by the court, not necessary to be here specifically mentioned.

The jury, as stated, found a verdict for the plaintiff.

*Mr.* **David D. Duncan** argued the cause, and, with *Messrs. John F. Dillon* and *Winslow S. Pierce*, filed a brief for plaintiff in error:

If Welsh, the foreman, was negligent in performing a duty which was equally the duty of those under him, his negligence in this respect would be the negligence of a fellow servant, and not that of vice principal, for which the railway company would not be responsible.

*Quinn* v. *New Jersey Lighterage Co.* 23 Blatchf. 209, 23 Fed. 363; *Hoke* v. *St. Louis, K. & N. R. Co.* 11 Mo. App. 574; *Olson* v. *Oregon Coal & Nav. Co.* 44 C. C. A. 51, 104 Fed. 574; *The Kensington*, 91 Fed. 681; *The Miami*, 35 C. C. A. 281, 93 Fed. 219; *Stockmeyer* v. *Reed*, 55 Fed. 259; *Illinois C. R. Co.* v. *Bolton*, 99 Tenn. 273, 41 S. W. 442; Buswell, Personal Injuries, 387.

There was no evidence of the negligence of the foreman in failing to discover the maul or hammer upon the bridge, sufficient to warrant the jury in finding a verdict for the plaintiff.

*Patton* v. *Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275.

In every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

*Schuylkill & D. & R. Improv. Co.* v. *Munson*, 14 Wall. 448, 20 L. ed. 867; *Pleasants* v. *Fant*, 22 Wall. 116, 22 L. ed. 780.

*Mr.* **F. E. Albright** submitted the cause for defendant in error. *Messrs. E. C. Orrick* and *J. C. Terrell, Jr.*, were with him on the brief:

When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. The question of negligence is one of law only when the facts and circumstances are such that all reasonable men must draw the same conclusion from them.

*Gardner* v. *Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

The statutes of the state of Texas defining vice principal and fellow servant make the question of fellow servant depend upon the grade of employment, and not the act done or omitted to be done. This was the rule governing the relation of master and servant, ultimately adopted by the supreme

courts of this state prior to the passage of the act.

*Nix* v. *Texas P. R. Co.* 82 Tex. 473, 18 S. W. 571; *Sweeney* v. *Gulf, C. & S. F. R. Co.* 84 Tex. 433, 19 S. W. 555.

The master owes to the servant a reasonably safe place in which to perform his work, and to use ordinary care to keep the same in a reasonably safe condition; and if, instead of personally performing these obligations, he engages another to do so, he is liable for the neglect of that other.

*Northern P. R. Co.* v. *Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Hess* v. *Rosenthal*, 160 Ill. 621, 43 N. E. 743; *Harrison* v. *Detroit, L. & N. R. Co.* 79 Mich. 409, 7 L. R. A. 623, 44 N. W. 1034.

The supreme court of the state of Texas having construed this statute, the Supreme Court of the United States will follow this construction.

U. S. Rev. Stat. § 721 (U. S. Comp. Stat. 1901, p. 581); *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Long* v. *Chicago, R. I. & T. R. Co.* 94 Tex. 53, 57 S. W. 802; *Fenwick* v. *Illinois C. R. Co.* 40 C. C. A. 369, 100 Fed. 247; *Peirce* v. *Van Dusen*, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 693.

If an ordinarily prudent person ought to have foreseen that injury might result to any person by reason of the negligence of the foreman in failing to discover the maul on the track, under the circumstances, the anticipation of any injury would be sufficient to constitute the leaving of the maul there while a train was approaching the probable consequence of the injury done and the proximate cause thereof.

*Texas & P. R. Co.* v. *Short* (Tex. Civ. App.) 58 S. W. 57; *Chicago, St. L. & N. O. R. Co.* v. *Doyle*, 60 Miss. 977; *Baltimore & O. R. Co.* v. *Anderson*, 29 C. C. A. 235, 56 U. S. App. 137, 85 Fed. 413; *Herrick* v. *Quigley*, 41 C. C. A. 294, 101 Fed. 187; *Zopf* v. *Postal Teleg. Cable Co.* 9 C. C. A. 308, 22 U. S. App. 136, 60 Fed. 987; *Chicago & N. W. R. Co.* v. *Prescott*, 23 L. R. A. 654, 8 C. C. A. 109, 19 U. S. App. 291, 59 Fed. 237; *Jackson* v. *Galveston, H. & S. A. R. Co.* 90 Tex. 372, 38 S. W. 766; *Gulf, C. & S. F. R. Co.* v. *Wood* (Tex. Civ. App.) 63 S. W. 164; *Gulf, C. & S. F. R. Co.* v. *Marchand*, 24 Tex. Civ. App. 47, 57 S. W. 860.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

Two grounds have been urged upon the court for reversing this judgment and granting a new trial: One was that the negligence of the railway company, if any, was that of a fellow servant, for which it was [359] not liable; and (2) that there *was no evidence of the negligence of the foreman, in failing to discover the maul or hammer upon the bridge, sufficient to warrant the jury in finding a verdict for the plaintiff.

The right to maintain this action is founded upon a statute of Texas, the material sections of which read as follows:

"Art. 4560*g*. All persons engaged in the service of any person, receiver, or corporation controlling or operating a railroad or street railway, the lines of which shall be situated in whole or in part in this state, who are intrusted by such person, receiver, or corporation with the authority of superintendence, control, or command of other servants or employees of such person, receiver, or corporation, or with the authority to direct any other employee in the performance of any duty of such employee, are vice principals of such person, receiver, or corporation, and are not fellow servants with their coemployees.

"Art. 4560*h*. All persons who are engaged in the common service of such person, receiver, or corporation controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment, and are doing the same character of work or service, and are working together at the same time and place and at the same piece of work and to a common purpose, are fellow servants with each other. Employees who do not come within the provisions of this article shall not be considered fellow servants." Sayles's Civil Stat. (Tex.) 1897.

With reference to this statute, counsel for the defendant requested the court to charge the jury that—

"Although Welsh, the bridge foreman, may have been, in law, the representative of the company, yet, if they find that the act of examining the track, as the train might be approaching, for the purpose of ascertaining whether or not any obstruction was upon or near it, was a duty that may be expected to be performed by any one of the men, irrespective of his grade or rank; that is to say, by the foreman and men alike as occasion and circumstances may require,—then, in any such event, the act or duty of Welsh in this respect was one which existed between fellow servants, and defendant would not be liable for the negligent acts of Welsh in this respect, if any there were."

*This charge was refused, and counsel for [360] defendant excepted.

The court did charge that the foreman of the bridge gang was, under the evidence, the vice principal of the defendant company. This charge was duly excepted to by defendant's counsel.

Defendant contends that if the negligence which caused the accident was the failure of the foreman to see the maul or hammer upon the bridge and to remove it, it was not the failure to perform a duty peculiar to him, the foreman, and specially imposed upon him as such foreman within the meaning of article 4560*g*, because it was a duty resting equally upon all the members of the bridge gang. The testimony in regard to this question leaves no doubt as to the duty of the foreman, although it also appeared that when a man was using tools and got through with them he was supposed to put them out of the way where a train would not strike them, and it was his business to do so. The evidence showed, in addition, that it was the special business of the fore-

man to see that the track was unobstructed on the bridge when a train was about to cross, and that, although the men were supposed to see that the track was clear, it was the foreman's business to supervise them and see that the men left a clear track as the train came on. This was his duty as foreman, and not as fellow workman; and the duty of care on the part of the workmen under him to keep the tools off the track when the train came on the bridge in no degree lessened the duty of the foreman to see that the men under him did as they ought, and that a free and unobstructed track was left for the train. In other words, it was the special duty of the foreman, as such, to see that the men performed their duty.

The negligent act of the foreman did not arise in the performance of the duty of a mere servant, although each servant was under an obligation to be careful, but it was the negligent act of the vice principal in the performance of his duty as such. As it was the special duty of the foreman to see that the men performed their duty, his neglect so to do was the neglect of a duty which he owed, not as fellow servant, but as vice principal within the statute above cited.

Upon the second ground, we are of opin-[361] ion that there was *evidence sufficient to go to the jury upon the question of the negligence of the foreman in failing to discover the maul upon the bridge immediately prior to the passage of the train. The foreman himself swears that he did look along the track just prior to the coming of the train, and that he did not see any obstruction on the track, and did not see the spike maul in question. Whether he looked or not is, under the evidence, one of the material facts in the case. He says that he did, but we are of opinion that other facts proved in the case were of such a character as to make it proper to submit the question to the jury. The foreman's evidence was that of a somewhat interested witness. If the foreman did in fact neglect to perform his duty by looking over the track just prior to the coming of the train for the purpose of seeing that the bridge was clear of obstructions, it might be quite a serious matter for him in his future relations with the company. At any rate, no man is an absolutely disinterested witness where his testimony relates to the question of the performance or nonperformance of a duty which he owed on account of the position which he occupied. It was, therefore, a question for the jury as to what measure of credence should be given to his testimony. Of course, the mere absence of evidence that the foreman did his duty would not be equivalent to evidence, direct or circumstantial, that he did not, and it rested with the plaintiff to show negligence of the foreman for which the defendant would be liable.

But there are certain facts proved in this case which we think rendered it necessary to submit the question of negligence to the jury, notwithstanding the testimony of the foreman. We have here a bridge not more than 60 or 65 feet long,—an open top bridge, the surface of which was plain. The ties for the rails were the usual distance apart, and there was nothing on top of them except the rails themselves. The guard rails were 10 inches from the track and parallel with it, and they stood up about 4 inches above the ties. There was, therefore, nothing to obstruct or prevent the view of the length of the bridge by anyone at either end, and nothing to prevent the discovery of the maul if the glance of the individual were anything more than casual or formal. The maul could not *have been hidden between[362] the track and the guard rails so as not to be above the track, for if the maul were lower than the track, the train could not have hit it, as it is perfectly clear that anything lower than the surface of the track could not be struck by the train. So it would seem quite obvious that if anyone in the position of the foreman had looked, it would have been possible for him to have discovered this maul if it were there. Was it there? Workmen had been using the maul on the bridge during the morning and a few moments, not more than ten or fifteen minutes, prior to the crossing of the train. The maul was struck by it and hurled with great force, sufficient to break the handle, against the plaintiff, who was standing near the east end of the bridge. The man who was known to have used the maul a few minutes before the arrival of the train says himself that he has no recollection of what he did with it. Now, whether the maul were left exactly on the bridge, or just off the bridge, and so near the track as to be struck by the passing train, it is not necessary to determine, because if it had been left in a position just off the bridge, and yet so near the track as to be struck by the train, the failure of the foreman to see it and have it removed was the same as if it had been on the bridge. The maul being left so that it was struck by the train and hurled against the plaintiff, the failure of the foreman to see it might have been found by the jury to be a negligent failure, and, it being his duty to see that the track was kept clear for the passage of trains, that failure was a neglect which was the proximate cause of the injury. To be sure, it was negligence on the part of the servant who left the tool there in the first place, but after such negligence had occurred the duty of the foreman arose, and he had plenty of time in which to perform it, to overlook the bridge where the track was and see that there was no obstruction for the passing train, and his failure to look, or, looking, to discover the obstruction, thus became the immediate and proximate cause of the injury which followed.

There is no other cause assignable for this injury than the fact that the train did strike the maul, and that fact is proved from the fact that it was thrown in the direction in which the train was going. Counsel for the defendant admits that the evidence *shows[363] that fact, but he avers that it does not appear that the maul was in such a position as to convict the foreman of negligence in not discovering it, and as to that fact coun-

sel insists that the negligence of the foreman is disproved by the uncontradicted testimony.

The facts already stated rendered it necessary, in our judgment, to submit the question to the jury as to the negligence of the foreman, even although he testified that he looked and did not discover any obstacle on the bridge.

These two are the propositions particularly argued before us. We do not see in them any ground for disturbing the verdict of the jury.

We have looked at the other exceptions taken in the course of the trial, and are of opinion that they do not show any error requiring a reversal of the judgment, and *it is therefore affirmed.*

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UNION STEAMBOAT COMPANY, Claimant of the Propeller New York, *Petitioner,*

*v.*

ERIE & WESTERN TRANSPORTATION COMPANY *et al.*†

(See S. C. Reporter's ed. 363-370.)

*Appeal—construction of mandate — decree in conformity with opinion—statutes—repeal by implication.*

1. A mandate from the Supreme Court of the United States, which directs the entry of a decree in conformity with its opinion dividing the damages caused in a collision between vessels held in fault, but leaving undisturbed a judgment obtained by the owners of the cargo against one of such vessels for the full amount of their damages, does not require that such decree provide for the recoupment by the latter vessel of one half of the damages to such cargo from the moiety of damages awarded to the other vessel.
2. The rate of interest on judgments and decrees, fixed in Michigan at 7 per cent by a statute originally enacted in 1838 and carried forward in the various compilations of the statutes of that state, was not changed by a statute enacted in 1891, which, according to its title, was one to regulate the interest of money on account and interest on money judgments, but which actually provided only for the reduction of the rate of "interest of money" to 6 per cent, and which was amended by the act of September 22, 1899, by a further reduction of such rate to 5 per cent.

[No. 97.]

*Argued December 1, 2, 1902. Decided March 9, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Michigan entered in pursuance of a mandate from the Supreme Court of the United States. *Affirmed.*

See same case below, 47 C. C. A. 232, 108 Fed. 102.

Statement by Mr. Justice **McKenna:**

*The facts of this case are fully set out in [364] previous decisions of this court. 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67; 178 U. S. 317, 44 L. ed. 1084, 20 Sup. Ct. Rep. 904.

The steamer Conemaugh, owned by respondents, and the propeller New York, owned by the petitioner, collided in the Detroit river, November 11, 1891. The Conemaugh for herself, and as bailee of her cargo, filed a libel against the New York for the sum of $70,000 damages in the district court for the eastern district of Michigan. Subsequently, certain underwriters of the cargo of the Conemaugh filed an intervening petition in the cause. Subsequently, the New York, for damages sustained by her, filed a cross libel against the Conemaugh for $3,000 damages, sustained by the New York in the collision. No answer was filed to this cross libel.

The district court held the New York to have been solely in fault, and passed a decree against her. The circuit court of appeals for the sixth circuit reversed the decree of the district court on the ground that the Conemaugh had been solely in fault, and adjudged that her owners pay the owners of the New York, petitioners here, the damages sustained by the New York. The case was then brought here by certiorari, and both vessels were pronounced to have been in fault. The decrees of the lower courts were reversed and the damages caused by the collision ordered to be divided. The following is the material part of the judgment and mandate:

"On consideration whereof, it is now ordered, adjudged, and decreed by this court that the decree of the said United States circuit court of appeals in the cause be and the same is hereby reversed; the claimant of the Conemaugh and the claimant of the New York each to pay one half of all costs in this cause.

"And that the said Erie & Western Transportation Company recover against the Union Steamboat Company $276.75 for one half of the costs herein expended, and have execution therefor.

"And it is further ordered that this cause be and the same is hereby remanded to the district court of the United States for the eastern district of Michigan, with direction to enter a decree in conformity with the opinion of this court, with interest *from [365] July 3, 1896, until paid, at the same rate per annum that decrees bear in the courts of the state of Michigan."

Upon the return of the case to the district court, that court made its decree in favor of the several intervening underwriters upon the cargo for their respective claims,

† This case is reported by the Official Reporter under the title of "The Conemaugh."

NOTE.—*On repeal of statutes by implication* —see notes to State v. Massey (N. C.) 4 L. R. A. 309; First Nat. Bank v. Weidenbeck, 38 C. C. A. 136; and United States v. 356 Caddies of Tobacco, 20 L. ed U. S. 235.

with interest at 7 per cent from July 3, 1896. The court also decreed that the owners of the cargo and their underwriters, other than the interveners, by reason of the collision, sustained damages in the sum of $19,627.67, "for which the said Erie & Western Transportation Company appears in this suit as trustee only." And it was adjudged and decreed "that said trustee recover from the said Union Steamboat Company and its surety, in trust, for the said owners of and underwriters on cargo, the aforesaid sum of $19,627.67, with interest thereon at the rate of 7 per cent per annum from July 3, 1896, until paid, and that it have execution therefor."

Judgment was also given in favor of the Conemaugh for one half of the damages of that steamer, less one half of the damages of the New York, with interest.

At the hearing in the district court on the return of the mandate the petitioner "submitted a decree to the effect that both vessels were in fault for the collision, and that the damage resulting therefrom be equally divided between the Erie & Western Transportation Company, owner of the Conemaugh, and the Union Steamboat Company, owner of the New York; that such damages amounted in all to the sum of $74,319.49, of which certain intervening underwriters of the cargo were entitled to, and recovered from the steamboat company, $19,841.56; that the transportation company, as trustees for the underwriters and owners of the cargo of the Conemaugh, not intervening, suffered damages in the sum of $19,627.67; that, as owner of the propeller, it had suffered damages in the sum of $30,508.46, aggregating the sum of $50,136.13; that the transportation company recover of the petitioner one half of $50,136.13, less one half the sum of $19,841.56, decreed to be paid to the intervening petitioners, etc.

"The court, however, declined to enter this decree; refused to permit the petition-
366 er to recoup any sum that it might pay to the owners or underwriters of the cargo of the Conemaugh, from any sum that was due from the steamboat company for damages sustained by the Conemaugh, so that such company was compelled to pay of the total damages about 76 per cent instead of 50 per cent." 178 U. S. 317, 318, 44 L. ed. 1084, 20 Sup. Ct. Rep. 904.

The action of the district court was affirmed by the circuit court of appeals (47 C. C. A. 232, 108 Fed. 102), and the case was then brought here.

*Mr.* **C. E. Kremer** argued the cause, and, with *Messrs. F. C. Harvey* and *W. O. Johnson*, filed a brief for petitioner:

Any provision of an act, directly or indirectly relating to the subject expressed in the title, and having a natural connection therewith, and not foreign thereto, should be embraced by it.

*Ryerson* v. *Utley*, 16 Mich. 278.

Under the Constitution of Michigan the title of an act is significant, and usually controlling in determining its scope.

*McKellar* v. *Detroit*, 57 Mich. 158, 58 Am. Rep. 357, 23 N. W. 621.

The body of the act must reasonably harmonize with the title.

*Booth* v. *Eddy*, 38 Mich. 245; *Bates* v. *Nelson*, 49 Mich. 459, 13 N. W. 817; *Northwestern Mfg. Co.* v. *Chambers*, 58 Mich. 381, 55 Am. Rep. 693, 25 N. W. 372; *McKellar* v. *Detroit*, 57 Mich. 158, 58 Am. Rep. 357, 23 N. W. 621.

*Mr.* **Harvey D. Goulder** argued the cause, and, with *Messrs. S. H. Holding* and *F. S. Masten*, filed a brief for respondents:

The stereotyped phrase of the mandate, "as according to right and justice and the laws of the United States ought to be had," did not authorize the district court to depart in any respect from the judgment of this court.

*Re Washington & G. R. Co.* 140 U. S. 91, 35 L. ed. 339, 11 Sup. Ct. Rep. 673; *Gaines* v. *Rugg*, 148 U. S. 228, *sub nom. Gaines* v. *Caldwell*, 37 L. ed. 432, 13 Sup. Ct. Rep. 611.

The district court could not revise or consider in any respect the decision, and was entirely without authority to admit "new matter," had such been proffered, without leave of this court.

*Re Potts*, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520.

This was an admiralty cause brought to this court on writ of certiorari, and treated as if on appeal; all questions presented in the case were here decided, and the decree entered in pursuance of the mandate was the decree of this court.

*Stewart* v. *Salamon*, 97 U. S. 361, 24 L. ed. 1044; *Humphrey* v. *Baker*, 103 U. S. 736, 26 L. ed. 456; *Southard* v. *Russell*, 16 How. 547, 14 L. ed. 1052.

There was no power in the district court to allow new pleading, amendments, or rehearing; and silence upon any point involved in the case would have to be taken as a denial of the point.

*Re Washington & G. R. Co.* 140 U. S. 91, 35 L. ed. 339, 11 Sup. Ct. Rep. 673; *Texas & P. R. Co.* v. *Anderson*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843.

An appeal from a decree entered by the court below in accordance with the mandate of the appellate court cannot be maintained.

*Aspen Min. & Smelting Co.* v. *Billings*, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4.

*Mr.* **Wilhelmus Mynderse** argued the cause and filed a brief for interveners:

The only proceedings now under review are those taken under the mandate issued out of this court January 22, 1900.

*Sibbald* v. *United States*, 12 Pet. 488, 9 L. ed. 1167; *The Lady Pike*, 96 U. S. 461, *sub nom. Pearce* v. *Germania Ins. Co.* 24 L. ed. 672; *The Nuestra Señora de Regla*, 108 U. S. 101, *sub nom. United States* v. *The Nuestra Señora De Regla*, 27 L. ed. 666, 2 Sup. Ct. Rep. 287; *Kreiger* v. *Shelby R. Co.* 125 U. S. 39, 31 L. ed. 675, 8 Sup. Ct. Rep. 752; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed.

680, 17 Sup. Ct. Rep. 300; *Thompson* v. *Maxwell Land Grant & R. Co.* 168 U. S. 451, 42 L. ed. 539, 18 Sup. Ct. Rep. 121; *Ex parte Union S. B. Co.* 178 U. S. 317, 44 L. ed. 1084, 20 Sup. Ct. Rep. 904.

The repeal of a statute is not to be effected by inference or by implications, but only by express legislation.

*Rosencrans* v. *United States*, 165 U. S. 257, 41 L. ed. 708, 17 Sup. Ct. Rep. 302.

While the title of an act should not be altogether ignored, and may afford a key to unlock the meaning of a very doubtful statute, yet it cannot be used to extend the provisions of an act so as to include within its scope that which, without such aid, would plainly not be included.

*Hadden* v. *Barney*, 5 Wall. 107, 18 L. ed. 518; *Goodlett* v. *Louisville & N. R. Co.* 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254; *United States* v. *Palmer*, 3 Wheat. 610, 4 L. ed. 471.

*Mr. F. H. Canfield* filed a brief for underwriters who originally intervened in the district court:

Repeals by implication are not favored; the rule being that there must be a positive repugnancy between the provisions of the new statute and those of the old, in order to work a repeal by implication.

*Rosencrans* v. *United States*, 165 U. S. 257, 41 L. ed. 708, 17 Sup. Ct. Rep. 302; *People* v. *Hanrahan*, 75 Mich. 622, 4 L. R. A. 751, 42 N. W. 1124; *Rice* v. *Hosking*, 105 Mich. 303, 63 N. W. 311; *Brown* v. *McCormick*, 28 Mich. 215; *Connors* v. *Carp River Iron Co.* 54 Mich. 168, 19 N. W. 938; *Lake Superior Ship Canal, R. & Iron Co.* v. *Aplin*, 79 Mich. 353, 44 N. W. 616; *Regents of University* v. *Auditor General*, 109 Mich. 134, 66 N. W. 956; *Wood* v. *United States*, 16 Pet. 342, 10 L. ed. 987; *Chew Heong* v. *United States*, 112 U. S. 549, 28 L. ed. 773, 5 Sup. Ct. Rep. 255; *Frost* v. *Wenie*, 157 U. S. 46, 39 L. ed. 614, 15 Sup. Ct. Rep. 532.

There is no inconsistency or conflict between a statute which, in terms, provides for interest on judgments or decrees, and one which fixes the rate of interest in matters of contract, and prescribes a penalty for usury. The two may well exist together in perfect harmony.

*Henderson's Tobacco*, 11 Wall. 652, *sub nom. United States* v. *356 Caddies of Tobacco*, 20 L. ed. 235; *United States* v. *Tynen*, 11 Wall. 92, 20 L. ed. 154; *South Carolina* v. *Stoll*, 17 Wall. 431, 21 L. ed. 654.

If the act is read without the title, no one would suppose that it was intended to include either judgments or decrees in chancery. The title of an act furnishes but little aid in its construction. It cannot extend its effect or meaning beyond the scope of the text or body of the act itself.

*Hadden* v. *Barney*, 5 Wall. 107, 18 L. ed. 518; *United States* v. *Church of the Holy Trinity*, 36 Fed. 304; *Wilson* v. *Spaulding*, 19 Fed. 304; *United States* v. *Palmer*, 3 Wheat. 610, 4 L. ed. 471; *Northern P. R. Co.* v. *Barden*, 46 Fed. 592; *Goodlett* v. *Louisville & N. R. Co.* 122 U. S. 391, 30 L. ed. 1230, 7 Sup. Ct. Rep. 1254.

The decisions of the supreme court of the state regard § 4865 as being still in force.

*Hayden* v. *Hefferan*, 99 Mich. 262, 58 N. W. 59; *Flint & P. M. R. Co.* v. *State Auditors*, 102 Mich. 500, 60 N. W. 773.

Mr. Justice **McKenna** delivered the opinion of the court:

There is one main and several subsidiary propositions asserted by petitioner. The main proposition is that in all cases of collision, if both vessels are in fault, the damages resulting are to be equally divided between the owners of the vessels.

The subsidiary propositions are that if one of the offending vessels pay more than half the damages to a third or innocent party she may recoup or set off such excess against any claim for damages which the other vessel may have without bringing in the other vessel as a codefendant under admiralty rule 59, or filing other pleadings than an answer to the libel. In such case it is insisted that all the parties are before the court. And further, that it is not necessary upon an appeal to the circuit court of appeals, or to this court, that the pleadings show a demand for recoupment,—the hearing in both courts being a trial *de novo*.

The main proposition asserted may be conceded. It was the basis of our decision when the case was here on the first certiorari *and determined the judgment rendered. [367] 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67. And if under some circumstances the other propositions could be applied (which is not necessary to decide), they cannot be under the circumstances of this case. The petitioner made no claim for a division of damages upon the original trial of the case. It asserted its own innocence and the entire guilt of the Conemaugh, and submitted that issue for judgment. It sought to escape all liability, not to divide liability, and on the issues hence arising judgments were entered against it, not only for the Conemaugh, but for the cargo owners, some having intervened, others still being represented by the Conemaugh. Petitioners maintained the same attitude in the circuit court of appeals and in this court. After the decision in this court it changed its attitude, and for justification says it had no earlier opportunity to do so. It urges that the decision of the district court was completely against it; the decision of the circuit court completely for it; and that the judgment from which its right of recoupment arose was rendered by this court.

But the controversy as presented by the pleadings was not only between the Conemaugh and the New York, but between the latter and cargo, and this court did not disturb the judgment obtained by the cargo owners against the New York. Explaining our decision we said:

"The only questions decided were as to the respective faults of the two vessels, and the claim of the underwriters upon the Conemaugh's cargo, that they were entitled

to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh was also in fault for the collision. This claim was sustained, and directions given to enter a decree in conformity to the opinion of this court."

The decree against it, the New York now seeks to shift in part to the owners of the Conemaugh; indeed, not to shift it, but virtually to vacate it and put the claims of the cargo owners into controversy with the Conemaugh. This, we think, should not be done. The cargo owners' judgments were affirmed by this court, as we have seen, and they are none the less entitled to them under the circumstances of this record, although as to some of them they were rep-
[368] resented by the Conemaugh. The *New York, having been in fault, was responsible to the cargo, and if, as between her and the Conemaugh, she have a claim for recoupment, the way is open to recover it. We think that the district court rightly construed our mandate.

2. Our mandate directed that a decree be entered "with interest from July 3, 1896, until paid at the same rate per annum that decrees bear in the courts of the state of Michigan." The district court and the circuit court of appeals found the rate to be 7 per cent. This is assigned as error.

The statute which provided for interest on judgments and decrees in Michigan at 7 per cent was enacted in 1838, and has been carried forward with amendments into the various compilations of the statutes, and appears as § 4865, Compiled Laws of Michigan of 1897. It is as follows:

"Interest may be allowed and received upon all judgments at law, for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money, whatever may be the form or cause of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of 7 per centum per annum: *Provided*, That on a judgment rendered or any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument not exceeding 10 per centum."

This section, it is insisted by appellants, was repealed by a statute passed in 1891, which statute was entitled "An Act to Regulate the Interest of Money on Account, Interest on Money Judgments, Verdicts," etc., and provided as follows:

"Sec. 1. The people of the state of Michigan enact: That the interest of money shall be at the rate of $6 upon $100 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding 8 per cent per annum: *Provided*, That this act shall not apply to existing contracts, whether the same be either due, not due, or part due."

*"Sec. 4. All acts or parts of acts contra- [369]
vening the provisions of this act are hereby repealed."

Subsequently, the rate was reduced to 5 per cent by a statute passed September 22, 1899, which reads as follows:

"Sec. 1. That § 1 of act numbered 156 of Public Acts of 1891, entitled, 'An Act to Regulate the Interest of Money, on Account, Interest on Money Judgments, Verdicts,' etc., the same being compiler's § 1594 of volume 3 of Howell's Annotated Statutes, and § 4897 be, and the same is hereby, amended to read as follows:

"Sec. 1. The people of the state of Michigan enact: That the interest of money shall be at the rate of $5 upon $100 for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding 7 per cent per annum: *Provided*, That this act shall not apply to existing contracts, whether the same be either due, not due, or part due."

According to its title the act is one to regulate the interest of money on account and interest on money judgments. Section 1, however, provides only "that the *interest of money* shall be at the rate of $5 upon $100 for a year." It is urged, however, that § 1 must take meaning from the title of the act, and that by "interest of money" is meant "interest of money on account" and "interest on money judgments," and having that meaning it repeals § 4865, *supra*. But money on account and money judgments are distinguished in the title, and it is hard to suppose that the former was intended to include the latter in the body of the act. They are distinguished also in the prior statutes. "Interest of money" was provided for in § 3 of the act of 1838 in substantially the same language as in the acts of 1891 and 1899, and it is certain that it was not intended thereby to include interest on judgments and decrees. The *latter were provided for in § 8 of the [370]
act of 1838, which became § 4865, and as such has been given a place in the compiled laws of the state ever since.

If it is anomalous, as urged by counsel and as observed by the circuit court of appeals, for legal interest in the state to be fixed at 5 per cent, and judgments left to bear 7 per cent, we cannot correct the anomaly. Nor can we regard the words "interest of money" to have been suddenly given a meaning in 1891 or 1899 different from that which they had borne for over fifty years in the statutes of the state with the intention to work by implication the repeal of a provision with which for the same length of time they were regarded as consistent.

*Decree affirmed.*

HARRIET M. ZANE, *Petitioner*,
*v.*
COUNTY OF HAMILTON, ILLINOIS.

(See S. C. Reporter's ed. 370-383.)

*Contracts—impairment of obligation—purchase in reliance on the decisions of state courts.*

A purchaser of county bonds issued in aid of a railroad, under the supposed authority of the act incorporating the road, which is subsequently held unconstitutional by the state courts because the provisions for the transfer to the railroad company of municipal subscriptions in aid of another railroad were not within its title, has no contract rights protected by the Federal Constitution against impairment because the purchase was made on the faith of prior decisions that municipal subscriptions to railroad stock were so far germane to railroad incorporation as not to require specific mention in the title of an act providing for the incorporation of a railroad.

[No. 115.]

*Argued and submitted December 5, 1902. Decided April 6, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Illinois sustaining a demurrer to a declaration in an action on municipal bonds issued in aid of a railroad company. *Affirmed.*

See same case below, 43 C. C. A. 416, 104 Fed. 63.

The facts are stated in the opinion.

*Mr.* **George A. Sanders** argued the cause and filed a brief for petitioner.

*Mr.* **J. M. Hamill** submitted the cause for respondent.

Contentions of counsel sufficiently appear in the opinion.

Mr. Justice **McKenna** delivered the opinion of the court:

This is an action brought in the United States circuit court for the southern district of Illinois on five coupon bonds which were issued to the St. Louis & Southeastern Railway Company, under a statute of the state of Illinois. The petitioner alleges she is a bona fide purchaser of the bonds. A copy of the bonds is inserted in the margin.† The following is a copy of the coupons attached to the bonds:

*35.00. 35.00[379]
McLeansboro, Hamilton County, Illinois.
January 1st, 1872.

The County of Hamilton, in the State of Illinois, promises to pay the sum of thirty-five dollars on the first day of January, 1892, lawful money of the United States of America, being six months' interest on bond No. 46 for one thousand dollars, issued on

†United States of America.
No. 86. $1,000.00
Bond of
Hamilton County.
Interest seven per cent. Payable semiannually.
State of Illinois.

Know all men by these presents, that the county of Hamilton, in the state of Illinois, acknowledges itself indebted and firmly bound to the St. Louis & Southeastern Railway Company, or bearer, in the sum of one thousand dollars, lawful money of the United States of America, which sum said county, for value received, promises to pay the said company, or bearer, in the city and state of New York, twenty years after date, payable at any time before this bond becomes due after five years at the pleasure of said county of Hamilton, with interest thereon from the date hereof at the rate of seven per cent per annum, payable semiannually on the first days of January and July in each year, on the presentation and surrender, at the place in said city of New York where the treasurer of the state of Illinois pays the interest and debt of said state, of the coupons hereto attached as they severally become due.

This bond is one of two hundred of like tenor and amount, of same issue, and it is issued under and by virtue of the authority given by a majority of all the legal voters in said county, by their votes, at an election held in said county, pursuant to law, on the third day of November, A. D. 1868, and also by the authority given by the provisions of an act of the general assembly of the state of Illinois, in force March 10, A. D. 1869, entitled "An Act to Incorporate the St. Louis & Southeastern Railway Company."

This bond is also issued under the provisions of an act of the general assembly of the state of Illinois, in force April 16, A. D. 1869, entitled "An Act to Fund and Provide for the Payment of the Railroad Debts of Counties, Townships, Cities, and Towns."

This bond is issued in part payment of a subscription made by said county under and by virtue of the authority aforesaid, to the capital stock of the St. Louis & Southeastern Railway Company in the sum of two hundred thousand dollars.

In testimony whereof, the said county of Hamilton has executed this bond by the county judge of said county, under the order of the county court of said county, signing his name hereto, in open court, and by the clerk of said court, in obedience to the order thereof, attesting the same and affixing hereto the seal of the said court, in open court.

Done at the courthouse at McLeansboro, in said county, on this, the 23d day of October, Anno Domini 1871.

[SEAL.]

T. B. Steele,
County Judge of Hamilton County, Ill.

NOTE.—*As to what laws are void as impairing obligation of contracts*—see notes to Franklin County Grammar School v. Bailey (Vt.) 10 L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

*As to change of decision of state court as impairing obligation of contract*—see notes to Los Angeles v. Los Angeles City Water Co. 44 L. ed. U. S. 886, and Allen v. Allen (Cal.) 16 L. R. A. 646.

subscription to the St. Louis & Southeastern Railway Company.

This coupon is payable in the city of New York.

J. W. Marshall, Clerk.

[380] *The bonds were a part of an issue of two hundred of like tenor and amount, save as to dates of issue, registration and numbers. There was a general demurrer filed to the declaration, which was sustained, and the case was taken to the circuit court of appeals for the seventh circuit. That court affirmed the judgment of the circuit court. 43 C. C. A. 416, 104 Fed. 63.

The question presented is the validity of the statute of the state under which the bonds were issued. The circuit court of appeals followed the case of *People ex rel. Standerfer* v. *Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280, and (quoting from the case) held that the statute was invalid "because § 20 of the act mentioned was void, as being in violation of the provision of the Constitution of the state (art. 3, § 23) that 'no private or local law . . . shall embrace more than one subject, and that shall be expressed in the title.'"

It was alleged in the declaration, and the bonds recited, that they were issued under the provisions of an act of the general assembly of the state of Illinois, in force March 10, 1869, entitled "An Act to Incorporate the St. Louis & Southeastern Railway Company," and also, under the provision of an act in force April 16, 1869, entitled "An Act to Fund and Provide for the Payment of Railroad Debts of Counties, Townships, Cities, and Towns."

The act of April 16, 1869, was a mere registration act, and, it is conceded, conferred no authority to issue the bonds. Ample authority, however, it is insisted, was given by the act of March 10, 1869. Secs. 15, 16, and 17 provided for the subscription by counties and cities and incorporated towns to the stock of the company, and the terms of issue and payment of the bonds, and § 20 provides as follows:

"And the said company may lease or purchase, upon such terms as may be agreed upon, any other railroad or part of railroad, either wholly or partially constructed, which may constitute or be adopted as part of their line; and by such lease or purchase they shall acquire, and become vested with, all the rights and franchises pertaining to said road or part of road in the right of way, construction, maintenance, and working thereof. And the county court of Gallatin county is hereby authorized and empowered to subscribe to the capital stock of this company the $100,000 or any part thereof heretofore voted by a majority of the legal voters of said county to the Shawneetown branch of the Illinois Central Railroad Company. And the county court of Hamil-[381] ton county is hereby *authorized and empowered to subscribe to the capital stock of this company the $200,000 or any part thereof heretofore voted by a majority of the legal voters of said county to the Shawneetown branch of the Illinois Central Railroad Company. And the county court of Jefferson county is hereby authorized and empowered to subscribe to the capital stock of this company the $100,000 or any part thereof voted by a majority of the legal voters of said county to the Mount Vernon Railroad Company.

"And it shall not be necessary to submit the question of making the several subscriptions in this section mentioned to the vote of the legal voters of said respective counties: *Provided*, That nothing herein shall be so construed as to prevent either of the counties mentioned in this section subscribing any other or larger amounts to the capital stock of this company than the amount mentioned in this section.

"This act shall be deemed a public act and shall be liberally construed for all purposes therein expressed and declared, and shall be in force from and after its passage."

As we have seen, this act was declared by the supreme court of the state in *People ex rel. Standerfer* v. *Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280, to be in violation of the Constitution of the state, and that the bonds issued under it were void. This decision, plaintiff in error contends, is contrary to prior decisions interpreting the Constitution of the state, and under the faith of which she purchased the bonds; and she insists that a contract hence arose which is protected by the Constitution of the United States. To support the contention a number of decisions are cited, but we do not consider it necessary to review them. The conclusion of plaintiff in error is but a deduction from them, and we need only consider the more direct cases.

In 83 Ill. 436, it was decided that the provisions of the Constitution, that "no private or local *law. . . . shall embrace more [382] than one subject, and that shall be expressed in its title," did not require that the subject of the bill should be specifically and exactly expressed in the title, and it was concluded that when the title calls attention to the subject of the bill, although in general terms, it fulfills the requirement of the Constitution. In *Ottawa* v. *People ex rel. Caton*, 48 Ill. 233, it was held that the "adjuncts of the subject are not required to be expressed, or the *modus operandi*."

In *Belleville & I. R. Co.* v. *Gregory* (1853) 15 Ill. 20, 58 Am. Dec. 589, and *Schuyler County* v. *People ex rel. Rock Island & A. R. Co.* (1860) 25 Ill. 181, it was held that a subscription to the stock of a railroad company by a municipal corporation was so far germane to the incorporation of the railroad as not to require specific mention in the title of an act providing for the incorporation of such road. But whatever may be said of the reasoning of those cases, the contention of plaintiff in error goes beyond it. If an incorporation of a railroad and a subscription to its stock are parts of the same subject, the incorporation of one road and the transfer to it of the stock authorized to be taken in another road are certainly not parts of the same subject, more particularly

when the subscription to the stock of the latter depended upon and was based upon the vote of the people of the county. And this the supreme court decided in *People ex rel. Standerfer* v. *Hamill*, 134 Ill. 666, 17 N. E. 799, 29 N. E. 280. It was also decided that the act of 1869 was a private and local act. The court said:

"It is seen the act of March 10, 1869, to which reference is made as giving the requisite authority to the county to subscribe for the stock and issue the bonds, is 'An Act to Incorporate the St. Louis & Southeastern Railroad Company.' That is all it purports to be by its title. The Constitution of 1848, under which this act was passed, contained a restriction that 'no private or local law which may be passed by the general assembly shall embrace more than one subject, and that shall be expressed in the title.' This is a private or local act, and although the subscribing by counties, etc., to the capital stock of the corporation thereby created [383] is germane to the object *expressed in the title (*Belleville & I. R. Co.* v. *Gregory*, 15 Ill. 20, 58 Am. Dec. 589; *Virden* v. *Allan*, 107 Ill. 505), the diversion to that corporation of a subscription theretofore authorized by a vote of the people to be made to a different corporation is a wholly different thing. That, it is to be presumed, affects adversely the corporation from which the subscription voted is to be diverted, and is therefore clearly not germane to the title of the act, and § 20 must therefore be held to have been inhibited by the Constitution of 1848, and is for that reason void and of no effect. *Lockport* v. *Gaylord*, 61 Ill. 276; *Middleport* v. *Ætna L. Ins. Co.* 82 Ill. 562."

It was held in *Belleville & I. R. Co.* v. *Gregory*, 15 Ill. 20, 58 Am. Dec. 589, that the provision of the Constitution of that state could not be evaded by declaring a private act to be a public one.

From these views it follows that the bonds of plaintiff in error, having been illegally issued, do not constitute a contract which is protected by the Constitution of the United States.

*Judgment affirmed.*

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## DETROIT, FORT WAYNE, & BELLE ISLE RAILWAY, *Plff. in Err.*, *v.* CHASE S. OSBORN, Commissioner of Railroads.

(See S. C. Reporter's ed. 383-391.)

*Error to state court—Federal question—constitutional law—due process of law—equal protection of laws—validity of order requiring safety appliances at grade crossings.*

1. A decision of a state court refusing a petition for a writ of mandamus, in which relator claimed and set up a right under the Constitution of the United States, is tantamount to the denial of that right, and is therefore reviewable in the Supreme Court of the United States.
2. Neither due process of law nor the equal protection of the laws is denied a street railway company by an order of the commissioner of railroads made and issued under Mich. Pub. Acts 1893, act No. 171, § 5, requiring such street railway to pay one half of the expense of constructing and maintaining safety appliances at a grade crossing of a steam railroad which was not built until after the street railway had been constructed.
3. An objection that a state statute violates the Federal Constitution because it does not provide for notice to those who may be affected by it is not available to a party who was in fact given notice, and who at the hearing objected to the action proposed to be taken under such statute.

[No. 139.]

*Argued January 15, 1903. Decided April 6, 1903.*

IN ERROR to the Supreme Court of the State of Michigan to review a judgment which denied a petition for a writ of mandamus to vacate an order of a railroad commissioner requiring a street railway company to pay a portion of the expense of constructing and operating safety appliances at a grade crossing of a steam railroad. *Affirmed.*

See same case below, 127 Mich. 219, 86 N. W. 842.

Statement by Mr. Justice **McKenna:**

This case involves the legality of an order of the commissioner of railroads of the state of Michigan, requiring the plaintiff in error and the Union Terminal Association of Detroit, at their own cost and expense, to maintain and operate safety gates and derailing and signaling appliances at Clark avenue, in said city. The order is inserted in the margin.†

*The order was made and issued under act [385] 171 of the Public Acts of the state of 1893, § 5 of which provides as follows:

"The commissioner of railroads shall, as

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†State of Michigan, }
Office of the Commissioner of Railroads. }

*In Re* Application of The Common Council of the City of Detroit for Additional Protection at the Clark Avenue Crossing of the Tracks of the Union Terminal Association, in the City of Detroit, County of Wayne, Michigan.

Application having been received by the commissioner of railroads from the common council of the city of Detroit, Wayne county, Michigan, for additional protection at the Clark avenue crossing of the tracks of the Union Terminal Association in said city of Detroit, Wayne county, Michigan;

And after a personal inspection of the premises aforesaid, and after hearing representations of the city officials of the city of Detroit, as well as the arguments of the representatives

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NOTE.—*On writs of error from United States Supreme Court to state courts*—see notes to Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Kipley v. Illinois, 42 L. ed. U. S. 998; and *Re* Buchanan, 39 L. ed. U. S. 884.

*As to the right of a railroad company to com-*

soon as possible after the passage of this act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incidental thereto between the companies affected, as he may deem just and reasonable."

The statute and order are attacked as depriving the plaintiff in error of its property without due process of law, because compliance with the order "will involve the expenditure of a large sum of money; first, in the construction of the said safety devices, and, if the same are constructed, in the maintenance and repair thereof."

The plaintiff in error is a street railroad company incorporated under the laws of Michigan, and operates a railroad on certain streets of the city of Detroit, including Clark avenue. It succeeded in ownership and operation a company known as the Fort Street & Elmwood Avenue Railway, which was also a street railway corporation. The latter company was authorized to construct its road on Clark avenue, and under its grant did construct and operate its road thereon. "At the time the track was constructed" (we quote from the opinion of the supreme court of the state) "on Clark avenue there was no railroad, or highway, street, lane, or alley, or crossing of any kind over Clark avenue between Fort street and 886] the river *road. In 1882 or 1883 the Wabash Railroad constructed a single track across Clark avenue and across petitioner's tracks. Up to that time there had been no crossing over Clark avenue, between Fort street and the river road, of any kind,—either that of a railroad or a public highway, a private way, road, street, or alley. In the year 1893, or thereabouts, the union station was opened at the corner of Third and Fort streets, in Detroit; and since that time said station has been used jointly by the Wabash, the Detroit, Lansing, & Northern, the Flint & Pere Marquette, the Detroit & Lima Northern, and the Canadian Pacific railroads as a terminal point, the tracks over Clark avenue at this point having been increased from one to three to accommodate the increased traffic. These tracks are used as approaches to the union station, and incoming and outgoing trains and cars of all the foregoing roads, except the Canadian Pacific Railroad pass over said tracks. There are thirty-eight regular daily passenger trains crossing Clark avenue upon these tracks. Besides this, the Canadian Pacific uses the station as an eastern terminus, connecting with the other roads for purposes of through east and west traffic."

In 1893 the legislature of the state passed the act hereinbefore set out, and under its authority the defendant in error made the order complained of.

The case was submitted upon the petition of relator (plaintiff in error) and the answer of respondent (defendant in error), and the mandamus prayed for denied. 127 Mich. 219, 86 N. W. 842. This writ of error was then sued out.

*Mr.* **John C. Donnelly** argued the cause, and, with *Mr. Michael Brennan*, filed a brief for plaintiff in error:

Where a public officer is given authority to determine that certain things should be done in the interests of public safety, and is given the further authority to impose the cost thereof upon certain individuals who are bound by his action, the matter is quasi-judicial in its character; and if the law does

of the said railroad company above named in relation thereto, and having decided after due deliberation that the public interests required said additional protection at the said crossing;

Now, therefore, by authority vested in me by law, it is hereby ordered:

That within sixty days from date hereof, you, the said Union Terminal Association Railway Company, cause to be constructed and thereafter operated and maintained safety gates, and derailing and signaling appliances to be operated day and night by a watchman from a tower. Said tower to be constructed at the best point of vision at the said crossing, and so constructed that the said operator may have plain view of movements of all trains or cars on both of the respective lines. Derailers shall be provided and placed in the tracks of the Fort Wayne & Belle Isle Railway, not less than 75 feet from clearance point of crossing, and signals shall be placed on the tracks of the Union Terminal Association at a distance of not less than 600 feet from said crossing. Said derailers and signals to be operated by levers in said tower, and such levers to be properly interlocked.

And it is further ordered that cost and expense of the construction, maintenance, and operation of said gates, tower, and derailing and signaling appliance shall be borne by the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company, equally, share and share alike. This appliance to be constructed in accordance with plans to be submitted to and approved by the commissioner of railroads within thirty days from date hereof, and such appliance to be further approved by the commissioner of railroads before being put into use. This order is subject to modification at any time when in the opinion of the commissioner of railroads the public safety will be more effectually secured.

*pensation for laying street railway across railroad track at a street crossing*—see note to Chicago, B. & Q. R. Co. v. West Chicago Street R. Co. (Ill.) 29 L. R. A. 485.

*As to what constitutes due process of law*—see Kuntz v. Sumption (Ind.) 2 L. R. A. 655, and note; *Re* Gannon (R. I.) 5 L. R. A. 359, and note; Ulman v. Baltimore (Md.) 11 L. R. A. 224, and note; and Gilman v. Tucker (N. Y.) 13 L. R. A. 304, and note. And see notes to People v. O'Brien (N. Y.) 2 L. R. A. 255; Pearson v. Yewdall, 24 L. ed. U. S. 436; and Wilson v. North Carolina, 42 L. ed. U. S. 865.

*On notice and hearing required to constitute due process of law* — see notes to Kuntz v. Sumption (Ind.) 2 L. R. A. 657; Chauvin v. Valiton (Mont.) 3 L. R. A. 194; and Ulman v. Baltimore (Md.) 11 L. R. A. 225.

*As to constitutional equality of privileges, immunities, and protection*—see Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. 579, and note.

not in express terms, or by necessary implication arising from the language of the act itself, grant to the party against whom the judgment is rendered the right to a hearing before condemnation, such a proceeding and judgment amount to a deprivation of property without due process of law, within the meaning of the constitutional provision.

*Garvin* v. *Daussman*, 114 Ind. 429, 16 N. E. 826; *Kuntz* v. *Sumption*, 117 Ind. 1, 2 L. R. A. 655, 19 N. E. 474; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Ulman* v. *Baltimore*, 72 Md. 587, 11 L. R. A. 224, 20 Atl. 141, 21 Atl. 709; *Baltimore* v. *Scharf*, 54 Md. 499, 39 Am. Rep. 397; *Baltimore* v. *Johns Hopkins Hospital*, 56 Md. 1; *Spencer* v. *Merchant*, 125 U. S. 345, 31 L. ed. 763, 8 Sup. Ct. Rep. 921; *Whiteford Twp.* v. *Phinney*, 53 Mich. 130; *Paulsen* v. *Portland*, 149 U. S. 30, 37 L. ed. 637, 13 Sup. Ct. Rep. 750; *Railroad Tax Cases*, 13 Fed. 722, 8 Sawy. 238; *Sonoma County Tax Case*, 8 Sawy. 312, 13 Fed. 789; *Burns* v. *Multnomah R. Co.* 8 Sawy. 543, 15 Fed. 183; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 410; *Seifert* v. *Brooks*, 34 Wis. 443; *State ex rel. Flint* v. *Fond du Lac*, 42 Wis. 287.

According to a fundamental principle of law, the railroad seeking an intersection must make compensation for all damages and loss that may result therefrom.

8 Am. & Eng. Enc. Law, p. 351; Opinion by Mr. Justice Brewer, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 259, 41 L. ed. 994, 17 Sup. Ct. Rep. 992; *Illinois C. R. Co.* v. *Bloomington*, 76 Ill. 447.

A street railway which has been granted a franchise to occupy a public street acquires a right to use the same in common with other members of the traveling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude; and if it is built across a highway, it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be if such railroad were not built across it at all.

*Chicago & C. Terminal R. Co.* v. *Whiting, H. & E. C. Street R. Co.* 139 Ind. 297, 26 L. R. A. 337, 38 N. E. 604; *Chicago, B. & Q. R. Co.* v. *West Chicago Street R. Co.* 156 Ill. 255, 29 L. R. A. 485, and note, 40 N. E. 1008; *New York, N. H. & H. R. Co.* v. *Bridgeport Traction Co.* 65 Conn. 410, 29 L. R. A. 367, 32 Atl. 953; *Chicago, B. & Q. R. Co.* v. *Steel*, 47 Neb. 741, 66 N. W. 830; *Du Bois Traction Pass. R. Co.* v. *Buffalo, R. & P. R. Co.* 149 Pa. 1, 24 Atl. 179; *Detroit City R. Co.* v. *Mills*, 85 Mich. 634, 48 N. W. 1007; *Nichols* v. *Ann Arbor & Y. Street R. Co.* 87 Mich. 369, 16 L. R. A. 371, 49 N. W. 538; Mr. Justice Cooley in *Grand Rapids & I. R. Co.* v. *Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

*Mr.* **Fred A. Maynard** argued the cause, and, with *Mr. Horace M. Oren*, filed a brief for defendant in error:

This court has no jurisdiction to review the judgment rendered by the supreme court of Michigan in this case.

*Harrison* v. *Morton*, 171 U. S. 38–47, 43 L. ed. 63–66, 18 Sup. Ct. Rep. 742; *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Simmerman* v. *Nebraska*, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; *California Powder Works* v. *Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Fowler* v. *Lamson*, 164 U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; *Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718; *Miller* v. *Cornwall R. Co.* 168 U. S. 131, 42 L. ed. 409, 18 Sup. Ct. Rep. 34; *Chappell Chemical & Fertilizer Co.* v. *Sulphur Mines Co.* 172 U. S. 465, 43 L. ed. 517, 19 Sup. Ct. Rep. 265; *New Orleans Waterworks Co.* v. *Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *Clark* v. *Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 2, 113; *De Saussure* v. *Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Endowment Benev. Asso.* v. *Kansas*, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; *Church* v. *Kelsey*, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897; *Kennebec & P. R. Co.* v. *Portland & K. R. Co.* 14 Wall. 25, 20 L. ed. 850; *Rector* v. *Ashley*, 6 Wall. 142, 18 L. ed. 733; *Gibson* v. *Chouteau*, 8 Wall. 314, 19 L. ed. 317; *Klinger* v. *Missouri*, 13 Wall. 257, 20 L. ed. 635; *Detroit City R. Co.* v. *Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811.

It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of the Supreme Court to review their decisions, except when specially authorized so to do.

*Commercial Bank* v. *Buckingham*, 5 How. 317, 12 L. ed. 169; *Adams* v. *Preston*, 22 How. 473, 16 L. ed. 273; *Congdon* v. *Goodman*, 2 Black, 574, 17 L. ed. 257; *Smith* v. *Adsit*, 16 Wall. 185, 21 L. ed. 310; *Klinger* v. *Missouri*, 13 Wall. 257, 20 L. ed. 635; *Murray* v. *Gibson*, 15 How. 421, 14 L. ed. 755; *Nichol* v. *Levy*, 5 Wall. 433, 18 L. ed. 596.

And this is true, although the position of the state court is an unsound one.

*De Saussure* v. *Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053.

This court supervises decisions of state courts only when a Federal question arises, and, of its own motion, will deny its jurisdiction unless it affirmatively appears on the face of the record, although neither party makes the point in argument.

*King Iron Bridge & Mfg. Co.* v. *Otoe County*, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552.

The bare averment of a Federal question is not, in all cases, sufficient. It must not be wholly without foundation.

*Millingar* v. *Hartupee*, 6 Wall. 258, 18 L. ed. 829; *Hamblin* v. *Western Land Co.* 147 U. S. 532, 37 L. ed. 268, 13 Sup. Ct. Rep. 353; *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep.

142; *St. Louis G. & Ft. S. R. Co.* v. *Missouri*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; *Wilson* v. *North Carolina*, 169 U. S. 586–595, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; *St. Paul, M. & M. R. Co.* v. *St. Paul & N. P. R. Co.* 15 C. C. A. 167, 32 U. S. App. 372, 68 Fed. 11.

There was a waiver of notice by appearance.

2 Lewis, Em. Dom. § 379; *East Saginaw & St. C. R. Co.* v. *Benham*, 28 Mich. 459; *Dunning* v. *Township Drain Comr.* 44 Mich. 519, 7 N. W. 239; *Soller* v. *Brown Twp.* 67 Mich. 422, 34 N. W. 888.

Railroad corporations may be compelled to adopt such appliances and make such additions or changes in their works or property, and take such precautions, as are necessary to the public safety.

*New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 566, 38 L. ed. 272, 14 Sup. Ct. Rep. 437; *New York & N. E. R. Co.'s Appeal*, 58 Conn. 532, 20 Atl. 670.

The rule of no additional servitude is restricted to the case where the street railroad is within the corporate limits of a city and used solely for carrying passengers.

*Taylor* v. *Bay City Street R. Co.* 80 Mich. 77, 45 N. W. 335; *Detroit City R. Co.* v. *Mills*, 85 Mich. 634, 48 N. W. 1007; *Nichols* v. *Ann Arbor & Y. Street R. Co.* 87 Mich. 361, 16 L. R. A. 371, 49 N. W. 538; Booth, Street Railways, §§ 54, 222, 231; *Hannah* v. *Metropolitan Street R. Co.* 81 Mo. App. 78; *Southern R. Co.* v. *Atlanta R. & Power Co.* 111 Ga. 679, 51 L. R. A. 125, 36 S. E. 873; *La Crosse City R. Co.* v. *Higbee*, 107 Wis. 389, 51 L. R. A. 923.

This order of the railroad commissioner is a simple and just exercise of the police power of the state, delegated to him by the legislature.

*Pearsall* v. *Great Northern R. Co.* 161 U. S. 646–665, 40 L. ed. 838–844, 16 Sup. Ct. Rep. 705; *Gladson* v. *Minnesota*, 166 U. S. 427, 430, 41 L. ed. 1064, 1066, 17 Sup. Ct. Rep. 627; *Chicago & N. W. R. Co.* v. *Chicago*, 140 Ill. 309, 29 N. E. 1109–1111; *Chicago, M. & St. P. R. Co.* v. *Milwaukee*, 97 Wis. 418, 72 N. W. 1118; Tiedeman, Pol. Power, §§ 179, 194; Booth, Street Railways, 220–226; Joyce, Electric Law, § 477. See also Elliott, Roads and Streets, 2d ed. § 459.

It is entirely competent for the legislature to require of corporations every reasonable and expedient change in the method of operating their roads and conducting their business, which may be necessary to promote the security, convenience, and comfort of the public; and the expense may be imposed on the corporations owning and operating such roads within the state. Such statutes are not in conflict with any provision of the Federal Constitution.

*Grand Rapids* v. *Bennett*, 106 Mich. 528, 64 N. W. 585, and other Michigan cases cited therein; *Old Colony R. Corp.* v. *Plymouth County*, 14 Gray, 155; *Scarle* v. *Lackawanna & B. R. Co.* 33 Pa. 57; *Peoria & P. U. R. Co.* v. *Peoria & F. R. Co.* 105 Ill. 110; *Chicago & A. R. Co.* v. *Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799; *Commissioner of Parks* v. *Michigan C. R. Co.* 90 Mich. 385, 51 N. W. 447; *Commissioner of Parks* v. *Chicago, D. & C. G. T. Junction R. Co.* 91 Mich. 292, 51 N. W. 934; *Flint & P. M. R. Co.* v. *Detroit & B. C. R. Co.* 64 Mich. 370, 31 N. W. 281; *People* v. *Detroit, G. H. & M. R. Co.* 79 Mich. 474, 7 L. R. A. 717, 44 N. W. 934; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Chicago & N. W. R. Co.* v. *Chicago*, 140 Ill. 317, 29 N. E. 1109; *Charlotte, C. & A. R. Co.* v. *Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Maine C. R. Co.* v. *Waterville & F. R. & Light Co.* 89 Me. 328, 36 Atl. 453; *Fitchburg R. Co.* v. *Grand Junction R. & Depot Co.* 4 Allen, 198; *Pittsburg & C. R. Co.* v. *South-west Pennsylvania R. Co.* 77 Pa. 173; *State use of School Fund* v. *Wabash, St. L. & P. R. Co.* 83 Mo. 144.

The state, in the exercise of its police power, may impose a burden upon a street railway corporation that it cannot upon a private citizen, for the reason that the latter can use the highway without a license from the public authorities, while the corporation that wishes to use the street to make money for itself must obtain such license.

*State* v. *Canal & C. R. Co.* 50 La. Ann. 1189, 56 L. R. A. 287, 24 So. 265.

Mr. Justice **McKenna** delivered the opinion of the court:

1. A motion is made to dismiss the writ of error on the *ground that the record ex- [387] hibits no Federal question. The motion is denied. The plaintiff claimed and set up a right under the Constitution of the United States, and the decision of the supreme court of the state was tantamount to the denial of that right. *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173.

2. The argument of plaintiff in error on the merits is that it was the first to occupy Clark avenue; that at that time there was no public highway or street crossing at such avenue; that subsequently the steam railroads laid their tracks, the Wabash Railway Company being the first to do so, but installed no safety devices of any kind, "though it were the junior company;" that the tracks on the other railroads were subsequently constructed and are controlled by the Union Terminal Company. It is hence asserted that the plaintiff in error cannot be made liable for any part of the cost of safety devices, because it is the settled constitutional law of Michigan that its occupation constituted no additional burden upon the highway, but is simply a method of using the highway for the purpose of public travel and "in direct furtherance of the purpose for which the highway was established; that the street railroad company, in contemplation of the law, bears no different relation to the highway than that of any other person using the highway for the moving of vehicles or for any other method of public or private travel, and cannot, as between others using the highway for like purposes, be required alone to bear the expense of installing and maintaining safety devices at

steam railroad crossings designed for the protection of all the traveling public."

And, further, it is also a well-established principle of the constitutional law of Michigan, that a junior road seeking to cross another cannot shift any portion of the expense of maintaining safety devices without compensation, though the senior company did not insist upon the installation of the devices or compensation at the time the tracks of the junior company were constructed. In other words, it is asserted that the dangerous condition arose, and yet arises, from the steam railroads, and on them alone can the cost of safety devices be legally imposed.

[388] *3. It is also insisted that the law is unconstitutional because it does not provide for notice.

(1) It was conceded by the supreme court of the state that it was the law of the state that the compensation for the damages caused by crossing the tracks of a railroad by another railroad or by a highway included the cost of making the highway safe. But the court said: "An examination of these cases will show they were all cases where it was sought to obtain a right of way either for a railroad across a highway or for a highway across a railroad, or a crossing for one railroad over the right of way of another; and none of the cases relate to the question involved here, as to who shall bear the expense of additional safeguards ordered upon roads which have crossed each other for a long period of time."

And besides this element of time, the court said that there were other elements of damage which were either too remote or depended upon the relation of the roads to the state. Both elements are important. The conditions which exist to-day could not have been contemplated years ago, or be the measure of the rights and relations of the respective roads. Those rights and relations were necessarily determined at the time the crossings were made. What could not be foreseen could not have been made a ground of action, and if the growth of business and population can give rights to either of the bisecting roads it is not clear how the police power of the state can be limited in its control over either of them. The supreme court of the state recognized this, and fortified its views by Michigan cases.

In *Flint & P. M. R. Co.* v. *Detroit & B. C. R. Co.* 64 Mich. 350, 31 N. W. 281, the court in an elaborate opinion expressed the rules of compensation when the right of one road to cross the tracks of another was sought by condemnation proceedings. In that case compensation was claimed, not only for the use of the crossing, but for the cost of maintaining signals or a cross system, cost of a watchman, and cost of stopping trains. These items were rejected. There was some uncertainty in the evidence, and the items for maintaining signals or the crossing sys-[389] tem were disallowed on that ground, *but the court pointed out the difference between a "structural change in the property," for which compensation should be given, and those things which may be required by the legislature in the exercise of police regulations, as to which the roads "stand upon an equality before the law, and neither can levy tribute upon the other as a compensation for obedience to its requirements." And such regulations, it was observed, "are as binding upon an existing road as one newly organized." The court cited the case of *Massachusetts C. R. Co.* v. *Boston, C. & F. R. Co.* 121 Mass. 124, where Mr. Justice Gray, then chief justice of the supreme judicial court of Massachusetts, expressed the law as follows:

"A railroad corporation across whose road another railroad or highway is laid out has the like right as all individuals or bodies politic and corporate owning lands or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new condition. *Com.* v. *Boston & M. R. Co.* 3 Cush. 25, 53; *Old Colony & F. River R. Co.* v. *Plymouth County*, 14 Gray, 155; *Grand Junction R. Co.* v. *Middlesex County*, 14 Gray, 553. But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad. *Proprietors of Locks and Canals* v. *Nashua & L. R. Corp.* 10 Cush. 385, 392; *Boston & W. R. Corp.* v. *Old Colony R. Corp.* 12 Cush. 605, 611, and 3 Allen, 142, 146; *Old Colony & F. River R. Co.* v. *Plymouth County*, 14 Gray, 155."

It is, however, contended that a street railway has a different relation to a street than that which a steam railroad has; that the former "acquires a right to use the same in common with *other members of the trav-[390] eling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude, and if it is built across a highway it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be if such railroad were not built across it at all."

It may be that this difference is recognized as to abutting property owners or crossing railroads, but it cannot be recognized as limiting or affecting the power of the state to regulate the management of the roads in view of the danger of their operation to the public. Whether electricity be the motive power, or steam be the motive power, there is enough danger in the operation of either to justify regulation. The

record in this case shows that there are thirty-eight daily passenger trains crossing Clark avenue, and that the cars of the plaintiff in error pass every few minutes. It is manifest, as the supreme court of the state observed, that the crossing "is a place of unusual danger, not only to the passengers in steam cars, but also to the passengers in the electric cars," and that the danger is caused by both. In such situation the city is surely not powerless to act, nor before acting must it ascertain the exact quantum of damage caused by each road, and by that standard assign the cost of protecting the public. See *Maine C. R. Co.* v. *Waterville & F. R. & Light Co.* 89 Me. 328, 36 Atl. 453.

It is also objected to the order that it deprives plaintiff in error of the equal protection of the laws. The argument to support this contention is an extension of that which claims that the use of the street by the plaintiff in error "is merely an adaptation of the highway to the particular means of travel." And it is deduced that an electric street railway has an equality of rights with ordinary vehicles. That we think there is a difference between ordinary vehicles and cars propelled by electricity, which may be recognized by the state in the exercise of its police power, we have sufficiently indicated.

(2) The objection that the statute does [391] not provide for notice *seems to be made for the first time in this court. It is not mentioned in the majority opinion nor in the dissenting opinion. It is not particularized in the petition for the writ of error nor in the assignment of errors. In the petition for this writ of error it is recited that the plaintiff in error in its application for mandamus claimed that the order of the railroad commissioners was invalid because it deprived plaintiff in error of its property without due process of law and denied it the equal protection of the laws. And also recited that on the "issue framed therein said cause went to a final hearing." The cause was submitted on petition and answer, and the petition alleged "that notice was given by respondent to relator and the Union Terminal Association, and the hearing had, at which relator's representative objected to the making of said order." It is, therefore, not open to the plaintiff in error to complain that the statute does not provide for notice.

*Judgment affirmed.*

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UNITED STATES, *Plff. in Err.*,
*v.*
MISSION ROCK COMPANY.

(See S. C. Reporter's ed. 391-408.)

*Waters—control of state over tide lands—right to convey free from easement—naval reservation—construction of President's order.*

1. The state of California has the right to convey its title to tide lands contiguous to, and immediately surrounding, certain islands in the bay of San Francisco, free from any easement appurtenant to such islands.
2. The order of the President of January 13, 1899, reserving for naval purposes "Mission island and the small island southeast thereof" in the bay of San Francisco, cannot be construed as an appropriation for such purposes of the surrounding tide land, which had been reclaimed by a grantee from the state of California, and upon which had been erected extensive warehouses and wharves.

[No. 198.]

*Argued March 11, 1903. Decided April 13, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment reversing a judgment of the Circuit Court for the Northern District of California in favor of the United States in an action of ejectment, and remanding the cause, with instructions to enter judgment for the recovery of a portion only of the property sued for. *Affirmed.*

See same case below, 48 C. C. A. 641, 109 Fed. 763.

Statement by Mr. Justice **McKenna:**

Ejectment brought in the circuit court of the United States, ninth circuit, northern district of California, by the United States against the California Dry Dock Company. Pending the hearing, the latter company sold and transferred its title to the Mission Rock Company, a corporation, which thereupon entered into possession of the property. By stipulation the Mission Rock Company was substituted as defendant, and an amended and supplemental complaint was filed.

The property sued for was described by metes and bounds, and, it was alleged, constituted a "tract of land, being a square, including the rock known as Mission rock, and containing 14.69 acres, more or less, and being a fractional part of the westerly half of section 11, township 2 south, range 5 west, Mount Diablo base and meridian." Damages and rents and profits were also prayed, in the sum of $355,000.

By consent the case was tried by the court, and its findings, as far as material, are as follows:

"II. At the date of the admission of the state of California *into the Union, the premises sued for consisted of two rocks or islands adjacent to one another and projecting above the plane of ordinary high water in the bay of San Francisco, the larger of which rose to a height of more than 20 and less than 40 feet above such high water. Also of other lands contiguous thereto and surrounding said rocks or islands, which were completely submerged and over which the daily tides continuously flowed and [393]

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NOTE.—*On the right of owner of upland to access to navigable water*—see note to State *ex rel.* Denny v. Bridges (Wash.) 40 L. R. A. 593.

*As to the separation of riparian rights from upland*—see note to Gratz v. Land & River Improv. Co. (C. C. App. 7th C.) 40 L. R. A. 393.

*On title to land under water*—see note to Goff v. Cougle (Mich.) 42 L. R. A. 161.

ebbed. The rocks or islands referred to are laid down on the chart in this cause, and marked Exhibit 'A.'

"III. The areas of these rocks or islands above ordinary high-water mark at the time of the admission of the state of California into the Union were as follows: The one on the chart called 'Mission rock' had an area of fourteen one-hundredths (14-100) of an acre; the other had an area of one one-hundredth (1-100) of an acre. These rocks or islands rose abruptly out of the bay of San Francisco. Their sides to the extent that they were covered and uncovered by the flow and ebb of the tide varied from 10 to 25 feet, depending on their steepness. Both rocks were barren, without soil or water, and were of no value for purposes agricultural or mineral. They lay at a distance of about half a mile of the then shore line of that part of the bay upon which the city of San Francisco fronted. Navigable water divided and still divides the lands sued for from the mainland, and surrounded and now surrounds them.

"IV. The lands described in the complaint were not, at the date of the admission of the state of California into the Union, within the boundaries of any valid private or pueblo grant of lands of the Spanish or Mexican governments.

"V. No approved plat of the exterior limits of the city of San Francisco, as provided by the terms of § 5 of the act of July 1, 1864 (13 Stat. 332), has been filed or rendered to the General Land Office of the United States, or of the state of California. The lands sued for in this action are within such exterior limits.

"VI. On the 13th day of January, 1899, the President of the United States, purporting to act in conformity with the act of July 1, 1864, already referred to, issued the following order:

"Executive Mansion, January 13, 1899.

"It is hereby ordered that the Mission island and the small island southeast thereof, designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California, containing, according to the plat, fourteen one-hundredths of an acre and one one-hundredth of an acre, respectively, be, and they are hereby, declared as permanently reserved for naval purposes. William McKinley.

[394] *"VII. On the day of March, 1864, the United States surveyor general for the state of California extended the public survey so as to comprehend and include the rocks or islands and the lands in controversy in the present suit.

"VIII. On April 4, 1870, the governor of the state of California approved an act of the legislature of the state entitled, 'An Act to Provide for the Sale and Conveyance of Certain Submerged Lands in the City and County of San Francisco to Henry B. Tichenor,' which act as printed in the statutes of California for the years 1870, 1871, at page 801, is hereby referred to and made part hereof."

"The lands herein described include the lands sued for in this action.

"On the 11th day of July, 1872, the state of California, in conformity with said act, issued its patent for the said lands to said Henry B. Tichenor, purporting to convey the same to him. Said patent was duly recorded in liber 1 of Records of Patents, page 66.

"After execution of the said patent, the said Tichenor executed and delivered a deed of grant, bargain, and sale, dated May 1, 1878, purporting to convey the said lands to the California Dry Dock Company, which thereafter, on the 6th day of June, 1900, executed and delivered to the Mission Rock Company, the defendant, a like deed to the said lands. The last-named company has not, since said date, conveyed to any person or corporation the said lands.

"IX. The California Dry Dock Company, upon going into possession of said lands so conveyed, undertook the improvement of the same by filling in portions of the submerged lands immediately around and contiguous to said islands or rocks, with many thousands of tons of rock, thus increasing the available area of said lands to about 4 acres, upon which extensive warehouses were built by it, and wharves erected for the accommodation of shipping.

"Since the issuance of the state patent hereinbefore referred to, the patentee thereof up to May 1, 1878, the California Dry Dock Company from said time to the 6th day of June, 1900, and the defendant from said last-named date to the present *time have been in continuous and uninter- [395] rupted possession of the said lands, using the same and the improvements thereon for commercial purposes, and claiming to be the absolute owner thereof."

The conclusion of the court was that the United States was entitled to the lands sued for, without damages or rents and profits, and judgment was entered accordingly.

The circuit court of appeals reversed the judgment, and remanded the cause, with instructions "to enter judgment for the plaintiff for the recovery of the possession of the two islands or rocks mentioned in the record, containing, respectively, 14-100 of an acre, and 1-100 of an acre, and designated on the official plat on file in the General Land Office, approved October 12, 1898, as lots 1 and 2 of section 11, township 2 south, range 5 west, Mount Diablo meridian, California; and as respects the remainder of the land sued for, that the plaintiff take nothing." 48 C. C. A. 641, 109 Fed. 763. This writ of error was thereupon sued out.

*Solicitor General* **Richards** argued the cause and filed a brief for plaintiff in error:

Upon the acquisition of California from Mexico, the United States became the owner of all the land in California, both the tide lands and the upland.

*San Francisco* v. *LeRoy*, 138 U. S. 656, 34

L. ed. 1096, 11 Sup. Ct. Rep. 364; *Knight* v. *United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

The tide or submerged lands the United States took in trust for the future state of California.

*San Francisco* v. *LeRoy*, 138 U. S. 656, 34 L. ed. 1096, 11 Sup. Ct. Rep. 364; *Knight* v. *United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258.

The land, which, under this doctrine, went to the original states when the Revolution took place, and to the subsequent states upon their admission to the Union, is submerged lands,—land under water,—not land above water. The control over the navigable waters included the ownership, in trust for the people, of the soils covered by such water.

*Martin* v. *Waddell*, 16 Pet. 367, 10 L. ed. 997; *Weber* v. *State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548.

The island or islands known as Mission Rock never had been, nor are they now, tide land, or submerged land, or soil under navigable waters.

*Com.* v. *Shaw*, 14 Serg. & R. 9.

Carried to its logical conclusion, the contention that, if there was any land reserved under the act admitting California as a state, it was only "public lands," meaning thereby land "subject to sale or other disposal under general laws," would strip the United States of all its lands except such as were open for pre-emption and sale under general laws.

*Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634; *Wilcox* v. *Jackson, ex dem. M'Connel*, 13 Pet. 498, 10 L. ed. 264; *Newhall* v. *Sanger*, 92 U. S. 761, 23 L. ed. 769; *Doolan* v. *Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Mann* v. *Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820.

Parts of the public domain may be reserved from pre-emption or sale, and set apart for public uses.

*Grisar* v. *McDowell*, 6 Wall. 363, 18 L. ed. 863.

Submerged lands surrounding an island in the Bay of San Francisco, half a mile from shore, and separated from it by navigable waters, could not be conveyed or used except in connection with the island which they surrounded.

*Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110.

The state had no power to convey the lands, to be held distinct from Mission Rock and in opposition to the title of the United States to one of its islands.

*Stockham* v. *Browning*, 18 N. J. Eq. 390; *E. G. Blakslee Mfg. Co.* v. *E. G. Blakslee's Sons Iron Works*, 129 N. Y. 155, 29 N. E. 2.

The title of the United States to Mission Rock was absolute and unqualified, and the authority of the United States over the surrounding navigable waters and submerged land was supreme; the right of the state in the interests of navigation and commerce being subordinate to that of the United States.

*United States* v. *Bellingham Bay Boom Co.* 176 U. S. 211, 44 L. ed. 437, 20 Sup. Ct. Rep. 343.

Whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in the navigation of such waters.

*Scranton* v. *Wheeler*, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

Whatever right the state held in the tide lands or submerged lands surrounding the island was subordinate and subservient to right of access to the navigable water, which went with the upland.

*Dutton* v. *Strong*, 1 Black, 1, 17 L. ed. 339; *Weber* v. *State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *Yates* v. *Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Lake Superior Land Co.* v. *Emerson*, 38 Minn. 406, 38 N. W. 200; *Hanford* v. *St. Paul & D. R. Co.* 43 Minn. 104, 42 N. W. 596.

The improvements made at Mission Rock were of such a character that they necessarily became, when made, a part of the island itself, impossible to be separated, and therefore the property of the owner of the island.

*Ledyard* v. *Ten Eyck*, 36 Barb. 102; *Nichols* v. *Lewis*, 15 Conn. 137.

Respecting the authority of the President to set aside parcels of land belonging to the United States for particular public uses, see —

*Grisar* v. *McDowell*, 6 Wall. 363, 18 L. ed. 863, 17 Ops. Atty. Gen. 160.

The United States as the owner of this island had the right of access to the navigable waters surrounding it.

*Shirley* v. *Bishop*, 67 Cal. 543, 8 Pac. 82; Gould, Waters, 3d ed. § 174; 1 Dill. Mun. Corp. 4th ed. 169; *Potomac S. B. Co.* v. *Upper Potomac S. B. Co.* 109 U. S. 673, 27 L. ed. 1070, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15; *Polhemus* v. *Bateman*, 60 N. J. L. 163, 37 Atl. 1015; *Sayre* v. *Newark*, 60 N. J. Eq. 361, 48 L. R. A. 722, 45 Atl. 985.

*Mr.* **Charles Page** argued the cause, and, with *Messrs. Edward J. McCutchen* and *Samuel Knight*, filed a brief for defendant in error:

A state upon admission becomes endowed with all the rights over persons and property which the original states had and have, except so far as any such rights may be specially and expressly reserved by the United States.

*Pollard* v. *Hagen*, 3 How. 221, 11 L. ed. 570; *Shively* v. *Bowlby*, 152 U. S. 27, 38 L. ed. 341, 14 Sup. Ct. Rep. 548; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 434, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Ft. Leavenworth R. Co.* v. *Lowe*, 114 U. S. 526, 29 L. ed. 264, 5 Sup. Ct. Rep. 995.

It has been uniformly held that, upon the admission of a state into the Union, the tide lands or the lands under tide waters vest in the state.

There is no distinction between lands di-

urnally covered and uncovered by the tides, and lands which are constantly covered by the tides, even when at their lowest stage.

*Pollard* v. *Hagen*, 3 How. 230, 11 L. ed. 574; *Gilman* v. *Philadelphia*, 3 Wall. 726, 18 L. ed. 100; *Martin* v. *Waddell*, 16 Pet. 410, 10 L. ed. 1012; *San Francisco* v. *LeRoy*, 138 U. S. 671, 34 L. ed. 1101, 11 Sup. Ct. Rep. 364; *Weber* v. *State Harbor Comrs.* 18 Wall. 65, 21 L. ed. 802; *Lowndes* v. *Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758.

The fact that there is no tide land in the Great Lakes does not affect the right of the state. That right is the right to the soil under its navigable waters.

*Illinois C. R. Co.* v. *Illinois*, 146 U. S. 436, 36 L. ed. 1037, 13 Sup. Ct. Rep. 110; *Morris* v. *United States*, 174 U. S. 236, 43 L. ed. 960, 19 Sup. Ct. Rep. 649; *Mann* v. *Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820; *Knight* v. *United Land Asso.* 142 U. S. 183, 35 L. ed. 982, 12 Sup. Ct. Rep. 258; *Hardin* v. *Jordan*, 140 U. S. 381, 35 L. ed. 433, 13 Sup. Ct. Rep. 808, 838; *Packer* v. *Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 270; *St. Clair County* v. *Lovingston*, 23 Wall. 64, 23 L. ed. 62; *Barney* v. *Keokuk*, 94 U. S. 336, 24 L. ed. 224; *Gilman* v. *Philadelphia*, 3 Wall. 726, 18 L. ed. 100; *Mumford* v. *Wardwell*, 6 Wall. 436, 18 L. ed. 761; *Smith* v. *Maryland*, 18 How. 74, 15 L. ed. 269; *Goodtitle* v. *Kibbe*, 9 How. 471, 13 L. ed. 220; *Pacific Gas Improv. Co.* v. *Ellert*, 64 Fed. 421. See also *Oakland* v. *Oakland Water Front Co.* 118 Cal. 182, 50 Pac. 277.

The right of the state to its navigable waters includes the right to the fish in them and the use of the beds for the planting of oysters, to the exclusion of the citizens of other states.

*McCready* v. *Virginia*, 94 U. S. 391, 24 L. ed. 248; *Smith* v. *Maryland*, 18 How. 74, 15 L. ed. 269; *Huntington* v. *Lowndes*, 40 Fed. 630.

The United States may appropriate tide lands though sold by the state, if the necessities of commerce shall require them; but if they have been improved, they can be taken only upon due compensation made.

*Scranton* v. *Wheeler*, 6 C. C. A. 585, 16 U. S. App. 152, 57 Fed. 812; *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622.

The state may create an obstruction to navigation when commerce will be thereby aided.

*Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Assante* v. *Charleston Bridge Co.* 41 Fed. 365; *Rhea* v. *Newport N. & M. Valley R. Co.* 50 Fed. 16; *Willamette Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811.

The state may, in aid of its own commerce, remove obstructions, deepen channels, and improve them generally, if such acts do not impair their navigation, or defeat any system provided by the general government.

*Mobile County* v. *Kimball*, 102 U. S. 699, 26 L. ed. 240.

To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.

*Pollard* v. *Hagan*, 3 How. 230, 11 L. ed. 574.

The reason for conceding the right of the state to the lands under navigable waters applies equally to the rocks that project from such waters.

*Shively* v. *Bowlby*, 152 U. S. 1, 49, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548.

The admission of the state on an equal footing with the original states gave to it all property above and below high water, not already given into private ownership, or not reserved by the United States in the act of admission.

*Nichols* v. *Boston*, 98 Mass. 42, 93 Am. Dec. 132; *Shively* v. *Bowlby*, 152 U. S. 14, 38 L. ed. 336, 14 Sup. Ct. Rep. 548; *People* v. *Godfrey*, 17 Johns. 230, 9 Am. Dec. 203; *Ft. Leavenworth R. Co.* v. *Lowe*, 114 U. S. 538, 29 L. ed. 269, 5 Sup. Ct. Rep. 995.

The words "public lands" do not include lands below high-water mark.

*Mann* v. *Tacoma Land Co.* 153 U. S. 273, 38 L. ed. 714, 14 Sup. Ct. Rep. 820; *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634; *Doolan* v. *Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *Newhall* v. *Sanger*, 92 U. S. 761, 23 L. ed. 769; *Shively* v. *Bowlby*, 152 U. S. 49, 38 L. ed. 349, 14 Sup. Ct. Rep. 548; *Morris* v. *United States*, 174 U. S. 237, 43 L. ed. 961, 19 Sup. Ct. Rep. 649; *Barney* v. *Keokuk*, 94 U. S. 324, 338, 24 L. ed. 224, 228; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *State* v. *Pacific Guano Co.* 22 S. C. 50; *Allegheny City* v. *Reed*, 24 Pa. 39.

*Mr. Charles Page* also filed a supplemental brief for defendant in error:

At common law the right of the owner of lands fronting on the shore to wharf out does not exist.

*Shively* v. *Bowlby*, 152 U. S. 27, 38 L. ed. 341, 14 Sup. Ct. Rep. 548; *Weber* v. *State Harbor Comrs.* 18 Wall. 65, 21 L. ed. 802.

California may sell its submerged lands free of any easement whatever in favor of the riparian proprietor.

*Pacific Gas Improv. Co.* v. *Ellert*, 64 Fed. 425.

The alienation of the tide lands by the state may prevent access to the navigable waters of the bay.

*Oakland* v. *Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277.

Mr. Justice **McKenna**, after stating the case, delivered the opinion of the court:

"It will be observed," as was said by the circuit court of appeals, "that the judgment [of the circuit court] is not limited to the two rocks or islands embraced in the executive order of January 13, 1899, the one covering 14-100 and the other 1-100 of an acre, but awards the government the entire tract of 14.69 acres, including the warehouses and

other improvements constructed by the defendant and its predecessors in interest." The circuit court of appeals confined the recovery of the plaintiff to the rocks proper, and awarded the submerged lands to the defendant. The controversy then is, Which party has the title to the latter? The defendant in error is the successor of the rights and title of the California Dry Dock Company, that company being grantee of Henry B. Tichenor, who received the patent for the lands on the 11th of July, 1872, from the state of California, in pursuance of and in conformity with an act of the [404] legislature of the state, entitled, "An Act *to Provide for the Sale and Conveyance of Certain Submerged Lands in the City and County of San Francisco to Henry B. Tichenor." Cal. Stat. 1870–71, p. 801.

Had the state the title to convey? The plaintiff in error, in effect, contests this, and asserts, besides, a right to the submerged land as an easement appurtenant to the islands.

The title and dominion which a state acquires to lands under tide waters by virtue of her sovereignty received elaborate consideration, exposition, and illustration in the case of *Shively* v. *Bowlby*, 152 U. S. 1–58, 38 L. ed. 331–352, 14 Sup. Ct. Rep. 548. Prior cases are there collected and quoted, among others, *Weber* v. *State Harbor Comrs.* 18 Wall. 65, 21 L. ed. 801. From the latter as follows (and the case concerned tide lands in California): "Although the title to the soil under the tidewaters of the bay was acquired by the United States by cession from Mexico, equally with the title to the upland, they held it only in trust for the future state. Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government." And Mr. Justice Gray said, delivering the opinion of the court in *Shively* v. *Bowlby:* "Each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public."

This right is an attribute of the sovereignty of the state, and it follows that in the exercise of the right, as said by Mr. Justice Gray, the state may "dispose of its tide lands free from any easement of the upland proprietor." The facts of the case emphasized its doctrine. Shively was the [405] owner of *the upland. Bowlby was the grantee of the state of Oregon of the tide lands in front of Shively's property. The grant was sustained. The sovereignty of California and the rights and powers dependent upon it are as complete as those of other states. How has California chosen to exercise them? In other words, What is the law of California as to the title and rights of riparian or littoral proprietors in the soil below highwater mark? Upon the answer to these questions the present litigation must be determined. The title papers of the defendant contain an act of the legislature of the state conveying the lands in controversy in private ownership, and the history of the state shows that the act was in accordance with the policy and practice of the state.

The legislature, commencing at the first session after the admission of the state into the Union, made grants of the tide lands to municipalities under conditions which contemplated their being conveyed to and held in private ownership. Among these was the act of March 26, 1851, known as the "beach and water lot Act." [Cal. Stat. 1851, p. 309, chap. 41.] It was entitled, "An Act to Provide for the Disposition of Certain Property of the State of California." Section 1 provided that "all the lots of land situated within the following boundaries according to the survey of the city of San Francisco and the map or plat of the same now on record in the office of recorder of the county of San Francisco are known and designated in this act as the San Francisco Beach and Water Lots; that is to say, beginning at the point," etc. Then follows a description by streets, which includes a portion of the bay. Section 2 grants the use and occupation of the land for ninety-nine years, and confirms grants of lands sold by authority of the ayuntamiento, or town or city council, or by any alcalde of said town or city; and § 4 makes the boundary line described in the 1st section a permanent water front of the city. These acts came up for consideration, and the character of the title conveyed was defined in *Smith* v. *Morse*, 2 Cal. 524; *Eldridge* v. *Cowell*, 4 Cal. 87; *Chapin* v. *Bourne*, 8 Cal. 294; *Hyman* v. *Read*, 13 Cal. 445; *Holladay* v. *Frisbie*, 15 Cal. 635; *Wheeler v. Miller, 16 Cal. [406] 125; *San Francisco* v. *Straut*, 84 Cal. 124, 24 Pac. 814.

These cases all expressed under varying facts the validity of the title conveyed by the acts of the legislature. They are reviewed in *Pacific Gas Improv. Co.* v. *Ellert*, 64 Fed. 421.

In *Taylor* v. *Underhill*, 40 Cal. 473, Mr. Justice Temple said, speaking of lands below high-water mark: "The state can probably sell the land, and authorize the purchaser to extend the water front so as to enable him to build upon this land . . ."

The decisions cover a period of many years, and have become a rule of property and the foundation of many titles. As said by Circuit Judge Ross, delivering the opinion of the circuit court of appeals: "A large and valuable part of the city of San

Francisco, extending from the present water front to, in some places, Montgomery street, was at the time of, and subsequent to, the admission of California into the Union a part of the submerged lands of the bay, but has since been filled in by the many hundred grantors under the city and state, who have erected buildings and improvements thereon at costs running into many millions of dollars. All of this was done in aid of commerce, in the upbuilding of a great city upon the bay, and with the encouragement and consent of the general government."

There is nothing inconsistent with these views in *Shirley* v. *Bishop*, 67 Cal. 545, 8 Pac. 82; *People* v. *Gold Run Ditch & Min. Co.* 66 Cal. 151, 56 Am. Rep. 80, 4 Pac. 1152, or in *Heckman* v. *Swett*, 99 Cal. 303, 33 Pac. 1099. In *Shirley* v. *Bishop* there was no question of riparian rights. The defendants attempted, under a franchise from the city of Benicia, to erect a wharf within 3 feet of the plaintiff's wharf, and parallel to it for 60 feet in the navigable waters of the straits of Carquinez, and beyond the water front established by an act of the legislature of the state. The building of the wharf was restrained. The other two cases expressed the general doctrine that the title of the state to the lands covered by navigable waters is held in trust for the public. That doctrine is declared in all of the cases. It has a conspicuous illustration in the *Lake Front Case* [*Illinois C. R. Co.* v. *Illinois*], 146 U. S. 463, 36 L. ed. 1046, 13 Sup. Ct. Rep. 110. The doctrine and its limitations [407] *are expressed in *Heckman* v. *Swett*, 99 Cal. 309, 33 Pac. 1102, and in *Shively* v. *Bowlby*. The court said in *Heckman* v. *Swett*: "Navigable streams and the shores to ordinary high-water mark are held by the state in trust for the public; but qualified rights therein may be granted, so far as they are not inconsistent with, or are in aid of, the principal use, *viz.*, for the purposes of navigation." In other words, the rights granted must be in aid of commerce; and it is recognized, as we have seen, in judicial decisions, and established by practical examples, that the conveyance by the state of its title to tide lands, to be held in private ownership, free from any easement of the upland proprietor, is in aid of commerce, and therefor in strict performance of the state's trust. See, in addition to the other cases, *Oakland* v. *Oakland Water Front Co.* 118 Cal. 160, 50 Pac. 277.

2. A claim was made in the circuit court of appeals by the plaintiff in error under § 5 of the act of Congress of July 1, 1864, entitled, "An Act to Expedite the Settlement of Titles to Lands in the State of California." 13 Stat. at L. 333, chap. 194. By that section the title of the United States to the lands within the corporate limits of the city of San Francisco was relinquished and granted to the city "for the uses and purposes" specified in a certain ordinance of the city called the Van Ness ordinance, which ordinance had been ratified by the legislature of the state. Answering and disposing of the contention of the plaintiff in error, the circuit court of appeals said: "Those uses and purposes . . . had no relation whatever to the rocks or islands here in controversy, which were and are far outside of the pueblo grant of lands claimed by and confirmed to the city." This is not contested here, but it is urged that "the order of President McKinley may be read, not as a reservation under that act, but as an appropriation of Mission island and the small island southeast thereof, with the shores, contiguous submerged land, and navigable water appurtenant thereto, permanently for naval purposes." There are two answers to the contention. The order of the President explicitly designates the islands proper, and, besides, limits the areas appropriated to "14-100 of an acre and 1-100 of an acre respectively." At the time the order *was made the land in controversy had been [408] reclaimed by the California Dry Dock Company, and upon it were "extensive warehouses," which had been built by that company, "and wharves erected for the accommodation of shipping." The property was so valuable that the plaintiff in error regarded itself damaged by its withholding in the sum of $250,000, and the rental thereof was alleged to be $5,000 per annum. It is not conceivable that the President, by his order, intended to appropriate so valuable a property without explicit declaration, or to leave the appropriation to result as "appurtenant" to the rocks.

*Judgment affirmed.*

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## CHATTANOOGA NATIONAL BUILDING & LOAN ASSOCIATION, *Petitioner*,

*v.*

## WILLIAM H. DENSON and Rosa E. Denson.

(See S. C. Reporter's ed. 408–417.)

*Foreign corporations—what constitutes doing business within the state.*

The granting of a loan by a Tennessee building and loan association to a citizen of Alabama upon the latter's signed application, solicited by a traveling agent for the association, and the taking as security of a note and mortgage executed within the state by the borrower, constitute, regardless of the form and terms of such instruments, the doing of business in the state, within the meaning of Ala. Const. art. 14, and Ala. Code 1896, §§ 1316, 1318, 1319, requiring foreign corporations doing any business within the state to designate a local agent for service of process, and

NOTE.—*On recognition or exclusion of foreign corporations*—see note to Cone Export & Commission Co. v. Poole (S. C.) 24 L. R. A. 289.

*As to exclusion of foreign corporation as an interference with interstate commerce*—see note to Kindel v. Beck & P. Lithographing Co. (Colo.) 24 L. R. A. 311.

*As to what constitutes dealing or carrying on business*—see note to State v. Ray (N. C.) 14 L. R. A. 529.

to have a known place of business within the state.

[No. 206.]

*Submitted March 12, 1903. Decided April 27, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which reversed a decree of foreclosure rendered by the Circuit Court for the Southern Division of the Northern District of Alabama, and directed the bill to be dismissed. *Affirmed.*

See same case below, 46 C. C. A. 634, 107 Fed. 777.

Statement by Mr. Justice **McKenna:**

Suit to foreclose a mortgage given by the respondents to the petitioner to secure a note for the sum of $5,000, given as evidence of a loan made by petitioner to respondents. The petitioner is a building and loan association, and a corporation of the state of Tennessee; the respondents are citi-
[409] zens of Alabama. *One of the defenses of respondents is that the transactions were illegal because petitioner had not complied with the laws of Alabama in regard to foreign corporations doing business in the state. This is the only defense with which we are concerned. The circuit court rendered a decree foreclosing the mortgage, which was reversed by the circuit court of appeals, and the bill was directed to be dismissed. 46 C. C. A. 634, 107 Fed. 777. The case was then brought here by certiorari.

The Constitution of the state of Alabama provides as follows:

"4. No foreign corporation shall do any business in this state without having at least one known place of business, and an authorized agent or agents therein; and such corporation may be sued in any county where it does business by service of process upon an agent anywhere in this state." Ala. Const. art. 14.

The material parts of the Code of the state, passed in execution of the Constitution, are as follows:

"1316. Foreign corporation must file instrument of writing designating agent and place of business in this state.— Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state." Ala. Code 1896.

"1318. Unlawful for foreign corporation to transact business in this state before declaration filed; penalty.— It is unlawful for any foreign corporation to engage in or transact any business in this state before filing the written instrument provided for in the two preceding sections; and any such corporation that engages in or transacts any business in this state without complying with the provisions of the two preceding sections *shall, for each offense, forfeit and [410] pay to the state the sum of $1,000." (Ibid.)

"1319. Unlawful to act as agent of foreign corporation before such declaration is filed; penalty.— It is unlawful for any person to act as agent or transact any business, directly or indirectly, in this state, for or on behalf of any foreign corporation which has not designated a known place of business in this state and an authorized agent or agents residing thereat, as required in this article: and any person so doing shall, for each offense, forfeit and pay to the state the sum of $500." (Ibid.)

There was no point made on the by-laws of the association, and by agreement they were omitted from the record on appeal to the circuit court of appeals, and are also omitted here. And it was also stipulated "that the complainant is a corporation chartered and organized under and in accordance with the public statutes of the state of Tennessee, authorizing the creation of corporations for carrying on the business of building and loan associations; that its principal office and place of business is, and was at the time the loan involved in this case was made, and has ever since continuously been, in the city of Chattanooga, state of Tennessee; and that the loan to defendant, William H. Denson, involved in this case was made in accordance with the power and authority conferred on complainant by its charter, and in the manner prescribed by its by-laws."

The note executed by respondents was as follows:

$5,000.00.

Chattanooga, Tennessee, June 10th, 1895.

On or before nine years from date I promise to pay the Chattanooga National Building and Loan Association, at its home office, Chattanooga, Tennessee, five thousand dollars with interest on the sum of twenty-five hundred dollars, at the rate of six per cent per annum, payable monthly.

. . . . . .

It is further understood that this note is made with reference to and under the laws of the state of Tennessee, and if paid before seven years from this date such rebate from the premium included herein will be allowed as the board of directors of said association shall deem equitable.

*The omitted part recited that the note [411] was for money borrowed on fifty shares of stock, and expressed certain conditions of the nonpayment of the note when due, or the nonpayment of premiums or assessments; and also expressed the right of peti-

tioner, in case of such nonpayments, to collect the debt, though not due, and to foreclose the mortgage. The mortgage covered lots in the city of Gadsden, Elowah county, state of Alabama. It repeated the note and its conditions, and contained others. The facts connected with the execution of the note and mortgage are stated by the circuit court of appeals as follows:

"The complainant below, the Chattanooga National Building & Loan Association, is, and was at the time the loan to Mr. Denson was made, a corporation under the laws of the state of Tennessee, with its principal office in the city of Chattanooga, in that state. Among its corporate functions was the authorization, and, so far as we are advised, its sole business was, to loan its funds to its stockholders on real estate security. It had no local office or agent in Alabama, but it had a traveling agent whose business it was to solicit subscriptions to its stock, and to obtain applications for loans, and submit the same to the home office of the association at Chattanooga.

"On the 25th of April, 1895, appellant, Denson, who was a resident of Gadsden, Alabama, on the suggestion and at the solicitation of the agent, signed at that place a written application for fifty shares of stock in the association, complainant below, appellee in this court. This application was forwarded by the agent, to whom Mr. Denson delivered it, to the home office, where the stock was issued and returned to the agent, to be by him delivered to Mr. Denson. On the same day on which he applied for his stock, Mr. Denson signed a written application to the association for a loan of $2,500 on the fifty shares of stock he had applied for. He offered a premium of $2,500 for the loan, and proposed to secure the loan and premium, if his application should be granted, by a mortgage on certain real estate in Gadsden, Alabama, which he represented to be of the value, in all, of about $9,000. This application was accompanied by the report of two parties, selected by the [412] association, *fixing the value of the property which Denson proposed to mortgage at $8,000, and the certificate of an attorney, also selected by the association, with reference to the condition of the title. This application was forwarded by the agent to the home office in Chattanooga, where it was submitted, along with other applications, to the board of directors, by whom the application was granted and the loan directed to be made in accordance with the charter and by-laws of the association. Thereupon a note and deed of trust were prepared at the home office and were sent to the agent by whom Mr. Denson's application had been taken and forwarded; and at the same time the check of the association on the Chattanooga National Bank of Chattanooga, Tennessee, in favor of W. H. Denson for the sum of $2,367.50 was sent to one D. P. Goodhue, of Gadsden, with instructions to him to deliver said check to Mr. Denson when he should have executed and delivered the note and deed of trust. Upon the execution of the note and deed of trust by Denson and wife, and the delivery of the same to the agent, all at Gadsden, Alabama, the agent delivered to Denson the check for $2,367.50, directing him to present the same to the First National Bank of Gadsden, which would pay the same. The check was presented to the said bank, and the face thereof paid over to Denson, as the cashier said, 'under an understanding with the said building and loan association and that the Chattanooga National Bank, on which the check was drawn, would pay the same on presentation.'"

And the following testimony of the secretary of the association was quoted:

"At the time the loan to defendant Denson was made, complainant association had been for some time soliciting subscriptions to stock, and receiving applications for loans, in the state of Alabama, and had paid a tax, or license fee, required under the laws of the state of Alabama, for foreign corporations proposing to do business in that state, and complainant's officers supposed and understood that the payment of this fee, or tax, was the only condition with which it was necessary for them to comply in order to be entitled to do business in that state. Subsequently, however, and some months after the loan to defendant *Denson [413] was made, complainant was informed by an attorney in the state of Alabama that the Alabama statutes required foreign corporations doing business in Alabama to designate a local agent, on whom process against the association could be served, and also a local place of business in that state. Thereupon complainant promptly designated such local agent and place of business, and continued up to the 2d of October, 1899, to pay the license tax, or fee, required of nonresident corporations doing business in Alabama, and to keep a local agent and place of business in that state."

*Mr.* **Robert Pritchard** submitted the cause for petitioner. *Mr. J. B. Sizer* was with him on the brief:

The contract for this loan was made in Tennessee.

Wharton, Confl. of L. § 421; *Allgeyer* v. *Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Holder* v. *Aultman M. & Co.* 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; *Western* v. *Genesee Mut. Ins. Co.* 12 N. Y. 258; *Tayloe* v. *Merchants' F. Ins. Co.* 9 How. 390, 13 L. ed. 187; *Glover* v. *Equitable Mortg. Co.* 31 C. C. A. 105, 59 U. S. App. 151, 87 Fed. 518; *State Mut. F. Ins. Asso.* v. *Brinkley Stave & Heading Co.* 61 Ark. 1, 29 L. R. A. 712, 31 S. W. 157; *Garrettson* v. *North Atchison Bank*, 47 Fed. 867; *Hyde* v. *Goodnow*, 3 N. Y. 266.

The place of the note itself was the state of Tennessee, and not the state of Alabama.

Wharton, Confl. of L. §§ 398, 399, 507; *Andrews* v. *Pond*, 13 Pet. 65, 10 L. ed. 61; *Pritchard* v. *Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Andruss* v. *People's Bldg. L. & Sav. Asso.* 36 C. C. A. 336, 94 Fed. 575; *Dugan* v. *Lewis*, 79 Tex. 246, 12 L. R.

A. 93, 14 S. W. 1024; *Glover* v. *Equitable Mortg. Co.* 31 C. C. A. 105, 59 U. S. App. 151, 87 Fed. 518; *Eastern Bldg. & L. Asso.* v. *Bedford*, 88 Fed. 7; *London Assur. Co.* v. *Companhia de Moagens do Barreiro*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785; *Penn Mut. L. Ins. Co.* v. *Mechanics' Sav. Bank & Trust Co.* 38 L. R. A. 33, 19 C. C. A. 286, 37 U. S. App. 692, 72 Fed. 413.

The mortgage is a mere incident to the debt, and its situs is that of the debt it secures, although it may cover property elsewhere.

*Lauter* v. *Jarvis-Conklin Mortg. Trust Co.* 29 C. C. A. 473, 54 U. S. App. 49, 85 Fed. 894; *Pioneer Sav. & L. Co.* v. *Cannon*, 96 Tenn. 599, 33 L. R. A. 112, 36 S. W. 386; *Sullivan* v. *Sheehan*, 89 Fed. 247; *Electric Lighting Co.* v. *Rust*, 117 Ala. 680, 23 So. 751; *United States Sav. & L. Co.* v. *Shain*, 8 N. D. 136, 77 N. W. 1006.

The taking of the note and mortgage, and the payment of the money, did not constitute a transaction of business in Alabama by the petitioner.

*Beard* v. *Union & American Pub. Co.* 71 Ala. 60; *Sullivan* v. *Sullivan Timber Co.* 103 Ala. 371, 25 L. R. A. 543, 15 So. 941.

*Mr.* **Oscar W. Underwood** submitted the cause for respondents. *Mr. William H. Denson* was with him on the brief:

To constitute engaging in or transacting any business in this state, within the meaning of the Alabama law, there must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created.

*Beard* v. *Union & American Pub. Co.* 71 Ala. 60; *Sullivan* v. *Sullivan Timber Co.* 103 Ala. 371, 25 L. R. A. 543, 15 So. 941; *State* v. *Bristol Sav. Bank*, 108 Ala. 3, 18 So. 533; *Farrior* v. *New England Mortg. Secur. Co.* 88 Ala. 275, 7 So. 200.

The association was doing business in Alabama.

*New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; *Equitable Life Assur. Soc.* v. *Clements*, 140 U. S. 226, 35 L. ed. 497, 11 Sup. Ct. Rep. 822; *State* v. *Bristol Sav. Bank*, 108 Ala. 6, 18 So. 533; *Farrior* v. *New England Mortg. Secur. Co.* 88 Ala. 275, 7 So. 200; *Mullens* v. *American Freehold Land Mortg. Co.* 88 Ala. 280, 7 So. 201; *Sullivan* v. *Sheehan*, 89 Fed. 349.

The exposition given by the highest tribunals of the state to its own Constitution and statutes constitutes a part of the law, as much as if embodied in it, and is as binding upon the courts of the United States as the text, and is conclusive on such courts.

*New York L. Ins. Co.* v. *Cravens*, 178 U. S. 389, 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; *Louisiana* v. *Pilsbury*, 105 U. S. 294, 26 L. ed. 1090; *Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261; *Erb* v. *Morasch*, 177 U. S. 584, 44 L. ed. 897, 20 Sup. Ct. Rep. 819; *Sioux City Terminal R. & Warehouse Co.* v. *Trust Co. of N. A.* 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Missouri, K. & T. R. Co.* v. *McCann*, 174 U. S. 580, 43 L. ed. 1093, 19 Sup. Ct. Rep. 755; *Provident Inst. for Savings* v. *Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Fairfield* v. *Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Bauserman* v. *Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466.

No state or nation will enforce any contract in its own courts, wherever it may be made, that is in disregard or violation of the public policy or positive legislation of such state.

*Gist* v. *Western U. Teleg. Co.* 45 S. C. 344, 23 S. E. 143; *Swing* v. *Munson*, 191 Pa. 582, 58 L. R. A. 223, 43 Atl. 342; *Seamans* v. *Temple Co.* 105 Mich. 400, 28 L. R. A. 430, 63 N. W. 408; *Cowan* v. *London Assur. Corp.* 73 Miss. 321, 19 So. 298; *Rose* v. *Kimberly & C. Co.* 89 Wis. 545, 27 L. R. A. 556, 62 N. W. 526.

What was done by the Chattanooga corporation in Alabama was "doing business" in Alabama, and a violation of the laws of Alabama.

*Swing* v. *Munson*, 191 Pa. 582, 58 L. R. A. 223, 43 Atl. 342; *Henni* v. *Fidelity Bldg. & L. Asso.* 61 Neb. 744, 86 N. W. 475; *Seamans* v. *Temple Co.* 105 Mich. 400, 28 L. R. A. 430, 63 N. W. 408; *Cowan* v. *London Assur. Corp.* 73 Miss. 321, 19 So. 298.

Mr. Justice **McKenna** delivered the opinion of the court:

The question presented by the case is, Did the loan made by petitioner and the taking for security the note and mortgage under the circumstances presented by the record constitute a doing of business in the state, within the meaning of the Constitution and laws of the state?

It was said by the supreme court of Alabama (*Beard* v. *Union & American Pub. Co.* 71 Ala. 60), that to constitute a doing of business within the state "there must be a doing of some of the works, or an exercise of some of the functions, for which the corporation was created." It was held, however, that receiving a subscription to a newspaper, or collecting the money therefor, was not doing business in the state "within the principle." In a subsequent case (*Dudley* v. *Collier*, 87 Ala. 431, 6 So. 304) the court announced that "a loan or borrowing of money by or from" a foreign corporation is a doing of business within the state, and "is an unlawful act, subjecting both the agents and company to a heavy penalty." The provisions of the statute prescribing penalties were considered, and their effect was declared to be not only to punish offenders against the statute, but to render their contracts void. Many cases were cited [414] in support of the conclusion as a proper deduction from the imposition of the penalties. And the principle was applied to make illegal a contract with an agent for services rendered in procuring a loan for the use of the corporation.

In *Farrior* v. *New England Mortg. Secur. Co.* 88 Ala. 275, 7 So. 200, it was said that the Constitution prohibited the making of a single contract or the doing of a single

act of business by a foreign corporation in the exercise of a corporate function, as well as the engaging in or carrying on its business generally. To the same effect are *Mullens* v. *American Freehold Land Mortg. Co.* 88 Ala. 280, 7 So. 201; *Ginn* v. *New England Mortg. Secur. Co.* 92 Ala. 135, 8 So. 388; *Sullivan* v. *Sullivan Timber Co.* 103 Ala. 371, 25 L. R. A. 543, 15 So. 941.

These cases constitute an interpretation of the constitutional and statutory provisions, and clearly hold that any act in the exercise of corporate functions is forbidden to a foreign corporation which has not complied with the Constitution and statute, and that the contracts hence resulting are illegal and cannot be enforced in the courts.

The petitioner is a building and loan association. Its corporate purpose is to lend money to its stockholders. The respondent Denson was one of its stockholders, and, manifestly, regarding the essence of the transactions between them, they constituted a doing of business within the state of Alabama. But it is insisted that on account of the form and terms of the instruments and by operation of law the loans must be regarded as having been made in Tennessee. It is said: "The note and mortgage were drawn in Tennessee, and by their express terms were payable there. The note is dated on its face at Chattanooga, Tennessee, and expressly stipulates that it 'is made with reference to and under the laws of Tennessee.'" And, further, that the petitioner's part of all the transactions was performed in the state of Tennessee, "and only those acts which the borrower was required to do *as a condition precedent* to the loan of the money to him were performed in Alabama." It is hence deduced that the business done must be regarded as having been done in Tennessee.

[415] *Counsel has discussed at some length the situs of contracts, and by the law of what place their obligation is determined. We think, however, that the discussion is not relevant. It withdraws our consideration from the Constitution and statute of Alabama; and, it is manifest, the contention based upon it, if yielded to, would defeat their purpose. The prohibition is directed to the doing of any business in the state in the exercise of corporate functions; and there can be no doubt that petitioner considered that it was exercising such functions in the state. Its secretary testified that "at the time the loan to defendant Denson was made complainant association had been for some time soliciting subscriptions to stock, and receiving applications for loans, in the state of Alabama, and had paid a tax, or license fee, required under the laws of the state of Alabama for foreign corporations proposing to do business in that state, and complainant's officers supposed and understood that the payment of this fee, or tax, was the only condition with which it was necessary for them to comply in order to be entitled to do business in that state." The application of Denson was presumably solicited as other applications were, and, if what was done in pursuance of it did not constitute doing business in the state, the effect would be, as expressed by the circuit court of appeals, that petitioner "and other foreign associations engaged in the same business of loaning money on real security, may safely flood the state of Alabama with soliciting agents, make all the negotiations for loans, take real-estate securities therefor, and fully transact all other business pertaining to their corporate functions as though incorporated therein, and yet neither be obliged to have a known place of business or any authorized agent within the state, nor pay any license tax or fee, as required of nonresident corporations doing business therein."

The case of *Fritts* v. *Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93, does not relieve from the effect of the Alabama decisions and from the necessity of following them. The action was ejectment to recover certain real property in Colorado. The title of one of the parties was derived through the Comstock Mining Company, a Missouri corporation, which, before its purchase of the property, had been engaged *in the prosecution of its mining business in [416] the state, but it had not complied with the Constitution and statutes of the state prescribing the terms upon which foreign corporations might do business in the state. The constitutional provision was substantially like that of Alabama, but the statutes were materially different, and, besides, there had been no decision of the supreme court of Colorado interpreting the statutes. The only penalty expressed in the statutes was the imposition of personal liability upon the officers, agents, and stockholders of the corporation for any and all contracts made within the state during the time the corporation was in default. It was held that the fair implication was that, "in the judgment of the legislature of Colorado, this penalty was ample to effect the objects of the statutes." And it was said that it was not for the judiciary, at the instance of, or for the benefit of, private parties, to forfeit property which had been conveyed to the corporation, and by it to others. *Fritts* v. *Palmer*, therefore, was but the interpretation of a particular statute, and there is not a word in it which denies or questions the power of a state to make void the contracts of a foreign corporation which is doing business in the state in violation of its laws.

It is urged by petitioner that it thought it had complied with the law of Alabama, and that it was not an intentional offender against it and therefore should not be "repelled from court." But the latter consequence has been decided to result from noncompliance with the statute, and we cannot grant an exemption from it. The statute makes no distinction between an inadvertent and a conscious violation of its provisions, and a familiar legal maxim precludes a defense based on that distinction. Nor can the payment of the license fee be urged as a justification for omitting to comply with the statute. Such payment was one con-

dition to be performed by a foreign corporation; the designation of a known place of business and an authorized agent was another, and was of so much importance as to be enjoined by the Constitution of the state.

It is contended that this case cannot be distinguished from *Bedford* v. *Eastern Bldg. & L. Asso.* 181 U. S. 227, 45 L. ed. 834, 21 Sup. Ct. Rep. 597, and must be ruled by that case.

7] *We think there is a marked distinction. In the *Bedford Case* the contract was legally entered into and was entitled to be enforced. In the case at bar the contract was made in violation of the statute of Alabama, and it cannot, therefore, claim the protection given to the contract in the other case.

*Decree affirmed.*

Mr. Justice **Harlan** dissents.

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EUGENE C. GORDON, for the use of Mary C. Roper, *Plff. in Err.*,
*v.*
ARTHUR E. RANDLE.

(See S. C. Reporter's ed. 417–420.)

*Courts—duty to prolong term to settle bills of exceptions—not exercised unless invoked—commencement of January term—effect of holiday.*

1. The supreme court of the District of Columbia is not bound to prolong its term by the adjournment, authorized by rule 2 of that court, for "not longer than thirty-eight days" to enable bills of exceptions to be prepared, where its duty under such rule is not invoked.
2. The October term, 1900, of the circuit court branch of the supreme court of the District of Columbia ended on December 31st, 1900, although the first Tuesday in the following January, on which, by rule 3 of that court, the January term began, fell on a holiday; since the effect was not to postpone the commencement of the January term, but to deprive the court of the power to do any business other than to discharge those who had been required to attend, until the succeeding day, when its general powers and duties could be legally exercised.

[No. 229.]

*Argued April 7, 1903. Decided April 27, 1903.*

IN ERROR to the Court of Appeals of the District of Columbia to review an order denying a petition for mandamus to require an associate justice of the Supreme Court of the District to settle a bill of exceptions. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **S. Herbert Giesy** argued the cause, and, with *Mr. Holmes Conrad*, filed a brief for plaintiff in error:

The writ of mandamus was the proper remedy to require the judge to settle and sign the bill of exceptions.

*Ex parte Chateaugay Ore & Iron Co.* 128 U. S. 557, 32 L. ed. 513, 9 Sup. Ct. Rep. 150; *Crane* v. *Crane*, 5 Pet. 190, 8 L. ed. 92.

The writ should have issued, and the hearing of the questions involved should have been had after a return thereto.

*Kentucky* v. *Denniston*, 24 How. 98, 16 L. ed. 726.

"Discretion," when applied to a court of justice, means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular.

*Rex* v. *Wilkes*, 4 Burr. 2539; *Ex parte Mackey*, 15 S. C. 328.

The court had no authority to hear the cause and render judgment on a legal holiday, and would not have had authority to do so, even though the express prohibition had been omitted from the statute.

*Lampe* v. *Manning*, 38 Wis. 674; *Michie* v. *Michie*, 17 Gratt. 109; *Butler* v. *Kelsey*, 15 Johns. 177; *Pulling* v. *People*, 8 Barb. 384, 24 Am. & Eng. Enc. L. p. 574.

Where power is given to public officers, in the language of the act before us, or in equivalent language,—whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done.

*Rock Island County* v. *United States*, 4 Wall. 447, 18 L. ed. 423; *Galena* v. *Amy*, 5 Wall. 708, *sub nom. Galena* v. *United States*, 18 L. ed. 560; *United States* v. *Breitling*, 20 How. 254, 15 L. ed. 900; *Coe* v. *Morgan*, 13 Fed. 844.

The word "may" in a statute is sometimes used in a mandatory, and sometimes in a directory and permissive, sense. It has always been construed "must" or "shall" whenever it could be seen that the legislative intent was to impose a duty, and not simply a privilege or discretionary power, and when the public was interested, and the public or third persons had a claim *de jure* to have the power exercised.

14 Am. & Eng. Enc. L. p. 979.

*Mr.* **J. J. Darlington** argued the cause and filed a brief for defendant in error:

Mandamus does not lie to secure a reversal of a judicial determination, by the court below, of the question when the October Term of the supreme court of the District of Columbia ends, under its rules, when the 1st Tuesday of the following January happens to fall upon a legal holiday.

*Ex parte Taylor*, 14 How. 12, 14 L. ed. 305; *Ex parte Many*, 14 How. 24, 14 L. ed. 311.

Authorities to the effect that a power given to public officers, though by language indicating a discretion upon their part, is compulsory, and may be called into exercise by mandamus where necessary to *de jure* rights of third persons, are not applicable to the exercise of a discretion judicial in its nature.

*Rock Island County* v. *United States*, 4 Wall. 447, 18 L. ed. 423.

Verdicts may be received on Sunday.

*Reid* v. *State*, 53 Ala. 402, 25 Am. Rep.

627; *Henderson* v. *Reynolds*, 84 Ga. 159, 7 L. R. A. 327, 10 S. E. 734; *Webber* v. *Merrill*, 34 N. H. 202; *Stone* v. *Bird*, 16 Kan. 488; *State* v. *Penley*, 107 N. C. 808, 12 S. E. 455; *Hiller* v. *English*, 4 Strobh. L. 486.

And the jury may be further instructed, and any orders or motions incidental to receiving the verdict may be made.

*Jones* v. *Johnson*, 61 Ind. 257; *McCorkle* v. *State*, 14 Ind. 39; *People* v. *Odell*, 1 Dak. 197, 46 N. W. 601; *State* v. *Douglass*, 69 Ind. 544; *Johnston* v. *People*, 31 Ill. 469.

And bail may be taken.

*Watts* v. *Com.* 5 Bush, 309; *Hammons* v. *State*, 59 Ala. 164, 31 Am. Rep. 13; *Weldon* v. *Colquitt*, 62 Ga. 449, 35 Am. Rep. 128.

And even injunctions may issue on that day, in cases of necessity.

*Langabier* v. *Fairbury, P. & N. W. R. Co.* 64 Ill. 247, 16 Am. Rep. 550.

In the absence of special circumstances not arising from any fault or omission upon the part of the exceptant, the trial court is without power to settle or sign a bill of exceptions after the end of the term, unless, during the term, it has been continued for the purpose.

*Dredge* v. *Forsyth*, 2 Black, 563, 17 L. ed. 253; *Re Wight*, 134 U. S. 136, *sub nom. Wight* v. *Nicholson*, 33 L. ed. 865, 10 Sup. Ct. Rep. 487; *Müller* v. *Ehlers*, 91 U. S. 250, 23 L. ed. 320; *Michigan Ins. Bank* v. *Eldred*, 143 U. S. 293, 36 L. ed. 162, 12 Sup. Ct. Rep. 450; *Brown* v. *Bradley*, 6 App. D. C. 207; *Coe* v. *Morgan*, 13 Fed. 844; *Western Dredging & Improv. Co.* v. *Heldmaier*, 53 C. C. A. 625, 116 Fed. 179.

The rules of court are a law to the court as well as to the suitors, so long as they remain in force, and cannot be dispensed with to meet the supposed hardships of particular cases.

*Talty* v. *District of Columbia*, 20 App. D. C. 489; *Johnson* v. *Wright*, 2 App. D. C. 220.

Mr. Justice **McKenna** delivered the opinion of the court:

The purpose of this writ is to review an order of the court of appeals of the District of Columbia, made March 12, 1901, denying a petition for mandamus to require Andrew C. Bradley, at that time an associate justice of the supreme court of the District of Columbia, to settle a bill of exceptions.

[418] *The plaintiff in error brought suit against defendant in error, in the supreme court of the District of Columbia, on the 20th day of April, 1897, to recover the sum of $5,900, on several causes of action. They need not be described nor the defenses which were interposed to them. It is enough to say that, upon the issues made, a verdict resulted for defendant in error, on the 16th of November, 1900.

On December 14, 1900, a motion for new trial was made by plaintiff and denied by the court, and judgment entered on the verdict. The plaintiff prayed for, and was allowed, an appeal to the court of appeals of the District. The case was tried and judgment entered at October term, 1900, which expired December 31, 1900, unless it had been continued, and this resulted, it is contended, from the following proceedings: On the 7th day of January, 1901, the plaintiff, through his attorney, deposited with the clerk $50 in lieu of a bond on appeal, and moved the court that October term be prolonged by adjournment, in order to prepare a bill of exceptions. The motion was overruled on the ground that October term had ended on the 31st of December, 1900. Notice was given by the attorney for the plaintiff that he would present the "bill of exceptions to the court for settlement before Justice Bradley in the circuit court number 2." The bill was presented in pursuance of the notice, but Justice Bradley declined to settle the bill on the ground that October term had not been prolonged. The petition now under review was then presented to the court of appeals, praying "that the writ of mandamus may issue, requiring Andrew C. Bradley, an associate justice of the supreme court of the District of Columbia, to settle the bill of exceptions in this cause." The petition was dismissed.

The rule of the court in regard to bills of exceptions is as follows:

"Sec. 2. The bill of exceptions must be settled before the close of the term, which may be prolonged by adjournment in order to prepare it, but not longer than thirty-eight days, exclusive of Sundays, save in case of a trial begun during a term, but not concluded until after the expiration of the term, *in [419] which case the trial justice may extend the term in his discretion in order to prepare a bill of exceptions."

The case presents some anomalies. The mandamus was prayed against Justice Bradley for refusing to act officially; but the citation in error was directed to Arthur E. Randle, and he alone is defendant in error here. He was a party in the original cause, but not a party in the proceedings for mandamus. Making him a party here is attempted to be justified by the death of Justice Bradley and the action of the court of appeals in not entertaining the petition for mandamus. The immediate answer would seem to be that mandamus is itself an action, and can only, like other actions, be prosecuted against the parties to it, and that one of two effects resulted from the death of Justice Bradley: either the action abated, or could only be continued against the person who succeeded to his office and duty.

But passing this, we think the main contention of plaintiff in error is untenable. The argument of plaintiff is that the purpose of the rule was to allow thirty-eight days for the settlement of bills of exceptions, and to afford time to do so the rule provided that the term might be prolonged by adjournment, and the duty of prolonging the term was imposed on the court. We do not so interpret the rule. It provided the means for parties to secure the necessary time to present bills of exceptions. The court was not required to anticipate the intention of parties. Its duty under the rule, like its other duties, was to be exercised when invoked.

But it is also insisted that a motion to prolong the term was made in time. The argument to support this is that October term did not end on the 31st of December, 1900, but continued until the 7th of January, 1901, because by rule 3 of the supreme court of the District of Columbia the January terms of the circuit court commence on the 1st Tuesdays in January, and that the 1st Tuesday of January, 1901, fell on the 1st of January, which, being a holiday, and therefore, as it is insisted, a *dies non*, the term did not commence until the following Tuesday, the 8th of January. We cannot concur in the contention. The term commenced on the 1st of January, and the only effect of the holiday was to deprive the court of the power of doing any business but to discharge those who had been required to attend until the succeeding day, when the general duties and powers of the court could be legally exercised. It follows, therefore, that there was no error in refusing to settle the bill of exceptions, and the petition for mandamus was properly denied.

*Order affirmed.*

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PULLMAN COMPANY, *Plff. in Err.*,
*v.*
WIRT ADAMS, State Revenue Agent.

(See S. C. Reporter's ed. 420–422.)

*Commerce—privilege tax—on sleeping car companies.*

The privilege tax imposed by Miss. Code 1892, §§ 3317, 3387, on sleeping and palace car companies carrying passengers from one point to another within the state, cannot be deemed an unconstitutional regulation of commerce because of the declaration in Miss. Const. § 195, that sleeping car companies are common carriers and subject to liability as such, where such provision is regarded by the state courts as imposing no obligation on the company to transport local passengers.

[No. 138.]

*Argued and submitted December 19, 1902. Decided March 2, 1903.*

IN ERROR to the Supreme Court of the State of Mississippi to review a judgment affirming a judgment of the trial court in favor of plaintiff in an action to recover privilege taxes from a sleeping car company. *Affirmed.*

See same case below, 78 Miss. 814, 29 So. 917.

The facts are stated in the opinion.

*Mr.* **William Burry** argued the cause, and, with *Mr. J. S. Runnells*, filed a brief for plaintiff in error:

The operation of the sleeping cars, and the business in which plaintiff in error is engaged in Mississippi, constitute interstate commerce, and therefore the state cannot call such business a privilege, and impose a privilege tax thereon.

*Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

There is a well-defined difference between a license tax affecting interstate commerce, which is void, and a properly proportioned property tax on property or capital stock engaged in interstate commerce.

*Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 220, 41 L. ed. 695, 17 Sup. Ct. Rep. 305; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360.

If the interstate business and local business are necessarily so mixed as to preclude separation, a tax thereon is invalid.

*Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *State Freight Tax Case*, 15 Wall. 277, *sub nom. Philadelphia & R. R. Co.* v. *Pennsylvania*, 21 L. ed. 162.

Plaintiff in error is obliged to furnish sleeping accommodations to travelers local to Mississippi, as part of its interstate business, and therefore cannot carry on interstate business without subjecting itself to this privilege tax.

*Nevin* v. *Pullman Palace Car Co.* 106 Ill. 222, 46 Am. Rep. 688; Elliott, Railroads, § 1617.

The court will examine to see if exacting a full license tax for accommodating a single local passenger on an interstate car is not done to evade the Federal Constitution, and is not really a tax on interstate commerce.

*Crutcher* v. *Kentucky*, 144 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *United States Exp. Co.* v. *Allen*, 39 Fed. 712; *Austin* v. *Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

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NOTE.—*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. (Va.) 13 L. R. A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; and Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

*As to police power as affecting commerce*—see notes to People v. Budd (N. Y.) 5 L. R. A. 559; and State *ex rel.* Corwin v. Indiana & O. Oil, Gas. & Min. Co. (Ind.) 6 L. R. A. 579.

*On license taxes as affecting interstate commerce*—see notes to Rothermel v. Meyerle (Pa.) 9 L. R. A. 366; and American Fertilizing Co. v. North Carolina Bd. of Agri. (C. C. E. D. N. C.) 11 L. R. A. 179.

*Mr.* **Marcellus Green** submitted the cause for defendant in error. *Messrs. W. R. Harper* and *W. H. Potter* were with him on the brief:

A state may require a privilege license of a foreign corporation to do a purely local business, even though such corporation may, for the most part, be engaged in an interstate business of like character and kind, where the tax so levied is confined strictly to the local business, either by the express terms of the statute or by the construction of the courts.

*Osborne* v. *Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214.

The constitutional provision making the plaintiff in error a common carrier does in nowise affect its right to decline to do a local business, if such local business be unprofitable. Its right, like the right of every other common carrier, now and still is to classify the business it will engage in, upon any reasonable basis, and, when thus reasonably classified and limited, to serve all persons alike, within such limitation.

Hale, Bailments, p. 322; *Johnson* v. *Midland R. Co.* 4 Exch. 367; *Central R. & Bkg. Co.* v. *Lampley*, 76 Ala. 357, 52 Am. Rep. 334; *Honeyman* v. *Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20, 10 Pac. 628; *Kimball* v. *Rutland & B. R. Co.* 26 Vt. 247, 62 Am. Dec. 567; *Pitlock* v. *Wells, F. & Co.* 109 Mass. 452; *Citizens' Bank* v. *Nantucket S. B. Co.* 2 Story, 16, 33, Fed. Cas. No. 2,730; *Scwall* v. *Allen*, 6 Wend. 335, 346; *Kuter* v. *Michigan C. R. Co.* 1 Biss, 35, Fed. Cas. No. 7,955; *Sheldon* v. *Robinson*, 7 N. H. 157, 26 Am. Dec. 726; *Kemp* v. *Coughtry*, 11 Johns. 107, 109; *Emery* v. *Hersey*, 4 Greenl. 407, 16 Am. Dec. 268; *Harrington* v. *M'Shane*, 2 Watts, 443, 27 Am. Dec. 321; *Merwin* v. *Butler*, 17 Conn. 138; *Dwight* v. *Brewster*, 1 Pick. 50, 11 Am. Dec. 133.

A state has authority to require a privilege tax of a foreign corporation doing a local business in such state, even though such tax may indirectly affect its interstate business.

*Postal Teleg. Cable Co.* v. *Adams*, 71 Miss. 565, 4 Inters. Com. Rep. 416, 14 So. 36; *Louisville & N. R. Co.* v. *Kentucky*, 183 U. S. 518, 46 L. ed. 306, 22 Sup. Ct. Rep. 95.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action for taxes, brought by the revenue agent of the state of Mississippi against the Pullman Company. The defendant in due form raised the objection [421] that the tax law *was void as an interference with commerce between the states. Judgment was given for the plaintiff in the local state court, and the judgment was affirmed by the supreme court of the state. 78 Miss. 814, 29 So. 917. The case then was brought here by writ of error.

The tax in question was imposed by the following sections of the Mississippi Code of 1892: "§ 3317. A tax on privileges is levied as follows, to wit: . . . § 3387. Sleeping car companies: On each sleeping and palace car company carrying passengers from one point to another within the state, $100, and 25 cents per mile for each mile of railroad track over which the company runs its cars." We assume that the last words mean what afterwards was expressed by an amendment, "over which the company runs its cars in this state."

The Pullman Company is an Illinois corporation. Its sleeping cars were carried by various railroad companies, and all of them were carried into the state from another state, or out of the state to another state, or both. But such cars in their passage also carried passengers from point to point within the state, and a specific fare was collected by the servants of the Pullman Company. The company attempted by pleas and by an offer of evidence to bring before the court the fact that its receipts from this class of passengers did not equal the expenses chargeable against such receipts. It contended that these facts would show that the business within the state was merely a burden on its commerce between the states, while at the same time, it argued, it was compelled to assume that burden by § 195 of the state Constitution, which declares sleeping car companies to be common carriers and subject to liability as such. The pleas were held bad on demurrer, the evidence was rejected, and the jury was instructed to find for the plaintiff on the facts admitted. These rulings and the refusal of the court to declare the above-mentioned § 3387 unconstitutional are the errors assigned.

If the clause of the state Constitution referred to were held to impose the obligation supposed and to be valid, we assume without discussion that the tax would be invalid. For then it *would seem to be true [422] that the state Constitution and the statute combined would impose a burden on commerce between the states analogous to that which was held bad in *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851. On the other hand, if the Pullman Company, whether called a common carrier or not, had the right to choose between what points it would carry, and therefore to give up the carriage of passengers from one point to another within the state, the case is governed by *Osborne* v. *Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214. The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce. Both parties agree that the tax is a privilege tax.

As the validity of the tax is thus bound up with the effect of the section of the state Constitution, we think that the Pullman Company was entitled to know how it stood under the latter, and that a judgment against it could not be justified by reasoning which leaves that point obscure. We are somewhat embarrassed in dealing with the case, because we are not quite certain whether we rightly interpret the intimations upon the subject in the judgment under review. If the Constitution of Mississippi should be read as imposing an obligation to take local passengers, the question

for us might be which, if not both, the clause of the Constitution or the tax act, is invalid. But we assume that the opinion of the supreme court of Mississippi intends to meet the difficulty frankly, and when it says that the argument against the tax drawn from the above interpretation of the Constitution is fallacious, we take it as meaning that no such interpretation will be attempted in the future, and we take it so the more readily that we can see no ground for a different view. If we are right in our understanding the judgment of the supreme court was correct for the reason sufficiently stated above.

*Judgment affirmed.*

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3]*NATIONAL BANK & LOAN COMPANY OF WATERTOWN, New York, *Plff. in Err.*,

*v.*

MOSES PETRIE.

(See S. C. Reporter's ed. 423–426.)

*Contracts—rescission of illegal contract for fraud.*

The right to recover money paid to a national bank on a contract sought to be rescinded for fraud is not defeated because the parties were attempting a transaction forbidden by law, since to deny the right to rescind is to rely on the contract, which must be accepted, if at all, with the burden of the fraud.

[No. 166.]

*Argued and submitted February 24, 1903. Decided March 9, 1903.*

IN ERROR to the Supreme Court of the State of New York to review a judgment for plaintiff in a suit to recover money paid to a national bank on a contract alleged to have been void for fraud, which was affirmed by the Appellate Division of the Supreme Court of that State and by the Court of Appeals. *Affirmed.*

See same case below, in Supreme Court, 46 App. Div. 634, 61 N. Y. Supp. 1145, and in the Court of Appeals, 167 N. Y. 589, 60 N. E. 1119.

The facts are stated in the opinion.

*Messrs.* **Henry Purcell** and **John Lansing** submitted the cause for plaintiff in error:

The buying and selling of bonds such as the one sold to the plaintiff was not within the scope of the bank's corporate powers.

*First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 122, 23 L. ed. 679; *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; *California Nat. Bank* v. *Kennedy*, 167 U. S. 362, 42 L. ed. 198, 17 Sup. Ct. Rep. 831; *First Nat. Bank* v. *Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

As the sale of the bond to the defendant in error was such a transaction as the plaintiff in error, the bank, had no authority to engage in, the bank is not responsible for the misrepresentations of its president at the time of the sale.

*Weckler* v. *First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95; *First Nat. Bank* v. *Hoch*, 89 Pa. 324, 33 Am. Rep. 769; 2 Thomp. Nat. Bank Cas. 375.

The defendant in error in dealing with the bank is presumed to have known the powers of the bank and its officers, and that such a transaction as the purchase and sale of bonds was not within those powers.

*Western Nat. Bank* v. *Armstrong*, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572.

As the defendant in error and the plaintiff in error were equally subjects of legal censure in engaging in the transaction of the sale and purchase of the bond, they will be left where they have placed themselves.

*First Nat. Bank* v. *Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778.

The presumption of law is that the defendant in error knew that in selling him the bond the bank and its officers were acting beyond the scope of the powers of the bank, and that the transaction was illegal.

*Western Nat. Bank* v. *Armstrong*, 152 U. S. 346, 38 L. ed. 470, 14 Sup. Ct. Rep. 572.

The contract of sale being illegal as *ultra vires*, and having been fully executed by both parties, neither party can claim anything under it, and they will be left as the court finds them.

*Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Pearce* v. *Madison & I. R. Co.* 21 How. 441, 16 L. ed. 184.

The United States alone can question the validity of the transaction between the plaintiff and defendant.

*Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66.

This court has jurisdiction to entertain this writ of error.

*Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496; *McCormick* v. *Market Nat. Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

*Mr.* **Elon R. Brown** argued the cause and filed a brief for defendant in error:

The sale of the bond to the defendant in error having been induced by the false and fraudulent representations of the bank's officer as to its nature and value, he was entitled to recover the damages he had suffered by reason thereof.

*Fairchild* v. *McMahon*, 139 N. Y. 290, 34 N. E. 779; *Rothschild* v. *Mack*, 115 N. Y. 1, 21 N. E. 726; *Daly* v. *Wise*, 132 N. Y. 306, 16 L. R. A. 236, 30 N. E. 837; *Hickey* v. *Morrell*, 102 N. Y. 454, 55 Am. Rep. 824, 7 N. E. 321.

Having taken the money of the defendant in error on a contract of sale fraudulently induced by the false representations of its president, the bank cannot shelter itself be-

NOTE.—*As to rescission of contract* — see notes to Katz v. Bedford (Cal.) 1 L. R. A. 826; McCreery v. Day (N. Y.) 6 L. R. A. 503; and Tarkington v. Purvis (Ind.) 9 L. R. A. 607.

hind any statutory limitations of the national bank act, to escape answering to the defendant in error for the loss he has suffered.

*Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

Where the provisions of the national banking act prohibit certain acts by banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties.

*Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66; *Union Nat. Bank* v. *Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank* v. *Whitney*, 103 U. S. 99, 26 L. ed. 443; *First Nat. Bank* v. *Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778.

The decision of the state court having proceeded upon a distinct ground not involving a Federal question, and sufficient of itself to sustain a final judgment without reference to the Federal question involved, the judgment should be affirmed.

*Beaupre* v. *Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *Seeberger* v. *McCormick*, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128; *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Pierce* v. *Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Remington Paper Co.* v. *Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456.

This appeal should be dismissed for want of jurisdiction.

*Walworth* v. *Kneeland*, 15 How. 348, 14 L. ed. 724; *Udell* v. *Davidson*, 7 How. 269, 12 L. ed. 907; *Conde* v. *York*, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action to recover money paid to the plaintiff in error for certain bonds. One defense set up in the answer was that the bank was a national bank, and that the sale of the bonds was without the authority of the bank, and was illegal and void. Judgment went against the bank, it was affirmed by the appellate division of the supreme court and by the court of appeals, and the case now comes here by writ of error. The ground of the action is that the sale was induced by false representations of the president of the bank. We do not state these particularly, because the findings and rulings of the state court with regard to them are not open. We have to deal with no question except the defense attempted under the United States statute, and, therefore, need not inquire whether they con-[424] tained a stronger infusion of *fraud than is allowed to vendors in the way of praising their wares.

As we are of opinion that the defendant in error is entitled to keep his judgment, it does not matter so much as otherwise it would whether the result is reached by a dismissal of the writ, on the intimation of *Walworth* v. *Kneeland*, 15 How. 348, 353, 14 L. ed. 724, 726 (see *Conde* v. *York*, 168 U. S. 642, 649, 42 L. ed. 611, 18 Sup. Ct. Rep. 234), or by an affirmance of the judgment. We shall assume that the defense under the statute was such a claim of immunity as to entitle the plaintiff in error to come here. *Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 72, 35 L. ed. 107, 110, 11 Sup. Ct. Rep. 496; *McCormick* v. *Market Bank*, 165 U. S. 538, 546, 41 L. ed. 817, 820, 17 Sup. Ct. Rep. 433. On that assumption, however, we do not perceive how the defense is made out on the record. The complaint, to be sure, alleges that the bank was acting unlawfully in selling the bond, but it does not appear that Petrie knew the fact, and it would be a strong thing to charge him with notice or a duty to make inquiries as to how the bank was conducting its business, or to make the validity of the sale depend upon the fact alone, irrespective of the purchaser's knowledge. See *Miners' Ditch Co.* v. *Zellerbach*, 37 Cal. 543, 578, 579, 99 Am. Dec. 300; *New York & N. H. R. Co.* v. *Schuyler*, 34 N. Y. 30, 73; *Madison & I. R. Co.* v. *Norwich Sav. Soc.* 24 Ind. 457, 462. The sale might have been lawful. It was not necessarily wrong. *First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 122, 128, 23 L. ed. 679, 681. However, we need not stop at this preliminary difficulty or another suggested by the answer, on which no point was made. The answer alleges that the sale was without the authority or consent of the bank, and was not within the course of its regular business, which looks a good deal like an attempt to deny that there ever was an effective sale, and yet to keep the price.

The declaration goes upon a rescission of the contract. It contains ambiguous language, but the allegations of tender of the bond and that the tender still is kept good make the ground sufficiently clear. The question then is, leaving on one side the averment just quoted from the answer, and assuming that the parties were attempting a transaction forbidden by the law, whether the nature of the attempt prevents one of them from *withdrawing from the bargain[425] on the ground of preliminary fraud. If the withdrawal were on the ground of repentance alone the law might, or might not, leave the parties where it found them. See *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 60, 61, 35 L. ed. 55, 69, 11 Sup. Ct. Rep. 478; *Pullman's Palace Car Co.* v. *Central Transp. Co.* 171 U. S. 138, 150, 43 L. ed. 108, 113, 18 Sup. Ct. Rep. 808. But a person does not become an outlaw and lose all rights by doing an illegal act. See *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that, as between the parties, the one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed.

That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that with which the other had been content, has lost his right to object, because he has brought about the other's consent by wrong. See *Pullman's Palace Car Co.* v. *Central Transp. Co.* 171 U. S. 138, 151, 43 L. ed. 108, 114, 18 Sup. Ct. Rep. 808. It is true that the fraud was perpetrated by an agent. and it is argued that he did not represent the bank for an illegal act. But unless this means that there was no sale, as the answer and a part of the argument seem to suggest,—in which case, of course, Petrie must have his money back,—the answer is that if the bank relies upon the sale it must take it with the burden of the fraud. It must adopt the whole transaction or no part of it. It cannot affirm what is for its advantage and repudiate the rest. Cases where the action is on the illegal contract do not apply. Such was *First Nat. Bank* v. *Hoch*, 89 Pa. 324, 33 Am. Rep. 769. Here the attempt is to recover outside of it, treating it as set aside. An action for damages caused by fraudulent representations which induced a contract affirms the contract and relies upon it (*Whiteside* v. *Brawley*, 152 Mass. 133, 134, 24 N. E. 1088), and therefore may be subject to the same defenses as an action brought directly upon the contract. *Weckler* v. *First Nat. Bank*, 42 Md. 581, 595, 597, 20 Am. Rep. [426]95, seems to have been *an action of this character in respect of a sale on commission by the bank. We express no opinion as to an action of that kind. See *Thompson* v. *Saint Nicholas Nat. Bank*, 146 U. S. 240, 251, 36 L. ed. 956, 961, 13 Sup. Ct. Rep. 66; *First Nat. Bank* v. *Hawkins*, 174 U. S. 364, 43 L. ed. 1007, 19 Sup. Ct. Rep. 739. But when a right is claimed to repudiate it, the party who denies the right is the one who relies upon the contract, and that party must take it as it was made. The record discloses no error re-examinable here.

*Judgment affirmed.*

Mr. Justice **McKenna** took no part in the consideration and disposition of this case.

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NATIONAL BANK & LOAN COMPANY OF WATERTOWN, New York, *Plff. in Err.*,

*v.*

LILIAN TRAVER CARR.

(See S. C. Reporter's ed. 426.)

*Contracts—rescission of illegal contract for fraud.*

This case is governed by the decision in *National Bank & Loan Co.* v. *Petrie, ante*, 879.

[No. 165.]

*Argued and submitted February 24, 1903. Decided March 9, 1903.*

IN ERROR to the Supreme Court of the State of New York to review a judgment for plaintiff in a suit to recover money paid to a national bank on a contract alleged to have been void for fraud, which was affirmed by the Appellate Division of the Supreme Court of that State and by the Court of Appeals. *Affirmed.*

*Messrs.* **Henry Purcell** and **John Lansing** submitted the cause for plaintiff in error.

For their contentions see their briefs as reported in *National Bank & Loan Co.* v. *Petrie, ante*, 879.

*Mr.* **Elon R. Brown** argued the cause and filed a brief for defendant in error:

As the purchase of the bonds for the defendant in error from the bank required the exercise of judgment and discretion, the bank's president could not lawfully act as an agent of both the bank and the defendant in error. The defendant in error, being ignorant of his dealings with the bank in her behalf, was entitled to rescind or avoid the contract on discovering that fact, independently of any false representations made by him in effecting the sale to her.

*Conkey* v. *Bond*, 36 N. Y. 427; *Mayo* v. *Knowlton*, 134 N. Y. 250, 31 N. E. 985; *Taussig* v. *Hart*, 58 N. Y. 425; *Bruce* v. *Davenport*, 36 Barb. 349; *New York Cent. Ins. Co.* v. *National Protection Ins. Co.* 14 N. Y. 85; *Murray* v. *Beard*, 102 N. Y. 505, 7 N. E. 553; *Empire State Ins. Co.* v. *American Cent. Ins. Co.* 138 N. Y. 446, 34 N. E. 200; *Ritt* v. *Washington Marine & F. Ins. Co.* 41 Barb. 353; *Utica Ins. Co.* v. *Toledo Ins. Co.* 17 Barb. 134; *Knauss* v. *Gottfried Krueger Brewing Co.* 142 N. Y. 70, 36 N. E. 867. See also *Carman* v. *Beach*, 63 N. Y. 97; *Fellows* v. *Northrup*, 39 N. Y. 117; Pom. Eq. Jur. 902.

The defendant in error may rescind the purchase of the bonds because of the president's misrepresentations as to the value and nature of the bonds, and of the suppression by him of the fact that he was purchasing them from the bank while acting as its manager and president, without proof of the intent of the bank to defraud her.

*Hammond* v. *Pennock*, 61 N. Y. 145. Approved in *Fairchild* v. *McMahon*, 139 N. Y. 294, 34 N. E. 779; *American Sugar Ref. Co.* v. *Fancher*, 145 N. Y. 559, 27 L. R. A. 757, 40 N. E. 206.

The tender of the bonds to the plaintiff in error, and demand for the return of the consideration for them, made upon her discovery that the president had purchased them from the bank, was a disaffirmance of the sale, entitling the defendant in error to recover in this action.

*Gould* v. *Cayuga County Nat. Bank*, 86 N. Y. 75, 99 N. Y. 333, 2 N. E. 16; *Yeomans* v. *Bell*, 151 N. Y. 230, 45 N. E. 552; *Allerton* v. *Allerton*, 50 N. Y. 670; *Vail* v. *Reynolds*, 118 N. Y. 297, 23 N. E. 301; *Berry* v.

*American Cent. Ins. Co.* 132 N. Y. 49, 30 N. E. 254.

The bank as the undisclosed principal is liable on the contract and for the acts of its president. It cannot reap the benefit of a contract made by him or by his wrongful acts, and escape resulting responsibility to those with whom he dealt.

*Bennett* v. *Judson*, 21 N. Y. 238; *Fairchild* v. *McMahon*, 139 N. Y. 290, 34 N. E. 779; Benjamin, Sales, § 467a.

Having taken the money of the defendant in error on a contract induced by false representations and double dealing, the bank as the undisclosed principal cannot shelter itself behind statutory limitations of the national bank act, to escape answering to the defendant in error for the loss she has suffered.

*Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 35 L. ed. 107, 11 Sup. Ct. Rep. 496.

That the bank was acting as an undisclosed principal, and that the defendant in error had no knowledge that she was dealing with the bank, render inapplicable the doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void.

*McCormick* v. *Market Bank*, 165 U. S. 538, 41 L. ed. 817, 17 Sup. Ct. Rep. 433.

Having no knowledge that she was dealing with the bank, the defendant in error, of course, was not charged with the duty of taking notice of the legal limits of its powers.

*Weckler* v. *First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95.

Where the provisions of the national banking act prohibit certain acts of banks or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties.

*Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66; *Union Nat. Bank* v. *Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank* v. *Whitney*, 103 U. S. 99, 26 L. ed. 443; *First Nat. Bank* v. *Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778.

The decision of the state court having proceeded upon distinct grounds not involving a Federal question, and sufficient of themselves to sustain a final judgment, without reference to the Federal question involved, the judgment should be affirmed.

*Beaupre* v. *Noyes*, 138 U. S. 397, 34 L. ed. 991, 11 Sup. Ct. Rep. 296; *Seeberger* v. *McCormick*, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128; *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Pierce* v. *Somerset R. Co.* 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; *Remington Paper Co.* v. *Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *Jenkins* v. *Loewenthal*, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638.

The appeal should be dismissed for want of jurisdiction.

*Walworth* v. *Kneeland*, 15 How. 348, 14 L. ed. 724; *Udell* v. *Davidson*, 7 How. 769, 12 L. ed. 907; *Conde* v. *York*, 168 U. S. 642, 42 L. ed. 611, 18 Sup. Ct. Rep. 234; *Murdock* v. *Memphis*, 20 Wall. 590, 22 L. ed. 429.

Mr. Justice **Holmes** delivered the opinion of the court:

This case is similar in substance, pleading, and argument to the foregoing, with the additional fact that the president of the bank acted as the confidential adviser of the defendant in error, and did not reveal to her that the bonds belonged to the bank, or that he was on both sides of the transaction and interested against her. As soon as she found out that the bank was the seller, she repudiated the sale.

*Judgment affirmed.*

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JOHN BROWNFIELD, *Plff. in Err.*,
*v.*
STATE OF SOUTH CAROLINA.

(See S. C. Reporter's ed. 426–429.)

*Appeal—recital in agreed statement—when taken as true.*

A recital in an agreed statement, that defendant offered to introduce testimony of a discrimination against negroes in the selection of grand jurors, which was relied upon as the ground for his motion to quash the indictment, will not be taken as true on error to a state court, where such statement was signed "with relation to case as settled by judge," and he stated therein that he overruled the motion because the statement of facts set out in the grounds for quashing the indictment did not appear from the records or otherwise, and that in the absence of any showing to the contrary he was bound to assume that the jury commissioners had done their duty, and the record discloses no exception to the supposed refusal to hear the proffered evidence, and no contention in that regard on the appeal to the state supreme court.

[No. 172.]

*Argued February 25, 1903. Decided March 9, 1903.*

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment which affirmed a conviction of murder. *Affirmed.*

See same case below, 60 S. C. 509, 39 S. E. 2.

The facts are stated in the opinion.

*Messrs.* **J. L. Mitchell** and **W. J. Whipper** argued the cause, and, with *Mr. E. M. Hewlett*, filed a brief for plaintiff in error.

*Mr.* **John S. Wilson** argued the cause and filed a brief for defendant in error.

*Mr.* **W. H. Townsend** also argued the cause for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes here by writ of error to the supreme court of South Carolina. The

plaintiff in error has been convicted of murder, and the error alleged is that the grand jury was composed wholly of white persons, and that all negroes, although constituting four fifths of the population and of the registered voters of the county, were excluded on account of their race and color. The plaintiff in error is a negro, and he says that in this way he has been denied the equal protection of the laws and of the civil rights guaranteed to him by the Constitution and laws of the United States. *Carter* v. *Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687. The case was taken to the supreme court of the state by appeal, and the judgment of the trial court was affirmed.

We have stated the error which is alleged. The trouble with the case is that we are not warranted in assuming that the allegations are true. The record contains an agreed statement called a brief, in which it appears that the defendant made a motion to quash on the grounds stated, and in which it is said that the defendant offered to introduce testimony to support these grounds. But this agreed statement is "signed with relation to case as settled by judge." It appears that the parties agreed that the judge before whom the case was tried should "make a statement as to his rulings upon the motion to quash the indictment, and also as to the motion to challenge the arrays of grand and petit jurors in the case, and also as to requests to charge, and such statement shall be the agreed statement for the purposes of this appeal." The challenge of the array referred to was upon the same grounds as the [428] motion to quash. *In pursuance of this agreement the judge made a statement of the grounds on which he overruled the motion. "Because the statement of facts set out in the grounds for quashing the same did not appear from the records or otherwise. . . . In the absence of any showing to the contrary, I was bound to assume that the jury commissioners had done their duty."

The foregoing language is quite inconsistent with there having been an offer to prove the allegations of the motion, as is the further fact that the record discloses no exception to the supposed refusal to hear evidence offered to that end. If these considerations were not enough, we have, in addition, the absence of any suggestion of a refusal to admit evidence in the reasons for appeal to the supreme court, and the statement of the supreme court that it was not contended at the hearing of the appeal that there was any offer to introduce testimony on the point "other than the offer therein made." The last words refer, we assume, to the concluding words of the motion: "All of which the defendant is ready to verify." Upon the whole record we are compelled to infer that the statement that the defendant offered to introduce evidence was inserted in the so-called brief by his counsel, but was not agreed to except so far as it might be confirmed by the statement of the judge, and that he did not confirm it. We see no ground for the suggestion that this fact was outside the matters submitted to the judge, and therefore must be taken to have been admitted. Evidently, that was not the understanding on the part of the state. It is suggested that the allegations of the motion to quash, not having been controverted and having been supported by the affidavit of the defendant, must be taken to be true. But a motion, although reduced to writing, is not a pleading, and does not require a written answer. It appears from the grounds on which the judge decided it, apart from anything else, that the allegations were controverted, and under such circumstances it was necessary for the defendant to make an attempt to introduce evidence. The formal words of the motion were not enough. *Smith* v. *Mississippi*, 162 U. S. 592, 601, 40 L. ed. 1082, 1085, 16 Sup. Ct. Rep. 900.

A provisional objection is made to the Constitution of South *Carolina in case it [429] should be held to exclude negroes from the jury. But the ground of the motion was not that negroes were excluded by an invalid constitutional provision, but that they were excluded in the administration of the law, although they were qualified under it to serve. The case involves questions of the gravest character, but we must deal with it according to the record, and the record discloses no wrong.

*Judgment affirmed.*

Mr. Justice **McKenna** took no part in the consideration and disposition of this case.

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EDWARD H. PARDEE and Arabella D. Huntington, Executrix, and Charles H. Tweed and Isaac E. Gates, Executors of Collis P. Huntington, Deceased, *et al.*, *Plffs. in Err.*,

*v.*

A. D. ALDRIDGE, A. F. Hardie, and W. G. Mowry, Trustees for J. E. Downs and Associates.

(See S. C. Reporter's ed. 429-434.)

*Trial—conflicting findings of fact—mortgage—of railroad property—what property covered — judgments—conclusiveness against strangers.*

1. The findings of the jury upon special issues of fact submitted to them for their determination, where warranted by the evidence, control conflicting findings made under the instructions of the court.
2. Real property only temporarily used for railroad purposes, having been acquired by a railroad company with the intention of subdividing such portions as should not be

NOTE.—*On mortgages of railroad property*—see note to Thompson v. White Water Valley R. Co. 33 L. ed. U. S. 256.

*As to jurisdiction as affected by possession of the subject-matter*—see Adams v. Mercantile Trust Co. 15 C. C. A. 6, and note.

*On conclusiveness of judgments generally*—

needed for railroad purposes into lots to be sold to its employees, is not covered by a mortgage of all the property of such company "used for and pertaining to the operation of said railroad."

3. An adjudication in a suit in equity brought by a receiver of mortgaged property against persons claiming the land under an execution sale, that such property was subject to the mortgage, did not so bring the property into the custody of the court as to invalidate a prior sale of the same property on execution to other persons, strangers to the suit.

[No. 137.]

*Argued January 19, 20, 1903. Decided March 16, 1903.*

IN ERROR to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas to review a judgment which reversed a judgment of the trial court in favor of defendants in an action of trespass to try title to land. *Affirmed.*

See same case below, 24 Tex. Civ. App. 254, 60 S. W. 789.

The facts are stated in the opinion.

*Messrs.* **Maxwell Evarts** and **R. S. Lovett** argued the cause and filed a brief for plaintiffs in error:

This court has jurisdiction to inquire and determine whether, by the judgment of the court of civil appeals, due effect has been denied to the decrees of the circuit court in the foreclosure proceedings.

*Dupasseur* v. *Rochereau*, 21 Wall. 130, 22 L. ed. 588; *Embry* v. *Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25; *Crescent City L. S. L. & S. H. Co.* v. *Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Central Nat. Bank* v. *Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

Where, as in this case, the evidence is without conflict, and the question is whether the judgment of the state court upon such evidence denies due effect to a decree of a court of the United States, the question is obviously one of law, and not of fact, and this court has the right of review.

*Martin* v. *Hunter*, 1 Wheat. 304, 4 L. ed. 97; *Smith* v. *Maryland*, 6 Cranch, 286, 3 L. ed. 225; *Chouteau* v. *Eckhart*, 2 How. 344, 11 L. ed. 293; *Cunningham* v. *Ashley*, 14 How. 377, 14 L. ed. 462; *Hyde* v. *Booraem*, 16 Pet. 169, 10 L. ed. 925; *The Francis Wright*, 105 U. S. 381, *sub nom. Duncan* v. *The Francis Wright*, 26 L. ed. 1100; *Republican River Bridge Co.* v. *Kansas P. R. Co.* 92 U. S. 315, 23 L. ed. 515; *Lytle* v. *Arkansas*, 22 How. 193, 16 L. ed. 306; *Mackay* v. *Dillon*, 4 How. 421, 11 L. ed. 1038; *United States* v. *Pugh*, 99 U. S. 265, 25 L. ed. 322; *Sun Mut. Ins. Co.* v. *Ocean Ins. Co.* 107 U. S. 485, 27 L. ed. 337, 1 Sup. Ct. Rep. 582; *The Edwin I. Morrison*, 153 U. S. 199, *sub nom. Bradley Fertilizer Co.* v. *The Edwin I. Morrison*, 38 L. ed. 688, 14 Sup. Ct. Rep. 823; *Dower* v. *Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

The supreme court of Texas, the jurisdiction of which by express constitutional provision is limited to questions of law, does not hesitate to review judgments of the courts of civil appeals (which are declared by the Constitution to be conclusive upon the facts) in cases where it deems the evidence insufficient to support the judgment; and in some cases it bases its judgment upon facts not embraced in the findings of the court of civil appeals, but which are contained in the statement of facts.

*Clarendon Land Invest. Agency Co.* v. *McClelland Bros.* 86 Tex. 179, 22 L. R. A. 105, 23 S. W. 576, 1100; *Bauman* v. *Jaffray*, 86 Tex. 617, 26 S. W. 394; *Gainesville, H. & W. R. Co.* v. *Lacy*, 86 Tex. 246, 24 S. W. 269; *Tackaberry* v. *City Nat. Bank*, 85 Tex. 488, 22 S. W. 151, 299; *McLeary* v. *Dawson*, 87 Tex. 524, 29 S. W. 1044; *Ætna Ins. Co.* v. *Holcomb*, 89 Tex. 404, 34 S. W. 915; *Lee* v. *International & G. N. R. Co.* 89 Tex. 583, 36 S. W. 63; *Kilgore* v. *Northwest Texas Baptist Educational Asso.* 90 Tex. 139, 37 S. W. 598; *Moore* v. *Waco Bldg. Asso.* 92 Tex. 265, 47 S. W. 716. See also *Fellows* v. *Northrup*, 39 N. Y. 117; *Whitman* v. *Winchester Repeating Arms Co.* 55 Conn. 247, 10 Atl. 571; *Morey* v. *Milliken*, 86 Me. 464, 30 Atl. 102.

Where property in the custody of one court through a receiver is sold under process of other courts against the defendant, such sales are absolutely void.

*Wiswall* v. *Sampson*, 14 How. 52, 14 L. ed. 322; *Davis* v. *Gray*, 16 Wall. 203, 21 L. ed. 447; *Porter* v. *Sabin*, 149 U. S. 473, 37 L. ed. 815, 13 Sup. Ct. Rep. 1008; *Re Tyler*, 149 U. S. 181, 37 L. ed. 694, 13 Sup. Ct. Rep. 785; *Edwards* v. *Norton*, 55 Tex. 410, *Russell* v. *Texas & P. R. Co.* 68 Tex. 646, 5 S. W. 686; *Ellis* v. *Vernon Ice, Light & Water Co.* 86 Tex. 109, 23 S. W. 858; *Texas Trunk R. Co.* v. *Lewis*, 81 Tex. 1, 16 S. W. 647.

Upon the same principle, every sale sought to be made of property while in the custody of a court for administration and distribution, and in hostility to the title there held, no matter whether under legal process or voluntarily, and no matter whether the vendor or vendee are parties to the receivership litigation or not, should be declared void.

See *Scott* v. *Crawford*, 16 Tex. Civ. App. 477, 41 S. W. 697.

*Mr.* **W. J. Moroney** argued the cause and filed a brief for defendants in error:

Findings of fact in a state court, whether by court or jury, are conclusive on this court, regardless of the question of the suffi-

see notes to Sharon v. Terry (C. C. N. D. Cal.) 1 L. R. A. 572; Bollong v. Schuyler Nat. Bank (Neb.) 3 L. R. A. 142; Wiese v. San Francisco Musical Fund Soc. (Cal.) 7 L. R. A. 577; Morrill v. Morrill (Or.) 11 L. R A. 155; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

*As to conclusiveness and effect of judgments as between Federal and state courts*—see note to Kansas City, Ft. S. & M. R. Co. v. Morgan, 21 C. C. A. 478; and Union & P. Bank v. Memphis, 49 C. C. A. 468.

ciency of the evidence to support the findings.

*Bartlett* v. *Lockwood*, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; *Noble* v. *Mitchell*, 164 U. S. 367, 41 L. ed. 472, 17 Sup. Ct. Rep. 110; *Missouri, K. & T. R. Co.* v. *Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Hedrick* v. *Atchison, T. & S. F. R. Co.* 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; *Chemical Nat. Bank* v. *City Bank*, 160 U. S. 646, 40 L. ed. 568, 16 Sup. Ct. Rep. 417; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Israel* v. *Arthur*, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; *Dower* v. *Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 457; *Jenkins* v. *Neff*, 186 U. S. 230, 46 L. ed. 1140, 22 Sup. Ct. Rep. 905; *Bement* v. *National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; U. S. Rev. Stat. § 1011 (U. S. Comp. Stat. 1901, p. 715).

When property in the hands of a receiver is sold under order of court, the sale confirmed and complied with, the deed made to the purchaser, and the receiver directed to deliver the property to the purchaser on demand, and the purchaser, after a reasonable time, fails to demand possession, but voluntarily leaves the property in the receiver's hands, such property ceases to be *in custodia legis*, and the receiver in fact becomes the private agent of the purchaser.

*Houston & T. C. R. Co.* v. *Bath*, 17 Tex. Civ. App. 697, 44 S. W. 595; *Animarium Co.* v. *Bright*, 82 Fed. 197; *Baughman* v. *Calavera County Super. Ct.* 72 Cal. 572, 14 Pac. 369; *Houston & T. C. R. Co.* v. *State*, 89 Tex. 294, 34 S. W. 734, and cases cited; *The Holladay Case*, 29 Fed. 226.

Under the term "appurtenances," as used in a railroad mortgage, only such property passes as is indispensable to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company and facilitate the discharge of its business. A distinction is made, in such cases, between what is indispensable to the operation of a railroad, and what would be only convenient.

*Humphreys* v. *McKissock*, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779; *State, Camden & A. R. & Transp. Co., Prosecutors*, v. *Mansfield*, 23 N. J. L. 510, 57 Am. Dec. 409; *Shirley* v. *Waco Tap R. Co.* 78 Tex. 136, 10 S. W. 543.

The purchaser at a foreclosure sale acquires title to the road as constructed.

2 Perry, Tr. § 759; *Walsh* v. *Barton*, 24 Ohio St. 28; *Seymour* v. *Canandaigua & N. F. R. Co.* 25 Barb. 284; *Elwell* v. *Grand Street & N. R. Co.* 67 Barb. 83; *Shamokin Valley R. Co.* v. *Livermore*, 47 Pa. 465, 86 Am. Dec. 552.

Use for a Y of a temporary, and not a permanent, character, would exclude the land from the mortgage, even if it had been definitely located.

Elliott, Railroads, 654, § 498.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action of trespass to try title to land, brought by *Aldridge and others, [430] trustees, against Pardee and others, the plaintiffs in error. The only parcels here in controversy are two tracts, known as the Hughes and Slaughter tract and the Mays tract. Both parties claim title under the Texas Trunk Railroad Company. Pardee claims under the foreclosure of a mortgage made by the railroad company and some incidental proceedings. Aldridge claims under a sale outside of the mortgage. The question in the case is whether the mortgage embraced these tracts.

Although it may not be necessary, we will state the title on each side a little more in detail before discussing the questions of law. On March 22, 1880, the Texas Trunk Railroad Company mortgaged its road, "including all appurtenances and appendages of said railroad, and the property of said company now acquired or which may be acquired, in the state of Texas, used for and pertaining to the operation of said railroad." This was to secure bonds. Later in the same year, although the deed was dated earlier, the Hughes and Slaughter tract was conveyed to the railroad. The Mays tract was conveyed the next year. On January 31, 1883, there was a decree of foreclosure on the mortgage in the United States circuit court, and there was a sale on the 1st of the following May. The purchasers organized a new company, under the old charter, but a distinct organization, as permitted by the local law. In 1885 the property of the second company was sold by the sheriff, on execution following a judgment in the state court, and also by the United States marshal, under an order of sale for failure to pay certain sums as provided in the original foreclosure proceedings. The same persons purchased at both sales, and organized a third company, still under the old charter. On August 30, 1888, the third company made a mortgage of the railroad. A bill to foreclose this was filed in the United States court on September 4, 1891, a decree of foreclosure was made in 1895, and Pardee, the plaintiff in error, purchased at the sale, for the benefit of himself and C. P. Huntington. Thus, it will be seen that the title of the plaintiffs in error depends, as we have said, on the question whether the original mortgage embraced the land in suit.

*Before the first foreclosure, but after the [431] execution of the mortgage, suits were begun against the first corporation, and in 1887 a judgment was rendered against it in one of them. On this judgment executions were issued, and the parcels of land in suit were sold to the trustee for Downs and his associates, the defendants in error. The trustee brought a suit to try title against the trustees and surviving directors of the first company and a receiver of the third company, and got judgment on April 7, 1898. The defendant directors and trustees also executed a deed to him, and he afterwards

conveyed to the present trustees for Downs. If the first mortgage embraced the land, Downs got no rights, but except for that question and one other to be mentioned, his title is not in controversy here, and we do not go into it in detail. The trial court gave judgment for Pardee and Huntington as to the tracts in question, but the judgment was reversed by the court of civil appeals, and final judgment was entered in that court in favor of the trustees for Downs. A writ of error was refused by the supreme court of the state. The case is brought here by writ of error on the ground that due effect was denied to decrees of the United States court. *Dupasseur* v. *Rochereau*, 21 Wall. 130, 22 L. ed. 588. See *Sweringen* v. *St. Louis*, 185 U. S. 38, 41, 46 L. ed. 705, 797, 22 Sup. Ct. Rep. 569. As we are of opinion that the judgment of the court of appeals was right, it is less important than otherwise it would be to discuss the grounds upon which we think that there is jurisdiction, and we shall proceed at once to the merits of the case.

If the disputed parcels of land came under the mortgage when they were acquired, they did so as "property used for and pertaining to the operation of said railroad." At the trial evidence was taken on the question whether these parcels were used for or did pertain to such operation. The defendants in error disclaimed to the extent of a right of way 100 feet wide, 50 feet on each side of the center line of the railroad. But there was testimony that the company, when it purchased, intended, after using what was necessary for tracks on the west side, to lay out the rest of the Hughes and Slaughter land in lots and sell them to the [432] employees of the road. So as to the Mays tract; what was needed was taken for tracks and to get sand, and the rest was to be cut up into lots. Both parcels were returned each year for taxation as "lands and town lots . . . exclusive of right of way and depot grounds," in the inventory of the company. The judge instructed the jury to return findings on two special issues to the following effect: As to the Hughes and Slaughter land, the intention of the company was to put there the main track, part of the sheds, and whatever switches and side tracks should be necessary to the operation of the road, and if they did not occupy all of the land to sell lots on the eastern side to its employees. The land was not cut up, and no lots were sold. The company built its main track on the west side, a Y extending eastwardly across the land to beyond its center, and a small house, used as a ticket office and car shed. This was the only land the road owned in Dallas, where it terminated, and if it had been constructed and operated properly it would have needed as much as 25 acres (the size of the tract) for terminal purposes. As to the Mays tract, the intention was as above stated. The main track was built across it on the east, and a spur track was built to reach the sand. It would be necessary to use sand properly to construct and operate the road.

The foregoing findings were merely the result of rulings on the evidence. But the jury found, on other special issues submitted to them, that all but 100 feet off the west boundary of the Hughes and Slaughter tract was acquired for the above-stated purpose of subdivision and sale, that any use of the rest of the land in connection with the operation of the railroad, except the 100 feet, was only of a temporary character, and that there was no such use of the rest of the land except of so much as was occupied by the Y. There was evidence that the company expected to use another tract for terminal purposes, although it never got the deed. The jury further found that no part of the Hughes and Slaughter tract above what was disclaimed was necessary for the construction, equipment, or operation of the railroad when the first mortgage was foreclosed. Also, they found that all of the Mays tract was acquired for the purpose of subdivision and sale. As there was evidence warranting these find- [433] ings, and as the findings dealt with pure matters of fact, which it was the province of the jury to determine, so far as there was a conflict between them and those which were made under instructions, those which expressed the free judgment of the jury would prevail. We have no concern with the arguments which are urged here in favor of different conclusions. It is enough that there was some evidence to support the free findings of the jury, and, that being so, those findings establish the facts, as was held by the court of appeals.

On the findings which we have recited, the land in dispute was not property used for and pertaining to the operation of said railroad, and the ruling of the court of appeals was right. Some point is made of the disclaimer, which is said to have been arbitrary in amount, and not based on evidence. But a party may disclaim what he likes, in advance of the evidence, and is not bound to give reasons for his course.

One matter remains to be mentioned. A receiver appointed in the second foreclosure suit brought a bill in equity in the United States court against certain persons who had purchased the land in question on other execution sales. One ground of the bill was that the property was subject to the mortgage, and on July 16, 1895, it was so decreed. It is argued that although the trustees for Downs were not parties to this bill, they in some way were affected by the decree, that the proceeding was *in rem*, and that the decree brought the property into the custody of the court so as to invalidate the sale. *Wiswall* v. *Sampson*, 14 How. 52, 14 L. ed. 322. But a suit in equity is not a proceeding *in rem*, properly so called. It does not purport to summon or invite, by notice or otherwise, all the world to come in, so far as there are any adverse interests. It is more personal even than the common law, and works out its decrees by orders to the

defendants. Of course, the adjudication in such a suit does not conclude strangers. As to the decree bringing the property into the custody of the court in such sense as to invalidate the sales under which Downs claims, the receiver being a receiver of the mortgaged property only, and there being no representative of the equity of redemption
[14] or of Down's interest *before the court, it is not to be presumed that any act was done inconsistent with outstanding rights as now established, or that the receiver was put in possession of property which was not embraced in the mortgage. The receiver was in possession of the road, and his right to the portion of the land over which the railroad ran is not disputed, but it does not appear that he held the residue under an adverse claim, or at all. Although declaring his right to the residue to be paramount to a third person, the court left all others free to assert their claims. There is nothing to show that the mode in which the trustees for Downs asserted their rights was unlawful or void. Probably nothing was done under the suit in equity beyond the entering of the decree on July 16, 1895. The principal sale took place before that date.

*Judgment affirmed.*

Mr. Justice **White** and Mr. Justice **Peckham** dissented.

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## KNOXVILLE WATER COMPANY, *Plff. in Err.*, *v.* MAYOR AND ALDERMEN OF THE CITY OF KNOXVILLE.

(See S. C. Reporter's ed. 434–438.)

*Contracts—impairment of obligation—regulation of water rates—contract exemption.*

1. A provision in a contract between a water company and a municipality, that the company shall supply water to private consumers at a specified rate, does not amount to an implied undertaking by the municipality not to disturb such rates, the obligation of which is impaired by an ordinance reducing them, where the company was incorporated under an act which, while conferring upon it power to charge such rates as might be agreed upon with its consumers, expressly recognized the power of the municipality to regulate water rates.

2. The obligation of contracts between a water company and private consumers by which the latter were to pay for the water in accordance with the rates "now or hereafter in force" is not impaired by a municipal ordinance reducing such rates, enacted in the exercise of the power of the municipality to regulate water rates.

[No. 212.]

*Argued March 13, 1903. Decided March 23, 1903.*

IN ERROR to the Supreme Court of the State of Tennessee to review a judgment of that court enforcing a penalty for charging water rates in excess of those fixed by municipal ordinance. *Affirmed.*

See same case below, 107 Tenn. 647, 64 S. W. 1075.

The facts are stated in the opinion.

*Messrs.* **Charles T. Cates, Jr.,** and **Heber J. May** argued the cause and filed a brief for plaintiff in error:

The result of the authorities upon the subject is that, as a general rule, every member of the municipal council is entitled to reasonable notice of special meetings, and no action can be lawfully taken at such meetings unless such notice has been given, or unless the members not notified actually attend and participate in the business of the meeting.

*London & N. Y. Land Co.* v. *Jellico*, 103 Tenn. 320, 52 S. W. 995; Dill. Mun. Corp. 4th ed. §§ 256, 263, 264; 1 Beach. Pub. Corp. § 265; *Re Turnpike Road*, 5 Binn. 481; *Paola & F. River R. Co.* v. *Anderson County*, 16 Kan. 302; *Rex* v. *Shrewsberry*, Cas. T. Hardw. 151; Ang. & A. Corp. §§ 492–494; 15 Am. & Eng. Enc. Law, 1st ed. pp. 1035, 1080, 1081; 7 Am. & Eng. Enc. Law, 2d ed. p. 679, note 2; 2 Cook, Corp. §§ 594, 596; *Lord* v. *Anoka*, 36 Minn. 176, 30 N. W. 550; *Beaver Creek Twp.* v. *Hastings*, 52 Mich. 528, 18 N. W. 250; *People ex rel. Loew* v. *Batchelor*, 22 N. Y. 128; *Harding* v. *Vandewater*, 40 Cal. 77; *Stow* v. *Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Medical & Surgical Soc.* v. *Weatherly*, 75 Ala. 248; *Wiggin* v. *First Freewill Baptist Church*, 8 Met. 301.

The right to contract, and to agree upon prices for water as an essential element of said right, is not in conflict with the city's claim of "power to regulate," but is property and liberty within the meaning of the Constitution of Tennessee and the 14th Amendment to the Constitution of the United States.

*Third Nat. Bank* v. *Divine Grocery Co.* 97 Tenn. 604, 34 L. R. A. 445, 37 S. W. 390; *Stratton Claimants* v. *Morris Claimants*, 89 Tenn. 497. *sub nom. Dibrell* v. *Kanier*, 12 L. R. A. 70, 15 S. W. 87; *Williams* v. *Fears*, 179 U. S. 274, 45 L. ed. 188, 21 Sup. Ct. Rep. 128.

By "due process of law," which is synonymous with "the law of the land," is intended "that general law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial." By it is meant the natural and inherent principles of justice, and it forbids that one man's property or right to property shall be taken for the benefit of another or for the state without compensation, and that no one shall be condemned in his person or property, or

NOTE.—*As to what laws are void as impairing obligation of contracts*—see notes to Franklin County Grammar School v. Bailey (Vt.) 10 L. R. A. 405; Fletcher v. Peck, 3 L. ed. U. S. 162; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 20; and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 12.

*As to contract exemptions from legislative power to fix rates*—see note to Detroit v. Detroit Citizens' Street R. Co. 46 L. ed. U. S. 592.

be deprived of his liberty, without in proper form being heard in his own defense.

*Holden* v. *Hardy*, 169 U. S. 390, 391, 42 L. ed. 790, 18 Sup. Ct. Rep. 383; *Louisville & N. R. Co.* v. *Schmidt*, 177 U. S. 230, 44 L. ed. 747, 8 Sup. Ct. Rep. 620; Brannon, 14th Amendment, 140 *et seq.*

The legislature of Tennessee could not constitutionally delegate to the city the power to fix prices at which water should be sold to the authorities of the city—itself a consumer—and to its inhabitants, without some provision for judicial investigation of the reasonableness of the rates sought to be fixed by such authorities.

*Cleveland Gaslight & Coke Co.* v. *Cleveland*, 71 Fed. 614; *Agua Pura Co.* v. *Las Vegas* (N. M.) 50 L. R. A. 224, 60 Pac. 208.

The exercise by the city of its power to contract for waterworks to supply itself and its inhabitants with water is not an exercise of its governmental or legislative functions, but its business or proprietary powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a benefit for the city itself and its inhabitants.

*Illinois Trust & Sav. Bank* v. *Arkansas City*, 34 L. R. A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; 1 Dill. Mun. Corp. § 27; *Cincinnati* v. *Cameron*, 33 Ohio St. 336, 367; *Safety Insulated Wire & Cable Co.* v. *Baltimore*, 13 C. C. A. 375, 25 U. S. App. 166, 66 Fed. 140; *Cunningham* v. *Cleveland*, 39 C. C. A. 211, 98 Fed. 657.

Both the "agreement" of July 1, 1882, and the ordinance-contract of October 20, 1899, contain all the essential elements of a valid contract.

*Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65–80, 46 L. ed. 808–815, 22 Sup. Ct. Rep. 585.

This court will form an independent judgment as to both the existence of the contract and its proper construction.

*Freeport Water Co.* v. *Freeport*, 180 U. S. 610, 611, 45 L. ed. 693, 21 Sup. Ct. Rep. 493; *Board of Liquidation of City Debt* v. *Louisiana*, 179 U. S. 622, 638, 45 L. ed. 347, 353, 21 Sup. Ct. Rep. 263.

To the extent that the judgment of the supreme court of Tennessee may have been based upon its opinion that the power to regulate rates is a police power, and that, therefore, the city could not be invested with power to bind itself by an irrevocable contract not to regulate rates, it is not in harmony with the repeated adjudications of this court.

*Los Angeles* v. *Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 10, 43 L. ed. 346, 19 Sup. Ct. Rep. 77; *New Orleans Waterworks Co.* v. *Rivers*, 115 U. S. 674, 29 L. ed. 525, 6 Sup. Ct. Rep. 273.

It was not intended that the power to regulate should destroy the power and right to contract, or that it was to be exercised notwithstanding a contract expressly or impliedly renouncing that right.

*Walla Walla* v. *Walla Walla Water Co.* 172 U. S. 1, 20, 43 L. ed. 341, 349, 19 Sup. Ct. Rep. 77; *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *City R. Co.* v. *Citizens' Street R. Co.* 166 U. S. 557, 41 L. ed. 1114, 17 Sup. Ct. Rep. 653.

In any event, rates established by the city must be shown to be reasonable.

*Freeport Water Co.* v. *Freeport*, 180 U. S. 590, 600, 45 L. ed. 680, 21 Sup. Ct. Rep. 493.

There is no more reason to permit the municipal government to repudiate its solemn obligation, entered into for value, than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other.

*Meyer* v. *Brown*, 65 Cal. 589, 4 Pac. 25, 625, 26 Pac. 281; *Los Angeles Water Co.* v. *Los Angeles*, 103 Fed. 711.

*Mr.* **George W. Pickle** argued the cause, and, with *Mr. J. W. Culton* and *Messrs. Pickle & Turner*, filed a brief for defendant in error:

The state, by direct enactment of its legislature, or by authority delegated by the legislature to counties or municipalities, may regulate public utilities and the rates to be charged by corporations or individuals rendering any service to the public.

*Munn* v. *Illinois*, 94 U. S. 133, 24 L. ed. 87; *Railroad Commission Cases*, 116 U. S. 307, 347–352, 29 L. ed. 636, 650, 651, 6 Sup. Ct. Rep. 334, 348, 391; *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Winchester & L. Turnp. Road Co.* v. *Croxton* 33 L. R. A. 177, and note (98 Ky. 739, 34 S. W. 518); *San Diego Water Co.* v. *San Diego*, 62 Am. St. Rep. 261, and note (118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633); *Danville* v. *Danville Water Co.* 178 Ill. 299, 53 N. E. 118; *Rogers Park Water Co.* v. *Fergus*, 178 Ill. 571, 53 N. E. 363.

The right of the city to regulate the rates of this company must be treated as if written on the face of its charter, and as a condition of its existence.

*People ex rel. Peabody* v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497, 22 N. E. 798; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478.

In order that any contract between the city and the water company, in restraint or limitation of the city's power to regulate water rates shall be valid, such contract must be within the corporate powers of both corporations.

*Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 35 L. ed. 55, 11 Sup. Ct. Rep. 478; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 32 L. ed. 950; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 297, 30 L. ed. 88, 6 Sup. Ct. Rep. 1094; *Oregon R. & Nav. Co.* v. *Oregonian R. Co.* 130 U. S. 26, 32 L. ed. 842, 9 Sup. Ct. Rep. 409; *Perrine* v. *Chesapeake & D. Canal Co.* 9 How. 184, 13 L. ed. 97; *Cass* v. *Manchester Iron & Steel Co.* 9 Fed. 640; *Danville* v.

*Danville Water Co.* 178 Ill. 299, 53 N. E. 118.

Municipal powers will not be implied simply because they may be convenient, but they must be indispensable; and any fair or reasonable doubt concerning the existence of any power is resolved against such corporation.

*Re Lee Tong*, 9 Sawy. 333, 18 Fed. 253; *Scott* v. *Shreveport*, 20 Fed. 714; *Los Angeles City Water Co.* v. *Los Angeles*, 88 Fed. 720.

The power of the state and of its municipalities to regulate water rates is a governmental function, essential to the protection of the citizens; and the power of the municipality to surrender such function and abandon its citizens to the arbitrary action of the water company must be conferred in clear and explicit terms, or it cannot be held to exist.

*Louisville & N. R. Co.* v. *Kentucky*, 183 U. S. 517, 46 L. ed. 306, 22 Sup. Ct. Rep. 95; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Providence Bank* v. *Billings*, 4 Pet. 514–565, 7 L. ed. 939–957; *Freeport Water Co.* v. *Freeport*, 180 U. S. 599, 45 L. ed. 688, 21 Sup. Ct. Rep. 493.

In the case at bar the authority of the city to contract with the water company is much more limited than the power conferred for that purpose upon the cities and villages of Illinois by the statutes of that state, held insufficient to authorize cities to make an irrevocable contract with a water company, with reference to water rates, for a period of thirty years.

*Freeport Water Co.* v. *Freeport*, 180 U. S. 587–618, 45 L. ed. 679–696, 21 Sup. Ct. Rep. 493; *Danville* v. *Danville Water Co.* 180 U. S. 619–624, 45 L. ed. 696–701, 21 Sup. Ct. Rep. 505.

An ordinance which provided that the water company "shall charge the following annual rate to consumers of water during the existence of this franchise" is a mere regulation of the right to charge rates, and does not amount to a stipulation that no other regulation will be made during the term of the franchise.

*Rogers Park Water Co.* v. *Fergus*, 180 U. S. 624–633, 45 L. ed. 702–707, 21 Sup. Ct. Rep. 490.

In these cases the court construed statutes or ordinances in which there was an express provision on the subject of water rates, or on the subject of contracting or fixing water rates.

See also *Winchester & L. Turnp. Road Co.* v. *Croxton*, 23 L. R. A. 177, and note (98 Ky. 739, 34 S. E. 518); *Danville* v. *Danville Water Co.* 178 Ill. 299, 53 N. E. 118; *Rogers Park Water Co.* v. *Fergus*, 178 Ill. 571, 53 N. E. 363; *San Diego Water Co.* v. *San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

The supreme court of the state of Tennessee has construed the provisions of the charter of the city of Knoxville as conferring no authority to make an irrevocable contract with the water company; and while this decision is not conclusive upon this court, it will be given great weight where, as in this case, there must be, to say the least, great doubt as to the existence of the power contended for by the water company.

*Louisville & N. R. Co.* v. *Kentucky*, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95; *Williams* v. *Gaylord*, 186 U. S. 157, 46 L. ed. 1102, 22 Sup. Ct. Rep. 798.

It has been held, in the construction of statutes and ordinances authorizing a city or water company to fix or establish rates, that a single exercise of such a power does not preclude further exercise upon proper occasion.

*Osborne* v. *San Diego Land & Town Co.* 178 U. S. 22, 44 L. ed. 962, 20 Sup. Ct. Rep. 860; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493.

The strictest rule of construction in favor of the city and against the water company should be adopted.

*Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 325, 29 L. ed. 642, 6 Sup. Ct. Rep. 334, 388, 1191; *Citizens' Street R. Co.* v. *Africa*, 100 Tenn. 44, 42 S. W. 485, 878; *Clarksville & R. Turnp. Co.* v. *Montgomery County*, 100 Tenn. 421, 58 L. R. A. 155, 45 S. W. 345.

The city did not enter into any contract in derogation or limitation of its right to regulate the prices of the water company. And whatever contract was made was revocable.

*Ragan* v. *Aiken*, 9 Lea, 609, 42 Am. Rep. 684; *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Osborne* v. *San Diego Land & Town Co.* 178 U. S. 22, 44 L. ed. 962, 20 Sup. Ct. Rep. 863; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Danville Water Co.* v. *Danville*, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505; *Laurel Fork & S. H. R. Co.* v. *West Virginia Transp. Co.* 25 W. Va. 324; *Ruggles* v. *People*, 91 Ill. 256; *Illinois C. R. Co.* v. *People*, 95 Ill. 313; *Capital City Gaslight Co.* v. *Des Moines*, 72 Fed. 829.

Whatever power of regulation the state possesses it may delegate to a city.

*Atty. Gen.* v. *Old Colony R. Co.* 160 Mass. 67, 22 L. R. A. 112, 35 N. E. 252; *Storrs* v. *Pensacola & A. R. Co.* 29 Fla. 623, 11 So. 226.

The power of regulation is a continuing one, and not exhausted by a single exercise.

*Providence Bank* v. *Billings*, 4 Pet. 514, 7 L. ed. 939; *Freeport Water Co.* v. *Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; *Rogers Park Water Co.* v. *Fergus*, 178 Ill. 571, 53 N. E. 363.

Whatever right, franchise, or power in a corporation depends for its existence upon the granting clause of a charter is lost by its repeal.

*Greenwood* v. *Union Freight R. Co.* 105 U. S. 13–24, 26 L. ed. 961–965.

The power to alter or modify is a continuing one, not exhausted by one alteration or exercise.

*People ex rel. McConvill* v. *Hills*, 46 Barb. 340; *Proprietors of Side-Booms* v. *Haskell*, 7 Me. 474.

A statute regulating the rates of a railroad company is within the reserved power to alter its charter.

*Capital City Gaslight Co.* v. *Des Moines*, 72 Fed. 829; *American Coal Co.* v. *Consolidation Coal Co.* 46 Md. 15; *Shields* v. *State*, 26 Ohio St. 86, Affirmed in 95 U. S. 319, 24 L. ed. 357; *St. Louis & S. F. R. Co.* v. *Ryan*, 56 Ark. 245, 19 S. W. 839.

And the legislature, under the power reserved in a railroad charter at any time hereafter to alter, modify, or repeal this act, has the right to fix the rates of fares which may be charged by such company, without being subject to the charge of impairing the obligation of a contract.

*Beardsley* v. *New York, L. E. & W. R. Co.* 15 App. Div. 251, 44 N. Y. Supp. 175.

Where the charter of a railroad company empowers it to exact tolls at its discretion, an act of the legislature restricting the rates that may be taken is an alteration of the charter within the scope of a reservation of power to alter or repeal.

*Atty. Gen.* v. *Chicago & N. W. R. Co.* 35 Wis. 425.

Where a power is reserved to alter a charter, the state may prescribe the manner of the exercise of such a power.

*Re Reciprocity Bank*, 22 N. Y. 9, Reversing 29 Barb. 369, 17 How. Pr. 323.

A statute empowering city councils to regulate the price to be charged for gas may constitute a valid exercise of the power to alter the charter of a gas company.

*State ex rel. Atty. Gen.* v. *Cincinnati Gaslight & Coke Co.* 18 Ohio St. 262.

An act creating a state corporation commission, and giving it the right to regulate railroad rates, is an exercise of the reserve power to amend or repeal the charter of a railroad company giving it the exclusive right to regulate rates or charges.

*Matthews* v. *Corporation Comrs.* 97 Fed. 400.

Charter power to demand such sums as a corporation may deem reasonable for carrying freight and passengers, provided they are reasonable, does not preclude the legislature from afterwards fixing the maximum of charges, even though there is no reservation of power to alter or repeal the charter.

*Laurel Fork & S. H. R. Co.* v. *West Virginia Transp. Co.* 25 W. Va. 324.

An implied restriction that the corporation, in fixing the rates of toll, shall make them reasonable, is held to exist in a charter giving the power to the corporation to fix its own rates. Therefore the legislature has the same power to say what are reasonable maximum charges as if the charter were silent on that point.

*Ruggles* v. *People*, 91 Ill. 256; *Illinois C. R. Co.* v. *People*, 95 Ill. 313.

So, a contract right of a gas company by its charter to charge and collect reasonable rates is not impaired by a delegation of authority to the city to fix reasonable prices for gas.

*Capital City Gaslight Co.* v. *Des Moines*, 72 Fed. 829.

From these decisions it seems to follow, as a necessary result, that the state had, under its reserve power to repeal or modify this water company's charter, a clear right to regulate its rates in a reasonable manner. The state likewise had the right to delegate this power to a municipality, and to exercise it in that manner. In fact, the usual method of exercising the power of regulation is to delegate it to boards and municipalities.

*Yazoo & M. Valley R. Co.* v. *Adams*, 180 U. S. 1, 45 L. ed. 395, 21 Sup. Ct. Rep. 240; *Citizens' Sav. Bank* v. *Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a complaint for a penalty against the Knoxville Water Company for charging and collecting water rates in excess of the rates fixed by the ordinances of the city of Knoxville. The water company pleaded that the ordinances relied on violated the obligation of contracts between the city and itself, and deprived it of its property and liberty without due process of law, and so was contrary to the Constitution of the United States. The case was tried on appeal before a single judge, who made a special finding of facts, on which the supreme court of the state entered a final judgment for the plaintiff. 107 Tenn. 647, 64 S. W. 1075. The company then brought the constitutional questions here by writ of error.

The water company was incorporated in Tennessee in 1882 to construct waterworks in or near Knoxville, with power to contract with the city and inhabitants for the supply of water, and to "charge such prices for the same as may be agreed upon between said company and said parties." This incorporation was under a general act which provides as follows: "And this [act] is in no way to interfere with or impair the police or general powers of the corporate authorities of such city, town, or village, and such corporate authorities shall have power by ordinance to regulate the price of water supplied by such company." Acts of 1877, chap. 104, § 2. In the same year, 1882, the company made a contract with the city by which it agreed to *con- [436] struct its works and to furnish water, the city gave the company exclusive privileges for thirty years and agreed to make certain payments, etc., and it was mutually agreed, among other things, that, after fifteen years, the city should have the right to purchase the works at a price to be fixed by appraisers if not agreed upon. The contract contained three distinct parts: first, the promises of the company; next, those of the city; and last, the mutual undertakings. In the first part the company undertook as follows: "Said company will supply private consumers with water at a rate not to exceed 5 cents per 100 gallons," subject to an immaterial proviso. These are the

words relied on by the company. They are assumed to contain an implied undertaking on the part of the city not to interfere with the company in establishing rates within the contract limits.

After the contract was made the company built its works and furnished water. Later it took over contracts between two other concerns and neighboring towns and consolidated with one of the other concerns, which was a corporation. The towns, on their side, were made a part of Knoxville; and the whole water supply was brought under the original contract. But these facts do not alter or affect the present case, and need not be stated in detail. The company went on furnishing water and charging rates within the contract limit, to the satisfaction of the city, it may be assumed, until within a year or two, when the city passed an ordinance which cuts down the rates which the company had been charging and asserts its right to charge.

The trouble at the bottom of the company's case is that the supposed promise of the city on which it is founded does not exist. If such a promise had been intended, it was far too important to be left to implication. In form the words of this part of the instrument are the words of the company alone. They occur in the part of the contract which sets forth the company's undertakings, not in the part devoted to the promises of the city or in that which contains the still later mutual agreements. See *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Ragan* v. *Aiken*, 9 Lea, 609, 42 Am. Rep. [437] 684. They are words *of a company which was notified by the act which called it into being of the power expressly conferred upon the city "by ordinance to regulate the price of water" which the company might supply. People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them, nor can the company which they have formed. *Rockport Water Co.* v. *Rockport*, 161 Mass. 279, 37 N. E. 168. This consideration answers a portion of the company's argument as to its rights under the 14th Amendment, and makes it unnecessary to consider whether the regulation of water rates is properly to be classed as a police power. It also reinforces our interpretation of the instrument upon which the company founds its claim.

We do not mean that under other circumstances words which on their face only express a limit might not embody a contract more extensive than their literal meaning. *Detroit* v. *Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410. But in that case the rate was fixed by an ordinance which was the language of the city, the ordinance was under a statute which declared that the rates should be established by agreement between the city and the railway company, and neither statute nor ordinance reserved a power to the city to alter rates. In the present case it seems to us impossible to suppose that any power to contract which the city may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law under which the water company was created. It would require stronger words than those used here to raise the question whether, under the statutes in force, the city could do it if it tried. The contracts fixing prices authorized by the statute were contracts between the company and its customers, not, as in the case of the railway company, a single contract between the company and the city, and were subject to the power to regulate them given to the city by the same statute. We assume that the charter of the city authorized it to contract, but it was not so specific as the statute which we have quoted, and added nothing to the power conferred by that law.

With the construction which we give the contract between the company and the city, the argument that the obligation of *that [438] contract is impaired must fall. It is argued here that the reduction of rates is not reasonable, and is or may be taking a first step towards a compulsory purchase of the company's plant at an unfairly low price, by cutting down its value. We may assume with the supreme court of Tennessee that if rates were reduced unreasonably a judicial remedy would be found. We may assume further that an attempt to affect the price of the company's plant in that way, if the city should elect to purchase, would not be allowed to succeed. But no such questions are before us. There is no evidence and no presumption that the ordinance rates were unreasonable, or were fixed with sinister intent. The judgment of the supreme court of Tennessee states that the question was not considered by it, and is expressed to be without prejudice to later litigation concerning the reasonableness of the rates. If the question is open here it is open only in form, and no error is shown.

A part of the argument was directed against the validity of the ordinance because of a failure to notify an alderman who was out of the state, but we see no sufficient ground for undertaking to revise the judgment of the state court on that point.

Some argument was attempted as to the ordinance impairing the obligation of the contracts between the company and its consumers. But such contracts, of course, were made by it subject to whatever power the city possessed to modify rates. The company could not take away that power by making such contracts. *New Orleans* v. *New Orleans Waterworks Co.* 142 U. S. 79, 91, 92, 35 L. ed. 943, 947, 948, 12 Sup. Ct. Rep. 142; *Browne* v. *Turner*, 176 Mass. 9, 15, 56 N. E. 969. The contracts recognize the possibility of change, as the agreement is to pay for the water in accordance with the rates "now or hereafter in force." This constitutional objection hardly is open on the pleadings, but we have given the company the benefit of the doubt so far as to consider it. We discover no error in the

record, and the judgment of the supreme court of Tennessee must be affirmed.

*Judgment affirmed.*

Mr. Justice **White**, Mr. Justice **McKenna**, and Mr. Justice **Day**, not having been present at the argument, took no part in the decision of the case.

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[439] *SAN DIEGO LAND & TOWN COMPANY, *Appt.*,

*v.*

JAMES A. JASPER, Charles H. Swallow, William Justice, John Griffin, and Howard M. Cherry (Members of and Constituting the Board of Supervisors of the County San Diego, State of California), and M. T. Hall *et al.*

(See S. C. Reporter's ed. 439–447.)

*Courts — jurisdiction — default of parties in interest — state regulation of water rates — tests of reasonableness.*

1. So long as a board of supervisors defends a suit to have water rates fixed by them declared void for unreasonableness, there is a sufficient party respondent to enable the court to consider the merits of the controversy, notwithstanding the default of those who set in motion the proceedings before the board.
2. The price which a waterworks plant brought on foreclosure is evidence which a board of supervisors when regulating water rates may take into consideration in estimating the value of the plant, on which the water company is entitled to a fair return from its rates.
3. The valuation of a waterworks plant for purposes of taxation may be considered by the courts in determining the reasonableness of water rates as fixed by a board of supervisors,—especially where such valuation was sworn to by officers of the water company.
4. The depreciation in value of a waterworks plant, and in the value of the services rendered to consumers, due to a diminution in the water supply from a long-continued drought from which the surrounding country has suffered since the passage of an ordinance regulating water rates, may be considered in determining the reasonableness of such rates.
5. Irrigation rates established by a board of supervisors are not necessarily unreasonable because they will only yield a full return on the total value of the plant when the water company shall serve the entire area which its system will supply.

[No. 193.]

*Argued March 10, 1903. Decided April 6, 1903.*

APPEAL from the Circuit Court of the United States for the Southern District of California to review a decree which dismissed a bill to have an ordinance of a board of supervisors fixing irrigation rates declared void for unreasonableness. *Affirmed.*

See same case below, 110 Fed. 702.

The facts are stated in the opinion.

*Mr.* **John D. Works** argued the cause, and, with *Messrs. Bradner W. Lee* and *Lewis R. Works*, filed a brief for appellant:

The proceedings before the board of supervisors were judicial.

*Wulzen* v. *San Francisco*, 101 Cal. 15, 24, 35 Pac. 353; *Quinchard* v. *Alameda*, 113 Cal. 664, 45 Pac. 856; *Jacobs* v. *San Francisco*, 100 Cal. 121, 34 Pac. 630.

And this court has so decided.

*Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

There should be the same degree of fairness in this as in other judicial proceedings.

*Ibid.; San Diego Water Co.* v. *San Diego*, 118 Cal. 556, 38 L. R. A. 460, 50 Pac. 633.

The reasonable value of the use of the water and plant of the company, or the services rendered by it in supplying the water to consumers, should be taken into account in arriving at just rates.

*Smyth* v. *Ames*, 169 U. S. 466, 524, 42 L. ed. 819, 841, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804.

Depreciation should be considered in arriving at just rates.

*San Diego Land & Town Co.* v. *National City*, 74 Fed. 79, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804.

*Mr.* **A. Haines** argued the cause, and, with *Mr. T. L. Lewis*, filed a brief for appellees:

The courts will interfere with rates prescribed by public authority only on the ground that they amount to a taking of property without due process of law.

*San Diego Land & Town Co.* v. *National City*, 74 Fed. 79, 174 U. S. 739, 754, 760, 43 L. ed. 1154, 1160, 1162, 19 Sup. Ct. Rep. 804; *Cotting* v. *Kansas City Stock Yards Co.* 183 U. S. 79, 90, 91, *sub nom. Cotting* v. *Godard*, 46 L. ed. 92, 101, 22 Sup. Ct. Rep. 30.

Evidence relating to value is defective when it does not show the real value of the property actually used and useful for the purposes contemplated by the ordinance, nor show anything respecting the extent or value of the service rendered.

*San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; *Cotting* v. *Kansas City Stock Yards Co.* 183 U. S. 79, 90, *sub nom. Cotting* v. *Godard*, 46 L. ed. 92, 101, 22 Sup. Ct. Rep. 30.

When this court speaks of cost of construction as competent evidence bearing on the fair value of the property used and useful for the public, it is careful to limit it in terms to "original" cost.

*San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 756, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804, quoting from *Smyth* v. *Ames*, 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418.

NOTE.—*On legislative power to fix tolls, rates, or prices*—see note to Winchester & L. Turnp. Road Co. v. Croxton (Ky.) 33 L. R. A. 177.

Even a conclusive finding of the original cost of a quasi-public improvement to the corporation that has been superseded by a reorganized corporation which acquires the property at a foreclosure sale furnishes of itself no means of determining that a rate fixed by public authority is unreasonable.

*Dow* v. *Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.

The market value of the bonded debt of the Kansas corporation is a proper test of the value of its assets, including the water system, when sold.

*Smyth* v. *Ames*, 169 U. S. 466, 546, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 756, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; *Cotting* v. *Kansas City Stock Yards Co.* 183 U. S. 79, 89, *sub nom. Cotting* v. *Godard*, 46 L. ed. 92, 101, 22 Sup. Ct. Rep. 30.

The true price paid for this water system at the foreclosure sale, represented by the value of the bonds and claims with which the price was paid, constitutes the most direct, trustworthy, and contemporaneous measure of the true value of the whole property of the Kansas corporation, including the water system here in question.

*Dow* v. *Beidelman*, 125 U. S. 680, 690, 691, 31 L. ed. 841, 844, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 661, 662, 39 L. ed. 567, 571, 15 Sup. Ct. Rep. 484; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The Maine corporation is in all respects perfectly distinct from the Kansas corporation, and stood, when bidding at the foreclosure sale, upon a precisely equal footing with the world of bidders.

Thomp. Corp. § 261.

The corporation must stand on its investment at the sale.

*Dow* v. *Beidelman*, 125 U. S. 689, 31 L. ed. 843, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028.

As to the distinct character of a consolidated or recognized corporation, see —

*Shields* v. *Ohio*, 95 U. S. 319, 323, 24 L. ed. 357, 358; *Keokuk & W. R. Co.* v. *Missouri*, 152 U. S. 301, 307–310, 38 L. ed. 450, 454, 14 Sup. Ct. Rep. 592.

The rights of the public would be ignored if rates for the transportation of persons and property on a railroad were exacted without reference to the fair value of the property used for the public, or the fair value of the services rendered, but in order simply that the corporation might meet operating expenses, pay the interest on its obligations, and declare a dividend to stockholders.

*San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 755, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; *Smyth* v. *Ames*, 169 U. S. 466, 546, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418.

This court has disapproved the practice of deciding a question affecting rates to the public, with only individuals before it.

*St. Louis & S. F. R. Co.* v. *Gill*, 156 U. S. 649, 666, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484.

Where, as here, there is a board of supervisors which "can be made to respond," and does respond, the persons who signed the original petition to the board to fix rates are distinctly unnecessary parties, and their default for want of answer is immaterial.

*Chicago & G. T. R. Co.* v. *Wellman*, 143 U. S. 339, 344, 346, 36 L. ed. 176, 179, 180, 12 Sup. Ct. Rep. 400; *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Stone* v. *Illinois C. R. Co.* 116 U. S. 347, 29 L. ed. 650, 6 Sup. Ct. Rep. 348; *Stone* v. *New Orleans & N. E. R. Co.* 116 U. S. 353, 29 L. ed. 651, 6 Sup. Ct. Rep. 349, 391; *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804, 74 Fed. 79; *Cotting* v. *Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cotting* v. *Godard*, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Lanning* v. *Osborne*, 76 Fed. 319.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity brought in the circuit court against the board of supervisors of San Diego county and others for the purpose of having certain water rates which have been fixed by the board, declared void. It is alleged that the rates are so low as to amount to a taking of the plaintiff's property without due process of law. The circuit court decided that it did not appear that the rates would have that effect, and dismissed the bill, whereupon the plaintiff appealed to this court.

By a statute of California approved March 12, 1885, the board of supervisors of the counties are to fix the maximum water rates in cases like the present. They are authorized to proceed to a hearing upon a petition of twenty-five inhabitants who are taxpayers, and the rates when fixed are to be binding for not less than one year. Subject to that limitation they may be re-es-[440] tablished or abrogated upon a similar petition, or a petition of the water company subjected to the regulation. The rate was fixed in this case upon a petition of twenty-five taxpayers. The present bill made the petitioners parties, as well as the board, and alleged that they were not water takers, but were induced to petition by the consumers, in order that the latter might not admit that any rates other than those originally fixed by the company could be established by anyone. The petitioners, after a demurrer by them to the bill was overruled, failed

to answer, and the bill was taken *pro confesso* as against them. On these facts, before coming to the merits, the appellant contends that this bill should not be dismissed. It says that the only parties in interest have made default, and that the ordinance regulating the rates was procured by a fraud upon the supervisors, with the consequence, we suppose it to be intended, that the ordinance should be set aside on that ground without going further into the case.

The preliminary objections may be disposed of in a few words. The default of the petitioner is relied upon as the ground of expressions in one or two cases here and elsewhere, that the duties of the supervisors are judicial in their nature. *Spring Valley Waterworks* v. *Schottler*, 110 U. S. 347, 354, 28 L. ed. 173, 176, 4 Sup. Ct. Rep. 48; *Jacobs* v. *San Francisco*, 100 Cal. 121, 130, 34 Pac. 630. The conclusion drawn is that when the original plaintiffs disappear, the case is at an end. We need not stop to consider to what extent or for what purposes the proceedings before the supervisors properly may be termed judicial. See, further, *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 750, 43 L. ed. 1154, 1159, 19 Sup. Ct. Rep. 804; *Cambridge* v. *Railroad Comrs.* 153 Mass. 161, 171, 26 N. E. 241. It is obvious that they are not so in such a sense as to do the appellant any good. The petitioners did not complain of injury to any private interest of theirs. They had none. They appeared on behalf of the public only, and asked purely legislative action in the form of a general rule for the future to govern the public at large. *San Diego Land & Town Co.* v. *National City*, 43 L. ed. 1154, 1159, 19 Sup. Ct. Rep. 804; *Spring Valley Waterworks* v. *San Francisco*, 82 Cal. 286, 6 L. R. A. 756, 22 Pac. 910, 1046; *Smith* v. *Strother*, 68 Cal. 194, 8 Pac. 852; *Janvrin, Petitioner*, 174 Mass. 514, 47 L. R. A. 319, 55 N. E. 381. As soon [441] as such a *rule was established, if not as soon as a hearing was begun, the petitioners were merged in the public affected by the rule. The present bill is an independent proceeding to have the ordinance declared void. In such a case the body making the regulation is the usual, proper, and sufficient party respondent, and the default of those who set the original proceedings in motion is immaterial, so long as it defends the case.

The charge that there was a fraud practised on the board hardly deserves mention, except for the undue warmth with which it has been pressed. There are no allegations in the bill sufficient to open the question. The board is here adhering to and defending its action, professing still to be satisfied. There is no indication of fraud or attempt at fraud. The course adopted was adopted for reasons which appear on the face of the bill, the situation was made plain at the hearing before the supervisors, and we see no evidence that the parties did more than exercise their legal rights.

Coming now to the merits, the first thing to be noticed is that the ordinance complained of took effect in November, 1897, and that after a year from that date the appellant was free to apply for a modification of the rates. It did not do so. There is no allegation or suggestion that the board is corrupt, or that it purposes and intends, without regard to evidence, to adhere to unjust rates so as to destroy or impair the value of the appellant's works. Under such circumstances the question arises whether this is much more than a moot case, in view of the principles adverted to in *Tennessee* v. *Condon*, 189 U. S. 64, *ante*, 709, 23 Sup. Ct. Rep. 579, or at least whether the appellant should not be required to exhaust its other remedies before coming into court. In any event, the limited effect of the ordinance must be taken into account when we are called on to declare it "such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use." *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804, 810. In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our *independent opinion as to [442] what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached.

The scheme of the California statute is as follows: The board is to estimate the value of the property actually used and useful in furnishing the water, and the annual reasonable expenses, including the cost of repairs, management, and operating the works. The cost of permanent improvements is not to be included under this last head, but "when accomplished shall be included in the present cost and cash value of such work." Then the board is to adjust the rates so that the net receipts and profits of the water company shall be not less than 6 nor more than 18 per cent upon the said value of the used and useful property. The board in this case estimated the value of the plant to be $350,000, and the returns at the rates fixed to be $34,442, or 6 per cent on the value and the expenses necessary to maintain and operate the plant, which were found to be $13,442.

The main object of attack is the valuation of the plant. It no longer is open to dispute that under the Constitution "what the company is entitled to demand, in order that it may have just compensation, is a fair return upon the reasonable value of the property at the time it is being used for the public." *San Diego Land & Town Co.* v. *National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804, 811. That is decided, and is decided as against the contention that you are to take the actual cost of the plant, annual depreciation, etc., and to allow a fair profit on that footing over and above expenses. We see no reason to doubt that the California statute means

the same thing. Yet the only evidence in favor of a higher value in the present case is the original cost of the work, seemingly inflated by improper charges to that account and by injudicious expenditures (being the cost to another company which sold out on foreclosure to the appellant), coupled with a recurrence to testimony as to the rapid depreciation of the pipes. In this way the appellant makes the value over a million dollars. No doubt, cost may be considered, and will have more or less importance according to circumstances. In the present 443] *case it is evident, for reasons, some of which will appear in a moment, that it has very little importance indeed.

The property of the company and its predecessor consisted, not only of the waterworks, but of a large amount of land. On the evidence the waterworks may be estimated at about a quarter of the total value. The earlier company was unable to raise the money it needed. Its bonds for $500,000, secured by mortgage, were not worth more than 95, and an attempt to raise a further loan on mortgage failed. The whole amount that the market and interested stockholders were willing to lend on all the security it could offer was $650,500. The company was put into the hands of a receiver, who issued some certificates, which, we infer, were made a paramount lien. Then, by arrangement with the stockholders who were willing to go on, the mortgage was foreclosed and all the property was sold to those stockholders for the nominal sum of $889,-163.33, which was equal to the amount of outstanding certificates and bonds, and was paid by turning them in. This was in 1897, a few months before the passage of the ordinance complained of. The purchasers organized the present corporation, and the above-mentioned sum is the cost of the land and waterworks to it. The appellant protests that this is not a fair value for the property of the company. We doubt whether it is not a liberal allowance. The officers of the two companies at the time thought that they got more than they could have got in any other way. But at all events, it is decided that the price is evidence, we might say more important evidence than the original cost. *Dow* v. *Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028. If the supervisors were convinced by it we certainly could not say, as matter of law, that they were wrong. Of course, as we indicated the other day in *Knoxville Water Co.* v. *Knoxville*, 189 U. S. 434, *ante*, 887, 23 Sup. Ct. Rep. 531, if an attempt had been made to cut down values by the reduction of rates, the courts would know how to meet it. But there is nothing of that sort in this case.

The valuation of property for the purposes of taxation may not be technical evidence in a court of law, yet it may be considered in coming to a decision whether the action of the supervisors was unfair,—espe-444] cially if, as was testified, it was sworn *to by the officers of the company. The total valuation for 1897 was somewhat less than the price got at the sale, and that of the plant was $155,000.

Another circumstance was adverted to by the circuit court, which we may mention. Whether the facts were stated with perfect accuracy, or the reasoning from them was absolutely correct, we need not stop to consider. The only question for us is whether it came to a right result. In reaching its conclusion the circuit court mentioned the drought from which that part of the country has suffered since the passage of this ordinance. At about that time the supply began to fall off. In December of the following year the reservoir was empty. The appellant asks us to take judicial notice that the rainfall has not been sufficient for the past five years to fill the storage reservoir of any large water company supplying water for irrigation in Southern California, but contends that the fact is immaterial to the point before us.

Of course it is hard to answer the proposition that value expressed in money depends on what people think at the time. That determines what they will give for the thing, and, whether they think rightly or wrongly, if they or some of them will give a certain price for it, that is its value then. Nevertheless, it has been held, under some circumstances, even in ordinary suits, that when events have corrected the prophecy of the public the facts may be shown and a more correct valuation adopted. *Twycross* v. *Grant*, L. R. 2 C. P. Div. 469, 544; *Peek* v. *Derry*, L. R. 37 Ch. Div. 541, 591 (not reversed on this point by L. R. 14 App. Cas. 337); *Whiting* v. *Price*, 172 Mass. 240, 51 N. E. 1084. See *National Bank of Commerce* v. *New Bedford*, 175 Mass. 257, 262, 56 N. E. 288. We think that upon the question before us subsequent events may be considered. The facts mentioned would tend to depreciate the market value of the plant, and very much depreciate the value of the services rendered to consumers during the year when the ordinance necessarily was in force. This consideration is the only answer that needs to be made to elaborate calculations by the appellant of the worth of the services to consumers, beyond adding that it does not appear that *the supervisors[445] did not give them what little weight they deserve upon the issues which the supervisors had to decide.

It is said that, if the drought is considered, the way in which it was met by digging wells and pumping also ought to be taken into account. That, however, was the private affair of the company. It was a voluntary act for which additional charges were made, and has little or no bearing on the issue.—less even than the drought, to which we do not attribute much. It seems however, that, soon after the first year, consumers, in order to get pumped water, contracted to pay ordinance rates and an extra charge, by a voluntary arrangement with the company; and, for all we know, that voluntary arrangement may be going on to this day, and may be one reason why

the company has not applied to have the rates revised.

If the price paid by the present company for all the property was the fair value, the evidence available,—such as the proportion between the valuations of the different parts by the company, the proportion between the assessment and taxation of the different parts, and the testimony of an expert,—indicates that the supervisors were liberal in valuing the plant at $350,000. Indeed, the proportion adopted is not a principal point of complaint.

A subordinate complaint is made, however, that the rates will not yield a net income of 6 per cent, even upon the valuation adopted. The counsel for the appellees contends, on the other hand, that that valuation was a good deal too high, that too much was allowed under the head of expenses, that the supervisors should have taken into account income from domestic rates, and finally sets up a claim that goes to the bottom of the whole assessment. By an amendment of the California statute, approved March 2, 1897, the act is not to invalidate or to interfere with contract easements for the flow and use of water. It is contended that the owners of water rights described in *Osborne* v. *San Diego Land & Town Co.* 178 U. S. 22, 44 L. ed. 961, 20 Sup. Ct. Rep. 860, which it is said now have been decided to be valid (*Fresno Canal & Irrig. Co.* v. *Park*, 129 Cal. 437, 62 Pac. 87; *San Diego Flume Co.* v. *Souther*, 32 C. C. A. 548, 61 U. S. App. 134, 90 Fed. 164, 44 C. C. A. 143, 104 Fed. 706, 112 Fed. 228), are entitled to [446] water upon merely paying their share of *the expenses, and that all the water takers have water rights. We shall say nothing on these points.

We will say a word about the opposite contention of the appellant, that there should have been allowance for depreciation over and above the allowance for repairs. From a constitutional point of view we see no sufficient evidence that the allowance for 6 per cent on the value set by the supervisors, in addition to what was allowed for repairs, is confiscatory. On the other hand, if the claim is made under the statute, although that would be no ground for bringing the case to this court, it has been decided by the supreme court of California that the statute warrants no such claim. *Redlands, L. & C. Domestic Water Co.* v. *Redlands*, 121 Cal. 312, 313, 53 Pac. 791. We go no further into detail. We do not sit as a general appellate board of revision for all rates and taxes in the United States. We stop with considering whether it clearly appears that the Constitution of the United States has been infringed, together with such collateral questions as may be incidental to our jurisdiction over that one. From this point of view there is only one other matter to be mentioned.

The supervisors, in determining the rates, assumed that the amount of water available for outside irrigation, apart from the amount used and paid for by National City, was enough for a little over 6,000 acres, and on that point there is no serious dispute. Then they fixed the rate as if the company supplied this 6,000 acres, although such was not the fact. Of course, the amount actually received for the water actually furnished was correspondingly less than the receipts as estimated by the supervisors upon their assumption. If there were no force in any of the arguments for the appellees which we have passed by, the result of this mode of estimate might be that the appellant did not get 6 per cent on the total value of its plant. But here, again, we have to distinguish between Constitution and statute. If a plant is built, as probably this was, for a larger area than it finds itself able to supply, or, apart from that, if it does not, as yet, have the customers contemplated, neither justice nor the Constitution requires that, say, two thirds of the contemplated *number should [447] pay a full return. The only ground for such a claim is the statute taken strictly according to its letter.

But when a case is brought here on a constitutional ground which wholly fails, we certainly shall not be astute to support it upon another which we could not consider apart from the failing foundation, and which has nothing to commend it but the letter of the law. The statute of California no doubt was contemplating the case of waterworks fully occupied within the area which they intended to supply. It hardly can have meant that a system constructed for 6,000 acres should have a full return upon its value from 500, if those were all that it supplied. At all events, we will not be the first to say so. If necessary to avoid that result, we should assume that only a proportionate part of the system was actually used and useful within the meaning of the statute. Upon the whole case we are unable to say that the circuit court should have declared the rates confiscatory. They are the rates which were fixed by the original company at the start, with prophecies, which the purchasers who believed them think amounted to a contract, that they never would be higher. If the original company embarked upon a great speculation which has not turned out as expected, more modest valuations are a result to which it must make up its mind.

*Decree affirmed.*

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## SOUTHERN PACIFIC RAILROAD COMPANY *et al.*, *Appts.*,
*v.*
## UNITED STATES OF AMERICA.

(See S. C. Reporter's ed. 447-452.)

*Railroad land grants—excepted lands—forfeiture—indemnity lands.*

1. Land within the 20-mile limit of the grant to the Texas Pacific Railroad Company by the act of March 3, 1871, chap. 122, § 9 (16

NOTE.—*As to land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

Stat. at L. 573), was excepted from the grant, by § 23 of that act, to the Southern Pacific Railroad Company, by the proviso therein that such section "shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company."

2. Indemnity selections cannot be made by the Southern Pacific Railroad Company from lands within the indemnity limits of the grant to it by the act of March 3, 1871, chap. 122, § 23 (16 Stat. at L. 573), which are also within the forfeited place limits of the grant to the Texas Pacific Railroad Company by § 9 of the same act.

[No. 190.]

*Argued March 9, 10, 1903. Decided April 6, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Northern District of California in favor of the United States in a suit to quiet title. *Affirmed.*

See same case below, 48 C. C. A. 712, 109 Fed. 913.

The facts are stated in the opinion.

*Messrs.* **Maxwell Evarts** and **L. E. Payson** argued the cause and filed a brief for appellants:

While a congressional land grant to a railroad company is a grant *in præsenti*, until acceptance by the company and the filing of a map of definite location of line fixing the route of the road beyond the power of the company to change it without express authority from Congress, the so-called grant is, in the language of the decisions, only a "float," and does not vest the company with any right or interest in any tract of land.

*Van Wyck* v. *Knevals*, 106 U. S. 360, 365, 27 L. ed. 201, 203, 1 Sup. Ct. Rep. 336.

The act which fixes the time of the definite location is the act of filing the map in the office of the Commissioner of the General Land Office.

*Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 629, 28 L. ed. 1122, 5 Sup. Ct. Rep. 566.

No application can be made here of the law of contemporaneous grants, to the effect that lands common to the place limits of the two grants must be shared equally between the grantees, because such rule of law presupposes that both companies have vested rights in the common land, acquired by each having filed a map of definite location.

*Sioux City & St. P. R. Co.* v. *United States*, 159 U. S. 349–364, 40 L. ed. 177–182, 16 Sup. Ct. Rep. 17.

While the grant is only a "float" till definite location, upon such location the fiction of "relation" is brought in, and the right to the land relates back to the date of the grant.

*Sioux City & St. P. R. Co.* v. *Chicago, M. & St. P. R. Co.* 117 U. S. 406, 408, 29 L. ed. 928, 929, 6 Sup. Ct. Rep. 790.

If the Texas Pacific Company located and constructed its line of road, and the Southern Pacific Company abandoned its contemplated road, and its lands were forfeited, clearly the Texas Pacific would receive all the land within its place limits. Conversely, the Southern Pacific Company is now entitled to all, unless defeated by the proviso to § 23 of the act of 1866.

*United States* v. *Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261; *United States* v. *Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *Southern P. R. Co.* v. *United States*, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154.

As to railroad lands, no right, present or prospective, can possibly arise without location of line. When that shall have been done, there is a present right as to place lands, and a prospective right as to indemnity lands; but, until then, no rights of any kind exist as to specific lands.

*United States* v. *Colton Marble & Lime Co.* 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163.

A withdrawal by the Department on the general route map gives no right, claim, or interest in and to the lands covered by it. It simply protects the lands from the prohibited disposition to the public by pre-emption, private entry, or sale.

*Menotti* v. *Dillon*, 167 U. S. 720, 42 L. ed. 339, 17 Sup. Ct. Rep. 945; *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 636, 28 L. ed. 1124, 5 Sup. Ct. Rep. 566; *United States* v. *Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152; *United States* v. *Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261.

A railroad is entitled to select indemnity lands from any lands within its indemnity limits, which at the time of selection are public lands.

*Ryan* v. *Central P. R. Co.* 99 U. S. 382, 25 L. ed. 305; *Re Alabama & C. R. Co.* 20 Land Dec. 408; *Re Southern P. R. Co.* 26 Land Dec. 452.

The status of lands within indemnity limits at the time of selection determines entirely the right of the railroad thereto.

*Allers* v. *Northern P. R. Co.* 9 Land Dec. 452; *Northern P. R. Co.* v. *Halvorson*, 10 Land Dec. 15; *Missouri, K. & T. R. Co.* v. *Beal*, 10 Land Dec. 504; *Northern P. R. Co.* v. *Moling*, 11 Land Dec. 138; *Hensley* v. *Missouri, K. & T. R. Co.* 12 Land Dec. 19; *Northern P. R. Co.* v. *Bass*, 13 Land Dec. 201; *Hastings & D. R. Co.* v. *St. Paul, M. & M. R. Co.* 13 Land Dec. 535; *St. Paul, M. & M. R. Co.* v. *Munz*, 17 Land Dec. 288; *South & North Ala. R. Co.* v. *Hall*, 22 Land Dec. 273; *Southern P. R. Co.* v. *McKinley*, 22 Land Dec. 493.

*Mr.* **Joseph H. Call** argued the cause and filed a brief for appellee:

The grants to the Texas Pacific and to the Southern Pacific railroads being by the same act, if the respective rights of each had not been fixed and their priorities determined by the act, each company would have been entitled to an undivided moiety. Their rights and equities in that case would have been equal.

*Chicago, M. & St. P. R. Co.* v. *Sioux City & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Southern P. R. Co.* v. *United States*, 183 U. S. 519, 46 L. ed. 307, 22 Sup. Ct. Rep. 154.

It is well settled in the construction of grants of public lands and franchises, that where any doubt or ambiguity exists it should be resolved in favor of the public and the state, and construed most strongly against the grantee.

*Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 740, 23 L. ed. 634, 637; *Slidell* v. *Grandjean*, 111 U. S. 412, 437, 438, 28 L. ed. 321, 329, 330, 4 Sup. Ct. Rep. 475; *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550, 562, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689; *Atlantic & P. R. Co.* v. *Mingus*, 165 U. S. 413, 429, 41 L. ed. 770, 777, 17 Sup. Ct. Rep. 348.

It was not the intention of Congress to grant to the Southern Pacific Railroad Company any of the lands falling within the 20-mile limits of the Texas Pacific Railroad, as withdrawn by the Interior Department upon the map of general route in 1871.

*Re Texas P. R. Co.* 4 Land Dec. 215.

This construction of the act of 1871 by the Interior Department, so long acted upon, and under which rights of a very large number of persons have attached, will not be disturbed unless clearly erroneous.

*United States* v. *Philbrick*, 120 U. S. 52, 59, 30 L. ed. 559, 561, 7 Sup. Ct. Rep. 413; *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 366, 33 L. ed. 363, 367, 10 Sup. Ct. Rep. 112; *United States* v. *Alabama G. S. R. Co.* 142 U. S. 615, 621, 35 L. ed. 1134, 1136, 12 Sup. Ct. Rep. 306; *Hewitt* v. *Schultz*, 180 U. S. 139, 149, 151, 156, 45 L. ed. 463, 469, 470, 472, 21 Sup. Ct. Rep. 309; *Southern P. R. Co.* v. *United States*, 183 U. S. 519, 525, 527, 528, 46 L. ed. 307, 311, 312, 313, 22 Sup. Ct. Rep. 154; *Southern P. R. Co.* v. *Bell*, 183 U. S. 675, 684, 46 L. ed. 383, 388, 22 Sup. Ct. Rep. 232.

Whatever may be the rule with respect to conflicts between other land grants, a provision was specially inserted in the Southern Pacific grant in order to determine the priorities in case of conflict.

*United States* v. *Colton Marble & Lime Co.* 146 U. S. 615, 619, 36 L. ed. 1104, 1106, 13 Sup. Ct. Rep. 163.

Not only did the Texas Pacific Railroad acquire a prospective right to the lands by filing its map of general route, but it acquired something more than that; it secured, while but an imperfect and inchoate right, still a right to the lands which could be asserted against third parties.

*Northern P. R. Co.* v. *Sanders*, 166 U. S. 620, 634, 635, 636, 41 L. ed. 1139, 1144, 1145, 17 Sup. Ct. Rep. 671.

Where Congress had shown an intention to do so, the mere filing of a general route map did not prevent Congress from disposing of the lands embraced thereby, by a later act granting lands to another road.

*United States* v. *Oregon & C. R. Co.* 176 U. S. 28, 44 L. ed. 358, 20 Sup. Ct. Rep. 261.

If the Southern Pacific Railroad Company cannot take these lands as granted lands, it should not be permitted to take them as indemnity, because they are excluded from the Southern Pacific grant by reason of the intention of Congress that they should not be taken at all.

*Southern P. R. Co.* v. *United States*, 168 U. S. 1, 66, 42 L. ed. 355, 381, 18 Sup. Ct. Rep. 18; *Smead* v. *Southern P. R. Co.* 29 Land Dec. 135; *Germain* v. *Luke*, 26 Land Dec. 597; *Re Southern P. R. Co.* 6 Land Dec. 816; *Moore* v. *Kellogg*, 17 Land Dec. 391, 392; *Southern P. R. Co.* v. *Moore*, 11 Land Dec. 534; *Re Southern P. R. Co.* 15 Land Dec. 460; *Clark* v. *Herington*, 186 U. S. 206, 46 L. ed. 1128, 22 Sup. Ct. Rep. 872.

In the present case, Congress has declared that those lands to which the Texas Pacific Railroad had a present or prospective right shall not be taken by the Southern Pacific.

Effect must be given to the intention of Congress.

*Missouri, K. & T. R. Co.* v. *Kansas P. R. Co.* 97 U. S. 491, 497, 24 L. ed. 1095, 1097; *United States* v. *Southern P. R. Co.* 146 U. S. 570, 609, 36 L. ed. 1091, 1102, 13 Sup. Ct. Rep. 152.

Forfeitures are for the benefit of the United States, and not for the benefit of another company.

*United States* v. *Southern P. R. Co.* 146 U. S. 570, 613, 36 L. ed. 1091, 1104, 13 Sup. Ct. Rep. 152, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18.

The withdrawal of lands on general route maps is for the purpose of preserving the grant for the company to be aided.

*Buttz* v. *Northern P. R. Co.* 119 U. S. 55, 72, 30 L. ed. 330, 337, 7 Sup. Ct. Rep. 100; *St. Paul & P. R. Co.* v. *Northern P. R. Co.* 139 U. S. 1, 17, 18, 35 L. ed. 77, 83, 11 Sup. Ct. Rep. 389; *Northern P. R. Co.* v. *Musser-Sauntry Land, Logging & Mfg. Co.* 168 U. S. 604, 607, 42 L. ed. 596, 598, 18 Sup. Ct. Rep. 205.

Lands reserved by executive orders are not operated upon by a subsequent grant in aid of a railroad or other public improvement.

*Wolcott* v. *Des Moines Nav. & R. Co.* 5 Wall. 681, 18 L. ed. 689; *Wolsey* v. *Chapman*, 101 U. S. 755, 25 L. ed. 915; *United States* v. *Missouri, K. & T. R. Co.* 141 U. S. 374, 35 L. ed. 771, 12 Sup. Ct. Rep. 13; *Hamblin* v. *Western Land Co.* 147 U. S. 531, 536, 37 L. ed. 267, 271, 13 Sup. Ct. Rep. 353; *Wisconsin C. R. Co.* v. *Forsythe*, 159 U. S. 46, 54, 40 L. ed. 71, 74, 15 Sup. Ct. Rep. 1020; *Northern P. R. Co.* v. *Musser-Sauntry Land, Logging & Mfg. Co.* 168 U. S. 604, 42 L. ed. 596, 18 Sup. Ct. Rep. 205.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill to quiet title, brought by the United States against the plaintiff in error. It comes here by appeal from a decree of the United States circuit court of appeals (48 C. C. A. 712, 109 Fed. 913), affirming a decree of the circuit court (94 Fed. 427), in favor of the United States.

The United States claims under forfeiture of a grant made to the Texas Pacific Railroad Company in its charter, and the Southern Pacific Railroad Company under words in the same charter which are construed to make an incidental grant to it. The principal land in controversy is land within the place limits of the Southern Pacific under the said grant, and within the 20-mile limit of the Texas Pacific, being land situated where the road of the former company and the contemplated track of the Texas Pacific met at Yuma on the Colorado river in the southeastern corner of California. The United States contends that this land was excepted from the Southern Pacific grant.

The charter is the act of March 3, 1871, chap. 122 (16 Stat. at L. 573). By § 9 it grants to the Texas Pacific by words in the present tense "ten alternate sections of land per mile on each side of said railroad in California, where the same shall not have been sold, reserved, or otherwise disposed of by the United States," etc. By § 12, "said company, within two years after the passage of this act, shall designate the general route of its said road, as near as may be, and shall file a map of the same in the Department of the Interior; and when the map is so filed, the Secretary of the Interior, immediately thereafter, shall cause the lands within 40 miles on each side of said desig-[449]nated *route within the territories, and 20 miles within the state of California, to be withdrawn from pre-emption, private entry, and sale." The Texas Pacific filed its map of general route in August, 1871, and in October, 1871, the Secretary of the Interior withdrew the odd sections according to the statute, including the land in question.

By § 23 of this same charter, for the purpose of connecting the Texas Pacific Railroad with San Francisco, the Southern Pacific was authorized to construct a line to the Texas Pacific road at or near the Colorado river, "with the same rights, grants, and privileges, and subject to the same limitations," etc., as in the act of July 27, 1866, "*Provided, however*, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company." It was decided in *United States* v. *Colton Marble & Lime Co.* 146 U. S. 615, 36 L. ed. 1104, 13 Sup. Ct. Rep. 163, that this proviso excluded the indemnity lands of the Atlantic & Pacific road, and that the Southern Pacific took nothing in them, even after a forfeiture of the Atlantic & Pacific grant. But it is said that the Atlantic & Pacific had filed a definite location, and it is contended on several grounds that there is not a similar exception in this case.

In the first place, it is denied that the Texas Pacific is included under the words last quoted: "or any other railroad company." But we think it too plain for extended argument that it is included by those words. It was called into being, and was an "other railroad" at the moment when the proviso took effect. In fact, it was the only other railroad, so far as has been suggested to us, to which the words could apply. It received a grant for its main line, while that to the Southern Pacific was for a branch. By the contemplated junction of the latter with the former there would arise a conflict for which it was proper to provide, and natural to provide as the statute did.

Next, it is said that the Texas Pacific had no prospective rights at the moment when the act was passed, and that is said to be the moment when her priorities were fixed. We cannot take the words of the proviso so narrowly. The Atlantic & *Pacific had not[450] fixed its definite location when the act was passed, and yet in the decision which we have cited its indemnity lands were held excepted from the Southern Pacific grant. See *United States* v. *Southern P. R. Co.* 146 U. S. 570, 573, 36 L. ed. 1091, 1093, 13 Sup. Ct. Rep. 152; *Southern P. R. Co.* v. *United States*, 183 U. S. 519, 522, 46 L. ed. 307, 22 Sup. Ct. Rep. 154. As to the phrase "prospective rights," no doubt it is inartificial. The adjective changes the very nature of the substantive. A prospective right is not yet a right. It is only an expectation having a certain intensity of reasonableness. But it is plain, for instance, that when the lands were withdrawn along the general route of the Texas Pacific under § 12, that road had a prospective right to the whole of its place lands which the Southern Pacific could not affect by anything which it might do later. The statute is not governed by the ordinary rule as to contemporaneous grants. The Southern Pacific was not intended or allowed to interfere with what the Texas Pacific might take.

The strength of the appellant's case is in a somewhat attenuated line of reasoning. The Texas Pacific act refers to the act of July 27, 1866, for the rights conferred on the Southern Pacific. 14 Stat. at L. 292, chap. 278. The last-mentioned statute is an act incorporating the Atlantic & Pacific Railroad Company. By § 18 the Southern Pacific is authorized to connect with the Atlantic & Pacific, and is to have similar grants of land with that company. By § 6 there is a provision for the withdrawal of lands along the general route of the Atlantic & Pacific somewhat like that which has been mentioned as contained in § 12 of the Texas Pacific charter. It may be argued that it is implied by § 18 of the Atlantic & Pacific charter that there is to be a similar withdrawal of the land there granted to the Southern Pacific, and that this implied provision is carried over by a further implication to the grant to the Southern Pacific in § 23 of the Texas Pacific charter. The Southern Pacific filed the location of its general route in April, 1871, before the filing by the Texas Pacific, and, as the grant to the Texas Pacific by § 9 was only of lands not sold, reserved, or otherwise disposed of by the United States, it may be said that the Southern Pacific has got a preference, much as the Texas Pacific *would have got[451] one had the Southern Pacific done nothing

before the Texas Pacific filed the location of its general route.

It must be admitted that if this argument is correct in its premises it puts a good deal of a strain on the proviso in favor of the prospective rights of the Texas Pacific. For at the time when the Southern Pacific filed the location of its general route the prospective rights of the Texas Pacific were not determined otherwise than by its incorporation and the indications and promises in its charter. Nevertheless, we are of opinion that the argument cannot prevail. It is only by a stretch that the provision for withdrawal of lands along the general route of the Atlantic & Pacific could be extended to the grant to the Southern Pacific in the Texas Pacific charter, and if it be so extended it is such a remote and probably unconsidered consequence of a reference to a reference that it cannot be allowed to outweigh the plain intent of the proviso in § 23, reinforced by the express arrangement for withdrawal in favor of the Texas Pacific in § 9. Assuming that proviso to refer to the Texas Pacific, it indicates a plain intent to except from the grant to the Southern Pacific the land that in the natural course of events would be covered by the location of the former road. The conflict of interests naturally would be limited to the point of connection at Yuma. There might be no other. As to that land, the plain object of the proviso was to avoid a race of diligence by giving priority to the main line of the chartered road over the connecting branch. Our decision is in accord with the settled construction and practice in the Department of the Interior following a ruling of the late Mr. Justice Lamar when Secretary of the Interior. *Texas P. R. Co. and Southern P. R. Co.* 4 Land Dec. 215.

The Texas Pacific grant was declared forfeited by the act of February 28, 1885, chap. 265 (23 Stat. at L. 337), and this forfeiture inured to the benefit of the United States. *United States* v. *Southern P. R. Co.* 146 U. S. 570, 36 L. ed. 1091, 13 Sup. Ct. Rep. 152. It is argued further, however, that if the Southern Pacific did not get the lands in question under its primary grant, it may take a part of them as indemnity lands. It is said that the company has a right to take them for that purpose if the [452]status of the lands at the time of *selection permits it. *Ryan* v. *Central P. R. Co.* 99 U. S. 382, 25 L. ed. 305. That contention seems to be disposed of by *Southern P. R. Co.* v. *United States*, 168 U. S. 1, 47, 66, 42 L. ed. 355, 376, 382, 18 Sup. Ct. Rep. 18, and the practice of the Land Department for many years has been inconsistent with it. *Southern P. R. Co.* v. *Moore*, 11 Land Dec. 534; *Moore* v. *Kellogg*, 17 Land Dec. 391; *Smead* v. *Southern P. R. Co.* 29 Land Dec. 135. When it is decided that the company got no title to the land within its 20-mile limit, it would be contrary to the intimations of the cases to allow it to take the adjoining strip outside under a claim of indemnity. See *Bardon* v. *Northern P. R. Co.* 145 U. S. 535, 545, 36 L. ed. 806, 811, 12 Sup. Ct. Rep. 856; *Clark* v. *Herington*, 186 U. S. 206, 46 L. ed. 1128, 22 Sup. Ct. Rep. 872. It is not clear that the language of the statute does not forbid it. The indemnity to the Atlantic & Pacific, by § 3 of its charter adopted for the Southern Pacific by § 18, is to be other lands "in alternate sections, and designated by odd numbers, not more than 10 miles beyond the limits of said alternate sections, and not including the reserved numbers." It might be argued that the last-quoted words dispose of the matter. Without going into further reasons for our decision, we are of opinion that the decree appealed from was right. We deal only with the questions argued in this court.

*Decree affirmed.*

Mr. Justice **Brewer** and Mr. Justice **Day** took no part in the decision of this case.

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*UNITED STATES, *Appt.*, [453]

*v.*

THE SPANISH SMACK PAQUETE HABANA, Galban *et al.*, Claimants. (No. 578)

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UNITED STATES, *Appt.*,

*v.*

THE LOLA, Gonzales, Claimant. (No. 579)

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UNITED STATES, *Appt.*,

*v.*

THE PODER DE DIOS, Pengochea *et al.*, Claimants. (No. 580)

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UNITED STATES, *Appt.*,

*v.*

THE ANTONIO Y PACO, Lopez *et al.*, Claimants. (No. 581)

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UNITED STATES, *Appt.*,

*v.*

THE ENGRACIA, Gonzales *et al.*, Claimants. (No. 582)

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UNITED STATES, *Appt.*,

*v.*

THE SEVERITA, Trocha *et al.*, Claimants. (No. 583)

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UNITED STATES, *Appt.*,

*v.*

THE ANTONIO SUAREZ, Vilar, Serra, & Co., Claimants. (No. 584)

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UNITED STATES, *Appt.*,

*v.*

THE FERNANDITO, Trocha *et al.*, Claimants. (No. 585)

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NOTE.—*As to damages, in cases of capture, on restitution*—see note to United States v. The Nuestra Sifiora De Regla, 27 L. ed. U. S. 662.

UNITED STATES, *Appt.*,
*v.*
THE ORIENTE, Carillo, Claimant. (No. 586)

UNITED STATES, *Appt.*,
*v.*
THE ESPANA, Deus *et al.*, Claimants. (No. 587)

UNITED STATES, *Appt.*,
*v.*
THE CUATRO DE SETTEMBRE, Bunuel, Claimant. (No. 588)

UNITED STATES, *Appt.*,
*v.*
THE SANTIAGO APOSTOL, De La Torre, Claimant. (No. 589)†

(See S. C. Reporter's ed. 453–468.)

*Prize—damages for unlawful capture—liability of captors—of United States—sufficiency of exceptions to commissioner's report.*

1. Naval captors of vessels as prize of war, the proceeds of which the prize courts have decreed should be restored to the claimants, with damages and costs, cannot be held liable therefor, where the libels were filed by the United States in its own behalf, praying a forfeiture to it, and alleging a capture pursuant to instructions from the President.
2. A prize court may enter a decree against the United States for the damages sustained by the claimants of vessels captured by its Navy as prize of war, the proceeds of which have, in the prize proceedings, been ordered restored to such claimants, with damages and costs, where the libels were filed by the United States in its own behalf, praying a forfeiture to it, and alleging a capture pursuant to instructions from the President.
3. An exception to the findings of a commissioner as to the damages to be awarded the claimants of vessels unlawfully captured as prize of war, on the ground that they were not warranted by the evidence, is sufficient to open the question as to whether or not such damages were excessive, where all the evidence is attached to the commissioner's report.

[Nos. 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589.]

*Argued March 19, 1903. Decided April 6, 1903.*

APPEALS from the District Court of the United States for the Southern District of Florida to review decrees against the United States for the damages sustained by the claimants of vessels unlawfully captured as prize of war. *Reversed*, and remanded for further proceedings.

The facts are stated in the opinion.

*Solicitor General* **Hoyt** argued the cause and filed a brief for appellant:

The principles governing damages for ordinary marine torts, when the punitive feature does not appear, follow the general rules of allowance of damages for injuries to property. The underlying idea is that the person injured shall be made whole,—that he shall be put in the same position that he was in before, receiving interest also, to bring his avails up to the date of judgment or payment.

*The Baltimore*, 8 Wall. 377, 19 L. ed. 463; *Williamson* v. *Barrett*, 13 How. 101, 14 L. ed. 68; *Sturgis* v. *Clough*, 1 Wall. 269, 17 L. ed. 580; *The Potomac*, 105 U. S. 630, 26 L. ed. 1194; *The Umbria*, 166 U. S. 404, 41 L. ed. 1053, 17 Sup. Ct. Rep. 610; *The Apollon*, 9 Wheat. 362, 6 L. ed. 111; *The Three Friends*, 166 U. S. 1, *sub nom. United States* v. *The Three Friends*, 41 L. ed. 897, 17 Sup. Ct. Rep. 495; *The Conqueror*, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510.

Damages for seizures without probable cause ought to be equal to the real injury sustained: and, unless there have been personal indignities, the damages ought to go no farther.

*The Lively*, 1 Gall. 315, Fed. Cas. No. 8,403; *Murray* v. *The Charming Betsy*, 2 Cranch, 64, 2 L. ed. 208; *Maley* v. *Shattuck*, 3 Cranch, 458, 2 L. ed. 498; *The Lucy*, 3 C. Rob. 208; *The Narcissus*, 4 C. Rob. 20.

Cases like those cited and like the present ones are to be carefully distinguished from those where there was a gross marine trespass which involved outrages and the principles of punishment properly applicable thereto, not possible to be invoked in the present cases, under the order of this court.

*The Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 456; *Del Col* v. *Arnold*, 3 Dall. 333, 1 L. ed. 624; *The Anna Maria*, 2 Wheat. 327, 4 L. ed. 252; *The St. Juan Baptista*, 5 C. Rob. 33.

The government is not liable for torts or for tortious or unauthorized acts of its agents, and, in general, cannot be sued except as it may have expressly rendered itself liable to suit.

*Robertson* v. *Sichel*, 127 U. S. 507, 32 L. ed. 203, 8 Sup. Ct. Rep. 1286; *Gibbons* v. *United States*, 8 Wall. 269, 19 L. ed. 453; *Whiteside* v. *United States*, 93 U. S. 247, 23 L. ed. 882; *Hart* v. *United States*, 95 U. S. 316, 24 L. ed. 479; *Moffat* v. *United States*, 112 U. S. 24, 28 L. ed. 623, 5 Sup. Ct. Rep. 10.

The United States is not liable for costs, and a judgment against it for costs will be reversed.

*United States* v. *Barker*, 2 Wheat. 395, 4 L. ed. 271; *The Antelope*, 12 Wheat. 546, 6 L. ed. 723; *United States* v. *McLemore*, 4 How. 286, 11 L. ed. 977; *United States* v. *Boyd*, 5 How. 29, 12 L. ed. 36; *Reeside* v. *Walker*, 11 How. 272, 13 L. ed. 693; *Stanley* v. *Schwalby*, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

A money judgment can be rendered against the United States by the court of claims only.

*Case* v. *Terrell*, 11 Wall. 199, 20 L. ed. 134; *The Siren*, 7 Wall. 152, 19 L. ed. 129; *The Davis*, 10 Wall. 15, *sub nom. United States* v. *Douglas*, 19 L. ed. 875.

†These cases are reported by the Official Reporter under the title "The Paquete Habana."

The payment of damages allowed should be imposed upon the captors individually.

Story, Prize Courts, p. 42; *The Eleanor*, 2 Wheat. 346, 4 L. ed. 257; *Maley* v. *Shattuck*, 3 Cranch, 458, 2 L. ed. 498; *Little* v. *Barreme*, 2 Cranch, 170, 2 L. ed. 243; *The Mentor*, 1 C. Rob. 179; *The Freya*, 5 C. Rob. 75; *The St. Juan Baptista*, 5 C. Rob. 33; *Die Fire Damer*, 5 C. Rob. 357; *The William*, 6 C. Rob. 316; *Der Mohr*, 3 C. Rob. 129, 4 C. Rob. 315; *The Acteon*, 2 Dodson Adm. 48; *The Nemesis*, Edw. Adm. 50; *The Elize*, Spinks Prize Cas. 88; *The Ostsee*, 2 Spinks Eccl. & Adm. 174; *The Leucade*, 2 Spinks Eccl. & Adm. 228; *The Fortuna*, Spinks Prize Cas. 307.

*Mr.* **J. Parker Kirlin** argued the cause, and, with *Messrs. Convers & Kirlin*, filed a brife for appellees:

The claimants are entitled to fair indemnity for the losses sustained by the seizure.

*The Nuestra Señora De Regla*, 17 Wall. 29, *sub nom. United States* v. *The Nuestra Señora De Regla*, 21 L. ed. 596.

The owners of the vessels being Cubans, and the vessels having been seized in Cuban waters when about to enter Cuban ports, the damages are naturally to be measured with reference to the value of the vessels and property in Cuba, rather than in the United States.

*Bates* v. *Clark*, 95 U. S. 204, 24 L. ed. 471.

The damages to be awarded should be equivalent to the injury sustained.

*The Lively*, 1 Gall. 315, Fed. Cas. No. 8,403; *Hetzel* v. *Baltimore & O. R. Co.* 169 U. S. 26, 42 L. ed. 648, 18 Sup. Ct. Rep. 255.

The findings of the commissioner are entitled to great weight.

*The Elton*, 31 C. C. A. 496, 42 U. S. App. 666, 83 Fed. 519; *Tilghman* v. *Proctor*, 125 U. S. 136, 31 L. ed. 664, 8 Sup. Ct. Rep. 894; *The Grace Girdler*, 7 Wall. 196, *sub nom. Lockwood* v. *The Grace Girdler*, 19 L. ed. 113; *The Mangrove Prize Money*, 188 U. S. 720, *sub nom. United States* v. *The Mangrove*, *ante*, 664, 23 Sup. Ct. Rep. 343.

When both courts below have concurred in the decisions of questions of fact, parties ought not to expect this court to reverse such a decree by raising a doubt founded on the number or credibility of witnesses.

*The Richmond*, 103 U. S. 540, *sub nom. The Sabine* v. *The Richmond*, 26 L. ed. 313.

The exceptions that the commissioner had no evidence to justify his report; that the commissioner reported more than the evidence warranted; and that the evidence showed the vessel to be of less value than the report made it,—are not entitled to any consideration on appeal from the final decree.

*The Commander-in-Chief*, 1 Wall. 43, *sub nom. La Tourette* v. *Burton*, 17 L. ed. 609.

The value which is to be made good to the claimants is the value at the time and place of the capture.

*Bates* v. *Clark*, 95 U. S. 204, 24 L. ed. 471.

Without any exception or assignment of error on the subject, no question relating to interest appears to be before the court.

*The Commander-in-Chief*, 1 Wall. 43, *sub nom. La Tourette* v. *Burton*, 17 L. ed. 609.

Interest has always been allowed in cases of this class, not only against private captors, but against the United States.

*The Apollon*, 9 Wheat. 362, 6 L. ed. 111; *Murray* v. *The Charming Betsy*, 2 Cranch, 64, 2 L. ed. 208; *The Anna Maria*, 2 Wheat. 327, 4 L. ed. 252; *The Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 456; *The Nuestra Señora De Regla*, 108 U. S. 92, *sub nom. United States* v. *The Nuestra Señora De Regla*, 27 L. ed. 662, 2 Sup. Ct. Rep. 287; *The Labuan*, Blatchf. Prize Cas. 165, Fed. Cas. No. 7,964; *The Glen*, Blatchf. Prize Cas. 375, Fed. Cas. No. 5,479; *The Sybil*, Blatchf. Prize Cas. 615, Fed. Cas. No. 13,706.

The rate allowed was the legal rate prevailing in the district in which the decrees were entered, and is in accordance with the practice sanctioned by this court.

*Texas & P. R. Co.* v. *Anderson*, 149 U. S. 237, 37 L. ed. 717, 13 Sup. Ct. Rep. 843.

Any matter that was determined on the previous appeal must be taken as final and conclusive throughout the subsequent stages of the litigation.

*The Nuestra Señora De Regla*, 108 U. S. 92, *sub nom. United States* v. *The Nuestra Señora De Regla*, 27 L. ed. 662, 2 Sup. Ct. Rep. 287; *Clark* v. *Keith*, 106 U. S. 464, 27 L. ed. 302, 1 Sup. Ct. Rep. 568; *Wayne County* v. *Kennicott*, 94 U. S. 499, 24 L. ed. 260; *The Lady Pike*, 96 U. S. 461, *sub nom. Pearce* v. *Germania Ins. Co.* 24 L. ed. 672.

No application was made by the United States to amend the judgment or mandate of the court so as to provide, if it had been competent to do so, that the judgment should be against the captors as well as the United States, or against the captors alone. In the absence of such an amendment it would seem that the district court was without power or authority to enter any decree except a decree against the libellant of record.

*Re Potts*, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 992.

It is the settled practice in prize cases, where restitution is ordered with damages, to assess and award the damages in the original cause against the libellants therein. This was done without question in cases that arose prior to 1861.

*Murray* v. *The Charming Betsy*, 2 Cranch, 64, 2 L. ed. 208; *The Amiable Nancy*, 3 Wheat. 546, 4 L. ed. 456; *The Apollon*, 9 Wheat. 362, 6 L. ed. 111.

The practice since 1861 has been to award the damages against the United States alone, or, in cases where the captors have intervened before condemnation and asked to be made colibellants, against the United States and the naval captors jointly.

*The Labuan*, Blatchf. Prize Cas. 165, Fed. Cas. No. 7,964; *The Glen*, Blatchf. Prize Cas. 375, Fed. Cas. No. 5,479; *The Sybil*, Blatchf. Prize Cas. 615, Fed. Cas. No. 13,706; *The Nuestra Señora De Regla*, 108 U. S. 92, *sub nom. United States* v. *The Nuestra Señora De Regla*, 27 L. ed. 662, 2 Sup. Ct. Rep. 287; *The Teresita*, 5 Wall. 180, *sub nom. United States* v. *The Teresita*, 18 L. ed. 627.

If the government had taken the vessels

and applied them to its own use, instead of procuring them to be condemned and sold, without legal right, there could be no question that it would be bound to return the boats or their value.

*United States* v. *Russell*, 13 Wall. 623, 20 L. ed. 474; *Clark* v. *United States*, 95 U. S. 539, 24 L. ed. 518.

The court in previous decisions has recognized the liability of the government to the extent of the value of the property involved, where it has voluntarily submitted itself to the jurisdiction of the court as a plaintiff against such property.

*The Siren*, 7 Wall. 152, 19 L. ed. 129; *Carr* v. *United States*, 98 U. S. 436, 25 L. ed. 210; *Case* v. *Terrell*, 11 Wall. 199, 20 L. ed. 134; *United States* v. *Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Clark* v. *Barnard*, 108 U. S. 436, 27 L. ed. 780, 2 Sup. Ct. Rep. 878; *Cunningham* v. *Macon & B. R. Co.* 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; *The Nuestra Señora De Regla*, 17 Wall. 29, *sub nom. United States* v. *The Nuestra Señora De Regla*, 21 L. ed. 596, 108 U. S. 92, 27 L. ed. 662, 2 Sup. Ct. Rep. 287.

The English courts also recognize the principle that a sovereign, otherwise exempt from suit, may subject itself to judgment in a cross suit, if it invokes the jurisdiction of the court as a plaintiff.

*The Newbattle*, L. R. 10 Prob. Div. 33; *Hullett* v. *King of Spain*, 2 Bligh N. S. 31.

Under the prize acts, the ratification of the captures by the government, which founded libels thereon, may well be taken as relieving the naval captors from liability, even if they had been before the court as parties.

*Lamar* v. *Browne*, 92 U. S. 187, 23 L. ed. 650.

Mr. Justice **Holmes** delivered the opinion of the court:

These are cases of fishing smacks, which [464] were libeled as *prize of war. The proceedings in all the cases are similar and the evidence, to a large extent, the same. It was decided by this court in two of the cases, *The Paquete Habana*, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290, that smacks of this sort, engaged, as these were, in coast fishing for the daily market, were not liable to capture, and decrees were ordered that the proceeds of the vessels and cargoes be restored to the claimants, with damages and costs. On motion of the United States it was ordered that the decrees be modified so as to direct that the damages should be compensatory only, and not punitive. Decrees were entered in each of the above-named cases by the district court in pursuance of this mandate, and agreements between the United States, the captors, and claimants were filed, that the damages should be charged against the United States or the captors, or apportioned "as to justice may appertain and as the legal responsibility therefor may appear;" saving the right to review the decrees as to amount and as to where the ultimate responsibility rested. The papers do not disclose such an agreement in the Cuatro de Settembre, but, as the records, so far as similar to the first two cases, were not printed, we assume that the omission was only in the index, and that it was understood that this case should stand like the rest. The cases were referred to a commissioner to report the amount of damages. He reported his findings and the evidence. The United States excepted to the findings as excessive. The district court entered decrees against the United States for the amounts, and the United States appealed on the grounds that the decrees should have gone against the captors, and not against the government, and that the damages were excessive and the exceptions to the commissioner's report should have been sustained.

We do not see how it is possible that a decree should be entered against the captors. There was no formal intervention by them, and, whether a decree can be made against the United States or not, it has so far adopted the acts of capture that it would be hard to say that under the circumstances of these cases it has not made those acts its own. It is not disputed that the United States might have ordered the vessels to be released. It did not do so. The libels were filed by the United *States on its own behalf, [465] praying a forfeiture to the United States. The statutes in force seemed to contemplate that form of procedure (Rev. Stat. § 4618 [U. S. Comp. Stat. 1901, p. 3128]), and such has been the practice under them. The libels alleged a capture pursuant to instructions from the President. The captures were by superior force, so that there was no question that the United States was interested in the proceeds. Rev. Stat. § 4630 (U. S. Comp. Stat. 1901, p. 3132). The modification of the decrees in regard to damages, on motion by the United States, imported a recognition of the interest of the United States in that matter, and its submission to the entry of decrees against it. The agreements to which we have referred had a similar import, although they indicated an awakening to a determination to argue the form of the decree. In the case of *Little* v. *Barreme*, 2 Cranch, 170, 2 L. ed. 243, conversely to this, the United States was not a party and the captor was. All that was decided bearing upon the present point was that instructions from the President did not exonerate the captor from liability to a neutral vessel. As to even that the Chief Justice hesitated. But we are not aware that it is disputed that when the act of a public officer is authorized or has been adopted by the sovereign power, whatever the immunities of the sovereign, the agent thereafter cannot be pursued. *Lamar* v. *Browne*, 92 U. S. 188, 199, 23 L. ed. 651, 655; and as to ratification, *Buron* v. *Denman*, 2 Exch. 167, 187, 189; *Secretary of State* v. *Kamachee Boye Sahaba*, 13 Moore P. C. C. 22, 86. See *Dempsey* v. *Chambers*, 154 Mass. 330, 332, 13 L. R. A. 219, 28 N. E. 279. The principle and authority of *Buron* v. *Denman* was recognized and followed by the court of

claims in *Wiggins* v. *United States*, 3 Ct. Cl. 412, 423.

If we are right so far, we think that, under the circumstances of this case, a decree properly may be entered against the United States. The former decree of this court remains in force and requires a final decree for damages. *Re Potts*, 166 U. S. 263, 265, 41 L. ed. 994, 995, 17 Sup. Ct. Rep. 520; *M'Cormick* v. *Sullivant*, 10 Wheat. 192, 200, 6 L. ed. 300, 302. The decree must run against the United States if a decree is to be made. In *The Nuestra Señora de Regla*, 108 U. S. 92, 102, *sub nom. United States* v. *The Nuestra Señora de Regla*, 27 L. ed. 662, 666, 2 Sup. Ct. Rep. 287, the court was of opinion that the United States had submitted to the jurisdiction of the court so far as to warrant the ascertainment of damages according to the [466] rules applicable to private persons in *like cases. It seems to us that the facts here are not less strong. Decrees in cases which disclose no special circumstances have been recognized by subsequent statutes providing for their payment. *The Glen*, Blatchf. Prize Cas. 375, Fed. Cas. No. 5,479; Act of February 13, 1864, 13 Stat. at L. 575, chap. 10; *The Labuan*, Blatchf. Prize Cas. 165, Fed. Cas. No. 7,964; Act of July 7, 1870, 16 Stat. at L. 649, chap. 220; *The Sybil*, Blatchf. Prize Cas. 615, Fed. Cas. No. 13,706; Act of July 8, 1870, 16 Stat. at L. 650, chap. 231; *The Flying Scud*, 6 Wall. 263, *sub nom. The Flying Scud* v. *United States*, 18 L. ed. 755; Act of July 7, 1870, 16 Stat. at L. 649, chap. 219. See also 16 Stat. at L. 650, 651, chaps. 232, 234.

We pass, then, to the other ground of the appeal. With regard to this it is objected that the exceptions to the master's report are not sufficient to open the question; referring to the *Commander-in-Chief*, 1 Wall. 43, 50, *sub nom. La Touretta* v. *Burton*, 17 L. ed. 609, 611. But the objection being the general one that the evidence did not warrant the finding, and all the evidence being attached to the report, nothing more is needed.

On the amount of the damages, we are of opinion that further proceedings must be had. We do not forget the weight that is given to the findings of a master or commissioner upon matters of fact. But this weight is largely, although not wholly, due to the opportunity, which we do not share, of seeing the witnesses. So far as the commissioner disregarded the testimony of the witnesses whom he saw, we should hesitate to overrule his conclusion, although it seems too absolute on the grounds set forth. But the result reached is based on documentary evidence which is before us, and as to which we have equal opportunities for forming a judgment. It appears to us plain that this evidence was given undue weight. The source from which it comes and the high valuations require that it should be taken with considerable reserve. The commissioner had a right, which he seems to have thought that he did not possess, to chancer the estimates. He adopted the owners' prices without qualification. The certificate of the harbormaster of Havana is dated November 23, 1898. It does not purport to be a copy of any earlier record. It is true that he makes his valuation as of March 1, 1898, but he does not say, either in the certificate or in his testimony, that he made that valuation at that or any other date before November 23. We shall not go over the *other evidence in detail. Some, at least, [467] of the vessels were old; the Paquete Habana, for instance, at least eighteen or twenty years. One-half interest was bought in 1892 for $2,400. She is valued in 1898 by owners, harbormaster, and commissioner at $4,500. The Lola was purchased "at a cheap price," according to the owner, in 1887. The valuation of some of the other smacks is above the price said to have been paid for them in earlier years.

In the case of the Espana it appears that she was about fourteen years old, and cost, when built, $10,000. She is valued by the owners and harbormaster, agreeing as usual, at $9,000. The commissioner adopts this valuation. Yet it appears that the vessel was resold to the owners for $2,500. Whether this price was a fair value or not, and the owners would not give more, the result of the sale was that they had their boat back again. It is apparent, therefore, that their actual loss was only what they had to pay to get it, the loss from detention of the boat, and any wear and tear and changes that it had undergone in the meantime. In a case of the present kind, it would be going beyond the requirements of justice into the realm of very doubtful technicalities to disregard the fact that the vessel got back because it was due to a subsequent transaction with a stranger. There is some evidence that the same thing happened in some or all of the other cases. See *The Lively*, 1 Gall. 315, 321, Fed. Cas. No. 8,403.

The fish are allowed for at the highest price in Havana during the blockade, which is too high a rate, and interest was charged at 8 per cent, there being no reason apparent for charging more than 6, if interest was allowed. See *Lincoln* v. *Claflin*, 7 Wall. 132, 139, 19 L. ed. 106, 109; *The Amalia*, 34 L. J. Adm. N. S. 21; *Straker* v. *Hartland*, 2 Hem. & M. 570; *Fraser* v. *Bigelow Carpet Co.* 141 Mass. 126, 4 N. E. 620. These are details, but they show what is manifest throughout, that the owners' demands have been accepted without discrimination, on evidence which does not justify the result.

We think that we have said enough to show that a revision of the findings is necessary. It seems to us better that this revision should take place in the district court rather than *be attempted by us. Whether [468] further evidence shall be taken we leave to the parties and to that court.

*Decrees reversed*, and cases remanded for further proceedings in accordance with this opinion.

TEXAS & PACIFIC RAILWAY COMPANY,
*Plff. in Err.,*
*v.*
ABE BEHYMER.

(See S. C. Reporter's ed. 468–471.)

*Master and servant—assumption of risk—standard of care—instructions.*

1. The risk of injury from a sudden bump or jerk in the management of a freight train is not, as a matter of law, assumed by a brakeman standing, in obedience to orders, upon the icy roof of a car in such train.
2. Whether a freight train was handled with ordinary care, and not whether it was handled in the usual and ordinary way, is the test by which to determine the liability of a railroad company for injuries received by a brakeman because of a sudden bump or jerk while he was standing, in obedience to orders, on the icy roof of a car in such train.
3. An instruction that it was the duty of an injured employee to submit to all treatment that a reasonably prudent person would have submitted to, in order to improve his condition, and that his employer was liable for no damages which might have been prevented by reasonable care, is not objectionable as authorizing the inference that as a prudent man the employee might have postponed recovery from his injury to recovery of damages.

[No. 224.]

*Argued March 20, April 6, 1903. Decided April 20, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Texas in favor of plaintiff in an action for personal injuries, brought by an employee against a railroad company. *Affirmed.*

See same case below, 50 C. C. A. 106, 112 Fed. 35.

The facts are stated in the opinion.

*Mr.* **David D. Duncan** argued the cause, and, with *Messrs. John F. Dillon* and *Winslow S. Pierce*, filed a brief for plaintiff in error:

Behymer was hurt solely by exposure to an assumed risk.

*Central R. & Bkg. Co.* v. *Sims*, 80 Ga. 749, 7 S. E. 176; *Rutledge* v. *Missouri P. R. Co.* 110 Mo. 312, 19 S. W. 38; *Davis* v. *Baltimore & O. R. Co.* 152 Pa. 314, 25 Atl. 498; *Galveston, H. & S. A. R. Co.* v. *Lempe*, 59 Tex. 19; *Fisher* v. *Southern P. R. Co.* 89 Cal. 399, 26 Pac. 894; *International & G. N. R. Co.* v. *Turner*, 3 Tex. Civ. App. 487, 23 S. W. 146; *Galveston, H. & S. A. R. Co.* v. *Arispe*, 81 Tex. 517, 17 S. W. 47.

The charge should not have confined the jury to a consideration of what ordinarily prudent persons would or would not have done.

*Fisher* v. *Southern P. R. Co.* 89 Cal. 399, 26 Pac. 894; *Davis* v. *Baltimore & O. R. Co.* 152 Pa. 314, 25 Atl. 498; *Rutledge* v. *Missouri P. R. Co.* 110 Mo. 312, 19 S. W. 38; *Central R. & Bkg. Co.* v. *Sims*, 80 Ga. 749, 7 S. E. 176; *Galveston, H. & S. A. R. Co.* v. *Arispe*, 81 Tex. 517, 17 S. W. 47.

*Mr.* **Cone Johnson** argued the cause and filed a brief for defendant in error:

It was the duty of the master, knowing the peril of its servant, to use reasonable care to avoid injuring him.

*Missouri P. R. Co.* v. *Watts*, 63 Tex. 552.

The duty of the master to the servant is a varying one, to be measured by the circumstances of the case, the danger to the employee, and the consequences to follow from a failure to exercise care.

*Wabash R. Co.* v. *McDaniels*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 671, 42 L. ed. 1191, 18 Sup. Ct. Rep. 777; *Pantzar* v. *Tilly Foster Iron Min. Co.* 99 N. Y. 368, 2 N. E. 24; *Hosie* v. *Chicago, R. I. & P. R. Co.* 75 Iowa, 683, 37 N. W. 963; *Baltimore & O. R. Co.* v. *Rowan*, 104 Ind. 94, 3 N. E. 627; *Little Rock & Ft. S. R. Co.* v. *Voss* (Ark.) 18 S. W. 172; *Missouri P. R. Co.* v. *Watts*, 63 Tex. 552; *Moran* v. *Harris*, 63 Iowa, 390, 19 N. W. 278; *Pauck* v. *St. Louis Dressed-Beef Provision Co.* 159 Mo. 467, 61 S. W. 806; *Lalor* v. *Chicago, B. & I. R. Co.* 52 Ill. 401, 4 Am. Rep. 616; *Chicago Drop Forge & Foundry Co.* v. *Van Dam*, 149 Ill. 337, 36 N. E. 1024; *Jones* v. *Lake Shore & M. S. R. Co.* 49 Mich. 573, 14 N. W. 551; *Colorado Electric Co.* v. *Lubbers*, 11 Colo. 505, 19 Pac. 479; 1 Bailey, Personal Injuries Relating to Master & Servant, §§ 463, 467, 471, 473, 537, 578*a*; Buswell, Personal Injuries, §§ 207, 211.

The court having fully instructed the jury that it was Behymer's duty to use reasonable care to have his injuries healed and to submit to reasonable surgical operation, the law of the case was fully given, and as favorably to plaintiff in error as could be demanded.

*Gulf, C. & S. F. R. Co.* v. *McMannewitz*, 70 Tex. 76, 8 S. W. 66; *Cooper* v. *Dallas*, 83 Tex. 242, 18 S. W. 565.

The servant does not assume the risk arising from the negligence of the master, and no custom on the part of the master could justify his negligence.

*Hosie* v. *Chicago, R. I. & P. R. Co.* 75 Iowa, 683, 37 N. W. 963. See also *Baltimore & O. & C. R. Co.* v. *Rowan*, 104 Ind. 94, 3 N. E. 627; *Moran* v. *Harris*, 63 Iowa, 390, 19 N. W. 278; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct.

NOTE.—*On a servant's assumption of risk*—see Pidcock v. Union P. R. Co. (Utah) 1 L. R. A. 181, and note; Foley v. Pettee Mach. Works (Mass.) 4 L. R. A. 51, and note; Hunter v. New York, O. & W. R. Co. (N. Y.) 6 L. R. A. 246, and note; Georgia P. R. Co. v. Dooly (Ga.) 12 L. R. A. 342, and note. And see notes to Kehler v. Schwenk (Pa.) 13 L. R. A. 374; Howard v. Delaware & H. Canal Co. (C. C. D. Vt.) 6 L. R. A. 75; Southern P. Co. v. Seley, 38 L. ed. U. S. 391; and Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.

Rep. 184; *Northern P. R. Co.* v. *Teeter*, 11 C. C. A. 332, 27 U. S. App. 316, 63 Fed. 527; *Canadian P. R. Co.* v. *Johnston*, 25 L. R. A. 470, 9 C. C. A. 587, 26 U. S. App. 85, 61 Fed. 738; *Northern P. R. Co.* v. *Charless*, 2 C. C. A. 380, 7 U. S. App. 359, 51 Fed. 562; *Union P. R. Co.* v. *O'Brien*, 1 C. C. A. 354, 4 U. S. App. 221, 49 Fed. 538; *Cheatham* v. *Red River Line*, 56 Fed. 249; *Southern P. R. Co.* v. *Lafferty*, 6 C. C. A. 474, 15 U. S. App. 193, 57 Fed. 536; *Cleveland, C. C. & St. L. R. Co.* v. *Brown*, 6 C. C. A. 142, 18 U. S. App. 10, 56 Fed. 807; *Chicago, R. I. & P. R. Co.* v. *Stahley*, 11 C. C. A. 88, 27 U. S. App. 157, 62 Fed. 363; *Southerland* v. *Northern P. R. Co.* 43 Fed. 646; *Texas C. R. Co.* v. *Frazier* (Tex. Civ. App.) 34 S. W. 664; *Texas & P. R. Co.* v. *Eberheart*, 91 Tex. 324, 43 S. W. 510; *International & G. N. R. Co.* v. *Doyle*, 49 Tex. 190; *Brown* v. *Sullivan*, 71 Tex. 476, 10 S. W. 288; *Gulf, C. & S. F. R. Co.* v. *Sillaphant*, 70 Tex. 624, 8 S. W. 673; *Southern P. R. Co.* v. *Aylward*, 79 Tex. 675, 15 S. W. 697.

The opinion of the court was delivered by Mr. Justice **Holmes:**

This is an action for personal injuries, brought by an employee against a railroad company. It was tried in the circuit court, where the plaintiff had a verdict. It then was taken to the circuit court of appeals on [469]a writ of error and bill of exceptions*by the company, and now is brought here on a further writ of error, the company being a United States corporation. A good deal of the argument for the railroad is devoted to disputing the testimony of the plaintiff below and arguing that the verdict was excessive, but of course we have nothing to do with that. *New York, L. E. & W. R. Co.* v. *Winter*, 143 U. S. 60, 75, 36 L. ed. 71, 80, 12 Sup. Ct. Rep. 356; *Lincoln* v. *Power*, 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387. We must assume the most favorable statement of the plaintiff's case to be true, unless some particular request for instructions makes it necessary to deal with conflicting evidence. That statement may be made in a few words.

Behymer had been in the employ of the company as a brakeman about three months. On February 7, 1899, at Big Sandy, in Texas, he was ordered by the conductor of a local freight train to get up on some cars standing on a siding and let off the brakes, so that the engine might move them to the main track and add them to the train. The tops of the cars were covered with ice, as all concerned knew. He obeyed orders; the engine picked up the cars, moved to the main track, and stopped suddenly. The cars ran forward to the extent of the slack and back again, as they were moving up hill. The jerk upset Behymer's balance, the bottom of his trousers caught in a projecting nail in the running board, and he was thrown between the cars. It is true that the jury might have drawn a different conclusion from his evidence, or have disbelieved it in essential points, but they also were at liberty to find, as they must be taken to have found, that the foregoing statement is true. The car belonged to another road, but was in the charge of the defendant company, and, according to the statement of the counsel for the plaintiff in error, had been inspected before the accident, although we should have doubted whether the testimony meant to go so far. Behymer based his claim upon negligence in stopping the cars so suddenly with knowledge of his position and the slippery condition of the roof of the car, and upon the projection of the nail, which increased the danger and contributed to his fall. It should be added that, by a statute of Texas, if there was negligence, the fact that it was the *negligence of a fellow servant was not[470] a defense. Tex. Gen. Laws 1897, Special Session, chap. 6, § 1; 2 Sayles's Tex. Civil Stat. 1897, art. 4560*f*.

The fundamental error alleged in the exceptions to the charge is that the court declined to rule that the chance of such an accident as happened was one of the risks that the plaintiff assumed, or that the question whether the defendant was liable for it depended on whether the freight train was handled in the usual and ordinary way. Instead of that, the court left it to the jury to say whether the train was handled with ordinary care; that is, the care that a person of ordinary prudence would use under the same circumstances. This exception needs no discussion. The charge embodied one of the commonplaces of the law. What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not. *Wabash R. Co.* v. *McDaniels*, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932. No doubt a certain amount of bumping and jerking is to be expected on freight trains, and, under ordinary circumstances, cannot be complained of. Yet, it can be avoided, if necessary, and when the particular and known condition of the train makes a sudden bump, obviously dangerous to those known to be on top of the cars, we are not prepared to say that a jury would not be warranted in finding that an easy stop is a duty. If it was negligent to stop as the train did stop, the risk of it was not assumed by the plaintiff. *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 665, 672, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777.

However, the plaintiff did not rely on the management of the train alone. The projecting nail was another element in his case. The jury were instructed with regard to that, that the railroad company was not liable unless there was a nail there improperly projecting, and a reasonable inspection would have discovered and remedied the defect. The car was in the custody of the company. There is no suggestion that the company had not had an opportunity to inspect, and the contrary was assumed by a request for instructions on the part of the company. Indeed, as we have said, its counsel interprets the evidence as meaning that the car had been inspected before *the acci-[471] dent. It is not pressed that there was error

on this point. See *Mackin* v. *Boston & A. R. Co.* 135 Mass. 201, 46 Am. Rep. 456; *Glynn* v. *Central R. Co.* 175 Mass. 510, 512, 56 N. E. 698. The jury were instructed properly on the subject of assumption of risks and contributory negligence, and we think it unnecessary to deal more specifically with this part of the case.

It was argued that Behymer had aggravated the injury by refusing proper surgical treatment. With regard to this the jury were instructed in substance, but at more length, that it was his duty to submit to all treatment that a reasonably prudent person would have submitted to, in order to improve his condition, and that no damages could be allowed which might have been prevented by reasonable care. It is suggested that, as a prudent man, he might have postponed recovery from his injury to recovery of damages. The instructions plainly excluded such a view. The argument hardly is serious. We have examined all the minute criticisms on the rulings and refusals to rule, and discover no error. We deem it unnecessary to answer them in greater detail.

*Judgment affirmed.*

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UNITED STATES, *Appt.*,
*v.*
JOHN C. SWEET.

(See S. C. Reporter's ed. 471–474.)

*Army — travel pay to discharged officer — effect of departmental construction of statute.*

The settled practice of the War Department to deny an officer discharged at his own request the travel pay and commutation of subsistence from the place of discharge to the place of enrollment, allowable by U. S. Rev. Stat. § 1289 (U. S. Comp. Stat. 1901, p. 915), as amended by the act of February 27, 1877, chap. 69 (19 Stat. at L. 243, 244), "when an officer is discharged from the service except by way of punishment for an offense," is not so clearly erroneous as to justify the courts in construing such provision as including a discharge on resignation.

[No. 236.]

*Argued and submitted April 15, 1903. Decided April 27, 1903.*

APPEAL from the Court of Claims to review a judgment awarding travel pay and commutation of subsistence to an officer in the Volunteer Army of the United States honorably discharged on his resignation. *Reversed.*

The facts are stated in the opinion.

*Assistant Attorney General* **Pradt** and *Mr.* **Franklin W. Collins** submitted the cause for appellant.

*Mr.* **George A. King** argued the cause, and, with *Mr. William B. King*, filed a brief for appellee.

For contentions of counsel, see their brief as reported in *United States* v. *Barnett*, *post*, 908.

Mr. Justice **Holmes** delivered the opinion of the court:

This case comes here by appeal from a judgment of the court of claims in favor of the petitioner, Sweet. The petitioner was a second lieutenant of volunteers in the United States Army, tendered his resignation, and was honorably discharged on October 15, 1898. He was mustered into the service at St. Paul, Minnesota, his residence being Minneapolis. The place of his discharge was Camp Meade, Pennsylvania. He was not furnished transportation or subsistence, but returned to his residence at his own expense, and later brought this petition to recover travel pay and commutation of subsistence under Rev. Stat. § 1289 (U. S. Comp. Stat. 1901, p. 915), as amended by the act of February 27, 1877, chap. 69 (19 Stat. at L. 243, 244). That section allows the items demanded "when an officer is discharged from the service, except by way of punishment for an offense." The question whether the statute extends to cases like the present has been before this court twice, but has not been decided authoritatively. In one case the court was equally divided (*United States* v. *Price*, No. 60, December Term, 1870; *S. C.*, 4 Ct. Cl. 164); in the other, the decision went off upon another point (*United States* v. *Thornton*, 160 U. S. 654, 40 L. ed. 570, 16 Sup. Ct. Rep. 415; *S. C.*, 27 Ct. Cl. 342).

It is admitted that the settled practice of the War Department and of the Treasury has been to deny the allowances claimed when an officer or soldier is discharged at his own request, for his own pleasure or convenience. *Whitmeyer*, 3 Decisions of the Comptroller of the Treasury, 397, 398; *Weber*, Id. 640; 5 Id. 113, 117; Id. 939, 941; *Bridges*, Second Comptroller's Letter *Book, vol. 18, p. 184; *Weevil*, Id. vol. 26, p. [473] 296. The weight of a contemporaneous and long-continued construction of a statute by those charged with its execution is well recognized in cases open to reasonable doubt. *United States* v. *Johnston*, 124 U. S. 236, 253, 31 L. ed. 389, 396, 8 Sup. Ct. Rep. 446; *United States* v. *Finnell*, 185 U. S. 236, 244, 46 L. ed. 890, 893, 22 Sup. Ct. Rep. 633. But it is said that in this case the language of the statute admits of no doubt. It is argued that the words "except by way of punishment for an offense" exclude the implication of other exceptions to the rule. Some force was attributed also to the amendment to the Revised Statutes, which substituted for "honorably discharged from the service" the present words "discharged from the service, except by way of punishment for an offense." The change, however,

NOTE. — *On construction of statutes* — see notes to Riggs v. Palmer (N. Y.) 5 L. R. A. 340; United States v. Saunders, 22 L. ed. U. S. 736; Maillard v. Lawrence, 14 L. ed. U. S. 925; and Blake v. National City Bank, 23 L. ed. U. S. 119.

is merely a recurrence to the language of the earlier statutes under which the practice of the War Department grew up, so that no particular weight can be given to that.

The words "discharged from the service, except by way of punishment for an offense" are found in the acts of March 3, 1799 (1 Stat. at L. 755, chap. 48, § 25); March 16, 1802 (2 Stat. at L. 137, chap. 9, § 24); January 11, 1812 (2 Stat. at L. 674, chap. 14, § 22, U. S. Comp. Stat. 1901, p. 915); and January 29, 1813 (2 Stat. at L. 796, chap. 16, § 15, U. S. Comp. Stat. 1901, p. 915). See, further, the acts of April 12, 1808 (2 Stat. at L. 483, chap. 43, § 5, U. S. Comp. Stat. 1901, p. 874); March 3, 1815 (3 Stat. at L. 225, chap. 79, § 4); July 22, 1861 (12 Stat. at L. 269, chap. 9, § 5); July 29, 1861 (12 Stat. at L. 280, chap. 24, § 4); June 20, 1864 (13 Stat. at L. 145, chap. 145, § 8, U. S. Comp. Stat. 1901, p. 915); March 16, 1896 (29 Stat. at L. 63, chap. 59, U. S. Comp. Stat. 1901, p. 917); June 7, 1900 (31 Stat. at L. 708, chap. 860, U. S. Comp. Stat. 1901, p. 917; February 8, 1901, (31 Stat. at L. 762, chap. 342, U. S. Comp. Stat. 1901, p. 918). The phrase, "honorably discharged," seems first to have appeared in the Revised Statutes, and to have been amended back to the ancient form in three years. Except for that short intervening time, the allowance of travel pay and commutation of subsistence has gone on under the early words and the practical construction of them to which we have referred.

It follows that the only question is whether the meaning of the long-used phrase is too clear for almost equally long-established practice to control. It seems to us not to be so. It is quite true that in the military service the word "discharge" is the word applied to an order ending the [474] service of an officer at his own request. But in other connections it conveys the notion of a movement beginning with the superior, and more or less adverse to the object; as, for instance, when we speak of discharging a servant. Usually it is a slightly discrediting verb. If it is taken in its ordinary meaning here, the exception in case of a discharge by way of punishment raises no difficulty, because a discharge on resignation is not within the meaning of the principal clause. The course of the departments has amounted to no more than interpreting the word in this exact sense.

Enlisted men are given similar allowances by § 1290 (U. S. Comp. Stat. 1901, p. 916) and the earlier statutes cited. By the act of June 7, 1900, chap. 860 (31 Stat. at L. 708, U. S. Comp. Stat. 1901, p. 917), when the Secretary of War, in the exercise of his discretion, has directed the discharge "of any enlisted men . . . and the orders . . . stated that such enlisted men were entitled to travel pay," such order is to be sufficient authority for payment of the allowances under § 1290 (U. S. Comp. Stat. 1901, p. 916). This recognizes that it is usual to state in the order whether the soldier is entitled to travel pay or not, and seems to accept existing practices as they are. It has no effect upon the cases before us further than as another slight indication of the understanding in the service. But, taking everything into account, we are not prepared to overturn the long-established understanding of the departments charged with the execution of the law.

*Judgment reversed.*

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UNITED STATES, *Appt.*,
*v.*
PETER W. BARNETT.

(See S. C. Reporter's ed. 474.)

*Army — travel pay to discharged soldier.*

An enlisted man in the Volunteer Army of the United States, who has been discharged on his own application, is not entitled to recover the travel pay and commutation of subsistence from the place of his discharge to the place of his enrollment, which are allowable by U. S. Rev. Stat. § 1290 (U. S. Comp. Stat. 1901, p. 916), when discharged from the service except by way of punishment for an offense.

[No. 235.]

*Argued and submitted April 15, 1903. Decided April 27, 1903.*

APPEAL from the Court of Claims to review a judgment allowing travel pay and commutation of subsistence to an enlisted man in the Volunteer Army of the United States, discharged on his own application. *Reversed.*

*Solicitor General* **Pradt** and *Mr.* **Franklin W. Collins** submitted the cause for appellant:

It has been uniformly held by the War Department and by the accounting officers of the government, for a period of at least seventy years, that where an officer's or soldier's convenience is consulted, by resignation or otherwise, on his leaving the service he forfeits his traveling allowances.

5 Compt. Dec. 941; 5 Compt. Dec. 117; 3 Compt. Dec. 397, at p. 640.

Contemporaneous construction of a statute by those charged with its execution, where that construction has for many years controlled the conduct of public affairs, is entitled to great weight; and the court will not disregard or overturn the same, except for cogent reasons, and said construction is shown to be clearly erroneous.

*Rogers* v. *Goodwin*, 2 Mass. 476; *Midway Co.* v. *Eaton*, 183 U. S. 609, 46 L. ed. 353, 22 Sup. Ct. Rep 261; *United States* v. *Finnell*, 185 U. S. 236, 46 L. ed 890, 22 Sup. Ct Rep. 633.

A construction under such circumstances becomes established law.

*Hahn* v. *United States*, 107 U. S. 402, 27 L. ed. 527, 2 Sup. Ct. Rep. 494; *United States* v. *Pugh*, 99 U. S. 265, 25 L. ed. 322; *Edwards* v. *Darby*, 12 Wheat. 210, 6 L. ed. 604; *United States* v. *Alexander*, 12 Wall.

177, 20 L. ed. 381; *Peabody* v. *Stark*, 16 Wall. 240, 21 L. ed. 311; *Smythe* v. *Fiske*, 23 Wall. 374, 23 L. ed. 47; *United States* v. *Moore*, 95 U. S. 760, 24 L. ed. 588.

The contemporaneous construction and immemorial usage of the pay and other departments, in connection with the construction and administration of the statute in question, has continued for nearly three quarters of a century without interruption or disturbance by the courts.

*Price* v. *United States*, 4 Ct. Cl. 164; *Thornton* v. *United States*, 27 Ct. Cl. 342.

*Mr.* **George A. King** argued the cause, and, with *Mr. William B. King*, filed a brief for appellee:

The right of an officer who left the service on his own application was regarded as stronger than that of an officer discharged at the instance of the government.

*Sherburne* v. *United States*, 16 Ct. Cl. 491.

A soldier discharged for general unworthiness is to receive his travel allowances.

*Kingsley* v. *United States*, 24 Ct. Cl. 219, 138 U. S. 87, 33 L. ed. 896, 11 Sup. Ct. Rep. 286.

Long-continued contemporaneous construction can control only where the language of the statute is so doubtful or obscure as to be open to construction, and that construction has been acquiesced in without question. Both of these elements are wanting in the present case.

*Fairbank* v. *United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.

Mr. Justice **Holmes** delivered the opinion of the court:

This is the case of an enlisted man who makes a claim similar to the above, under Rev. Stat. § 1290 (U. S. Comp. Stat. 1901, p. 916), as amended. He was discharged on his own application, and the order of discharge stated that he was not entitled to travel pay. The foregoing reasoning also governs this case.

*Judgment reversed.*

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[475] *JACKSON W. GILES, *Appt.*,

*v.*

E. JEFF HARRIS, William A. Gunter, Jr., and Charles B. Teasley, Board of Registrars of Montgomery County, Alabama.

(See S. C. Reporter's ed. 475–504.)

*Jurisdiction of circuit court—amount in dispute—objection not raised below—direct appeal from circuit court—extent of review not affected by certificate—equity—compelling registration under unlawful acts—inadequacy of relief—civil rights.*

1. The absence of averments, in a bill in a circuit court of the United States, showing that the jurisdictional amount was in dispute, is not available on an appeal to the Supreme Court of the United States, which raises the question of the jurisdiction of the lower court on another ground, where no objection to the omission of such allegations was made in that court.
2. The jurisdiction of the Supreme Court of the United States to consider the whole case on a direct appeal from a circuit court taken under the act of March 3, 1891, chap. 517, § 5 (26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549), in a case in which a state constitution is claimed to violate the Constitution of the United States, cannot be narrowed to a review of the question of the jurisdiction of the circuit court as a court of the United States, by a certificate of the circuit judge which raises that single question.
3. The scope of the equitable jurisdiction of the Federal courts was not extended beyond what was an appropriate subject-matter for equitable relief according to existing standards, by the provision of U. S. Rev. Stat. § 1979 (U. S. Comp. Stat. 1901, p. 1262), that every person who, under color of state legislation, subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution and laws shall be liable to the party injured "in an action at law, suit in equity, or other appropriate proceeding for redress."
4. Equity will not compel a county board of registrars to enroll a negro on the voting lists as a duly qualified voter, under the registration provisions of Ala. Const. art. 8, where the main object of the bill is to have these registration provisions, upon which the right to register is founded, declared void as a fraud upon the Federal Constitution because of discrimination against negroes, since, if that is the character of these provisions, the court will not require officials to proceed to act under them.
5. The inadequacy of the relief which can be afforded by its decree will preclude a court of equity from compelling a county board of registrars to enroll a negro upon the voting lists, where the refusal to register him is alleged to be a part of a general scheme by the white population of the state, and the state itself, to disfranchise a large part, if not all, of the negroes within the state.

[No. 493.]

*Submitted February 24, 1903. Decided April 27, 1903.*

APPEAL from the Circuit Court of the United States for the Middle District of Alabama to review a decree which dismissed, for want of jurisdiction, a bill in equity to compel the board of registrars of Montgomery county to enroll a negro upon the voting lists. *Affirmed.*

The facts are stated in the opinion.

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NOTE.—*As to jurisdiction of United States circuit court as dependent u n amount*—see Auer v. Lombard, 19 C. C. A. 72, and note; Myers v. Murray, N. & Co. (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see notes to Roberts v. Lewis, 36 L. ed. U. S. 579; and Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 453.

*On direct review in the United States Supreme Court of circuit and district court judgments*—see note to Gwin v. United States, 46 L. ed. U. S. 741.

*On equitable jurisdiction in protection of civil rights*—see note to State *ex rel.* Cochran v. Winters (Kan.) 10 L. R. A. 616.

*That equity will not aid an immoral or illegal act*—see note to Riggs v. Palmer, 5 L. R. A. 844.

*Mr.* **Wilford H. Smith** submitted the cause for appellant:

Courts of equity have jurisdiction to grant relief against the threatened deprivation of rights guaranteed under the 14th and 15th amendments.

*Holt* v. *Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272.

This is not a suit brought to enforce a political right, but a civil right guaranteed by the Constitution of the United States. Nor is it sought in this action to control the exercise of any political functions of the state of Alabama, since no state has the right, nor have its officers the right, to deprive any person of the equal protection of the law or of his right to vote, on account of his race and color or previous condition of servitude.

*United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563; *Green* v. *Mills*, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852; *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

Equity alone has the power to anticipate and prevent a threatened injury, where damages would be insufficient or the wrong irreparable.

*Re Lennon*, 166 U. S. 548, 41 L. ed. 1110, 17 Sup. Ct. Rep. 658; *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585.

The question of the constitutionality of a state Constitution was the principal matter presented to the circuit court for decision, and the bill of complaint being dismissed on demurrer, an appeal from that ruling brings the whole case before this court for decision, notwithstanding the certification of the question of jurisdiction by the circuit court.

*McLish* v. *Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Horner* v. *United States*, 143 U. S. 578, 36 L. ed. 269, 12 Sup. Ct. Rep. 522; *Holder* v. *Aultman, M. & Co.* 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; *Scott* v. *Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Penn Mut L. Ins. Co.* v. *Austin*, 168 U. S. 685, 42 L. ed. 626, 18 Sup. Ct. Rep. 223; *Whitten* v. *Tomlinson*, 160 U. S. 231, 40 L. ed. 406, 16 Sup. Ct. Rep. 297.

*Mr.* **W. A. Gunter** submitted the cause for appellees:

The right to be admitted to registration as an elector, which is sought to be enforced in this case, is purely political, and therefore beyond the jurisdiction of a court of equity.

*Green* v. *Mills*, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852; *Fletcher* v. *Tuttle*, 151 Ill. 41, 25 L. R. A. 143, 37 N. E. 683.

The appeal should be dismissed because it is impossible for the appellate court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief.

*Mills* v. *Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132.

[482] *Mr. Justice **Holmes** delivered the opinion of the court:

This is a bill in equity brought by a colored man, on behalf of himself "and on behalf of more than five thousand negroes, citizens of the county of Montgomery, Alabama, similarly situated and circumstanced as himself," against the board of registrars of that county. The prayer of the bill is in substance that the defendants may be required to enroll upon the voting lists the name of the plaintiff and of all other qualified members of his race who applied for registration before August 1, 1902, and were refused, and that certain sections of the Constitution of Alabama, *viz.*, §§ 180, 181, 183, 184, 185, 186, 187, and 188 of article 8, may be declared contrary to the 14th and 15th Amendments of the Constitution of the United States, and void.

The allegations of the bill may be summed up as follows: The plaintiff is subject to none of the disqualifications set forth in the Constitution of Alabama and is entitled to vote,— entitled, as the bill plainly means, under the Constitution as it is. He applied in March, 1902, for registration as a voter, and was refused arbitrarily on the ground of his color, together with large numbers of other duly qualified negroes, while all white men were registered. The same thing was done all over the state. Under § 187 of article 8 of the Alabama Constitution, persons registered before January 1, 1903, remain electors for life unless they become disqualified by certain crimes, etc., while after that date severer tests come into play which would exclude, perhaps, a large part of the black race. Therefore by the refusal the plaintiff and the other negroes excluded were deprived, not only of their vote at an election which has taken place since the bill was filed, but of the permanent advantage incident to registration before 1903. The white men generally are registered for good under the easy test, and the black men are likely to be kept out in the future as in the past. This refusal to register the blacks was part of a general scheme to disfranchise them, to which the defendants and the state itself, according to the bill, were parties. The defendants accepted their office for the purpose of carrying out the scheme. The *part taken by the state, that is, by the [483] white population which framed the Constitution, consisted in shaping that instrument so as to give opportunity and effect to the wholesale fraud which has been practised.

The bill sets forth the material sections of the state Constitution, the general plan of which, leaving out details, is as follows: By § 178 of article 8, to entitle a person to vote he must have resided in the state at least two years, in the county one year, and in the precinct or ward three months, immediately preceding the election, have paid his poll taxes, and have been duly registered as an elector. By § 182 idiots, insane persons, and those convicted of certain crimes are disqualified. Subject to the foregoing, by § 180, before 1903 the following male citizens of the state, who are citizens of the United States, were entitled to register, *viz.:* First. All who had served honorably in the enumerated wars of the United States, including those on either side in the "war

between the states." Second. All lawful descendants of persons who served honorably in the enumerated wars or in the war of the Revolution. Third. "All persons who are of good character and who understand the duties and obligations of citizenship under a republican form of government." As we have said, according to the allegations of the bill, this part of the Constitution, as practically administered and as intended to be administered, let in all whites and kept out a large part, if not all, of the blacks, and those who were let in retained their right to vote after 1903, when tests which might be too severe for many of the whites as well as the blacks went into effect. By § 181, after January 1, 1903, only the following persons are entitled to register: First. Those who can read and write any article of the Constitution of the United States in the English language, and who either are physically unable to work or have been regularly engaged in some lawful business for the greater part of the last twelve months, and those who are unable to read and write solely because physically disabled. Second. Owners or husbands of owners of 40 acres of land in the state, upon which they reside, and owners or husbands of owners of real or personal estate in the state as-
[484] sessed for taxation at $300 *or more, if the taxes have been paid, unless under contest. By § 183 only persons qualified as electors can take part in any method of party action. By § 184 persons not registered are disqualified from voting. By § 185 an elector whose vote is challenged shall be required to swear that the matter of the challenge is untrue before his vote shall be received. By § 186 the legislature is to provide for registration after January 1, 1903, the qualifications and oath of the registrars are prescribed, the duties of registrars before that date are laid down, and an appeal is given to the county court and supreme court if registration is denied. There are further executive details in § 187, together with the above-mentioned continuance of the effect of registration before January 1, 1903. By § 188, after the last mentioned date, applicants for registration may be examined under oath as to where they have lived for the last five years, the names by which they have been known, and the names of their employers. This, in brief, is the system which the plaintiff asks to have declared void.

Perhaps it should be added to the foregoing statement that the bill was filed in September, 1902, and alleged the plaintiff's desire to vote at an election coming off in November. This election has gone by, so that it is impossible to give specific relief with regard to that. But we are not prepared to dismiss the bill or the appeal on that ground, because to be enabled to cast a vote in that election is not, as in *Mills* v. *Green*, 159 U. S. 651, 657, 40 L. ed. 293, 295, 16 Sup. Ct. Rep. 132, the whole object of the bill. It is not even the principal object of the relief sought by the plaintiff. The principal object of that is to obtain the permanent advantages of registration as of a date before 1903.

The certificate of the circuit judge raises the single question of the jurisdiction of the court. The plaintiff contends that this jurisdiction is given expressly by Rev. Stat. § 629, cl. 16 (U. S. Comp. Stat. 1901, p. 506), coupled with Rev. Stat. § 1979 (U. S. Comp. Stat. 1901, p. 1262), which provides that every person who, under color of a state "statute, ordinance, regulation, custom, or usage," "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, *or immunities secured by the [485] Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

We assume, as was assumed in *Holt* v. *Indiana Mfg. Co.* 176 U. S. 68, 72, 44 L. ed. 374, 376, 20 Sup. Ct. Rep. 272, that § 1979 has not been repealed, and that jurisdiction to enforce its provisions has not been taken away by any later act. But it is suggested that the circuit court was right in its ruling that it had no jurisdiction as a court of the United States, because the bill did not aver threatened damage to an amount exceeding $2,000. It is true that by the act of August 13, 1888, chap. 866, § 1 (25 Stat. at L. 433, 434), the circuit courts are given cognizance of suits of a civil nature, at common law or in equity, arising under the Constitution or laws of the United States, in which the matter in dispute exceeds the sum or value of $2,000. We have recognized, too, that the deprivation of a man's political and social rights properly may be alleged to involve damage to that amount, capable of estimation in money. *Wiley* v. *Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17; *Swafford* v. *Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783. But, assuming that the allegation should have been made in a case like this, the objection to its omission was not raised in the circuit court, and, as it could have been remedied by amendment, we think it unavailing. The certificate was made *alio intuitu*. There is no pecuniary limit on appeals to this court under § 5 of the act of 1891, chap. 517; 26 Stat. at L. 826, 828 (U. S. Comp. Stat. 1901, p. 549); *The Paquete Habana*, 175 U. S. 677, 683, 44 L. ed. 320, 322, 20 Sup. Ct. Rep. 290; and we do not feel called upon to send the case back to the circuit court in order that it might permit the amendment. In *Mills* v. *Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852, no notice was taken of the absence of an allegation of value in a case like this.

We assume further, for the purposes of decision, that § 1979 extends to a deprivation of rights under color of a state constitution, although it might be argued with some force that the enumeration of "statute, ordinance, regulation, custom, or usage" purposely is confined to inferior sources of law. On these assumptions we

are not prepared to say that an action at law could not be maintained on the facts alleged in the bill. Therefore, we are not prepared to say that the decree should be af-
[486] firmed *on the ground that the subject-matter is wholly beyond the jurisdiction of the circuit court. *Smith* v. *McKay*, 161 U. S. 355, 358, 359, 40 L. ed. 731, 732, 16 Sup. Ct. Rep. 490.

Although the certificate relates only to the jurisdiction of that court as a court of the United States, yet, as the ground of the bill is that the Constitution of Alabama is in contravention of the Constitution of the United States, the appeal opens the whole case under the act of 1891, chap. 517, § 5 (26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549). The plaintiff had the right to appeal directly to this court. The certificate was unnecessary to found the jurisdiction of this court, and could not narrow it. As the case properly is here, we proceed to consider the substance of the complaint.

It seems to us impossible to grant the equitable relief which is asked. It will be observed, in the first place, that the language of § 1979 does not extend the sphere of equitable jurisdiction in respect of what shall be held an appropriate subject-matter for that kind of relief. The words are, "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." They allow a suit in equity only when that is the proper proceeding for redress, and they refer to existing standards to determine what is a proper proceeding. The traditional limits of proceedings in equity have not embraced a remedy for political wrongs. *Green* v. *Mills*, 30 L. R. A. 90, 16 C. C. A. 516, 25 U. S. App. 383, 69 Fed. 852. But we cannot forget that we are dealing with a new and extraordinary situation, and we are unwilling to stop short of the final considerations which seem to us to dispose of the case.

The difficulties which we cannot overcome are two, and the first is this: The plaintiff alleges that the whole registration scheme of the Alabama Constitution is a fraud upon the Constitution of the United States, and asks us to declare it void. But, of course, he could not maintain a bill for a mere declaration in the air. He does not try to do so, but asks to be registered as a party qualified under the void instrument. If, then, we accept the conclusion which it is the chief purpose of the bill to maintain, how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists? If a white man came here on the same general
[487] *allegations, admitting his sympathy with the plan, but alleging some special prejudice that had kept him off the list, we hardly should think it necessary to meet him with a reasoned answer. But the relief cannot be varied because we think that in the future the particular plaintiff is likely to try to overthrow the scheme. If we accept the plaintiff's allegations for the purposes of his case, he cannot complain. We must accept or reject them. It is impossible simply to shut our eyes, put the plaintiff on the lists, be they honest or fraudulent, and leave the determination of the fundamental question for the future. If we have an opinion that the bill is right on its face, or if we are undecided, we are not at liberty to assume it to be wrong for the purposes of decision. It seems to us that unless we are prepared to say that it is wrong, that all its principal allegations are immaterial, and that the registration plan of the Alabama Constitution is valid, we cannot order the plaintiff's name to be registered. It is not an answer to say that if all the blacks who are qualified according to the letter of the instrument were registered, the fraud would be cured. In the first place, there is no probability that any way now is open by which more than a few could be registered; but, if all could be, the difficulty would not be overcome. If the sections of the Constitution concerning registration were illegal in their inception, it would be a new doctrine in constitutional law that the original invalidity could be cured by an administration which defeated their intent. We express no opinion as to the alleged fact of their unconstitutionality beyond saying that we are not willing to assume that they are valid, in the face of the allegations and main object of the bill, for the purpose of granting the relief which it was necessary to pray in order that that object should be secured.

The other difficulty is of a different sort, and strikingly reinforces the argument that equity cannot undertake now, any more than it has in the past, to enforce political rights, and also the suggestion that state constitutions were not left unmentioned in § 1979 by accident. In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order that it may make. This is al-
[488] leged *to be the conspiracy of a state, although the state is not and could not be made a party to the bill. *Hans* v. *Louisiana*, 134 U. S. 1, 33 L. ed. 842, 10 Sup. Ct. Rep. 504. The circuit court has no constitutional power to control its action by any direct means. And if we leave the state out of consideration, the court has as little practical power to deal with the people of the state in a body. The bill imports that the great mass of the white population intends to keep the blacks from voting. To meet such an intent something more than ordering the plaintiff's name to be inscribed upon the lists of 1902 will be needed. If the conspiracy and the intent exist, a name on a piece of paper will not defeat them. Unless we are prepared to supervise the voting in that state by officers of the court, it seems to us that all that the plaintiff could get from equity would be an empty form. Apart from damages to the individual, relief from a great political wrong, if done, as alleged, by the people of a state and the state itself, must be given by them or by the legislative and political department of the government of the United States.

*Decree affirmed.*

Mr. Justice Brewer dissenting:

I am unable to concur in either the opinion or judgment in this case. The single question is whether the circuit court of the United States had jurisdiction. Accepting the statement of facts in the opinion of the majority as sufficiently full, it appears that the plaintiff was entitled to a place on the permanent registry and was denied it by the defendants, the board of registrars in the county in which he lived. No one was allowed to vote who was not registered. He desired to vote at the coming election for representative in Congress. He was deprived of that right by the action of the defendants. Has the circuit court jurisdiction to redress such wrong? It is conceded that, because of the permanence of the registry, the appeal cannot be dismissed under *Mills* v. *Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132, for, if registered on the permanent registry, the plaintiff can vote at all future elections.

Whether the plaintiff's remedy was at law [489] or in equity cannot *be considered on this appeal. It was so decided in *Smith* v. *McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490, the authority of which is not in terms denied in the opinion of the majority, although, by the decision, it is practically disregarded. The certificate of the trial judge stated that "the only question considered and decided by the court in dismissing the bill of complaint was whether, upon the bill and demurrer thereto, a case is presented of which this court has jurisdiction under the Constitution or laws of the United States."

The act of Congress authorizing appeals directly from the circuit courts to this court (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549) provides that:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

In *Smith* v. *McKay* we said (p. 358, L. ed. p. 732, Sup. Ct. Rep. 492):

"When the requisite citizenship of the parties appears, and the subject-matter is such that the circuit court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the circuit court of appeals."

See also *Tucker* v. *McKay*, 164 U. S. 701, 41 L. ed. 1180, 17 Sup. Ct. Rep. 1001; *Murphy* v. *Colorado Paving Co.* 166 U. S. 719, 41 L. ed. 1188, 17 Sup. Ct. Rep. 997; *Shepard* v. *Adams*, 168 U. S. 618, 622, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; *Building & Loan Asso.* v. *Price*, 169 U. S. 45, 42 L. ed. 655, 18 Sup. Ct. Rep. 251, in which we said:

"The complainant appealed to this court, which appeal was allowed and granted solely upon the question of the jurisdiction of the circuit court, and that question alone has been certified. Whether the bill shows facts sufficient to invoke the consideration of a court of equity is not such a question of jurisdiction as is referred to in the judiciary act of March 3, 1891, chap. 517, and we have therefore no concern with that question." *Blythe Co.* v. *Blythe*, 172 U. S. 644, 43 L. ed. 1183, 19 Sup. Ct. Rep. 873; *Blythe* v. *Hinckley*, 173 U. S. 501, 506, 43 L. ed. 783, 785, 19 Sup. Ct. Rep. 497, 499, from which I quote: "Appeals or writs of error may be taken directly from the circuit courts to this court in *cases in which the jurisdiction of [490] those courts is in issue, that is, their jurisdiction as Federal courts, the question alone of jurisdiction being certified to this court. The circuit court held that the remedy was at law, and not in equity. That conclusion was not a decision that the circuit court had no jurisdiction as a court of the United States."

A still more significant case is *Huntington* v. *Laidley*, 176 U. S. 668, 44 L. ed. 630, 20 Sup. Ct. Rep. 526. In that case proceedings had been had in the courts of the state resulting in a final determination of the controversy. Subsequently this action was commenced in the Federal court, and the final decision of the state courts was pleaded as *res judicata*. The circuit court dismissed the suit for want of jurisdiction, and certified the question to this court. I thought it was sacrificing substance to form to reverse the judgment of dismissal when it was apparent that the controversy had been settled by the decisions in the state court, and, therefore, could not rightfully be relitigated in the Federal court. But this court held that the only question to be considered was that of jurisdiction, saying (p. 679, L. ed. p. 635, Sup. Ct. Rep. p. 530):

"Under the circumstances of this case, the question whether the proceedings in any or all of the suits, at law or in equity, in the state court, afforded a defense—either by way of *res judicata*, or because of any control acquired by the state court over the subject-matter—to this bill in the circuit court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and, as such, to be tried and determined by that court in the exercise of its jurisdiction. The circuit court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court, upon a direct appeal on the question of jurisdiction only, to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case. In any aspect of the case, the decree of the circuit court of the United States, dismissing the suit for want of jurisdiction, must be reversed, and the cause remanded to that court for further proceedings therein."

Although the statute and these decisions thus expressly limit the range of inquiry on a certificate of jurisdiction to the question *of jurisdiction, it is held that because there [491]

is a constitutional question shown in the pleadings, the certificate may be ignored and the entire case presented to this court for consideration. In other words, although the plaintiff, by his method of appeal, following the provisions of the statute, limited the inquiry to the matter of jurisdiction, this court will ignore such limit and treat the case as coming here on a general appeal, which he did not take. This conclusion seems to me to practically destroy the statute and overrule the prior decisions, for the jurisdiction of Federal courts primarily rests on the Constitution of the United States, and the extent of their jurisdiction is determined by its provisions. Hence, every case coming up on a certificate of jurisdiction may be held to present a constitutional question, and be open for full inquiry in respect to all matters involved.

Neither can I assent to the proposition that the case presented by the plaintiff's bill is not strictly a legal one and entitling a party to a judicial hearing and decision. He alleges that he is a citizen of Alabama, entitled to vote; that he desired to vote at an election for representative in Congress; that without registration he could not vote, and that registration was wrongfully denied him by the defendants. That many others were similarly treated does not destroy his rights or deprive him of relief in the courts. That such relief will be given has been again and again affirmed in both national and state courts.

That the United States circuit court has jurisdiction of an action like this seems to me to result inevitably from prior decisions of this court. Without stopping to notice in detail the cases of *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152, and *Re Coy*, 127 U. S. 731, 32 L. ed. 274, 8 Sup. Ct. Rep. 1263, in which the general jurisdiction of Federal courts over matters involved in the election of national officers is affirmed, I refer to two recent cases which bear directly upon the present question: *Wiley* v. *Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17, was an action brought in the circuit court of the United States by the plaintiff to recover damages of an election board for wilfully rejecting his vote for a member of the House of Representatives. We held that the court had jurisdiction, and said (p. 64, L. ed. p. 88, Sup. Ct. Rep. p. 20):

[492] *"This action is brought against election officers to recover damages for their rejection of the plaintiff's vote for a member of the House of Representatives of the United States. The complaint, by alleging that the plaintiff was at the time, under the Constitution and laws of the state of South Carolina and the Constitution and laws of the United States, a duly qualified elector of the state, shows that the action is brought under the Constitution and laws of the United States. The damages are laid at the sum of $2,500. What amount of damages the plaintiff shall recover in such an action is peculiarly appropriate for the determination of a jury, and no opinion of the court upon that subject can justify it in holding that the amount in controversy was insufficient to support the jurisdiction of the circuit court. *Barry* v. *Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Scott* v. *Donald*, 165 U. S. 58, 89, 41 L. ed. 632, 638, 17 Sup. Ct. Rep. 265; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 468, 472, 42 L. ed. 1111, 1113, 18 Sup. Ct. Rep. 645; *North American Transp. & Trading Co.* v. *Morrison*, 178 U. S. 262, 267, 44 L. ed. 1061, 20 Sup. Ct. Rep. 869. The circuit court, therefore, clearly had jurisdiction of this action, and we are brought to the consideration of the other objections presented by the demurrer to the complaint."

Again, in *Swafford* v. *Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783, which, like the former case, was one brought in the circuit court of the United States to recover damages for the alleged wrongful refusal by the defendants, as election officers, to permit the plaintiff to vote at a national election for a member of the House of Representatives, it was held that the court had jurisdiction. Here, too, we said, after referring to *Wiley* v. *Sinkler* (p. 492, L. ed. p. 1007, Sup. Ct. Rep. p. 785):

"It is manifest from the context of the opinion in the case just referred to that the conclusion that the cause was one arising under the Constitution of the United States was predicated on the conception that the action sought the vindication or protection of the right to vote for a member of Congress,—a right, as declared in *Ex parte Yarbrough*, 110 U. S. 655, 664, 28 L. ed. 275, 278, 4 Sup. Ct. Rep. 152, 'fundamentally based upon the Constitution of the United States, which created the office of member of Congress, and declared that it should be elective, and pointed out the means of ascertaining who should be electors.' That is to say, the ruling was that the case was equally one arising under the Constitution or laws of the United States, whether the illegal act complained *of arose from a charged viola- [493] tion of some specific provision of the Constitution or laws of the United States, or from the violation of a state law which affected the exercise of the right to vote for a member of Congress, since the Constitution of the United States had adopted, as the qualifications of electors for members of Congress, those prescribed by the state for electors of the most numerous branch of the legislature of the state. It results from what has just been said that the court erred in dismissing the action for want of jurisdiction, since the right which it was claimed had been unlawfully invaded was one in the very nature of things arising under the Constitution and laws of the United States, and that this inhered in the very substance of the claim. It is obvious from an inspection of the certificate that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. But, as the very nature of the con-

troversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States."

It seems to me nothing need be added to these decisions, and, unless they are to be considered as overruled, they are decisive of this case.

Mr. Justice **Brown** also dissents.

Mr. Justice **Harlan**, dissenting:

By the final judgment in the circuit court the bill in this case was dismissed for want of jurisdiction to entertain it and for want of equity; and from that judgment the plaintiffs prayed, and were allowed, an appeal.

Subsequently an order was made by the circuit court, certifying that the only question considered and decided was whether, upon the bill and demurrer, a case was pre-
[494] sented of *which it had jurisdiction under the Constitution and laws of the United States.

Although the case involves questions of considerable importance, it was submitted here without oral argument.

Could the circuit court take cognizance of this cause consistently with the act of Congress regulating its jurisdiction? This is naturally the fundamental, if not the only, question in the case. An answer to the question requires a reference to several acts of Congress, including the judiciary act of August 13th, 1888, correcting that of March 3d, 1887 [24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 514], 25 Stat. at L. 433, chap. 866.

Section 629 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 503) enumerates in subdivisions the cases of which the circuit courts of the United States may take original cognizance.

In subd. 1 of that section, the circuit courts are given original cognizance "of all suits of a civil nature at common law or in equity, where the matter in dispute, exclusive of costs, exceeds the sum or value of $500, and an alien is a party, or the suit is between a citizen of the state where it is brought and a citizen of another state;" and in subd. 2, "of all suits in equity, where the matter in dispute exclusive of costs, exceeds the sum or value of five hundred dollars, and the United States are petitioners." Rev. Stat. § 629, subdivs. 1 and 2 (U. S. Comp. Stat. 1901, p. 503).

By the 16th subdivision of that section it is declared that the circuit courts shall have original cognizance "of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage of any state, of any right, privilege, or immunity secured by the Constitution of the United States or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." The matter in dispute in such suits was not expressly required by the Revised Statutes to have any money value.

By § 1979 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1262), title 24, *Civil Rights*, it is provided that "every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen *of the United States or other [495] person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." It has been said that this section as well as subd. 16 of § 629 (U. S. Comp. Stat. 1901, p. 506) was based upon the 1st section of the act of April 20th, 1871, chap. 22 (17 Stat. at L. 13), entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes." *Holt* v. *Indiana Mfg. Co.* 176 U. S. 68, 70, 44 L. ed. 374, 375, 20 Sup. Ct. Rep. 272.

Next came the act of March 3d, 1875, which provided that "the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *and* arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein." 18 Stat. at L. 470, chap. 137 (U. S. Comp. Stat. 1901, p. 508). That act expressly repealed previous statutes in conflict with its provisions.

Then came the act of 1888, correcting that of 1887, and which provides "That the circuit courts of the United States shall have original cognizance concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, *and* arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, *or in which [496] controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum

or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." By that act the conflicting provisions of previous acts were repealed, except in certain particulars, among which were the provisions relating to "any jurisdiction or right mentioned . . . in title 24 of the Revised Statutes," *Civil Rights*, under which title § 1979 (U. S. Comp. Stat. 1901, p. 1262) is found.

It is clear that, under the act of 1888, a circuit court could not take original cognizance of a suit simply because it was one arising under the Constitution or laws of the United States. The value of the matter in dispute in such a case must exceed $2,000, exclusive of interest and costs.

The bill makes no allegation whatever as to the value of the matter in dispute, although this court, speaking by the Chief Justice, in *Holt* v. *Indiana Mfg. Co.* 176 U. S. 68, 70, 44 L. ed. 374, 375, 20 Sup. Ct. Rep. 272, after referring to the 1st section of the judiciary act of 1888, said: "This" [the question of the value in dispute in cases arising under the Constitution or laws of the United States] "was carefully considered in *United States* v. *Sayward*, 160 U. S. 493, 40 L. ed. 508, 16 Sup. Ct. Rep. 371, and it was held that the sum or value named was *jurisdictional*, and that the circuit court could not, under the statute, take original cognizance of a case arising under the Constitution or laws of the United States unless the sum or value of the matter in dispute, exclusive of costs and interest, exceeded $2,000. That decision was reaffirmed in *Fishback* v. *Western U. Teleg. Co.* 161 U. S. 96, 99, 40 L. ed. 630, 631, 16 Sup. Ct. Rep. 506." It was added — contrary to the intimation given in the opinion in the present case — that "the conclusion reached is not affected by the fact that the operation of the act of March 3d, 1891, was to do away with any pecuniary limitation on appeals directly from the circuit courts to this court. *The* [497] *Paquete* **Habana*, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290." Of course, it was not meant by that language that the jurisdiction of the circuit courts, so far as the value of the matter in dispute is concerned, was changed as to the cases embraced by the 5th section of the act of 1891. The act of 1891 left the original jurisdiction of the circuit courts as established by the act of 1888.

1. It cannot be disputed that the present suit is one arising under the Constitution and laws of the United States, and it is clear that the value of the matter in dispute is made by the statute an essential element in the jurisdiction of the circuit court in such a case. But it has been suggested that this suit is also embraced by subd. 16 of § 629 and § 1979 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 506 and 1262) —which provisions this court assumed, in *Holt* v. *Indiana Mfg. Co.* and now assumes, was not repealed by any subsequent statute, and therefore that the value of the matter in dispute is of no consequence. But this suggestion overlooks the declaration of the court in that case to the effect that, although the above provisions must be assumed to be still (1899) in force, they refer "to civil rights only." 176 U. S. 72, 44 L. ed. 377, 20 Sup. Ct. Rep. 272. In this view, subd. 16 of § 629 and § 1979 of the Revised Statutes have no bearing upon the present case, if the rights for the protection of which the present suit was brought are political rights, and not civil rights within the meaning of the statutes relating to civil rights. Consequently, the saving clause in the act of 1888 in respect of any jurisdiction or right mentioned in title 24 of the Revised Statutes, *Civil Rights*, becomes immaterial in the present case. Whether this be so or not, the court refrains from declaring that the plaintiff could proceed under subd. 16 of § 629 or § 1979 of the Revised Statutes, without regard to the value of the matter in dispute. If this court thinks that this suit could be maintained under subd. 16 of § 629 or under § 1979, or under both, without regard to the value of the matter in dispute, I submit that it should have been so adjudged.

2. Referring to the suggestion that the act of 1888 gives the circuit court jurisdiction in all suits at law or equity, in which the matter in dispute is the sum or value of $2,000 and arising under the Constitution or laws of the United States, and conceding *that this court in *Wiley* v. *Sinkler*, [498] 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17, and *Swafford* v. *Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783, recognized that the deprivation of a man's political rights (those cases had reference to the elective franchise) may properly be alleged to have the required value in money, the court says: "Assuming that the allegation [of value] should have been made in a case like this, the objection to its omission was not raised in the circuit court, and, as it could have been remedied by amendment, we think it unavailing. The certificate was made *alio intuitu*. There is no pecuniary limit on appeals to this court under § 5 of the act of 1891, chap. 517 (26 Stat. at L. 826, 828, U. S. Comp. Stat. 1901, p. 549); (*The Paquete Habana*, 175 U. S. 677, 683, 44 L. ed. 320, 322, 20 Sup. Ct. Rep. 290), and we do not feel called upon to send the case back to the circuit court in order that it might permit the amendment."

It seems to me that this question as to the value of the matter in dispute was sufficiently raised in the circuit court; for the demurrer to the bill was, in part, on the ground that the facts stated did not make a case "within the jurisdiction of the court." But, passing that view, I come to a more serious matter. In cases of which a circuit court may take original cognizance, the value of the matter in dispute — which is mentioned in the statute in advance of any reference to the nature of the

subject of the action — is as essential to jurisdiction as is the nature of the subject of such dispute. And yet the court says that an objection that the record from the circuit court does not show an allegation as to value is unavailing here, even if such allegation ought to have been made. That is a new, and I take leave to say, a startling, doctrine. Must not this court, upon its own motion, decline to pass upon — indeed, has this court, strictly speaking, jurisdiction to consider and determine — the merits of a case coming from the circuit court, unless it *affirmatively* appears *from the record* that the case is one of which that court could take cognizance? Is not a suit presumably without the jurisdiction of a circuit court, unless the record shows it to be one of which that court may take cognizance? Is it of any consequence that the parties did not raise the question of jurisdiction in the circuit court? If the record [499] shows nothing more than that the case *arises under the Constitution and laws of the United States, and if it does not affirmatively appear, in some appropriate way, that the value of the matter in dispute is up to the required amount, has this court jurisdiction to consider and determine the merits of the case?

Let us look at some of the adjudged cases upon the general subject of the jurisdiction of the Federal courts, and see what the duty of this court is when its own jurisdiction does not affirmatively appear from the record, or when it does not appear that the circuit court had jurisdiction.

In *Sizer* v. *Many*, 16 How. 103, 14 L. ed. 863, which was an action for the infringement of letters patent: "The sum taxed being less than $2,000, no writ of error will lie under the act of 1789. This act *gives no jurisdiction to this court* over the judgment of a circuit court, when the judgment is for less than that sum. . . . The writ of error must therefore be dismissed for want of jurisdiction." In *Brown* v. *Shannon*, 20 How. 55, 58, 15 L. ed. 826, 828, which was an action to enforce the specific execution of a contract in relation to the use of a patent right: "The sum mentioned in the bill . . . being less than $2,000, whatever errors may be apparent in the proceedings and decree of the court below, we have yet *no power* under the act of Congress to revise and correct them, and the appeal *must* be dismissed." In *Richmond* v. *Milwaukee*, 21 How. 80, 82, 16 L. ed. 72, which was an action to prohibit the conveyance of certain lots: "There is nothing in the allegations of the parties or in the evidence to show that the value of the lots in question exceeded $2,000, nor anything from which it can be inferred. The appeal must therefore be dismissed *for want of jurisdiction in this court*." In *Pratt* v. *Fitzhugh*, 1 Black. 271, 273, 17 L. ed. 206, 207, which was a cause in admiralty: "Without the fact of value being shown on the record, or by evidence *aliunde*, the court *has no jurisdiction*." In *Walker* v. *United States*, 4 Wall. 163, 164, 18 L. ed. 319, which was an action on a judgment for money: "*This court has no appellate jurisdiction*, except such as is defined by Congress. The act of Congress limits this jurisdiction to cases where the matter in dispute exceeds $2,000. We can no more take jurisdiction where the matter does not exceed [that sum] than we can where it is less *than that sum. The amount in contro- [500] versy in the case before us, ascertained in conformity with the settled principles of the court, does not exceed $2,000. We have, therefore, *no jurisdiction* of the writ of error, and it *must* be dismissed." In *The Grace Girdler*, 6 Wall. 441, *sub nom. Lockwood* v. *The Grace Girdler*, 18 L. ed. 790, which was an appeal in admiralty: "While it is true that the greater part of the loss fell upon Lockwood, as owner of the Ariel and her belongings, there is nothing in the record which shows that the damage sustained exceeded $2,000. And *this is essential to jurisdiction*." In *Ayers* v. *Watson*, 113 U. S. 595, 598, 28 L. ed. 1093, 1094, 5 Sup. Ct. Rep. 641, 642, which was an action of trespass to try title to land: "Diverse state citizenship of the parties, *or some other jurisdictional fact prescribed by the second section*, is absolutely essential, and cannot be waived, and the want of it will be error at any stage of the cause, even though assigned by the party at whose instance it was committed."

These cases relate to the jurisdiction of this court under statutes prescribing a certain amount as essential, upon writ of error or appeal, for the review of judgments rendered in the circuit court.

Looking now at cases in which the want of jurisdiction in the circuit court has been held to preclude this court from going into the merits of the case adjudged, we find in *King Bridge Co.* v. *Otoe County*, 120 U. S. 226, 30 L. ed. 624, 7 Sup. Ct. Rep. 552, which was an action upon county warrants, this language: "It does not appear that the circuit court had jurisdiction of the action. Unless the contrary appears affirmatively from the record, the presumption, upon writ of error or appeal, is that the court below was without jurisdiction." In *Metcalf* v. *Watertown*, 128 U. S. 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173, which was an action upon a judgment, and in which case the question was whether an action upon a certain judgment was barred by limitation, this court said: "We are not, however, at liberty to express any opinion upon the question of limitation, if the court whose judgment has been brought here for review *does not appear, from the record*, to have had jurisdiction of the case. And whether that court had or had not jurisdiction is a question which we must examine and determine, *even if the parties forbear to make it, or consent that the case be *considered upon its* [501] *merits*." In *Chapman* v. *Barney*, 129 U. S. 677, 681, 32 L. ed. 800, 801, 9 Sup. Ct. Rep. 426, 427, which was an action for trover: "We are confronted with the question of jurisdiction, which *although not raised by either party in the court below or in this court*, is presented by the record, and, under

repeated decisions of this court, must be considered." In *Parker* v. *Ormsby*, 141 U. S. 83, 35 L. ed. 655, 11 Sup. Ct. Rep. 912; "Did the court below have jurisdiction of this case? If jurisdiction did not affirmatively appear upon the record, it was error to have rendered a decree, *whether the question of jurisdiction was raised or not in the court below.* In the exercise of its power, this court, *of its own motion*, must deny the jurisdiction of the courts of the United States in all cases coming before it, upon writ of error or appeal, where such jurisdiction does not affirmatively appear in the record on which it is called to act." In *Mattingly* v. *Northwestern Virginia R. Co.* 158 U. S. 57, 39 L. ed. 895, 15 Sup. Ct. Rep. 727, which was an action to set aside certain conveyances and to foreclose a mortgage: "Although it does not appear that the question of jurisdiction was raised in the court below by any plea or motion, yet, as the record failed to affirmatively show jurisdiction, this court must take notice of the defect."

According to the adjudged cases, the first inquiry which this court should make as to any case before it from an inferior Federal court is as to its own jurisdiction. If jurisdiction does not appear from the record, then the writ of error or appeal should be dismissed. If it is found to have jurisdiction for any purpose, then its next duty is to inquire as to the jurisdiction of the court below. When the latter court does not appear upon the record to have jurisdiction, then the duty of this court is to reverse the judgment and remand the case to be dismissed for want of jurisdiction. I say "appear upon the record to have jurisdiction," because, as we have seen, the presumption is that a cause is without the jurisdiction of a Federal court, unless the contrary affirmatively appears. *Turner* v. *Bank of North America*, 4 Dall. 8, 1 L. ed. 718; *Brown* v. *Keene*, 8 Pet. 115, 8 L. ed. 886; *Ex parte Smith*, 94 U. S. 455, 24 L. ed. 165; *Robertson* v. *Cease*, 97 U. S. 646, 24 L. ed. 1057. In *Brown* v. *Keene*, Chief Justice Marshall said: "The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which juris-[502]diction *depends. It is not sufficient that jurisdiction may be inferred argumentatively from its averments."

To these cases I will add that of *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510, 511, in which this court said: "It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it; and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it; but the rule springing from the nature and limits of the judicial power of the United States is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

In the above case of *Holt* v. *Indiana Mfg. Co.* which involved a question of the jurisdiction of the circuit court, this court said: "In this, as in all cases, if it appears that the circuit court had no jurisdiction, *it is the duty of this court to so declare, and enter judgment accordingly.*"

These principles have been expressly affirmed by this court in many other cases. And yet, according to the opinion in this case, if objection is not made in the circuit court to its jurisdiction, it will be unavailing to raise that question in this court, and we may proceed to determine the merits of the case. Such a doctrine, I repeat, is a new departure. The court, in effect, says, that although it may know that the record fails to show a case within the original cognizance of the circuit court, it may close its eyes to that fact, and review the case on its merits. In view of the adjudged cases, I cannot agree that the failure of parties to raise a question of jurisdiction will relieve this court of its duty to raise it upon its own motion. The contrary *view cannot be[503] justified. This court may not assume jurisdiction to do that which it has no authority to do.

It will be appropriate to observe that the circuit court in effect propounds the question whether it had jurisdiction of this case upon the record before it. That question necessarily involves the inquiry whether subd. 16 of § 629 and § 1979 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 506 and 1202) were repealed by later acts. But that point is left undecided, the court only assuming that those statutory provisions are still in force, but does not say whether the suit could be maintained under those sections or under either of them without allegation or proof as to the value of the matter in dispute. Nor does the court distinctly adjudge whether the case is embraced by the act of 1887-88; but simply *assuming* that the allegation of value should have been made in the bill, it proceeds to consider the case upon its merits. The question of the jurisdiction of the circuit court under the acts of Congress, the one certified, is thus left in the air, and the case is examined and disposed of upon its merits just as if jurisdiction of the circuit court appeared upon the record. There is no claim that the essential fact of value appears anywhere in the record, either in the bill or otherwise. Consequently, as already said, this court is without power to consider the merits.

The court says that the plaintiff had the right to appeal directly to this court under

§ 5 of the act of 1891, and that the certificate was unnecessary to found the jurisdiction of this court and could not narrow it. But it does not follow that this court can review the merits of the case, if the circuit court does not appear to have had jurisdiction to determine the rights of the parties.

My views may be summed up as follows: 1. This case is embraced by that clause of the act of 1887–88 which provides that the circuit court shall have original cognizance "of all suits of a civil nature, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, and arising under the Constitution or laws of the United States." 2. That the sum or value of the matter in dispute in such cases is jurisdictional under the statute. 3. That, as it did not appear from the record, [504] in any way, that the matter *in dispute exceeded in value the jurisdictional amount, the circuit court could not take cognizance of the case or dispose of it upon its merits. 4. That least of all does this court have jurisdiction to determine the merits of this case. 5. That when a case comes here upon a certificate as to the jurisdiction of a circuit court, this court may not forbear to decide that question, and determine the merits of the case upon a record which does not show jurisdiction in the circuit court.

As these are my views as to the jurisdiction of this court, upon this record, I will not formulate and discuss my views upon the merits of this case. But to avoid misapprehension, I may add that my conviction is that upon the facts alleged in the bill (if the record showed a sufficient value of the matter in dispute), the plaintiff is entitled to relief in respect of his right to be registered as a voter. I agree with Mr. Justice Brewer that it is competent for the courts to give relief in such cases as this.

# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[505]*FRED. T. HEGEMAN *et al.*, etc., *Plaintiffs in Error*, *v.* JOHN H. SPRINGER, as Receiver, etc. [No. 169.]

In Error to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. Edward Jacobs* for plaintiffs in error.

*Mr. Chauncey S. Truax* for defendant in error.

March 2, 1903. Judgment *affirmed* with costs, on the authority of *Bleistein* v. *Donaldson Lithographing Co.* 188 U. S. 239, *ante*, 460, 23 Sup. Ct. Rep. 298; *Robinson* v. *Belt*, 187 U. S. 41, *ante*, 65, 23 Sup. Ct. Rep. 19, and the case remanded to the circuit court of the United States for the southern district of New York.

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GEORGE NESTER *et al.*, *Plaintiffs in Error*, *v.* FRANK E. CHURCH. [No. 179.]

In Error to the Supreme Court of the State of Michigan.

*Mr. Timothy E. Tarsney* for plaintiffs in error.

*Mr. Frank E. Robson* for defendant in error.

March 2, 1903. *Dismissed* for the want of jurisdiction, on the authority of *Castillo* v. *McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229.

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PEOPLE OF THE STATE OF ILLINOIS ON THE RELATION OF GEORGE F. RAYBURN *et al.*, *Plaintiffs in Error*, *v.* HUGH A. BINNS *et al.* [No. 208.]

In Error to the Supreme Court of the State of Illinois.

*Mr. Edward D. Blinn* for plaintiffs in error.

No counsel for defendants in error.

March 16, 1903. *Dismissed* for the want of jurisdiction on the authority of *Castillo* v. *McConnico*, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; *Butler* v. *Gage*, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235; *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605. See case below, *People ex rel. Glenn* v. *Binns*, 192 Ill. 68, 61 N. E. 376.

AMADA C. DE BACA *et al*, Administrators, etc., *Appellants*, v. UNITED STATES *et al.* [No. 402.]

Appeal from the Court of Claims.

*Mr. H. C. Burnett* for appellants.

*Messrs. Attorney General, Assistant Attorney General Thompson*, and *Lincoln B. Smith* for appellees.

March 2, 1903. Error being confessed by the appellees, judgment *reversed*, and cause remanded with directions to proceed therein according to law.

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BANK OF COMMERCE, *Plaintiff in Error*, *v.* CHARLES S. WILTSIE, Prosecuting Attorney. [No. 196.]

In Error to the Supreme *Court of the [506] State of Indiana.

*Mr. Augustin Boice* for plaintiff in error.

*Messrs. Wm. L. Taylor, Merrill Moores*, and *C. C. Hadley* for defendant in error.

March 16, 1903. *Dismissed* for the want of jurisdiction on the authority of *Erie R. Co.* v. *Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Mallett* v. *North Carolina*, 181 U. S. 592, 45 L. ed. 1017, 21 Sup. Ct. Rep. 730; *Mutual L. Ins. Co.* v. *McGrew*, 188 U. S. 291, *ante*, 480, 23 Sup. Ct. Rep. 375; and cases cited. See case below, *Re Bank of Commerce*, 153 Ind. 460–474, *sub nom. Bank of Commerce* v. *Wiltsie*, 47 L. R. A. 489, 53 N. E. 950, 55 N. E. 224.

---

HUNTER H. MOSS, JR., Prosecuting Attorney, etc., *et al.*, *Appellants*, *v.* ELLIS GLENN. [No. 197.]

Appeal from the Circuit Court of the United States for the Northern District of West Virginia.

*Messrs. Wm. N. Miller* and *Hunter H. Moss, Jr.* for appellants.

*Mr. C. C. Cole* for appellee.

March 16, 1903. Final order *reversed* with costs, and cause remanded with directions to quash the writ of habeas corpus and dismiss the petition. *Baker* v. *Grice*, 169 U. S. 284, 42 L. ed. 748, 18 Sup. Ct. Rep. 323; *Markuson* v. *Boucher*, 175 U. S. 184, 44 L. ed. 124, 20 Sup. Ct. Rep. 76; *Minnesota* v. *Brundage*, 180 U. S. 499, 45 L. ed. 639, 21 Sup. Ct. Rep. 455; *Dreyer* v. *Illinois*, 187 U. S. 71, *ante*, 79, 23 Sup. Ct. Rep. 28.

LILLIE WINSTON, *Plaintiff in Error*, *v.* WALKER WINSTON. [No. 227.]

In Error to the Supreme Court of the State of New York.

*Mr. Eugene Sweeney* for plaintiff in error.

*Mr. Daniel E. Lynch* for defendant in error.

[507] April 13, 1903. *Judgment *affirmed* with costs, on the authority of *Bell* v. *Bell*, 181 U. S. 175, 45 L. ed. 804, 21 Sup. Ct. Rep. 551; *Streitwolf* v. *Streitwolf*, 181 U. S. 179, 45 L. ed. 807, 21 Sup. Ct. Rep. 553; *Andrews* v. *Andrews*, 188 U. S. 14, *ante*, 366, 23 Sup. Ct. Rep. 237.

---

ALMOND A. WHITE, *Plaintiff in Error*, *v.* SIDNEY L. WRIGHT *et al.* [No. 535.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. Orville Rinehart* for plaintiff in error.

*Messrs. Jed L. Washburn* and *Leon E. Lum* for defendants in error.

April 13, 1903. *Dismissed* for the want of jurisdiction, on the authority of *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49; *Union Mut. L. Ins. Co.* v. *Kirchoff*, 160 U. S. 374, 40 L. ed. 461, 16 Sup. Ct. Rep. 318; *Meagher* v. *Minnesota Thresher Mfg. Co.* 145 U. S. 611, 36 L. ed. 835, 12 Sup. Ct. Rep. 876.

---

FREDERICK A. D. SCHULTE *et al.*, *Plaintiffs in Error*, *v.* AUGUST HEMAN. [No. 242.]

In Error to the Supreme Court of the State of Missouri.

*Mr. Wm. B. Thompson* for plaintiffs in error.

*Messrs. Hickman P. Rodgers* and *George E. Tralles* for defendant in error.

April 20, 1903. Judgment *affirmed* with costs, on the authority of *Shumate* v. *Heman*, 181 U. S. 402, 45 L. ed. 922, 21 Sup. Ct. Rep. 645; *French* v. *Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Chadwick* v. *Kelley*, 187 U. S. 540, *ante*, 293, 23 Sup. Ct. Rep. 175; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56. See *Heman* v. *Schulte*, 166 Mo. 409, 66 S. W. 163.

---

MARY J. LYON *et al.*, *Plaintiffs in Error*, *v.* MARGARET GOMBERT *et al.* [No. 357.]

In Error to the Supreme Court of the State of Nebraska.

*Messrs. Lionel C. Burr* and *Charles L. Burr* for plaintiffs in error.

*Mr. J. H. Broady* for defendants in error.

April 20, 1903. Writ of error *dismissed* for the want of jurisdiction, on the authority of *Eustis* v. *Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Pierce* v. *Somerset R. Co.* 171 U. S. 648, 43 L. ed. 319, 19 Sup. Ct. Rep. 64; *Gillis* v. *Stinchfield*, 159 U. S. 658, 40 L. ed. 295, 16 Sup. Ct. Rep. 131; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389. See case below, *Lyon* v. *Gombert*, 63 Neb. 630, 88 N. W. 774.

UNITED STATES *ex rel.* HENRY D. PHILLIPS, *Plaintiff in Error*, *v.* EUGENE F. WARE, Commissioner of Pensions. [Nos. 249, 250.] UNITED STATES *ex rel.* HENRY D. PHILLIPS, *Plaintiff in Error*, *v.* ETHAN ALLEN HITCHCOCK, Secretary of the Interior, *et al.* [Nos. 251, 322.]

In Error to the Court of Appeals of the District of Columbia.

*Mr. Henry D. Phillips, propria persona.*

*Messrs. Attorney General, A. C. Campbell,* and *F. L. Campbell* for defendants in error.

April 20, 1903. Writs of error *dismissed* *for the want of jurisdictiou. Act of March [508] 3, 1901, 31 Stat. at L. 1189, chap. 854, § 233; Act of February 9, 1893, 27 Stat. at L. 434, chap. 74, § 8, U. S. Comp. Stat. 1901, p. 573; Act of March 3, 1885, 23 Stat. at L. 443, chap. 355, U. S. Comp. Stat. 1901, p. 572; *Baltimore & P. R. Co.* v. *Hopkins*, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503; *United States* v. *Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114; *Cameron* v. *United States*, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184; *South Carolina* v. *Seymour*, 153 U. S. 353, *sub nom. United States ex rel. South Carolina* v. *Seymour*, 38 L. ed. 742, 14 Sup. Ct. Rep. 871.

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SECOND NATIONAL BANK OF RICHMOND, KENTUCKY, *Plaintiff in Error*, *v.* C. N. FITZPATRICK *et al.* [No. 237.]

In Error to the Court of Appeals of the State of Kentucky.

*Messrs. J. A. Sullivan* and *John T. Shelby* for plaintiff in error.

No counsel for defendants in error.

April 27, 1903. Writ of error *dismissed* for the want of jurisdiction, on the authority of *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49.

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NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY, *Plaintiff in Error*, *v.* PATRICK MCKEON. [No. 611.]

In Error to the Court of Common Pleas of Fairfield County, Connecticut.

*Mr. Arthur M. Marsh* for plaintiff in error.

*Messrs. Robert E. DeForest* and *Stiles Judson, Jr.*, for defendant in error.

April 27, 1903. Judgment *affirmed* with *costs and interest, on the authority of [509] *Wheeler* v. *New York, N. H. & H. R. Co.* 178 U. S. 321, 44 L. ed. 1085, 20 Sup. Ct. Rep. 949; *New York & N. E. R. Co.* v. *Bristol*, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023; *Little Rock & Ft. S. R. Co.* v. *Worthen*, 120 U. S. 97–102, 30 L. ed. 588–590, 7 Sup. Ct. Rep. 469; *Davidson* v. *New Orleans*, 96 U. S. 97, 105, 24 L. ed. 616, 620. See case below, *McKeon* v. *New York, N. H. & H. R. Co.* 75 Conn. 343, 53 Atl. 656.

JOSEPH H. CHING, *Petitioner*, *v.* UNITED STATES. [No. 512.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
*Mr. Adrian Posey* for petitioner.
*Messrs. Attorney General* and *Solicitor General Richards* for respondent.
March 2, 1903. *Denied.*

---

EUFAULA COTTON OIL COMPANY *et al.*, *Petitioners*, *v.* STILLWELL & BIERCE AND SMITH-VAILE COMPANY. [No. 573.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
*Mr. Wm. Edgar Simonds* for petitioners.
*Mr. E. E. Wood* for respondent.
March 2, 1903. *Denied.*

---

PHILIP S. WITHERSPOON, *Petitioner*, *v.* FREDERICK P. OLCOTT. [No. 577.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Mr. W. O. Davis* for petitioner.
No counsel for respondent.
March 2, 1903. *Denied.*

---

WALTER N. DIMMICK, *Petitioner*, *v.* UNITED STATES. [No. 592.]
[510] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
*Mr. George D. Collins* for petitioner.
*Messrs. Attorney General* and *Solicitor General Richards* for respondent.
March 2, 1903. *Denied.*

---

WILLIAM E. FERGUSON *et al.*, etc., *Petitioners*, *v.* ENOCH HELLIESEN *et al.* [No. 599.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Messrs. James J. Macklin* and *LaRoy S. Gove* for petitioners.
*Mr. Wilhelmus Mynderse* for respondents.
March 2, 1903. *Denied.*

---

WILLIAM J. HUME, *Petitioner*, *v.* UNITED STATES. [No. 608.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Messrs. J. D. Rouse, Wm. Grant*, and *H. M. Jordan* for petitioner.
*Messrs. Attorney General* and *Solicitor General Richards* for respondent.
March 2, 1903. *Denied.*

---

STEAMSHIP EAGLE POINT, ETC., *Petitioner*, *v.* LIVERPOOL, BRAZIL, & RIVER PLATE STEAM NAVIGATION COMPANY, Limited. [No. 613.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
*Mr. Wilhelmus Mynderse* for petitioner.
*Messrs. Harrington Putnam* and *Charles C. Burlingham* for respondent.
March 2, 1903. *Denied.*

PAUL CAPDEVIELLE, Mayor, etc., *et al.*, *Petitioners*, *v.* UNITED STATES *ex rel.* D. M. KILPATRICK *et al.* [No. 617.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Mr. Frank B. Thomas* for petitioners.
*Messrs. J. D. Rouse, Wm. Grant* and *H. M. Jordan* for respondents.
March 2, 1903. *Denied.*

*BOARD OF COMMISSIONERS OF WILKES [511] COUNTY *et al.*, *Petitioners*, *v.* W. N. COLER & Co. [No. 247.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
*Mr. A. C. Avery* for petitioners.
*Messrs. John F. Dillon, Charles Price, Harry Hubbard*, and *John M. Dillon* for respondents.
March 9, 1903. *Granted.*

---

DAVID R. JULIAN, Sheriff, etc., *et al.*, *Petitioners*, *v.* CENTRAL TRUST COMPANY *et al.* [No. 457.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.
*Messrs. A. C. Avery, Lee S. Overman*, and *C. A. Mountjoy* for petitioners.
*Mr. Charles Price* for respondents.
March 9, 1903. *Granted.*

---

ALPHONSE EMSHEIMER, *Petitioner*, *v.* CITY OF NEW ORLEANS. [No. 612.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Messrs. J. D. Rouse, Wm. Grant* and *H. M. Jordan* for petitioner.
No counsel for respondent.
March 9, 1903. *Denied.*

---

ARTHUR JOHN BUSTON, *Petitioner*, *v.* PENNSYLVANIA RAILROAD COMPANY. [No. 625.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.
*Messrs. Richard C. Dale, Geo. W. Pepper*, and *Samuel Dickson* for petitioner.
*Messrs. John G. Johnson* and *F. P. Prichard* for respondent.
March 9, 1903. *Denied.*

---

CREED & CRIPPLE CREEK MINING & MILLING COMPANY, *Petitioner*, *v.* UINTA TUNNEL MINING, & TRANSPORTATION COMPANY. [No. 609.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
*Messrs. Charles S. Thomas, Wm. H. Bryant*, and *H. H. Lee* for petitioner.
*Mr. Charles J. Hughes, Jr.*, for respondent.
March 16, 1903. *Granted.*

[512] *CHARLES B. KIMBELL *et al.*, *Petitioners*, *v.* CHICAGO HYDRAULIC PRESS BRICK COMPANY *et al.* [No. 623.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
*Mr. Edmund H. Smalley* for petitioners.
*Messrs. Edward Cunningham, Jr.*, and *Edward C. Eliot* for respondents.
March 16, 1903. *Denied.*

---

HENRY C. PAYNE, Postmaster General, *Plaintiff in Error and Petitioner*, *v.* UNITED STATES *ex rel.* NATIONAL RAILWAY PUBLICATION COMPANY. [No. 628.]
Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.
*Mr. Solicitor General Richards* for petitioner.
No appearance for respondent.
March 16, 1903. *Granted.*

---

HENRY C. PAYNE, Postmaster General, *Plaintiff in Error and Petitioner*, *v.* UNITED STATES *ex rel.* RAILWAY LIST COMPANY. [No. 629.]
Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.
*Mr. Solicitor General Richards* for petitioner.
No appearance for respondent.
March 16, 1903. *Granted.*

---

WILLIAM A. WRIGHT, Comptroller General, *Petitioner*, *v.* LOUISVILLE & NASHVILLE RAILROAD COMPANY *et al.* [No. 636.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Messrs. Boykin Wright* and *John C. Hart* for petitioner.
*Mr. Alex. C. King* for respondents.
March 23, 1903. *Granted.*

---

MEXICAN NATIONAL RAILROAD COMPANY, *Petitioner*, *v.* NIEL JACKSON. [No. 638.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Messrs. Thomas W. Dodd* and *J. W. Bailey* for petitioner.
No counsel for respondent.
March 23, 1903. *Denied.*

---

[513] *ROBERT H. DOWNMAN *et al.*, *Petitioners*, *v.* GERMAN INSURANCE COMPANY OF FREEPORT, ILLINOIS. [No. 619.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.
*Mr. H. N. Atkinson* for petitioners.
No counsel for respondent.
April 6, 1903. *Denied.*

UNITED STATES, *Petitioner*, *v.* ALFRED R. MULLINS. [No. 630.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
*Messrs. Attorney General* and *Solicitor General Richards* for petitioner.
*Mr. Alexander Pope Humphrey* for respondent.
April 6, 1903. *Denied.*

---

WELKER GIVEN, *Petitioner*, *v.* TIMES-REPUBLICAN PRINTING COMPANY *et al.* [No. 633.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.
*Mr. A. A. Lipscomb* for petitioner.
*Messrs. A. B. Cummins, Wm. W. Dudley*, and *L. T. Michener* for respondents.
April 6, 1903. *Denied.*

---

JOHN R. CLARKE, *Petitioner*, *v.* TOWN OF NORTHAMPTON. [No. 631.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Messrs. Fayette B. Tiffany, Henry J. Cookinham*, and *John M. Thurston* for petitioner.
*Messrs. Fred Linus Carroll* and *Andrew J. Nellis* for respondent.
April 20, 1903. *Denied.*

---

RALPH MOORE, ETC., *Petitioner*, *v.* SOUTHERN RAILWAY COMPANY. [No. 663.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.
*Mr. Henry H. Ingersoll* for petitioner.
*Messrs. W. A. Henderson* and *Leon Jourolmon* for respondent.
April 20, 1903. *Denied.*

---

H. BAUENDAHL & CO., *Petitioners*, *v.* JACOB S. *BERNHEIMER & BRO. [No. 652.] [514
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Mr. Adolph G. Wolf* for petitioners.
*Mr. Max J. Kohler* for respondents.
April 27, 1903. *Denied.*

---

S. WARREN LAMSON *et al.*, *Petitioners*, *v.* CHARLES F. HUTCHINGS, Executor, etc. [No. 669.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Mr. Wm. H. Barnum* for petitioners.
No counsel for respondent.
April 27, 1903. *Denied.*

---

STEAMSHIP ELY, ETC., *Petitioner*, *v.* WILLIAM B. BOWRING *et al.* [No. 672.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Messrs. J. Parker Kirlin* and *Charles R. Hickox* for petitioner.
*Mr. Wilhelmus Mynderse* for respondents.
April 27, 1903. *Denied.*

CHARLES DOHERTY, *Plaintiff in Error*, *v.* STATE OF VERMONT. [No. 233.]

In Error to the Supreme Court of the State of Vermont.

*Mr. Tracy L. Jeffords* for plaintiff in error.

*Mr. C. A. Prouty* for defendant in error.

March 2. 1903. *Dismissed*, on authority of counsel for plaintiff in error.

---

CONTRACTING & BUILDING COMPANY OF KENTUCKY, *Petitioner*, *v.* CONTINENTAL TRUST COMPANY. [No. 184.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Thomas Emery* and *John Ford* for petitioner.

No counsel for respondent.

March 4, 1903. *Dismissed* for the want of prosecution.

---

[515] *ROBERT H. BILLINGSLEA, *Petitioner*, *v.* KANSAS CITY SOUTHERN RAILWAY COMPANY *et al.* [No. 606.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

*Messrs. Presley K. Ewing* and *Henry F. Ring* for petitioner.

*Messrs. Gardiner Lathrop, Thos. R. Morrow*, and *S. W. Moore* for respondents.

March 9, 1903. *Dismissed*, per stipulation.

---

JEREMIAH F. MCCARTHY *et al.*, *Plaintiffs in Error and Appellants*, *v.* JAMES F. MCCARTHY. [No. 388.]

In Error to and Appeal from the Court of Appeals of the District of Columbia.

*Mr. Chapin Brown* for plaintiffs in error and appellants.

*Messrs. C. C. Cole* and *Vincent A. Sheehy* for defendant in error and appellee.

March 11, 1903. *Dismissed*, each party to pay its own costs in this court, per stipulation of counsel.

---

JOSHUA M. SEARS, *Plaintiff in Error*, *v.* BOARD OF STREET COMMISSIONERS OF THE CITY OF BOSTON. [No. 283.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

*Messrs. Edward W. Hutchins* and *Henry Wheeler* for plaintiff in error.

*Mr. Thomas M. Babson* for defendant in error.

April 6, 1903. *Dismissed* with costs, per stipulation.

---

SCHOONER GIBARA HABANA, ETC., *Appellant*, *v.* UNITED STATES. [No. 239.]

Appeal from the District Court of the United States for the Southern District of Florida.

*Messrs. H. A. Herbert* and *Benjamin Micou* for appellant.

*Mr. Attorney General* for appellee.

April 8, 1903. *Dismissed*, pursuant to the 10th Rule.

SCHOONER EXPRESSO, ETC., *Appellant*, *v.* UNITED STATES. [No. 240.]

Appeal from the District Court of the United States for the Southern District of Florida.

*Messrs. H. A. Herbert* and *Benjamin [516] *Micou* for appellant.

*Mr. Attorney General* for appellee.

April 8, 1903. *Dismissed*, pursuant to the 10th Rule.

---

JOHN LAWRENCE *et al.*, Trustees, etc., *Plaintiffs in Error*, *v.* BOARD OF STREET COMMISSIONERS OF THE CITY OF BOSTON. [No. 274.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

*Mr. J. H. Benton, Jr.*, for plaintiffs in error.

*Mr. Thomas M. Babson* for defendant in error.

April 13, 1903. *Dismissed* with costs, per stipulation.

---

JOHN LAWRENCE O'BRIEN, *Appellant*, *v.* JOHN H. SHINE, United States Marshal, etc. [No. 531.]

Appeal from the Circuit Court of the United States for the Northern District of California.

*Mr. John M. Thurston* for appellant.

*Messrs. Attorney General, Solicitor General Richards*, and *Morgan H. Beach* for appellee.

April 17, 1903. *Dismissed* with costs, on motion of *Mr. John M. Thurston* for the appellant.

---

V. VAN BUREN, *Plaintiff in Error*, *v.* MARGARET U. MCKINLEY. [No. 260.]

In Error to the Supreme Court of the State of Idaho.

*Mr. James H. Hawley* for plaintiff in error.

*Mr. Edgar Wilson* for defendant in error.

April 17, 1903. *Dismissed* with costs, pursuant to the 10th Rule.

---

JAMES P. WITHEROW, *Appellant*, *v.* CARNEGIE STEEL COMPANY, Limited. [No. 270.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

*Mr. Hector M. Hitchings* for appellant.

*Mr. John R. Bennett* for appellee.

April 23, 1903. *Dismissed* with costs, pursuant to the 10th Rule.

---

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS *RAILWAY COMPANY, *Plaintiff in* [517] *Error*, *v.* VILLAGE OF CLYDE, OHIO. [No. 262.]

In Error to the Supreme Court of the State of Ohio.

*Mr. John T. Dye* for plaintiff in error.

*Messrs. Homer Metzgar* and *S. S. Richards* for defendant in error.

April 24, 1903. *Dismissed* with costs, on authority of counsel for the plaintiff in error.

EMERSON CHAMBERLIN, *Appellant*, *v.* PEORIA, DECATUR, & EVANSVILLE RAILWAY COMPANY *et al.* [No. 284.]

Appeal from the Circuit Court of the United States for the District of Indiana.

*Mr. Edward B. Whitney* for appellant.

*Mr. J. M. Dickinson* for appellees.

April 27, 1903. *Dismissed*, per stipulation.

VIRGINIA-CAROLINA CHEMICAL COMPANY, *Petitioner*, *v.* HOME INSURANCE COMPANY OF NEW YORK *et al.* [No. 281.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

*Mr. Henry A. M. Smith* for petitioner.

*Messrs. Augustin T. Smythe* and *Alex. C. King* for respondents.

April 27, 1903. *Dismissed* for the want of prosecution.

# CASES

ARGUED AND DECIDED

IN THE

# SUPREME COURT

OF THE

# UNITED STATES

AT

OCTOBER TERM, 1902.

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Vol. 190.

# REFERENCE TABLE

OF SUCH CASES

## DECIDED IN U. S. SUPREME COURT,

OCTOBER TERM, 1902,

AND REPORTED HEREIN,

VOLUME 190,

AS ALSO APPEAR IN

## OFFICIAL REPORTER'S EDITION.

| Off. Rep. 190 U. S. | Title. | Here in. |
|---|---|---|
| 1-2 | Watts, Re<br>Sachs, Re | 933 |
| 2-5 | " | 934 |
| 5-8 | " | 935 |
| 8-10 | " | 936 |
| 10-13 | " | 937 |
| 13-16 | " | 938 |
| 26-28 | " | 941 |
| 28-30 | " | 942 |
| 30-33 | " | 943 |
| 33-36 | " | 944 |
| 36 | " | 945 |
| 36 | O'Neal v. United States | 945 |
| 36-38 | " " | 946 |
| 38 | Tubman v. Baltimore & O. R. Co. | 946 |
| 39-40 | " " | 947 |
| 40-42 | Wright v. Henkel | 948 |
| 42-44 | " " | 949 |
| 44-47 | " " | 950 |
| 47-49 | " " | 951 |
| 57-59 | " " | 954 |
| 59-61 | " " | 955 |
| 61-63 | " " | 956 |
| 64 | Tennessee v. Virginia | 956 |
| 64-67 | " " | 957 |
| 67-70 | " " | 958 |
| 70-73 | " " | 959 |
| 73-75 | " " | 960 |
| 75-78 | " " | 961 |
| 78-81 | " " | 962 |
| 81-84 | " " | 963 |
| 84-87 | " " | 964 |
| 87-88 | " " | 965 |
| 89 | Montgomery v. Portland | 965 |
| 89-91 | " " | 968 |
| 91-93, 103-104 | " " | 969 |
| 104-107 | " " | 970 |
| 107 | Wilkes County v. Coler ("Wilkes County Com'rs v. W. N. Coler & Co.") | 971 |
| 107-110 | " " | 972 |
| 110-113 | " " | 973 |
| 113-115 | " " | 974 |
| 115-116 | " " | 975 |

| Off. Rep. 190 U. S. | Title. | Here in. |
|---|---|---|
| 116 | Bocktinger v. Foster | 975 |
| 116-118 | " " | 976 |
| 118-121 | " " | 977 |
| 121-124 | " " | 978 |
| 124-126 | " " | 979 |
| 127 | James v. Bowman | 979 |
| 127-128 | " " | 980 |
| 135-137 | " " | 981 |
| 137-139 | " " | 982 |
| 139-142 | " " | 983 |
| 142 | " " | 984 |
| 143-144 | Swan & F. Co. v. United States | 984 |
| 144-147 | " " | 986 |
| 147 | " " | 987 |
| 147 | Mutual Reserve F. L. Asso. v. Phelps | 987 |
| 148 | " " | 988 |
| 148-149 | " " | 989 |
| 149-150 | " " | 990 |
| 150 | " " | 991 |
| 156-158 | " " | 994 |
| 158-160 | " " | 995 |
| 160 | Atlantic & P. Teleg. Co. v. Philadelphia | 995 |
| 161 | " " | 996 |
| 161 | " | 998 |
| 161-163 | " " | 999 |
| 163-165 | " " | 1000 |
| 165-168 | " " | 1001 |
| 168-169 | " " | 1002 |
| 169-170 | Patterson v. Bark Eudora | 1002 |
| 170-172 | " " | 1003 |
| 172-173 | " " | 1005 |
| 173-176 | " " | 1006 |
| 176-179 | " " | 1007 |
| 179 | " " | 1008 |
| 179-181 | Johanson v. Washington | 1008 |
| 181 | " " | 1009 |
| 181-183 | " " | 1010 |
| 184-186 | " " | 1011 |
| 186 | " " | 1012 |
| 186-187 | Oregon & C. R. Co. v. United States | 1012 |
| 187-189 | " " | 1013 |
| 189-192 | " " | 1014 |
| 192-195 | " " | 1015 |

| Off. Rep. 100 U. S. | Title. | Here in. |
|---|---|---|
| 195–197 | Oregon & C. R. Co. v. United States | 1016 |
| 197 | Hawaii v. Mankichi | 1016 |
| 198 | " " | 1017 |
| 209 | " " | 1019 |
| 209–212 | " " | 1020 |
| 212–214 | " " | 1021 |
| 214–217 | " " | 1022 |
| 217–220 | " " | 1023 |
| 220–222 | " " | 1024 |
| 223–225 | " " | 1025 |
| 226–227 | " " | 1026 |
| 227–230 | " " | 1027 |
| 230–233 | " " | 1028 |
| 233–235 | " " | 1029 |
| 235–238 | " " | 1030 |
| 238–241 | " " | 1031 |
| 241–243 | " " | 1032 |
| 243–246 | " " | 1033 |
| 246–249 | " " | 1034 |
| 249 | " " | 1035 |
| 249–250 | Snyder v. Bettman | 1035 |
| 250–252 | " " | 1036 |
| 252–254 | " " | 1037 |
| 254–257 | " " | 1038 |
| 257–259 | " " | 1039 |
| 259–260 | " " | 1040 |
| 260–261 | Mifflin v. R. H. White Co. | 1040 |
| 261 | " " | 1041 |
| 261–264 | " " | 1042 |
| 264 | " " | 1043 |
| 265–266 | Mifflin v. Dutton | 1043 |
| 266 | " " | 1044 |
| 267 | Northern P. R. Co. v. Townsend | 1044 |
| 267–269 | " " | 1045 |
| 270–271 | " " | 1046 |
| 271–273 | " " | 1047 |
| 273 | Interstate Commerce Commission v. Louisville & N. R. Co. | 1047 |
| 274–276 | " " | 1048 |
| 276–277 | " " | 1049 |
| 278–279 | " " | 1050 |
| 279–281 | " " | 1054 |
| 281–284 | " " | 1055 |
| 284–286 | " " | 1056 |
| 286–287 | " " | 1057 |
| 287–288 | Texas & P. R. Co. v. Watson | 1057 |
| 288 | " " | 1058 |
| 289–291 | " " | 1059 |
| 291–293 | " " | 1060 |
| 293 | " " | 1061 |
| 294–296 | Lockwood v. Exchange Bank | 1061 |
| 296–297 | " " | 1062 |
| 297–299 | " " | 1063 |
| 299–301 | " " | 1064 |
| 301 | Cosmos Exploration Co. v. Great Eagle Oil Co. | 1064 |
| 302–304 | " " | 1065 |
| 304–307 | " " | 1066 |
| 307 | " " | 1067 |
| 308–309 | " " | 1070 |
| 309–311 | " " | 1071 |
| 311–314 | " " | 1072 |
| 314–315 | " " | 1073 |
| 316 | Pacific Land & Imp. Co. v. Elwood Oil Co. | 1073 |
| 316 | " " | 1074 |
| 316–318 | United States ex rel. Riverside Oil Co. v. Hitchcock | 1074 |
| 318–320 | " " | 1075 |

| Off. Rep. 100 U. S. | Title. | Here in. |
|---|---|---|
| 320–323 | United States ex rel. Riverside Oil Co. v. Hitchcock | 1076 |
| 323 | " " | 1077 |
| 323–326 | " " | 1078 |
| 326 | Southern R. Co. v. Allison | 1078 |
| 326–328 | " " | 1079 |
| 328–330 | " " | 1080 |
| 330–332 | " " | 1081 |
| 332–335 | " " | 1082 |
| 335–337 | " " | 1083 |
| 337–339 | " " | 1084 |
| 340 | Dunbar v. Dunbar | 1084 |
| 340–342 | " " | 1085 |
| 342–344 | " " | 1086 |
| 344–346 | " " | 1089 |
| 346–349 | " " | 1091 |
| 349–352 | " " | 1092 |
| 352–353 | " " | 1093 |
| 353–354 | Buchanan v. Patterson | 1093 |
| 354–357 | " " | 1094 |
| 357–360 | " " | 1095 |
| 360–362 | " " | 1096 |
| 362–365 | " " | 1097 |
| 365–367 | " " | 1098 |
| 367 | " " | 1099 |
| 368–370 | Blackfeather v. United States | 1099 |
| 370–372 | " " | 1100 |
| 372–375 | " " | 1101 |
| 375–377 | " " | 1102 |
| 377–379 | " " | 1103 |
| 379 | United States v. Michigan | 1103 |
| 379–382 | " " | 1108 |
| 382–384 | " " | 1109 |
| 384–387 | " " | 1109 |
| 387–390 | " " | 1107 |
| 390–392 | " " | 1108 |
| 392–397 | " " | 1109 |
| 397–399 | " " | 1110 |
| 399–402 | " " | 1111 |
| 402–405 | " " | 1112 |
| 405–406 | " " | 1113 |
| 406 | Conley v. Mathieson Alkali Works | 1115 |
| 406–408 | " " | 1116 |
| 408–411 | " " | 1119 |
| 411–412 | " " | 1120 |
| 412–413 | Western Union Teleg. Co. v. Missouri ex rel. Gottlieb | 1116 |
| 413–416 | " " | 1117 |
| 416 | " " | 1118 |
| 420–421 | " " | 1119 |
| 421–423 | " " | 1120 |
| 423–426 | " " | 1121 |
| 426–427 | " " | 1122 |
| 428 | Geer v. Mathieson Alkali Works | 1122 |
| 428–430 | " " | 1123 |
| 430–432 | " " | 1124 |
| 432–434 | " " | 1125 |
| 434–437 | " " | 1125 |
| 437 | Stanly County v. Coler ("Stanly County Comrs. v. W. N. Coler & Co.") | 1126 |
| 438 | " " | 1127 |
| 439–441 | " " | 1128 |
| 441–442 | " " | 1130 |
| 442–444 | " " | 1131 |
| 444–447 | " " | 1132 |
| 447–449 | " " | 1133 |
| 449–451 | " " | 1134 |

| Off. Rep. 190 U. S. | Title. | Here in. |
|---|---|---|
| 452 | Kean v. Calumet Canal & Imp. Co. | 1134 |
| 458 | " " | 1136 |
| 458–461 | " " | 1137 |
| 461–463 | " " | 1138 |
| 463–466 | " " | 1139 |
| 466–469 | " " | 1140 |
| 469–471 | " " | 1141 |
| 471–474 | " " | 1142 |
| 474–476 | " " | 1143 |
| 476–479 | " " | 1144 |
| 479–482 | " " | 1145 |
| 482–484 | " " | 1146 |
| 484–486 | " " | 1147 |
| 486–489 | " " | 1148 |
| 489–491 | " " | 1149 |
| 491–494 | " " | 1150 |
| 494–496 | " " | 1151 |
| 496–499 | " " | 1152 |
| 499–501 | " " | 1153 |
| 501–504 | " " | 1154 |
| 504–506 | " " | 1155 |
| 506–507 | " " | 1156 |
| 508 | Hardin v. Shedd | 1156 |
| 518–519 | " " | 1157 |
| 519–522 | " " | 1158 |
| 522–524 | " " | 1159 |
| 524 | Colombia v. Cauca Co. ("Republic of Colombia v. Cauca Co.") | 1159 |
| 525–527 | Colombia v. Cauca Co. ("Republic of Colombia v. Cauca Co.") | 1162 |
| 527–529 | " " | 1163 |
| 529–532 | " " | 1164 |
| 532 | " " | 1165 |
| 533 | Randolph v. Scruggs ("Randolph & Randolph v. Scruggs") | 1165 |
| 533–536 | " " | 1169 |
| 536–538 | " " | 1170 |
| 538–540 | " " | 1171 |
| 540 | Globe Refining Co. v. Landa Cotton Oil Co. | 1171 |
| 540–542 | " " | 1172 |
| 542–545 | " " | 1173 |
| 545–547 | " " | 1174 |
| 547 | " " | 1175 |
| 548 | Queenan v. Oklahoma | 1175 |
| 548–549 | " " | 1177 |
| 549–552 | " " | 1178 |
| 552 | Hutchinson v. Otis ("Hutchinson v. Otis, Wilcox & Co.") | 1179 |
| 553–555 | " " | 1181 |
| 555–556 | " " | 1182 |
| 557–561 | Memorandum Cases | 1183–1185 |

# THE DECISIONS

OF THE

# Supreme Court of the United States

AT

## OCTOBER TERM, 1902.

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[1] *Re WILLIAM WATTS, *Petitioner.*

*Re* DAVID SACHS, *Petitioner.*

(See S. C. Reporter's ed. 1-36)

***Contempt — of bankruptcy court — advice of counsel inducing judicial action of state court.***

**Advice of attorneys to a state court, pursuant to which that court compelled the surrender by a receiver in bankruptcy of property which had, without the consent of the state court, been voluntarily turned over to him by a receiver appointed by such court, cannot be deemed to constitute contempt of the bankruptcy court, where there is no evidence that their advice was given otherwise than in good faith and in the discharge of their duty as counsel.**

[Nos. 15, 16, Original.]

***Argued April 20, 1903. Decided May 18, 1903.***

ON HABEAS CORPUS and Certiorari to review a sentence of contempt imposed by the United States District Court for the District of Indiana upon attorneys for advice given by them to a state court, which induced that court to compel the surrender of property in the hands of a receiver in bankruptcy appointed by the District Court. *Petitioners discharged.*

Statement by Mr. Chief Justice **Fuller**:

M. Zier & Company, a corporation located at New Albany, Indiana, engaged in the boil-[2]er manufacturing business, was *hopelessly insolvent on and prior to December 30, 1902, and some thousands of dollars had been drawn from its treasury by the manager of its affairs for the purpose of making certain payments, of which $3,100 had been paid to Ryerson & Son, a corporation of Chicago, Illinois, and a large creditor of the Zier company, previously to December 30, and $9,600 was on that day placed by M. Zier, the manager of the company, in the hands of his attorney to be paid over to Zier's sister-in-law, who was a stockholder and creditor of the Zier corporation. It was arranged by Zier's attorney with the Chicago corporation on December 29 that the latter should apply for the appointment of a receiver of the Zier corporation, and that the New Albany Trust Company should be appointed receiver, and this resulted in a complaint filed by the Ryerson corporation, represented by W. W. Watts, a member of the bar of Kentucky, in the circuit court of Floyd county, Indiana, charging that the Zier company was insolvent and was dissipating its property and assets, and praying for the appointment of a receiver, "and that the court shall make such orders as shall be necessary and proper for the preservation of said property, for the continuance of said business for the purpose of completing unfinished contracts," etc., to which defendant voluntarily appeared and consented to the appointment of the New Albany Trust Company as receiver. The appointment was accordingly made, and the trust company immediately qualified and proceeded to administer the estate and wind up its affairs.

On January 16, the trust company, as receiver, filed its report and petition, giving an inventory and appraisement of the assets of Zier & Co., the receipts and expenditures of the receiver to that date, the particulars in respect of outstanding contracts; raising the question as to the further operation of the plant, and advising an order for a meeting of the creditors to consider that subject; requiring creditors to prove their claims,

NOTE.—*On the liability of attorneys for contempt*—see note to Anderson v. Comptois, 48 C. C. A. 7.

and enjoining them from the prosecution of suits except by intervention. A list of the creditors was attached, which included the Inland Steel Company, John C. Thurston, and the Dey Time Register Company.

The court entered an order directing such [3] meeting to be *held January 24, and notice by mail to be given, which was done, and the meeting was held on that day, a large number of creditors being represented, including the Inland Steel Company. An order was thereupon entered for payment of rent, the completion of unfinished contracts, for the continuance of the operation of the plant to a specified extent, for the issue of certificates of indebtedness to a small amount, but that no new contracts should be made. It was further ordered that creditors be notified by mail and by publication to file their claims on or before May 11, and "that all creditors and other persons be and they are hereby enjoined and restrained from prosecuting any claim or suit against this estate except by intervention in this cause or by first obtaining leave of this court."

February 6, 1903, the Inland Steel Company, John C. Thurston, and John Dey, doing business as Dey Time Register Company, creditors of the Zier corporation to the amounts of $935, $15, and $100, respectively, filed their petition in bankruptcy in the United States district court for the district of Indiana against that corporation to have it declared a bankrupt. The petition alleged that the company was hopelessly insolvent and had committed, within four months next preceding the filing of the petition, acts of bankruptcy, which were specified. It was further alleged that it was necessary, for the preservation of the estate of Zier & Company and for the benefit of its creditors alike, that a receiver in bankruptcy be appointed at once to take charge of the affairs of said company. On February 11 a further petition was filed by the Inland Steel Company, and, on the same day, a supplemental petition, in which the appointment by the circuit court of Floyd county of a receiver and his being put in charge of the insolvent's property, were set up as additional acts of bankruptcy.

The district court thereupon appointed Frederick D. Connor as receiver, and directed that he should take into his possession the plant of Zier & Company and all its other property, and further ordered that the New Albany Trust Company should deliver up to the receiver all the property of Zier & Company and refrain from in any way in- [4] terfering with him. The receiver *immediately qualified by giving bond as required by the court.

February 13, 1903, and before the receiver of the district court had made demand for the property, on learning of Mr. Connor's appointment as receiver, Mr. Watts, after consulting with the local attorneys of Zier & Company, communicated with the district judge and requested that the Federal receiver should not proceed until he, Mr. Watts, could procure an order from the Floyd circuit court permitting him to do so, and could come to Indianapolis, and present to the district judge reasons why the receiver should not have been appointed by that court, and why his order to that effect should be vacated. The district judge immediately caused the court's receiver and the attorneys interested in the case to be notified to take no further steps until a hearing could be had on the questions suggested by Mr. Watts, on February 16, at Indianapolis. No further action was taken by the receiver of the district court, but he presented to the Floyd circuit court a petition setting forth his appointment and qualification, together with a certified copy of the order appointing him, on the morning of Saturday, February 14, and asked the delivery to him of the property and effects of Zier & Company and the discharge of the trust company as receiver. The Floyd circuit court entered an order reciting that Connor, as receiver, came by his attorney, "and by leave and order of the court, and upon his own motion, makes himself a party to this proceeding, and thereupon by leave of the court files his verified petition showing his appointment as receiver of said M. Zier & Co. by order of the United States district court for the district of Indiana," and praying for the surrender of the property; "and the matter of said petition is now continued until the next term of this court." Saturday, February 14, was the last day of the term, and the next term of the court commenced on the 9th day of March.

On the same day, February 14, the trust company, by Watts, its attorney, filed its petition, framed by him, which alleged that the trust company was carrying out as receiver the terms of the order of January 24; that that order had *been entered without [5] objection from the Inland Steel Company, John C. Thurston, or the Dey Register Company, or any creditor; that the three last-mentioned creditors had filed a petiton in involuntary bankruptcy against M. Zier & Company, February 6, 1903; that supplemental petitions were filed February 11, 1903, but that the petitions, although setting up the receivership in the state court, had not shown to the United States district court the participation of the Inland Steel Company in the proceedings of January 24, its appearance, and the restraining order and injunction; that thereupon the order had been obtained in the bankruptcy proceedings appointing Connor receiver, and directing him to take charge of the estate of M. Zier & Company in bankruptcy, and directing the receiver of the state court to deliver up the property. The petition further averred that the creditors whose appearance was noted in the state court on January 24 had claims aggregating $53,279.51; that creditors with claims aggregating $11,622.49 had filed claims with the state court receiver, making a total of $64,902 in amount, so filed or appearing, out of a total liability of $76,463.36; that the total number of creditors was seventy-six; that thirty-seven appeared to the action, and twenty-five, including the Dey Time Register Company, had

filed their claims with the state court receiver, making a total of sixty-two creditors who had appeared or filed their claims.

That, with a view to the due observance of the comity existing between the state and the Federal courts, and of avoiding a clash of jurisdiction, petitioner had communicated through its attorneys with the United States district judge and requested the nonenforcement of his order until after the matters in question had been presented to the state court, with the request that that court direct it and its attorneys to lay said matters before the judge of the district court, whereupon the district judge requested counsel to notify the attorneys of the creditors petitioning in bankruptcy that the matter would be heard on Monday, February 16, in Indianapolis, and that in the meantime the order appointing Connor was not to be enforced.

The petition further alleged that the [6] court was about to adjourn *over to the first day of its next term, March 9; that the order of January 24 directed petitioner as receiver to go on and complete various contracts; that it had entered upon the work; that the operation of the plant was for the beneficial purposes of the estate; and that the stoppage of the plant would involve loss to the creditors and many complicated questions of damage; that it would work great hardship to leave the estate with the court adjourned and without instructions as to what to do; and that the petitioner was this court's officer, and must be ordered and directed by this court, only, with respect to the property in its hands.

Petitioner averred that the injunction and restraining order of the state court had been knowingly violated by the Inland Steel Company and the Dey Time Register Company; that these two creditors and all other creditors were estopped from prosecuting the petition in bankruptcy, and from seeking to take from petitioner the assets in its hands as receiver; and that all the creditors were enjoined from prosecuting any attempt to take from the receiver any of the assets in its hands except by leave. And, further, that the record in the district court of the United States for the district of Indiana did not disclose all the facts regarding the matters herein; that that court had no information as to the restraining orders, and estoppels, by entry of appearance, participation, and otherwise. That the assets of the Zier company were *in custodia legis;* that the parties had submitted themselves to this forum; that the court came into lawful custody of the property, and the orders and proceedings were entered and had before the institution of the bankruptcy proceedings, and the attempt to oust this court and receiver therefrom. Petitioner, therefore, asserted its belief that the district court, under the peculiar circumstances of the case, would coincide with the state court, if it should deem wise to enter orders specifically restraining the Inland Steel Company, John L. Thurston, and the Dey Time Register Company and their attorneys, Connor, and the United States marshal from further prosecuting any matters in relation to the estate or of the taking of the assets in any manner, except by intervention in this action.

*Petitioner prayed for instructions; that [7] it should present the facts to the district court of the United States, either by limited or general appearance in the bankruptcy proceedings, and ask such relief, if any, as this court might direct; and that an injunction be granted.

An order was then entered, prepared by Mr. Watts, embodying matters set up in the petition, granting an injunction, ordering the operation of the plant to continue, and directing the receiver, through its attorneys, to proceed to Indianapolis and there, by a limited appearance, to lay before the district court the facts with regard to the matters herein, and to suggest to that court the orders of this court, and its belief that with full information of the facts the order of that court would at most have been a direction for application to be made to this court for the delivery of the assets to the receiver or trustee of the district court. It was further ordered that the Inland Steel Company John L. Thurston, and the Dey Time Register Company show cause why they should not be punished for contempt in disobeying the orders of this court by taking action without obtaining leave.

On Monday, February 16, Mr. Watts, with the vice president of the New Albany Trust Company, receiver, appeared in the district court at Indianapolis, and the proceedings in the state court, including the petition and order of February 14, were laid before that court, and hearing was had that day and on February 17. At the conclusion of the argument the district judge announced his ruling that the court in bankruptcy had supreme and exclusive jurisdiction in the matter; and asked Mr. Watts and the representative of the trust company if it were not better to avoid the clash of jurisdiction by voluntarily turning the property over to the Federal receiver, indicating at the same time that otherwise it would be his duty to exert the power of the court in vindication of its jurisdiction. Mr. Watts and his colleague thereupon announced that the property would be turned over to the Federal receiver. Mr. Watts at the same time stated to the court that he would do all in his power to see that the proceedings in the state court of February 14 were *stricken out, and that [8] he would endeavor to have the state court make an order directing the surrender of the property.

The district court, on February 17, made the following order:

"This cause coming on now to be heard upon the petition of Frederick D. Connor, filed herein on the 16th day of February, A. D. 1903, for the instruction of the court concerning the property and assets of said M. Zier & Company, which are now in the possession of the New Albany Trust Company, as receiver of the Floyd circuit court, in a suit therein pending against said M. Zier &

Company, because of their insolvency; and the petitioning creditors in this cause and said Connor, receiver as aforesaid, being now present and represented by George H. Hester and William Wilhartz, their solicitors, and said New Albany Trust Company, receiver as aforesaid, being now present and represented by Henry E. Jewett, its vice president, and by William W. Watts, its solicitor, and after argument by counsel, the said New Albany Trust Company, as receiver of the Floyd circuit court, by its said vice president, having voluntarily offered and agreed, by and with the consent and approval of said William W. Watts, its solicitor, in open court, to surrender full and immediate possession and control of the property and assets of said M. Zier & Company, in its possession or under its control, as receiver of the Floyd circuit court, to said Connor, as receiver of this court, upon the presentation by him to said New Albany Trust Company of a certified copy of the order for his appointment as such receiver heretofore made by this court. It is now hereby ordered by the court that said Connor, receiver as aforesaid, forthwith present a certified copy of the order for his appointment as such receiver to the said New Albany Trust Company, and immediately thereupon take full possession and control of the property and assets of said M. Zier & Company that are now in the possession or under the control of said New Albany Trust Company, as receiver of the Floyd circuit court."

On February 19 the trust company by its vice president filed a report in the Floyd circuit court, in which it stated that, in pursuance of the order of the court, it had ap-[9]peared before the *district judge in Indianapolis on Monday, February 16, and, upon the hearing in that court, the receiver had stated that it was ready and willing to deliver to the receiver appointed by the Federal court all the property and assets of Zier & Company in its hands; that it had not yet been able to make up its accounts as receiver, but was preparing the same to submit to the court, and was willing to turn over all the property to the Federal receiver; and prayed leave from the court to do so. The company further asked that, upon the presentation and approval of its accounts as receiver, its resignation be accepted, and that it be fully and finally discharged.

On the same day Connor demanded of the trust company the property of Zier & Company in its possession, to which that company at once replied that it had that morning filed before the judge of the Floyd circuit court, in chambers, a report, a copy of which was attached; that the judge had stated orally that he wished the property held until the accounts of the trust company as receiver were rendered and passed on; that the company thought this might be done the next day, and desired, if Connor was willing, to defer action until then, because it would "relieve us of embarrassment in the premises. On the other hand, if you insist on immediate surrender of the property to you, we are bound to say that we believe that to carry out in good faith the understanding with the honorable judge of the United States court of Indianapolis and our vice president, H. E. Jewett, we ought to surrender the property to you at once." Connor declined to grant further time, and the trust company turned over to him the plant of Zier & Company, which constituted all the property of that company except certain books and cash. Connor immediately took possession of the property and put watchmen in charge to hold the same for him.

On February 20 the United States Tube Company presented to the Floyd circuit court, "in vacation, at chambers," a petition signed and verified by D. A. Sachs, in which it was set forth that the trust company, as receiver, had wrongfully turned over and surrendered the possession of the boiler plant of Zier & Company to Connor, the receiver in bankruptcy, and was *threat-[10]ening to turn over to Connor all the other assets of Zier & Company in its hands. Petitioner therefore prayed that the trust company be cited to appear before the court, in chambers, on the afternoon of that day, and show cause why it should not be punished for contempt; and that if the court found that the trust company had violated its orders as represented that it be removed from its office as such receiver and a successor be appointed; and that the trust company be required to account immediately and turn over to its successor the property of Zier & Company. On this petition the judge of the Floyd circuit court on the same day entered an order removing the trust company from the receivership, and directing it to account for the assets of Zier & Company. The order further provided for the appointment of Charles D. Kelso as receiver, and directed him, on qualification, to demand of the trust company and Connor the immediate possession of the property of Zier & Company which came into the hands of the trust company as receiver, and, should Connor fail or refuse to surrender the possession of the assets, that he at once report to the judge for further instructions.

Kelso, having qualified, on the same day reported to the judge at chambers that he had demanded of the trust company the possession of the assets of Zier & Company, and that the trust company had refused to surrender the possession for the reason that it had turned over the possession of the plant to Connor, and that as to the other assets it intended to account forthwith to the judge of the Floyd circuit court; and that he then demanded the property of Connor, who refused to surrender the same. The state court then entered an order that a writ be issued, directed to the sheriff of the county, requiring him immediately to seize and deliver to Kelso all the property which Connor had in his possession, and forthwith to make a return to the court.

February 21, Connor filed a petition in the district court, in which, after setting forth the facts as to the delivery of the possession of the plant of Zier & Company to him Feb-

ruary 19, he stated that he retained possession of the same until February 20, when possession was demanded of him by Kelso, [11] as *receiver appointed by the Floyd circuit court, which demand he refused; that he was served with a certified copy of the order of the Floyd circuit court, and with a writ issued by that court February 20, to the sheriff, requiring him forthwith to take possession of the plant and the assets; and that the sheriff forcibly took possession thereof, and delivered the same over to Kelso, who was then in possession.

The petition of Connor further stated:

"That this petitioner believes the above-stated proceedings were procured to be had by William W. Watts, Esq., of Louisville, Kentucky, who during the continuation of the New Albany Trust Company, as receiver of M. Zier & Company, represented said trust company as such; that said Charles D. Kelso is now represented by one D. A. Sachs, Esq., of Louisville, Kentucky, an attorney-at-law, and that the petitioner believes that said Sachs also assisted in procuring the orders of the said Floyd circuit court above set out, and the petitioner further says that he verily believes the forcible removal of said property from his possession and control as receiver appointed by this court as aforesaid was brought about by the joint action and efforts of said Charles D. Kelso, as receiver, and Charles D. Kelso, individually, and William W. Watts, as attorney for said New Albany Trust Company, and D. A. Sachs, attorney for said Charles D. Kelso, receiver."

The petitioner further prayed that Kelso, as receiver and individually, the sheriff, the deputy sheriff, and the custodian of the plant, and William W. Watts, as attorney for the trust company, and D. A. Sachs, as attorney for Kelso, be required and directed to redeliver the property to petitioner, and be cited to appear and show cause why they should not be punished for contempt.

On this petition the district court, February 21, made an order requiring the parties therein named to appear before it at Indianapolis on February 25 to show cause why they should not redeliver the property, and restraining them from in any way interfering therewith; and further ordering that the parties show cause why they should not be punished for contempt. On the same day, [12] the United States district attorney *for the district of Indiana filed informations in the district court against Kelso, Watts, Sachs, and others, for contempt of the district court in disobeying and disregarding its orders. Watts and Sachs filed separate answers and pleas to the rule to show cause and to the information against them, which were traversed by the United States district attorney.

William W. Watts, by way of response to the rule, and plea to the information, pleaded that he was not guilty of the alleged contempts stated in the rule and information, or either of them. He denied that he had committed or advised any act of contempt of the orders of the district court, or that he had in any way, directly or indirectly, or by aiding or advising, forcibly, or in any other way, taken from the receiver in the bankruptcy proceedings the property of Zier & Company, or any part of it, or in any way, by aiding, abetting, or advising, had withheld the custody of said property or any part of it. But he said that the orders of the district court directing its receiver to take the property of Zier & Company into its custody were void because of want of jurisdiction, and that the possession of the property by Connor, receiver, was wrongfully and unlawfully obtained, and the retaking under the orders and writ of the Floyd circuit court was a lawful and proper taking.

He then set up the various proceedings hereinbefore enumerated, and the part he took therein; adding: "All this was done solely for the purpose of preventing any possible conflict between the two jurisdictions, and it was believed by this defendant and respondent, and by the said New Albany Trust Company, and by the judge of the Floyd circuit court, that upon such presentation the United States district court would rescind its said order appointing said Frederick D. Connor, as receiver, and directing him to take possession of said property of M. Zier & Company." Under this authorization he and the trust company appeared at Indianapolis on Monday, February 16, and exhibited to the district court the order of the Floyd circuit court authorizing them to appear, and made a full statement of the situation in the state court, after which an extended argument, the district judge refused in any way to reconsider, modify, or set aside his order, and demanded of *the rep- [13] resentative of the trust company whether or not it would turn over the property, and of defendant and respondent whether or not he, as counsel for the trust company, would advise it to turn the property over, to Connor, as receiver. "Under these circumstances, and not otherwise, and believing that the said demand of said judge of the said United States district court was peremptory, this defendant and respondent, as counsel for the said New Albany Trust Company, stated that he would advise the said New Albany Trust Company to turn over the said property to the said Frederick D. Connor, receiver." On February 17, defendant and the vice president of the trust company left Indianapolis, and defendant supposed that it was not necessary for any order respecting the hearing in the district court February 16 and 17 to be entered, and that no order would be entered. But an order was entered, a fact which he learned several days thereafter.

Defendant, further answering, alleged that on February 19 defendant and the trust company, receiver, appeared before the judge of the Floyd circuit court, in chambers, and defendant, as attorney for the trust company, then filed before the judge of that court a written petition and motion, setting forth what had passed at Indianapolis, in view of which he moved to strike out and expunge from the files the petition and order of Feb-

ruary 14, 1903. This was particularly desired, because the district judge seemed to regard the petition and order as offensive. That defendant was in every way in good faith endeavoring to carry out the understanding at Indianapolis, and advised, and at no time gave any contrary advice, the trust company to turn over to Connor, receiver, all the property of the Zier company. The response and plea further averred that Watts was much embarrassed by the condition of affairs, and felt that the judge of the Floyd circuit court might misconstrue his actions in the premises, and, before going to New Albany on February 19, 1903, requested his friend, D. A. Sachs, a lawyer residing in Louisville, Kentucky, to accompany him for the purpose of explaining his action to the judge of the Floyd circuit court, and this Sachs accordingly did. But the judge of that court was not satisfied, and entered a [14] rule on *Watts to show cause "why he should not be punished for contempt."

On the same day the trust company filed its separate petition, praying for leave to turn over the property, and for its discharge in the premises on the approval of its accounts. But the judge cited it also to show cause.

The pleading further set forth the communication of the trust company to Connor, receiver, and the delivery of the property to him; and that on February 20 defendant appeared before the judge of the Floyd circuit court in obedience to his request. On that day an order was entered removing the trust company as receiver, and appointing Charles D. Kelso as receiver in its stead, and authorizing him to demand of Connor the property of Zier & Company. Before that order was entered the trust company had, in fact, under the advice of Watts, turned over the property to Connor, and the response and plea asserted that defendant did not advise, aid, connive at, or abet the entry of said order, and had nothing whatsoever to do with it.

The response and plea further set forth the report of Kelso, and the entry of an order directing the issue of a summary writ to the sheriff of Floyd county, and stated: "This defendant and respondent did not procure the entry of said order, or connive at its entry, or advise its entry, and did not know of its entry until after it had been entered. He had no connection whatever with it."

Defendant and respondent reiterated that all of his acts and doings and advice after his appearance at Indianapolis were with the single purpose of having the trust company turn over all the property and effects to the receiver of the district court, and that he did nothing and said nothing and advised nothing which would in any way delay the execution of that purpose; that he did nothing and said nothing with reference to the removal of the trust company or the removal of Kelso, and in no way did he advise anything looking to the retaking of said property from the hands of said Connor, receiver, and with all these matters he had nothing to do. Transcripts of the records were attached as exhibits.

*By his separate response and plea D. A. [15] Sachs denied the commission of any act, or the advising or consenting to the commission of any act, in disobedience of any order of the court in the bankruptcy case, or that he had aided, abetted, or advised the taking from the receiver the property of Zier & Company, or in any way disobeyed or disregarded, or aided or abetted the disregarding of, the orders or decrees of the district court, or been guilty of any contempt in the case. He said that he first heard of the proceedings on February 18 from Mr. Watts, and appeared before the state judge and attempted to explain the matter simply as his friend. He at no time advised disobedience or disregard of the orders of the district court or the taking of the property from Connor, but, on the contrary, advised against that course; and "that all he did in this matter was without fee or any consideration whatever except through friendship to said Watts." He then believed, and is still of the opinion, that the receiver of the Floyd circuit court had the rightful possession of the property, and that the district court did not have the right or authority to interfere therewith in the summary way pursued herein. The response then set forth the various proceedings in both courts, and respondent asserted that on Monday, February 23, 1903, he learned for the first time of the making of the order in the district court dated February 17. He denied that he had anything to do with the proceedings other than the action he took with a view of extricating Mr. Watts from the complications, and "with a view of avoiding any action that might be justly construed as a violation of the orders of either court." He denied knowledge of a petition or order for the property to be seized, and had nothing whatever to do in any way with the procuring of execution of such an order, or with the forcible taking of the property or any part thereof from the receiver.

The responses and pleas having been traversed, evidence, documentary and oral, was adduced at considerable length, and on March 14, 1903, the district court found Watts and Sachs each guilty of contempt as charged in the information and rules, and sentenced each of them to confinement in the jail of Marion county for sixty days and to pay costs.

*In the meantime the property had been [16] restored to Connor, receiver, the $9,600 had been paid over to him, and Zier & Company had been adjudicated bankrupt.

Petitions by Watts and Sachs for writs of habeas corpus and of certiorari, setting forth the foregoing matters and things, were thereupon presented to this court, leave given to file them, and the writs thereupon issued, and it was directed that each of the petitioners be admitted to bail on his personal recognizance in the sum of $500, to be entered into before the judge of the United States court for the district of Indiana.

*Mr.* **David W. Fairleigh** argued the cause, and, with *Mr. Bernard Flexner*, filed a brief for petitioner Watts:

When a person is imprisoned by a United States court for refusing to comply with an order of that court, and such order is beyond the jurisdiction or power of the court to make, the order itself is void, and the order punishing for contempt is likewise void, and this court will, on writ of habeas corpus, discharge the person so imprisoned.

*Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Rowland*, 104 U. S. 604, 26 L. ed. 861; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Re Lane*, 135 U. S. 443, 34 L. ed. 219, 10 Sup. Ct. Rep. 760; *Re Tyler*, 149 U. S. 164, 37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Re Bonner*, 151 U. S. 242, 38 L. ed. 149, 14 Sup. Ct. Rep. 323; *Re McKenzie*, 180 U. S. 536, 45 L. ed. 657, 21 Sup. Ct. Rep. 468.

An order of a United States district court sitting in bankruptcy, commanding its receiver to peremptorily take from the possession of a receiver of a state court property in his hands as such at the time the bankruptcy proceedings were begun, is void.

*Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841; *Taylor* v. *Carryl*, 20 How. 583, 15 L. ed. 1028; *Marshall* v. *Knox*, 16 Wall. 551, 21 L. ed. 481; *Doe* v. *Childress*, 21 Wall. 643, 22 L. ed. 549; *Covell* v. *Heyman*, 111 U. S. 182, 28 L. ed. 393, 4 Sup. Ct. Rep. 355; *Shields* v. *Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *Johnson* v. *Bishop*, Woolw. 324, Fed. Cas. No. 7,373; *Metcalf* v. *Barker*, 187 U. S. 165, *ante*, 122, 23 Sup. Ct. Rep. 69; *Pickens* v. *Roy*, 187 U. S. 177, *ante*, 128, 23 Sup. Ct. Rep. 78; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293; *Bardes* v. *First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

A receiver appointed by a court has no authority to surrender the possession of the property in his hands without authority from the court which appointed him; and the person who so acquires the possesion of the property from him is in wrongful possession; and the court may issue an appropriate writ to restore the possession of the property to a custodian of the court.

*Davis* v. *Gray*, 16 Wall. 217, 21 L. ed. 452; *Shields* v. *Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *White* v. *Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; *Metcalf* v. *Barker*, 187 U. S. 165, *ante*, 122, 23 Sup. Ct. Rep. 78.

*Mr.* **W. H. H. Miller** argued the cause, and, with *Mr. W. M. Smith*, filed a brief for petitioner Sachs:

The Floyd circuit court was in the lawful, actual possession of the property in controversy when the bankruptcy proceeding commenced.

*First Nat. Bank* v. *United States Encaustic Tile Co.* 105 Ind. 227, 4 N. E. 846; *Pressley* v. *Lamb*, 105 Ind. 171, 4 N. E. 682.

This proceeding in state court is not subject to collateral attack.

*Phelps* v. *Mutual Reserve Fund Life Asso.* 50 C. C. A. 339, 112 Fed. 453; *Weiss* v. *Guerineau*, 109 Ind. 438, 9 N. E. 399; *Hollinger* v. *Reeme*, 138 Ind. 363, 24 L. R. A. 46, 36 N. E. 1114.

The suit in the state court was not under an "insolvency law."

*Mayer* v. *Hellman*, 91 U. S. 496, 23 L. ed. 377; *Carling* v. *Seymour Lumber Co.* 51 C. C. A. 1, 113 Fed. 483.

It is idle to say that the filing of the bill and procurement of the appointment of a receiver was a fraud on the state court because preferences had been given; since, in the absence of bankruptcy proceedings, the preferences were lawful.

*Sanford Fork & Tool Co.* v. *Howe, B. & Co.* 157 U. S. 312, 39 L. ed. 713, 15 Sup. Ct. Rep. 621; *McCormick* v. *Smith*, 127 Ind. 230, 26 N. E. 825.

The rules of comity between the state court and the United States district court sitting in bankruptcy apply in all their breadth and force.

*Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841; *Eyster* v. *Gaff*, 91 U. S. 521, 23 L. ed. 403; *Metcalf* v. *Barker*, 187 U. S. 165, *ante*, 122, 23 Sup. Ct. Rep. 67; *Carling* v. *Seymour Lumber Co.* 51 C. C. A. 1, 113 Fed. 483.

If the possession of the state court is actual, the fact—if it be a fact—that the jurisdiction of the bankruptcy court is exclusive, does not warrant the latter court in taking the possession from the state court by summary proceedings.

*Moran* v. *Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *The Oliver Jordan*, 2 Curt. 414, Fed. Cas. No. 10,503; *Taylor* v. *Carryl*, 20 How. 583, 15 L. ed. 1028; *The E. L. Cain*, 45 Fed. 367; *The James Roy*, 59 Fed. 784; *Carling* v. *Seymour Lumber Co.* 51 C. C. A. 1, 113 Fed. 483.

And the fact that the suit in the state court was not based on a valid lien is immaterial. The power of the bankruptcy court is as plenary when there are liens as when there are not.

*Johnson* v. *Bishop*, Woolw. 324, Fed. Cas. No. 7,373; *Bradley* v. *Frost*, 3 Dill. 457, Fed. Cas. No. 1,780; *Re Price*, 92 Fed. 987; *Re Lengert Wagon Co.* 110 Fed. 927; *Re Lesser*, 100 Fed. 433; *Re Wells*, 114 Fed. 222; *Re Ward*, 104 Fed. 985; *Smith* v. *Belford*, 45 C. C. A. 526, 106 Fed. 658; *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 46 L. ed. 413, 22 Sup. Ct. Rep. 293.

For discussion of rule of comity, see—

*Covell* v. *Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355.

The act of 1898 (as well as of 1867) provides for intervention by a representative of the bankruptcy court in a suit in a state court. This being done, the bankruptcy court was bound to await the decision of the state court in the ordinary way.

*Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841; *Johnson* v. *Bishop*, Woolw. 324, Fed. Cas. No. 7,373; *Doe* v. *Childress*, 21 Wall. 643, 22 L. ed. 549; *Scott* v. *Kelly*, 22 Wall. 57, 22 L. ed. 729; *Mays* v. *Fritton*, 20 Wall. 414, 22 L. ed. 389; *Davis* v. *Friedlander*, 104 U. S. 570, 26 L. ed. 818; *Winchester* v. *Heiskell*,

119 U. S. 450, 30 L. ed. 462, 7 Sup. Ct. Rep. 281; *Adams* v. *Crittenden*, 133 U. S. 296, *sub nom. Adams* v. *Connor*, 33 L. ed. 623, 10 Sup. Ct. Rep. 304; *Ludeling* v. *Chaffe*, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439.

The bankruptcy court never got lawful possession of the property.

*Shields* v. *Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; *White* v. *Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; *Metcalf* v. *Barker*, 187 U. S. 165, *ante*, 122, 23 Sup. Ct. Rep. 78; *The E. L. Cain*, 45 Fed. 367; *The James Roy*, 59 Fed. 784; *Moran* v. *Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019.

The amendment to the bankrupt act of February 5, 1903, making a receivership an act of bankruptcy, is not retroactive so as to apply to this case.

*Chew Heong* v. *United States*, 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; Endlich, Interpretation of Statutes, 276; *McEwen* v. *Den*, 24 How. 245, 16 L. ed. 673.

If the amendment is not retroactive, this receivership was not an act of bankruptcy.

*Re Wilmington Hosiery Co.* 120 Fed. 180.

*Solicitor General* **Hoyt** argued the cause and filed a brief for respondents:

District courts of the United States have jurisdiction in cases of this kind.

*Re Merchants' Ins. Co.* 3 Biss. 162, Fed. Cas. No. 9,441; *Re Lady Bryan Min. Co.* 6 Nat. Bankr. Reg. 252, Fed. Cas. No. 7,980; *Watson* v. *Citizens' Sav. Bank*, 2 Hughes, 200, Fed. Cas. No. 17,279; *Re Gutwillig*, 90 Fed. 475; *Re Bruss-Ritter Co.* 90 Fed. 651; *Re Rouse, H. & Co.* 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96; *Lea* v. *George M. West Co.* 91 Fed. 237; *Re Smith*, 92 Fed. 135; *Re John A. Etheridge Furniture Co.* 92 Fed. 329; *Re Richard*, 94 Fed. 633; *Re Lengert Wagon Co.* 110 Fed. 927; *Re Storck Lumber Co.* 114 Fed. 360; *Parmenter Mfg. Co.* v. *Hamilton*, 172 Mass. 178, 51 N. E. 529; *Harbaugh* v. *Costello*, 184 Ill. 110, 56 N. E. 363.

Although the property referred to in this case was not summarily taken from the receiver of the state court, but was voluntarily surrendered, the authority of the district court to take summary action in a proper case can hardly be questioned.

*Re Lengert Wagon Co.* 110 Fed. 927; *Clarke* v. *Larremore*, 188 U. S. 486, *ante*, 555, 23 Sup. Ct. Rep. 363; *Bryan* v. *Bernheimer*, 181 U. S. 189, 45 L. ed. 815, 21 Sup. Ct. Rep. 557; *Mueller* v. *Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269.

Acts similar to those committed by petitioners have been held to constitute contempt in the following cases:

*Re Vogel*, 2 Nat. Bankr. Reg. 427; Fed. Cas. No. 16,983; *Re Ulrich*, 6 Ben. 483, Fed. Cas. No. 14,328; *Re Litchfield*, 13 Fed. 866; *Ex parte Davis*, 112 Fed. 139; *Royal Trust Co.* v. *Washburn, B. & I. River R. Co.* 113 Fed. 531; *Anderson* v. *Comptois*, 48 C. C. A. 1, 109 Fed. 971.

The government of the United States may, by means of physical force exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it.

*Ex parte Siebold*, 100 U. S. 395, 25 L. ed. 726.

*Mr.* **George H. Hester** by special leave argued the cause, and, with *Mr. William Wilharts*, filed a brief for interested parties:

All state laws for the administration of insolvents' estates, and all actions and proceedings thereunder, are suspended by the enactment of the general bankruptcy law.

*Re Smith*, 92 Fed. 135; *Tua* v. *Carriere*, 117 U. S. 201, 29 L. ed. 855, 6 Sup. Ct. Rep. 565; *Re Bruss-Ritter Co.* 90 Fed. 651; *Lea* v. *George M. West Co.* 91 Fed. 237; *Re Rouse, H. & Co.* 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96; *Lothrop* v. *Highland Foundry Co.* 128 Mass. 120; *Parmenter Mfg. Co.* v. *Hamilton*, 172 Mass. 178, 51 N. E. 529; *Harbaugh* v. *Costello*, 184 Ill. 110, 56 N. E. 363; *Re Gutwillig*, 90 Fed. 475.

The jurisdiction of the Federal courts over the administration of insolvent estates is exclusive and supreme.

*Re Merchants' Ins. Co.* 3 Biss. 162, Fed. Cas. No. 9,441; *Re Smith*, 92 Fed. 135; *Harbaugh* v. *Costello*, 184 Ill. 110, 56 N. E. 363; *Watson* v. *Citizens' Sav. Bank*, 2 Hughes, 200, Fed. Cas. No. 17,279.

The jurisdiction of the bankruptcy court being supreme, it may properly, by summary process, obtain possession of property in the hands of an assignee or other officer of a state court.

*Re John A. Etheridge Furniture Co.* 92 Fed. 329; *White* v. *Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007; *Bryan* v. *Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557; *Mueller* v. *Nugent*, 184 U. S. 1, 46 L. ed. 405, 22 Sup. Ct. Rep. 269; *Re Tune*, 115 Fed. 906; *Re Green Pond R. Co.* 13 Nat. Bankr. Reg. 118, Fed. Cas. No. 5,786; *Re Safe Deposit & Sav. Inst.* 7 Nat. Bankr. Reg. 392, Fed. Cas. No. 12,211; *Re Washington Marine Ins. Co.* 2 Ben. 292, Fed. Cas. No. 17,246; *Re Merchants' Ins. Co.* 3 Biss. 162, Fed. Cas. No. 9,441; *Re National L. Ins. Co.* 6 Biss. 35, Fed. Cas. No. 10,046; *Re Whipple*, 6 Biss. 516, Fed. Cas. No. 17,512; *Re Smith*, 92 Fed. 135; *Clarke* v. *Larremore*, 188 U. S. 486, *ante*, 555, 23 Sup. Ct. Rep. 363.

Summary proceedings are also authorized to take property from the hands of a receiver of a state court.

*Re Merchants' Ins. Co.* 3 Biss. 162, Fed. Cas. No. 9,441; *Re Lengert Wagon Co.* 110 Fed. 927; *Re Storck Lumber Co.* 114 Fed. 360; *Re Bruss-Ritter Co.* 90 Fed. 651; *Platt* v. *Archer*, 9 Blatchf. 559, Fed. Cas. No. 11,213.

The proceeding in the state court for the appointment of a receiver of M. Zier & Co. was, in substance, a voluntary assignment or bankruptcy proceeding. Every asset of the insolvent was placed by it in the hands of the receiver selected by it. The purpose was the distribution of these assets among all its creditors.

*Re John A. Etheridge Furniture Co.* 92 Fed. 329; *Re Storck Lumber Co.* 114 Fed. 360.

If a receiver is appointed by a Federal court, and actually takes possession of the property, possession will not be yielded to a receiver subsequently appointed by a state court, although the suit in the state court was commenced before that in the Federal court.

*East Tennessee, V. & G. R. Co.* v. *Atlanta & F. R. Co.* 15 L. R. A. 109, 49 Fed. 608; *Central Trust Co.* v. *Chattanooga, R. & C. R. Co.* 62 Fed. 950.

Where a state court has no jurisdiction over property, and loses the actual possession thereof to the Federal court, there remains no possession by the state court, either actual or constructive.

*The Willamette Valley*, 62 Fed. 293, 13 C. C. A. 635, 29 U. S. App. 447, 66 Fed. 565; *Moran* v. *Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019.

Where there is neither actual nor constructive possession, there can be no obstacle to proceeding summarily; and an action thus taken cannot be invalidated by relation.

*Moran* v. *Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019.

The bankruptcy court having been given voluntary and peaceable possession, the question of comity between the courts is not involved, except as it applies to the action of the state court in retaking the property. It is a question of the supremacy of the Constitution and laws of the United States.

*Re Tune*, 115 Fed. 906; *East Tennessee, V. & G. R. Co.* v. *Atlanta & F. R. Co.* 15 L. R. A. 109, 49 Fed. 608; *Central Trust Co.* v. *Chattanooga, R. & C. R. Co.* 62 Fed. 950.

Where property is in the custody of the bankruptcy court, no other court, and no person acting under any process from any other court, can, without the permission of the bankruptcy court, interfere with it; and to so interfere is a contempt of the bankruptcy court.

*Re Vogel*, 7 Blatchf. 18, Fed. Cas. No. 16,982; *Moran* v. *Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Freeman* v. *Howe*, 24 How. 450, 16 L. ed. 749.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In this matter writs of certiorari as well as of habeas corpus were issued, and the record returned to us includes the evidence below, which was duly preserved by bill of exceptions. The district court held that a flagrant contempt of the court in bankruptcy was committed on the 20th of February by the taking the property of Zier & Company out of the possession of its receiver, in whose hands, in the view of the court, it had been voluntarily placed; and that defendants Watts and Sachs were so connected with that transaction as to subject them to like condemnation.

The New Albany Trust Company was appointed receiver of the property of Zier & Company under § 1245 of the Revised Statutes of Indiana providing that this might be done, "when a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;" and it was directed to complete unfinished contracts, but to make no new ones. The winding up of the business was contemplated and entered upon. Whether the transfers of $3,100 and $9,600 could have been overhauled in that suit we need not inquire, as they were undoubtedly acts of bankruptcy, and as such justified the *ap- [27] plication to the bankruptcy court. And the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the Federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily, when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession, or of possession in enforcement of pre-existing liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit; but that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the district court brought his appointment to the knowledge of the Floyd circuit court and requested the delivery of the assets.

We think there can be no reasonable doubt that the judge of the Floyd circuit court and Messrs. Watts and Sachs entertained the conviction in good faith that the custody of the state court could not be lawfully interfered with by the bankruptcy court by summary proceedings. Their view was that the jurisdiction of the state court having attached, that court was, in all circumstances, entitled to exercise it until voluntarily surrendered. But if the state court had taken into consideration that Zier & Company had committed acts of bankruptcy in the matter of preferential transfers; that the amendatory bankruptcy act of February 5, 1903, provided that acts of bankruptcy would exist if a person "being insolvent, applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the *United States:" and that the [28] tent of the bankruptcy law is to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts, it appears to us that, instead of continuing the application of the Federal receiver for three weeks, the court should have directed the surrender of the property to him at once, or at least after the report

of its own receiver on its return from Indianapolis.

The state court, however, did not approve of the assurance given by its receiver at Indianapolis, and refused to allow the surrender of possession, so that the delivery to Connor by the trust company, presently made, was unauthorized by the court, whose receiver and officer the trust company was.

We are not now dealing with the right of the district court to take possession *in invitum*, but with the voluntary delivery of property by the officer of a court, without the court's consent, and, therefore, unlawful. We say, "voluntary," for we decline to entertain the suggestion that the district court intimidated the trust company and Watts, or that members of the bar can be intimidated in the discharge of their duty.

It is true that the state court had authorized the trust company and Mr. Watts to appear at Indianapolis and explain the situation, but in doing so it was attempted to limit the operation of the order to a special appearance in the bankruptcy court, while by the order continuing the Federal receiver's application it was attempted to make him a party to the proceedings in the state court and bound by them. Obviously the state court did not wish its receiver to be bound by going before the district court, and did wish the receiver of the district court to be bound by his appearance in the state court.

On the other hand, the district court made an order on February 17, which recited the presence of the trust company and of Watts, the voluntary offer of the trust company, with the approval of Watts, in open court, to surrender possession, and then directed Connor to present a certified copy of the order of February 11 to the trust company, and thereupon to take possession. Mr. Watts had no notice or knowledge of this order until February 23, and Sachs first saw it on that day, though he was informed of its existence February 22.

[29] *The situation February 19 was this: The trust company and Watts were under rules to show cause for disregard of the orders of the state court. One had done, and the other had advised the doing, that which the state court had not consented to, and it was after it had signified its disapproval that the district court receiver obtained possession without such consent. The state court thereupon concluded that it was entitled to restore the *status quo*, and accordingly it entered the orders of February 20, under which Connor was dispossessed.

This was a reassertion of the jurisdiction which the state court insisted it was entitled to exercise, that it had not voluntarily parted with, or been lawfully deprived of.

The petitioners were sentenced to imprisonment for contempt because of their alleged participation in this action of the state court.

It is the action of the state court that was complained of, and the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule.

But here we do not have the ordinary case of advice to clients, but the case of judicial action alleged to have been induced by the advice complained of. The theory of the condemnation is that of conspiracy between the state court and the attorneys to obstruct the administration of justice and to bring the authority of the United States court into contempt.

We are of opinion that such charges ought never to be indulged in, and that the ultimate consequences of attacks of such a character by the courts of one government on the courts of another are too serious to allow them to be made.

The state court was a court of original general jurisdiction. On the face of its record its jurisdiction had been properly invoked, and been properly exercised, and was not open to collateral *attack. Assuming [30] that the proceedings in bankruptcy superseded further proceedings in the state court, and that nothing remained for the latter but to direct the surrender of the assets and the winding up of the accounts, the district court was of opinion that it might by summary proceedings take the assets out of the possession of the state court. But Connor's possession was not acquired in that way. The contention is that the property was given up voluntarily by the state court receiver, and not in obedience to any order entered on summary proceedings to which that receiver was a party. And the difficulty is that the receiver had no power to make the surrender when it was made. It was the representative of the state court. The property in its hands was property *in custodia legis*, and it had only such authority as was given to it by the court, and could not exceed the limits prescribed by the court. Without doubt the receiver agreed to give up the property in its hands to the receiver of the court in bankruptcy on the supposition that the state court would assent to its doing so. But the state court took a different view, and therefore the possession of Connor was from its standpoint a wrongful possession.

In order to the adequate enforcement of the provisions of the bankruptcy law, it is necessary that the powers of courts in bankruptcy should be, as they are, most comprehensive.

Section 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581) provides: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

By § 2 of the bankruptcy act of 1898 (30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. 1901, p. 3421) the bankruptcy courts are empowered to "(3) appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified;" . . . "(13) enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;" . . . "(15) [1]make such orders, *issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act."

The twelfth general order in bankruptcy provides: "3. Applications . . . for an injunction to stay proceedings of a court or officer of the United States or of a state shall be heard and decided by the judge."

But no writ of injunction as such was granted in this case. The order of February 11. for the appointment of a receiver, provided that the trust company should deliver up the property to the Federal receiver, and should refrain from interfering with his possession and control of the same. That order was entered on the application of the Inland Steel Company, which had appeared in the state court at the creditors' meeting of January 24, and had interposed no objection to the order then entered for the completion of pending contracts and the running of the plant for that purpose. It was one of the contentions in support of the jurisdiction of the state court that the Inland Steel Company was thereby estopped from resorting to the bankruptcy court and obtaining the appointment of a receiver there. In *Simonson* v. *Sinshcimer*, 37 C. C. A. 337, 95 Fed. 948, it was held by the circuit court of appeals for the sixth circuit, in a careful opinion by Taft, J., that a creditor might be estopped from filing a petition in involuntary bankruptcy, in the circumstances therein detailed, and *Re Curtis*, 91 Fed. 737, and 36 C. C. A. 430, 94 Fed. 630, in which a different conclusion was reached, was distinguished. We express no opinion on the matter, but it should be noted, in passing, as one of the elements of controversy entering into the views of counsel in the state court.

The completion of contracts by the state receiver and the procuring of materials therefor had been authorized at the creditors' meeting, in which the petitioning creditor participated, and the work had been entered upon, and it is possible that a state of facts might have existed which would involve the application of the doctrine of estoppel to some extent.

We do not understand it to be contended that the passage of the bankruptcy act in [32]itself suspended the statute of Indiana *in relation to the appointment of receivers, but only that when the proceedings for such appointment took the form, as they did here, of winding up the affairs of the insolvent corporation, the proceedings in bankruptcy displaced those in the state court and terminated the jurisdiction of the latter. But the acceptance of that view does not necessarily involve the concession that these attorneys were guilty of contempt of the district court because of the action of the state court.

They could not be found guilty because they believed and declared their belief that the state court had jurisdiction, and that the district court had not. Granting that they were mistaken, it does not follow that their mistaken conviction constituted contempt. In point of fact the state court agreed with them; and would certainly not have entered orders of whose validity it entertained any reasonable doubt.

The distinction between the exclusive jurisdiction of the court in bankruptcy, proceeding, as it were *in rem*, to determine the status of a debtor and his assets, and the jurisdiction over property subjected to particular liens, and the like, exercised by courts of concurrent jurisdiction, was probably thought by them not to apply in the circumstances existing here, and advice based on that opinion could not in itself constitute contempt.

What evidence is there that these attorneys, or either of them, gave any advice or took any action in bad faith, not in the honest discharge of their duty as counsel, but with the deliberate intent to have the Federal court set at defiance and its orders treated with contempt?

When Mr. Watts returned from Indianapolis he had been disabused of his conviction that the district court would modify its order of February 11, when fully informed of the actual situation of the suit in the state court, and the participation in the proceedings therein of the creditor on whose application that order had been granted, and he appears to have earnestly sought to bring about delivery over of the property, the discharge of the trust company, and the withdrawal from the record of the petition and order of February 14.

But he realized, when about to appear before the state court, *that his promise to en- [33] deavor to bring about the surrender of the property had been made under the pressure of expediency, and not by reason of change of judgment, and that he had placed himself in the embarrassing position of acting without leave and in disregard of the limitations of the order he had himself framed and procured to be entered. This led him to request Mr. Sachs to accompany him as his friend to New Albany, and assist in representing his situation in as favorable a light as possible to the state court. It is not disputed that Mr. Sachs visited New Albany solely in obedience to the dictates of friendship, and that he had no connection whatsoever with the litigation.

The result was, however, and it might well have been anticipated, that it appeared to the state court that its jurisdiction had been treated cavalierly by the attorney who had represented the original complainant, who had insisted that the court retained jurisdic-

tion, and who could not deny that he was of the same opinion still. It was then, and on the 20th, that Mr. Sachs, without the assent or connivance of Mr. Watts, unless suspicion be allowed to supply the want of proof, signed and verified a certain statement by the United States Tube Company, which represented that the trust company had "wrongfully, unlawfully, and without leave of this court" turned over the possession to Connor, and prayed for its removal, and the appointment of a successor. This statement is recited in the order of that date entered by the judge of the state court, disallowing the application of the trust company to resign because of its action "without leave or permission," and stating that "the judge of this court, upon his own motion and because of the open contempt of said receiver for the orders, judgment, and process of this court, does now order and direct that said receiver be and it is hereby removed from its trust." The trust company was ordered to account immediately for all the assets, and Kelso was appointed as receiver in succession by the judge "upon his own motion," and directed to demand possession of the property, and in case of refusal to report to the judge for further action in the premises. This was followed by the qualification of the new receiver, the demand [34] *on Connor, the report of his refusal, the issue of the writ to the sheriff, and its execution.

Mr. Sachs testified that on the 19th the judge of the circuit court insisted on retaining the property and in declining to approve of the promise Mr. Watts had made; that when it was known that the property had been delivered the judge still declined to discharge Mr. Watts; that on the forenoon of the 20th the judge announced that he had made up his mind to remove the trust company and appoint another receiver; that he, Sachs, expressed the opinion that if the judge did that the better procedure would be for the new receiver to interplead in the district court, setting up all the facts from the beginning and obtaining a determination in that court; that the judge asked Kelso to bring the facts in respect of the delivery of the plant to the official knowledge of the court, when he would remove the trust company and appoint Kelso. That in the afternoon Kelso desired him to sign the statement bringing the facts to the court's notice, which he, Kelso, objected to doing, because he was to be appointed receiver, and Sachs signed it supposing the course to be followed would be an application to the district court in the nature of an interpleader; that he did not know what became of the paper, and did not know, until after the commencement of the pending proceedings, what order had been entered upon it; that he did not know that any proceedings were contemplated or in course of preparation or prepared with the view of retaking the property; and did not advise or assist in any such, or believe any such would be undertaken.

In seeking to extricate Mr. Watts from his anomalous position, Sachs found himself involved, by the attitude of the state court, in similar embarrassment, for the state court adhered to its views as to jurisdiction, and insisted that it had never voluntarily yielded the position it occupied, which afforded the basis for testing the question. It does not seem to have occurred to Sachs that the mere effort to get an issue which could be transmitted to the district court for determination subject to petition for review or such other appellate remedy as the bankruptcy act provided, could be regarded as *con- [35] tempt of that court, and want of intention to commit contempt is entitled to great weight in such circumstances.

There is some conflict of evidence as to Sachs's participation by way of suggestion in the preparation of papers on the 20th, or knowledge of the preparation of the final order and writ, but, without attempting to review the evidence and pass upon its weight, we find nothing in this conflict to justify the conclusion of an intention to contemn.

State courts are entitled to the assistance of the gentlemen of the bar in the maintenance of their dignity and jurisdiction, and the fearless discharge of their duty by the latter should not be shaken by liability to punishment for mere errors of judgment in rendering such assistance.

The presumption on the verified response and plea of Sachs, which was sustained by his testimony, was that he had not been in any way a party to the dispossession of Connor, and had not advised it or expected it; that he not only had not intended any contempt, but had committed none. And as the record of the state court showed that the orders were entered by the judge of that court "upon his own motion," that presumption could not be overthrown without collaterally impeaching the record, and that we think was inadmissible.

It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter. Errors, if any, committed in so doing could be rectified in due course and in the designated way.

We cannot but express our regret at the unfortunate collision between the two courts, and the belief that the considerate observance of the rule of comity is adequate to avert such occurrences.

We are of opinion that there was no legal evidence to sustain these convictions for contempt, and the order in each case must be,—

*Petitioner discharged.*

*Mr. Justice **Harlan**, concurring: [36]

I concur in that part of the opinion of the court which shows that there was no evidence whatever upon which to base a judgment for contempt against Watts and Sachs, or either of them. That view of the evidence is sufficient to dispose of the case without reference to any other question arising

on the record. My concurrence in the judgment discharging the petitioners is solely on the ground just stated.

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W. C. O'NEAL, *Plff. in Err.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 36-38.)

*Error to district court—when jurisdiction in issue.*

A judgment of the district court of the United States imposing imprisonment for contempt cannot be reviewed in the Supreme Court of the United States on writ of error to that court, on the theory that the case is one "in which the jurisdiction of the court is in issue" within the meaning of the act of March 3, 1891, § 5 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549), where jurisdiction over the person and subject-matter was not challenged, and the question asserted in the certificate of the lower court was whether it had jurisdiction to try and punish the defendant for contempt upon the facts and for the causes stated.

[No. 534.]

*Submitted May 4, 1903. Decided June 1, 1903.*

IN ERROR to the District Court of the United States for the Northern District of Florida to review a judgment of imprisonment in contempt proceedings for an assault on a trustee in bankruptcy. *Dismissed* for want of jurisdiction.

The facts are stated in the opinion.

*Mr.* **W. A. Blount** submitted the cause for plaintiff in error:

There is no connection between the exercise of its ordinary appellate jurisdiction by this court and its jurisdiction to review special cases under acts of Congress so permitting.

*Nishimura Ekiu* v. *United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Re Lennon*, 150 U. S. 393, 37 L. ed. 1121, 14 Sup. Ct. Rep. 123; *Twitchell* v. *Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Tinsley* v. *Anderson*, 171 U. S. 105, 32 L. ed. 96, 18 Sup. Ct. Rep. 805; *Dakota Bldg. & L. Asso.* v. *Price*, 169 U. S. 45, 42 L. ed. 655, 18 Sup. Ct. Rep. 251; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 468, 42 L. ed. 1111, 18 Sup. Ct. Rep. 645; *Powers* v. *Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 574, 44 L. ed. 278, 20 Sup. Ct. Rep. 222.

A contempt proceeding is a cause.

*Lamonte* v. *Ward*, 36 Wis. 558; *Erwin* v. *United States*, 37 Fed. 479; *Goodrich* v. *United States*, 42 Fed. 392; *Taylor* v. *United States*, 45 Fed. 531; *McCullough* v. *Large*, 20 Fed. 309.

Proceedings, analogous in that they are not ordinary suits nor cases at law or equity, are held to be cases.

*Ex parte Milligan*, 4 Wall. 2, 18 L. ed. 281; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Oliver* v. *Martin*, 36 Ark. 139; *Kendall* v. *United States*, 12 Pet. 524, 9 L. ed. 1181; *Re Oregon Bulletin Printing & Pub. Co.* 3 Sawy. 529; *Fong Yue Ting* v. *United States*, 149 U. S. 728, 37 L. ed. 918, 13 Sup. Ct. Rep. 1016; *Holmes* v. *Jennison*, 14 Pet. 540, 10 L. ed. 579; *Weston* v. *Charleston*, 2 Pet. 449, 7 L. ed. 481; *Kohl* v. *United States*, 91 U. S. 367, 23 L. ed. 449.

These decided cases are in line with judicial definitions of a case or suit.

*Blyew* v. *United States*, 13 Wall. 581, 20 L. ed. 638; *Weston* v. *Charleston*, 2 Pet. 464, 7 L. ed. 486; *Smith* v. *Adams*, 130 U. S. 173, 32 L. ed. 897, 9 Sup. Ct. Rep. 566; *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Kundolf* v. *Thalheimer*, 12 N. Y. 596; *Fong Yue Ting* v. *United States*, 149 U. S. 728, 37 L. ed. 918, 13 Sup. Ct. Rep. 1016; *Home Ins. Co.* v. *North Western Packet Co.* 32 Iowa, 236, 7 Am. Rep. 183.

The words "case" and "cause" are constantly used as synonymous in statutes and judicial decisions, each meaning a proceeding in a court, a suit, "or action."

*Blyew* v. *United States*, 13 Wall. 581, 20 L. ed. 638; *Kendall* v. *United States*, 12 Pet. 645, 9 L. ed. 1229.

The words of the act of Congress, being as explicit as language can furnish, must comprehend every case not completely excepted from them.

*Young* v. *Bank of Alexandria*, 4 Cranch, 384, 2 L. ed. 655; *Carter* v. *Cutting*, 8 Cranch, 251, 3 L. ed. 553; *Ormsby* v. *Webb*, 134 U. S. 47, 33 L. ed. 805, 10 Sup. Ct. Rep. 478.

The statute creates no new jurisdiction in this court, but merely changes the form of resort here, for questions of jurisdiction in the court below in contempt cases have always been reviewable here by habeas corpus and are reviewable by certiorari.

*Re Chetwood*, 165 U. S. 462, 41 L. ed. 788, 17 Sup. Ct. Rep. 385.

*Mr.* **Benjamin C. Tunison** submitted the cause for defendant in error:

At common law contempt proceedings could not be reviewed by writ of error.

*Chambers's Case*, Cro. Car. 168; *Crosby's Case*, 3 Wils. 188.

The Federal courts lay down the rule broadly and stringently, that neither appeal nor writ of error lies from adjudications in contempt.

*Ex parte Kearney*, 7 Wheat. 38, 5 L. ed. 391; *New Orleans* v. *New York Mail S. S. Co.* 20 Wall. 387, 22 L. ed. 354; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Hayes* v. *Fischer*, 102 U. S. 121, 26 L. ed. 95; *Ex parte Rowland*, 104 U. S. 604, 26 L. ed. 861; *Ex parte Fisk*, 113 U. S. 713, 28 L. ed. 1117, 5 Sup. Ct. Rep. 724; *Re Tyler*, 149 U. S. 164,

NOTE.—*On direct review of district and circuit court judgments in the Supreme Court of the United States*—see note to Gwin v. United States, 46 L. ed. U. S. 741.

37 L. ed. 689, 13 Sup. Ct. Rep. 785; *Re Debs*, 158 U. S. 573, 39 L. ed. 1094, 15 Sup. Ct. Rep. 900; *Re Chetwood*, 165 U. S. 462, 41 L. ed. 788, 17 Sup. Ct. Rep. 385; *Re McKenzie*, 180 U. S. 536, 45 L. ed. 657, 21 Sup. Ct. Rep. 468; *Tinsley* v. *Anderson*, 171 U. S. 103, 43 L. ed. 96, 18 Sup. Ct. Rep. 805.

The authority to decide a case at all, and not the decision rendered therein, is what creates the jurisdiction, and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction—matters of regularity only, and not of jurisdiction.

*New Lamp Chimney Co.* v. *Ansonia Brass & Copper Co.* 91 U. S. 660, 23 L. ed. 338.

The statute confers upon this court appellate jurisdiction when the jurisdiction, and not when the exercise of jurisdiction, is in issue. Where the court below has authority to hear and determine, as in the case at bar, its jurisdiction would not be in issue within the meaning of this statute.

*Smith* v. *McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *The Resolute*, 168 U. S. 437, 42 L. ed. 533, 18 Sup. Ct. Rep. 112; *Dakota Bldg. & L. Asso.* v. *Price*, 169 U. S. 45, 42 L. ed. 655, 18 Sup. Ct. Rep. 251; *Shepard* v. *Adams*, 168 U. S. 618, 42 L. ed. 602, 18 Sup. Ct. Rep. 214; *Powers* v. *Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *World's Columbian Exposition* v. *United States*, 6 C. C. A. 58, 18 U. S. App. 42, 56 Fed. 666.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

This was a proceeding in the district court of the United States for the southern district [37] of Florida, commenced by the *filing of an affidavit of Greenhut, a trustee in bankruptcy, charging W. C. O'Neal with contempt of court in committing an assault upon him.

A rule to show cause was entered and served on O'Neal, to which he filed a demurrer, assigning as grounds that the affidavit did not show that respondent had committed any offense of which the court had jurisdiction, or had done any act punishable by the court as a contempt thereof, or had committed any act of contempt against the court.

The demurrer was overruled and O'Neal answered. Hearing was had on the rule and answer, and evidence introduced on both sides, and the court found respondent guilty of the acts and things set forth in the affidavit, and that they constituted a contempt of court, and thereupon sentenced O'Neal to imprisonment in the county jail at Pensacola, Florida, for the term of sixty days.

The district court certified the question of its jurisdiction for decision, and a writ of error directly from this court was allowed on the assumption that the case came within the first of the six classes of cases enumerated in § 5 of the judiciary act of March 3, 1891. That class embraces cases "in which the jurisdiction of the court is in issue," that is, where the power of the circuit and district courts of the United States to hear and determine is denied. *Smith* v. *McKay*, 161 U. S. 355, 40 L. ed. 731, 16 Sup. Ct. Rep. 490; *Vance* v. *W. A. Vandercook Co.* 170 U. S. 468, 472, 42 L. ed. 1111, 1112, 18 Sup. Ct. Rep. 645; *Mexican C. R. Co.* v. *Eckman*, 187 U. S. 432, *ante*, 246, 23 Sup. Ct. Rep. 212.

But the question here is asserted in the certificate to be whether the district court had "jurisdiction to try and punish the said defendant for contempt thereof, upon the facts and for the causes stated in said rule and affidavit."

Jurisdiction over the person and jurisdiction over the subject-matter of contempts were not challenged. The charge was the commission of an assault on an officer of the court, for the purpose of preventing the discharge of his duties as such officer, and the contention was that on the facts no case of contempt was made out.

In other words, the contention was addressed to the merits *of the case, and not to [38] the jurisdiction of the court. An erroneous conclusion in that regard can only be reviewed on appeal or error, or in such appropriate way as may be provided. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 26, 46 L. ed. 413, 416, 22 Sup. Ct. Rep. 293; *Ex parte Gordon*, 104 U. S. 515, 26 L. ed. 814.

And while proceedings in contempt may be said to be *sui generis*, the present judgment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error. Section 5, act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549), as amended by the act of January 20, 1897 (29 Stat. at L. 492, chap. 68, U. S. Comp. Stat. 1901, p. 556); *Re Chetwood*, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385; *Tinsley* v. *Anderson*, 171 U. S. 101, 105, 43 L. ed. 91, 96, 18 Sup. Ct. Rep. 805; *Cary Mfg. Co.* v. *Acme Flexible Clasp Co.* 187 U. S. 427, 428, *ante*, 244, 23 Sup. Ct. Rep. 211.

*Writ of error dismissed.*

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WILLIAM K. TUBMAN, *Plff. in Err.*,
*v.*
BALTIMORE & OHIO RAILROAD COMPANY, Baltimore & Potomac Railroad Company, Pennsylvania Railroad Company, Washington, Ohio, & Western Railroad Company, Chesapeake & Ohio Railway Company, Norfolk & Western Railroad Company, and Virginia Midland Railway Company.

(See S. C. Reporter's ed. 38-40.)

*Judgments — motion to vacate — when too late — appeal — error in declining jurisdiction — when not ground for reversal.*

1. A judgment dismissing a case for want of prosecution cannot be set aside on application made after the close of the term at which it is entered, where no showing of fraud or surprise is made.

2. Error, if any, committed by a court in de-

**clining jurisdiction of an appeal from an order overruling a motion to vacate a judgment dismissing the case for want of prosecution does not require reversal or modification in the Supreme Court of the United States, where, if the court had entertained jurisdiction, it must have affirmed the order appealed from.**

[No. 574.]

*Submitted May 18, 1903. Decided June 1, 1903.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which dismissed an appeal from an order of the Supreme Court of that District denying a motion to set aside a judgment dismissing the case for want of prosecution. *Affirmed.*

See same case below, 20 App. D. C. 541.

The facts are stated in the opinion.

*Mr.* **W. A. Meloy** submitted the cause for plaintiff in error. *Mr. Henry D. Martin* was with him on the brief:

The summary motion was a substitute for the writ of error *coram vobis*, or *coram nobis*, to correct error of fact.

*Pickett* v. *Legerwood*, 7 Pet. 147, 8 L. ed. 639; *Sibbald* v. *United States*, 12 Pet. 492, 9 L. ed. 1169; *Bronson* v. *Schulten*, 104 U. S. 410, 26 L. ed. 797; *Phillips* v. *Negley*, 117 U. S. 678, 29 L. ed. 1116, 6 Sup. Ct. Rep. 901; *Hickman* v. *Ft. Scott*, 141 U. S. 415, 35 L. ed. 775, 12 Sup. Ct. Rep. 9; *District of Columbia* v. *Humphries*, 12 App. D. C. 128; *Queen* v. *O'Connell*, 7 Ir. Law Rep. 261; *State* v. *Calhoun*, 50 Kan. 523, 18 L. R. A. 838, 32 Pac. 38.

A court has power to reinstate a cause after the term when dismissed by mistake.

*The Palmyra*, 12 Wheat. 10, 6 L. ed. 534; quoted in *Sibbald* v. *United States*, 12 Pet. 492, 9 L. ed. 1169, and in *Phillips* v. *Negley*, 117 U. S. 674, 29 L. ed. 1015, 6 Sup. Ct. Rep. 901; *Ex parte Crenshaw*, 15 Pet. 119, 10 L. ed. 682.

In case of fraud the supreme court will reverse its decision after the expiration of the term.

*United States* v. *Gomez*, 23 How. 326, 16 L. ed. 552, 1 Wall. 690, 17 L. ed. 677.

The Chief Justice overruled the motion. His decision on the facts was error of law, determined the cause, was final, and appealable.

*Michigan Ins. Co.* v. *Whittemore*, 12 Mich. 311; *Wood* v. *Colwell*, 34 Pa. 92; *Holford* v. *Alexander*, 12 Ala. 280, 46 Am. Dec. 253; *Merrick* v. *Baltimore & O. R. Co.* 33 Md. 487; *Queen* v. *O'Connell*, 7 Ir. Law Rep. 261; *State* v. *Calhoun*, 50 Kan. 523, 18 L. R. A. 838, 32 Pac. 38.

*Messrs.* **Frederic D. McKenney** and **George E. Hamilton** submitted the cause for defendants in error:

The order of August 6, 1901, is not an appealable order.

*Babbington* v. *Washington Brewery Co.* 13 App. D. C. 527; *Harman* v. *Lawler*, 32 Tex. 590; *Mulhall* v. *Keenan*, 18 Wall. 342, 21 L. ed. 808; *Fishburn* v. *Chicago, M. & St. P. R. Co.* 137 U. S. 60, 34 L. ed. 585, 11 Sup. Ct. Rep. 8.

*THE CHIEF JUSTICE: The declaration in [39] this action was filed March 26, 1895, and several demurrers were interposed thereto the following June. August 6, 1901, the case was dismissed for want of prosecution. After the term at which that judgment was entered had expired, and on May 19, 1902, plaintiff made a motion to set it aside, and the motion was denied. From the order denying the motion, plaintiff took an appeal to the court of appeals of the District of Columbia, which was dismissed, and this writ of error then allowed. The case comes before us on a motion to dismiss or affirm. The appeal to the court of appeals was dismissed on the ground that the order overruling the motion to vacate the judgment of dismissal was not the subject of appeal, and we think there was color for the motion here to dismiss the writ of error. But in the view we take, we must decline to sustain that motion, and will dispose of the case on the motion to affirm.

In its opinion the court of appeals said, among other things, that the "motion to vacate was not made until after the lapse of more than two terms of the court in which the original judgment was entered. It is not shown that there was any fraud or surprise in procuring the judgment of dismissal of the action by the court." The court of appeals and the supreme court of the District obviously agreed in this finding, and a careful examination of the record affords no basis for questioning the conclusion, if it were permissible for us to do so. The general rule is that a final judgment cannot be set aside on application made after the close of the term at which it was entered, by the court which rendered it, because the case has passed beyond the control of the court. *Bronson* v. *Schulten*, 104 U. S. 410, 415, 26 L. ed. 797, 799; *Phillips* v. *Negley*, 117 U. S. 665, 29 L. ed. 1013, 6 Sup. Ct. Rep. 901.

In the latter case, jurisdiction was taken on error to review a final order setting aside a judgment on motion made at a subsequent term. And in *Hume* v. *Bowie*, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582, *Phillips* v. *Negley* was considered, and the distinction between a judgment ordering a new trial when the court has jurisdiction to make such an order, and a judgment where such jurisdiction does not exist, was pointed out. See *Macfarland* v. *Brown*, 187 U. S. 239, 243, *ante*, 159, 161, 23 Sup. Ct. Rep. 105.

*In the present case, the motion to set aside [40] was denied, not granted, and, as it was made after the lapse of the term, and came within no exception, the general rule was applicable. If, then, the court of appeals had entertained jurisdiction, the result would have been an affirmance; and even if the court erred in declining jurisdiction, the difference between dismissing the appeal and affirming the order does not, in the circumstances, require reversal or modification.

*Judgment affirmed.*

WHITAKER WRIGHT, *Appt.*,

*v.*

WILLIAM HENKEL, United States Marshal for the Southern District of New York, *et al.*

(See S. C. Reporter's ed. 40-63.)

*Foreign extradition—what acts are made criminal by the laws of both countries—bail—when refusal not error—effect on appeal of pendency of second complaint.*

1. Absolute identity of statutes in Great Britain and the United States defining the offense of fraud by a corporate director is not necessary to make such offense "criminal by the laws of both countries," within the meaning of the provisions of the treaty with Great Britain of 1889, art. 1 (26 Stat. at L. 1508), defining extraditable crimes; it is sufficient if the essential character of the transaction is the same and is made criminal by both statutes.
2. A fugitive from the justice of Great Britain, charged with the commission of fraudulent acts as a corporate director, which are made criminal by the laws of that country and by the laws of the state of the United States in which the fugitive is found, is extraditable under the treaty with Great Britain of 1889, art. 1, including, among other extraditable crimes, fraud by a corporate director "made criminal by the laws of both countries."
3. The denial of an application for bail in foreign extradition proceedings, supported by the affidavit of petitioner's physician that he was suffering from bronchitis and a severe chill which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment, is not reversible error, although the refusal was put upon the ground of the want of power.
4. The dismissal of an appeal from an order of a United States circuit court dismissing writs of habeas corpus to inquire into a detention under a warrant of arrest issued in extradition proceedings is not required because of the pendency, as appears on the argument of such appeal, of proceedings on a second complaint by the demanding government, which reiterates the original charge with some amplification, and charges an additional offense.

[No. 661.]

*Argued April 28, 29, 1903. Decided June 1, 1903.*

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order dismissing writs of habeas corpus to inquire into a detention under a warrant of arrest issued in extradition proceedings. *Affirmed.*

See same case below, 123 Fed. 463.

Statement by Mr. Chief Justice **Fuller:**

Whitaker Wright applied to the circuit court of the United States for the southern district of New York for writs of habeas corpus and certiorari on March 20, 1903, by a petition which alleged:

(1.) That he was a citizen of the United States, restrained of his liberty by the marshal of the United States for the southern district of New York, by virtue of a warrant dated March 16, 1903, issued by Thomas Alexander, "United States commissioner *for [41] the southern district of New York, and commissioner duly authorized by the district court of the United States for the southern district of New York, and also commissioner appointed under the laws of the United States concerning the extradition of fugitives from the justice of a foreign government under a treaty or convention between this and any foreign government," which warrant was couched in these terms:

"Whereas, complaint has been made on oath under the treaty between the United States and Her Majesty, the late Queen of Great Britain and Ireland, concluded and signed at Washington, on the 9th day of August, 1842, and of the supplementary treaty between the same high contracting parties, signed July 12, 1889, before me, Thomas Alexander, one of the commissioners appointed by the district court of the United States for the southern district of New York, and also commissioner especially appointed to execute the acts of Congress, entitled 'An Act for Giving Effect to Certain Treaty Stipulations Between This and Foreign Governments for the Apprehension and Delivering up of Certain Offenders,' approved August 12, 1848 [9 Stat. at L. 302, chap. 167, U. S. Comp. Stat. 1901, p. 359], and of the several acts amendatory thereof, that one Whitaker Wright did heretofore, during the month of October, in the year 1899, and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore, in the month of October, in the year 1899, and in the month of December, 1900, at the city of London aforesaid, then being a director of a certain body corporate, to wit, the London & Globe Finance Corporation, unlawfully make, circulate, and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation; that the said Whitaker Wright is a fugitive from justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States; that the crime of which the said Whitaker *Wright has so as aforesaid been guilty is [42] an offense within the treaty between the United States and Great Britain."

(2.) That the warrant was issued on a complaint by His Britannic Majesty's consul general at the port of New York, as follows:

"First. That one Whitaker Wright did heretofore and in the month of December, 1900, in the city of London, in that part of the United Kingdom of Great Britain and

NOTE.—*As to foreign extradition*—see notes to Kentucky v. Dennison, 16 L. ed. U. S. 717, and State v. Jackson (D. C. E. D. Tenn.) 1 L. R. A. 370.

Ireland called England, and within the jurisdiction of his said Britannic Majesty, commit the crime of fraud as a director of a company, to wit, did heretofore and in the month of October, in the year 1899, and in the month of December, 1900, at the city of London, aforesaid, then being a director of a certain body corporate, to wit, the London & Globe Finance Corporation, unlawfully make, circulate, and publish certain reports and statements of accounts of the said corporation, which were false; the said Whitaker Wright, then well knowing the said reports and statements to be false, with intent thereby to deceive and defraud the shareholders or members of the said corporation.

"Second. That the said Whitaker Wright is a fugitive from the justice of the Kingdom of Great Britain and Ireland, and is now within the territory of the United States.

"Third. That the crime of which the said Whitaker Wright has so as aforesaid been guilty is an offense within the treaty between the United States and Great Britain.

"Fourth. That deponent's information and belief are based upon messages received by cable from his Majesty's Secretary of State for Foreign Affairs, one of the said messages stating that a warrant had been issued in England for the apprehension of the said Whitaker Wright for the offense herein charged and directing deponent to apply for a provisional warrant, under the treaty for extradition, between the United States and Great Britain.

"That deponent has, since the apprehension of the said Whitaker Wright yesterday, cabled to His Majesty's said foreign secretary for fuller details as to said crime, and an answer is directly expected, but that the [43] said Whitaker Wright may be *detained, pending the arrival of such information, deponent asks for a provisional warrant herein."

(3.) "That the aforesaid complaint states no facts which create jurisdiction for the issuance of the aforesaid warrant, and for the detention of your petitioner; that it does not state any facts which show that your petitioner has been guilty of any offense within the provisions of any extradition treaty between the United States of America and the United Kingdom of Great Britain and Ireland."

(4.) That he had duly objected to the continuance of any proceedings under the complaint and warrant, on the ground that the commissioner had no jurisdiction; but his objections had been overruled, and the commissioner had adjourned the proceedings until March 30, 1903.

(5.) That on March 18, 1903, he presented to the commissioner an application to be admitted to bail pending the proceeding, and, in support of the application, filed with the commissioner the affidavit of his attending physician, which was to the effect that petitioner was suffering from bronchitis and a severe chill, which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment; but that the commissioner denied the application on the ground that no power existed for admitting petitioner to bail; (6) that the cause of imprisonment was the charge and the refusal to admit to bail.

(7.) That the imprisonment and detention were illegal, and the warrant void, the complaint stating no jurisdictional facts to warrant imprisonment and detention. That the denial of the right to give bail constitutes a violation of the 8th Amendment of the Constitution, and § 1015 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 718), and of the common law of the United States, and constitutes a deprivation of liberty without due process of law.

The writs prayed for were granted, and, after hearing, dismissed and the application to be admitted to bail denied, March 30, the opinion being filed March 25, and copy of final order served March 28. 123 Fed. 463. The case was then brought to this court by appeal.

*At the argument it was made to appear [44] that, on March 31, His Majesty's consul general at New York made a new complaint, which reiterated the original charge, with some amplification, and added that Wright "did also, at the times and places aforesaid, then being a director and manager of said company or corporation aforesaid, with intent to defraud, alter and falsify books, papers, and writings belonging to the said company or corporation, and made and concurred in the making of false entries, and omitted and concurred in omitting material particulars in books of account and other documents belonging to the said company or corporation; and did also, at the times and places aforesaid, then being a director of the said company or corporation as aforesaid, alter and falsify books, papers, and writings, and made and was privy to the making of false and fraudulent entries in the books of account and other documents belonging to the said company or corporation, with intent to defraud and deceive shareholders and creditors of said company or corporation, and other persons."

It was further stated: "That deponent's information and belief are based upon a certified copy of a warrant, issued by one of his Majesty's justices of the peace for the city of London, for the apprehension of the said Whitaker Wright, for the offense herein first enumerated, and a certified copy of the information and complaint of the senior official receiver in companies liquidation (acting under the order of the high court of justice) and the depositions of Arthur Russell and John Flower, in support thereof, upon the application for a summons against the said Whitaker Wright, and the depositions of George Jarman and Harry Gerald Abrahams, on which information and complaint and depositions the said warrant was granted for the apprehension of the said Whitaker Wright," etc. Copies of these papers accompanied the complaint, and reference was made to cable messages

from the Secretary of State for Foreign Affairs.

On this complaint a warrant was issued and the accused arraigned before the commissioner, and it was thereupon stated that the demanding government would abandon all further proceedings under the complaint [45] of March 16, and consented* to the discharge of the prisoner from the arrest thereon. The commissioner held that, as the proceedings under the previous warrant had been carried into the circuit court, he was without power to discharge the prisoner under that warrant. Subsequently, the order of the circuit court dismissing the writs of habeas corpus and certiorari, and remanding the prisoner, was brought to the commissioner's attention, but counsel for the prisoner stated that papers were being prepared for the purpose of removing the case to the Supreme Court. The commissioner ruled that, pending such proceedings, he must decline to dismiss the complaint and discharge the prisoner.

Article 10 of the treaty of 1842 (8 Stat. at L. 572, 576), reads as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other: *Provided*, That this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction, and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if, on such hearing, the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive. The expense of such apprehension and delivery shall be borne and defrayed by the party who makes the requisition, and receives the fugitive."

[46] *Article 1 of the treaty of 1889 (26 Stat. at L. 1508), is:

"The provisions of the said 10th article are hereby made applicable to the following additional crimes:

"1. Manslaughter, when voluntary.

"2. Counterfeiting or altering money; uttering or bringing into circulation counterfeit or altered money.

"3. Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"4. Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries.

"5. Perjury, or subornation of perjury.

"6. Rape; abduction; child-stealing; kidnapping.

"7. Burglary; house-breaking or shop-breaking.

"8. Piracy by the law of nations.

"9. Revolt, or conspiracy to revolt by two or more persons on board a ship on the high seas, against the authority of the master; wrongfully sinking or destroying a vessel at sea, or attempting to do so; assaults on board a ship on the high seas, with intent to do grievous bodily harm.

"10. Crimes and offenses against the laws of both countries for the suppression of slavery and slave trading.

"Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article, provided such participation be punishable by the laws of both countries."

Sections 83 and 84 of chapter 96, 24 and 25 Victoria, are as follows:

83. "Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanor, and, being convicted thereof, shall be *liable, at [47] the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned.

84. "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing, any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to entrust or advance any property to such body corporate or public company, or to enter into any security for the benefit thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned."

Section 75 provided for a liability, on conviction of the misdemeanor therein mentioned, "at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not

exceeding two years, with or without hard labor, and with or without solitary confinement."

Section 166 of the companies' act of 1862 (25 and 26 Vict. chap. 89), provides:

"If any director, officer, or contributory of any company wound up under this act destroys, mutilates, alters, or falsifies any books, papers, writings, or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account, or other document belonging to the company, with intent to defraud or deceive any person, every person so offending shall be deemed to be guilty of a misdemeanor, and, upon being convicted, shall be liable to imprisonment for any term not exceeding two years, with or without hard labor."

Section 514 and subdivision 3 of § 611 of the New York Penal Code read as follows:

"Sec. 514. *Other cases of forgery in the third degree.*— A person who either (1) being an officer or in the employment of a corporation, association, partnership, or individuals, falsifies, or unlawfully and corruptly alters, erases, obliterates, or destroys [48] *any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association, partnership, or individuals; . . . is guilty of forgery in the third degree."

"Sec. 611. *Misconduct of officers and employees of corporations.*— A director, officer, agent, or employee of any corporation or joint stock association who: . . . (3) knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false; . . . is guilty of a misdemeanor."

Section 525 provides: "Forgery in the third degree is punishable by imprisonment for not more than five years."

By § 15 it is provided:

"A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary, or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both."

By the extradition act of Great Britain of 1870 (33 and 34 Vict. chap. 52), it is provided that: "A fugitive criminal shall not be surrendered until the expiration of fifteen days from the date of his being committed to prison to await his surrender." The accused is, on committal, to be informed of this, and "that he has a right to apply for a writ of habeas corpus." If he is not surrendered and conveyed out of the United Kingdom "within two months after such committal, or, if a writ of habeas corpus is issued, after the decision of the court upon the return to the writ, it shall be lawful for any judge of one of Her Majesty's superior courts at Westminster," on notice, to order him to be discharged, unless sufficient cause is shown to the contrary.

The first schedule contained a list of crimes, which includes: "Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company, made criminal by any act for the time being in force."

[49] *By § 5273 of the Revised Statutes, Title 66, *Extradition* (U. S. Comp. Stat. 1901, p. 3596), it is provided that whenever any person committed under the title or any treaty "to remain until delivered up in pursuance of a requisition," is not so delivered up and conveyed out of the United States within two calendar months after such commitment, he may be discharged by any judge of the United States or of any state, on notice, unless sufficient cause is shown to the contrary.

Section 5270 (U. S. Comp. Stat. 1901, p. 3591), is as follows:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the Supreme Court, circuit judge, district judge, commissioner authorized so to do by any of the courts of the United States, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

*Messrs.* **Samuel Untermyer** and **Louis Marshall** argued the cause and filed a brief for appellant:

Extradition should be declined in the absence of a conventional or legislative provision.

1 Moore, Extradition & Rendition, 21; *United States* v. *Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234; *Terlinden* v. *Ames*, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484.

The language of this treaty cannot be enlarged by interpretation so as to include crimes which do not come within the limitation which the signatories of the treaty have expressly created.

*Tucker* v. *Alexandroff*, 183 U. S. 436, 46 L. ed. 270, 22 Sup. Ct. Rep. 195; *Doe ex dem. Clark* v. *Braden*, 16 How. 657, 14 L. ed. 1099.

The subject of extradition is one of international cognizance, beyond the purview of state sovereignty; one over which the states composing the American Union have no more jurisdiction than have Ireland, Scotland, or Wales.

*People ex rel. Barlow* v. *Curtis*, 50 N. Y. 321, 10 Am. Rep. 483; *United States* v. *Rauscher*, 119 U. S. 414, 30 L. ed. 427, 7 Sup. Ct. Rep. 234.

The word "country" has received judicial interpretation from our courts.

*Stairs* v. *Peaslee*, 18 How. 521, 15 L. ed. 474; *United States* v. *The Recorder*, 1 Blatchf. 218, Fed. Cas. No. 16,129.

The crime charged is not one which is made criminal by the laws of the United States of America and the United Kingdom of Great Britain and Ireland, and does not, therefore, come within the terms of the extradition treaties between those governments.

*Re Windsor*, 6 Best. & S. 522; *Re John C. Eno*, 10 Quebec L. R. 194; *Re Tully*, 22 Blatchf. 213, 20 Fed. 812.

It is the policy of our government to admit to bail any person arrested in any kind of proceeding, except for contempt and prosecutions for capital offenses.

*United States* v. *Hamilton*, 3 Dall. 17, 1 L. ed. 490; *Ex parte Virginia*, 100 U. S. 343, 25 L. ed. 678; *Hudson* v. *Parker*, 156 U. S. 277, 39 L. ed. 424, 15 Sup. Ct. Rep. 450; *Benson* v. *McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; *United States* v. *Volz*, 14 Blatchf. 15, Fed. Cas. No. 16,627; *United States* v. *Rundlett*, 2 Curt. C. C. 41, Fed. Cas. No. 16,208; *United States* v. *Dana*, 68 Fed. 886.

In cases which have arisen under the Chinese exclusion act, the proceedings under which are analogous to those in extradition, the right to give bail has been recognized.

*Re Ah Kee*, 21 Fed. 701; *Re Chow Goo Pooi*, 9 Sawy. 606, 25 Fed. 77.

The power of a United States commissioner to admit a prisoner to bail is fully discussed by Judge Coxe in a note prepared by him, to the case of *United States* v. *Hom Hing*, 48 Fed. 638.

In *State* v. *Hufford*, 23 Iowa, 579, it has been held in a similar proceeding that the right to give bail exists.

The decisions in England and Canada sustain the right to bail in extradition cases.

*Queen* v. *Spilsbury* [1898] 2 Q. B. 615; *Ex parte Foster*, Quebec Consol. Dig. title *Extradition*.

The power to bail must be incident to the power to hear and determine.

*People* v. *Goodwin*, 1 Wheeler Crim. Cas. 434; *People* v. *McLeod*, 1 Hill, 377, 37 Am. Dec. 328; *People* v. *Van Horne*, 8 Barb. 158; *State Treasurer* v. *Rolfe*, 15 Vt. 9; *State* v. *Edney*, 20 N. C. (4 Dev. & B. L.) 378; *Rex* v. *Rudd*, Cowp. 331; *Rex* v. *Marks*, 3 East, 157; *Rex* v. *Baltimore*, 4 Burr. 2179; 4 Bl. Com. 299; 2 Hale P. C. 129; 4 Co. Inst. 71; *Harvey of Comb's Case*, 10 Mod. 334; *Rex* v. *Judd*, 2 T. R. 255; *Linford* v. *Fitzroy*, 13 Jur. 303; *Ex parte Tayloe*, 5 Cow. 39; *United States* v. *Evans*, 2 Flipp. 605, 2 Fed. 152; *Queen* v. *Spilsbury* [1898] 2 Q. B. 615; Church, Habeas Corpus, 2d ed. §§ 390, 395; 1 Bishop, Crim. Proc. §§ 251, 1406, 1407.

Such powers as are ordinarily denominated inherent are possessed even by courts of statutory creation.

*Ex parte Robinson*, 19 Wall. 505, 22 L. ed. 205; *United States* v. *Hudson*, 7 Cranch, 32, 3 L. ed. 259; *Anderson* v. *Dunn*, 6 Wheat. 204, 5 L. ed. 242; *Ex parte Terry*, 128 U. S. 302, 32 L. ed. 408, 9 Sup. Ct. Rep. 77; *Cartwright's Case*, 114 Mass. 230; *Re Neagle*, 5 L. R. A. 78, 14 Sawy. 232, 39 Fed. 856; *Freeman* v. *Howe*, 24 How. 450, 16 L. ed. 749; *Krippendorf* v. *Hyde*, 110 U. S. 276, 28 L. ed. 145, 4 Sup. Ct. Rep. 27; *Gumbel* v. *Pitkin*, 124 U. S. 131, 31 L. ed. 374, 8 Sup. Ct. Rep. 379; *Labette County* v. *United States*, 112 U. S. 217, 28 L. ed. 698, 5 Sup. Ct. Rep. 108; *Re Henderson*, 157 N. Y. 423, 52 N. E. 183.

The comparatively unimportant penal offense under N. Y. Penal Code, sub. 3, § 611, is not "fraud of a director" within the meaning of the treaty, and is not extraditable. Proof of fraud in support of a charge under that section would be surplusage.

In case of a statutory crime an indictment which follows the language of the statute is sufficient.

*United States* v. *Gooding*, 12 Wheat. 460, 6 L. ed. 693; *Com.* v. *Hobbs*, 140 Mass. 443, 5 N. E. 158; *Trout* v. *State*, 111 Ind. 499, 12 N. E. 1005; *Baysinger* v. *People*, 115 Ill. 419, 5 N. E. 375.

Where the offense is *malum prohibitum* and the statute embraces no words providing that the fraudulent intent or other criminal intent constitutes a part of the definition of the offense, it is neither necessary to allege nor to prove the existence of such intent.

*Com.* v. *Farren*, 9 Allen, 489; *Com.* v. *Nichols*, 10 Allen, 199; *Com.* v. *Boynton*, 2 Allen, 160; *Com.* v. *Goodman*, 97 Mass. 117; *Com.* v. *Wentworth*, 118 Mass. 441.

In cases of this character fraudulent intent is not a necessary ingredient of the crime.

*People* v. *Cipperly*, 101 N. Y. 634, 4 N. E. 107; *People* v. *Kibler*, 106 N. Y. 321, 12 N. E. 795; *Haggerty* v. *St. Louis Ice Mfg. & Storage Co.* 143 Mo. 238, 40 L. R. A. 151, 44 S. W. 1114; *Halsted* v. *State*, 41 N. J. L. 552, 32 Am. Rep. 247.

It is not within the province of the judiciary to enlarge the treaty.

*Terlinden* v. *Ames*, 184 U. S. 289, 46 L. ed. 545, 22 Sup. Ct. Rep. 484.

The law allows sureties to retake a prisoner who has been admitted to bail, should he escape into another state.

*Taylor* v. *Taintor*, 16 Wall. 371, 21 L. ed. 290; *Re Von Der Ahe*, 85 Fed. 959; *Cosgrove* v. *Winney*, 174 U. S. 64, 43 L. ed. 897, 19 Sup. Ct. Rep. 598.

In Chinese deportation cases it has been usual to allow bail pending an appeal to this court.

*Li Sing* v. *United States*, 180 U. S. 486, 45 L. ed. 634, 21 Sup. Ct. Rep. 449; *United States* v. *Gue Lim*, 176 U. S. 459, 44 L. ed.

544, 20 Sup. Ct. Rep. 415; *United States* v. *Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456; *United States* v. *Lee Yen Tai*, 185 U. S. 213, 46 L. ed. 878, 22 Sup. Ct. Rep. 629.

The expression of a willingness on the part of the demanding government to withdraw the warrant of March 16, was in the nature of a motion to enter a *nolle prosequi*.

It is well settled that unless such a motion is allowed by the court or tribunal to which it is addressed, it has no efficacy whatever.

*United States* v. *Schumann*, 7 Sawy. 439, Fed. Cas. No. 16,235; *United States* v. *Ebbs*, 4 Hughes, 473, 10 Fed. 369; *People* v. *McLeod*, 1 Hill, 465, 37 Am. Dec. 328; *State ex rel. Bier* v. *Klock*, 48 La. Ann. 140, 18 So. 942; *Statham* v. *State*, 41 Ga. 511; *Ex parte Donaldson*, 44 Mo. 149; *State* v. *Roe*, 12 Vt. 93.

The fact that the demanding government is now willing to consent to a discharge of the appellant from custody under the warrant of March 16, 1903, should not, under the circumstances, deprive him of his right to have the important questions of law which affect his liberty determined on this appeal.

*Chicago & A. R. Co.* v. *Union Rolling Mill Co.* 109 U. S. 702, 27 L. ed. 1081, 3 Sup. Ct. Rep. 594; *Stevens* v. *The Railroads*, 4 Fed. 97; *Booth* v. *Leycester*, 1 Keen, 247; *Cooper* v. *Lewis*, 2 Phill. Ch. 177; *Electrical Accumulator Co.* v. *Brush Electric Co.* 44 Fed. 602; *Hat-Sweat Mfg. Co.* v. *Waring*, 46 Fed. 87; *Western Union Teleg. Co.* v. *American Bell Teleph. Co.* 50 Fed. 662; *Detroit* v. *Detroit City R. Co.* 55 Fed. 569; *Hershberger* v. *Blewett*, 55 Fed. 170; *Lewis* v. *Cooper*, 16 L. J. Ch. N. S. 265; *Folger* v. *The Robert G. Shaw*, 2 Woodb. & M. 537, Fed. Cas. No. 4,899; *Beery* v. *Chicago, R. I. & P. R. Co.* 65 Mo. 533; *Browning* v. *Chrisman*, 30 Mo. 353; *Lane* v. *Morton*, 81 N. C. 38; *Mechanics' Bank* v. *Fisher*, 1 Rawle, 341.

The offense charged must at all events be a crime against the laws of the state where the accused is apprehended.

*Re Frank*, 107 Fed. 272.

The New York Penal Code does not define a crime which can be described as "the fraud of a director" or any equivalent crime.

The offense which it creates contains no element of fraud. The English statute makes "fraud" the *sine qua non*.

It does not require "the intent to deceive and defraud" (*Gardner* v. *People*, 62 N. Y. 299). The English crime depends upon the "fraudulent intent."

It does not require *scienter* of the falsity of the report on the part of the accused. The English statute makes it essential. The word "knowingly," as used in the New York statute, has reference only to concurrence in the making or publishing of the report, and not to knowledge of the falsity of its statements. The English statute uses the phrase "which he shall know to be false."

It creates an offense of a venial nature, and punishes carelessness and inconsiderateness amounting to official misconduct, but not to fraud.

**Mr. Charles Fox** argued the cause and filed a brief for appellees:

No examination having been commenced prior to the proceedings on habeas corpus now here for review, this court will confine its inquiry to the question of jurisdiction of the commissioner.

*Terlinden* v. *Ames*, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484.

A complaint in an extradition case need not be as precise, technical, and formal as an indictment. It is sufficient if it appears that a treaty offense is meant to be charged.

*Rice* v. *Ames*, 180 U. S. 371, 45 L. ed. 577, 21 Sup. Ct. Rep. 406; *Re Roth*, 15 Fed. 507; *Re Farez*, 7 Blatchf. 48, Fed. Cas. No. 4,644; *Ex parte Sternaman*, 77 Fed. 595; *Re Henrich*, 5 Blatchf. 414, Fed. Cas. No. 6,369.

All that is required is to set forth clearly the substance of the offense charged, so that the court can see that one or more particular crimes enumerated in the treaty are alleged to have been committed.

*Re Adutt*, 55 Fed. 376; *Re Grin*, 112 Fed. 790.

The complaint could be made upon information and belief.

*Re Farez*, 7 Blatchf. 343, Fed. Cas. No. 4,645; *Ex parte Lane*, 6 Fed. 34.

The laws of New York, after having established the laws of England, are to govern this proceeding.

*Re Farez*, 7 Blatchf. 357, Fed. Cas. No. 4,645; *Re Wadge*, 15 Fed. 865; *Re Charleston*, 34 Fed. 533.

A treaty is to be interpreted liberally and in such manner as to carry out its manifest purpose.

*Tucker* v. *Alexandroff*, 183 U. S. 424, 46 L. ed. 264, 22 Sup. Ct. Rep. 195; *Grin* v. *Shine*, 187 U. S. 181, *ante*, 130, 23 Sup. Ct. Rep. 98.

A crime need not bear the same name to bring it within the treaty, if it was criminal by the laws of both countries.

*Re Arton* [1896] 1 Q. B. 509; *Re Bellencontre*, 17 Cox C. C. 253; *Ex parte Piot*, 15 Cox C. C. 208.

There are no common-law crimes of the United States.

*Benson* v. *McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240; Moore, Extradition & Rendition, § 430.

The plaintiff has no right of asylum in this country.

*Ker* v. *Illinois*, 119 U. S. 436, 30 L. ed. 421, 7 Sup. Ct. Rep. 225; *Grin* v. *Shine*, 187 U. S. 181, *ante*, 130, 23 Sup. Ct. Rep. 98.

The object of a writ of habeas corpus is to ascertain whether the prisoner applying for it can be legally detained in custody, and if sufficient ground for his detention is shown he is not to be discharged for defects in the original arrest or commitment.

*Nishimura Ekiu* v. *United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Iasigi* v. *Van De Carr*, 166 U. S. 392, 41 L. ed. 1046, 17 Sup. Ct. Rep. 595.

The appellant is not entitled to bail, under any rule of law of the United States.

*Re Carrier*, 57 Fed. 578

A state is considered a country, with reference to certain conditions.

Dicey, Domicil, p. 31.

*Solicitor General* **Hoyt** argued the cause, and, with *Mr. Milton D. Purdy*, filed a brief for the United States:

The rule that the evidence must be such as to justify commitment for trial at the place where the fugitive is found, if the offense had there been committed, applies not only to the admissibility and the amount of evidence required for that purpose in the particular place, but also to the definition of the offense.

Moore, Extradition & Rendition, § 344.

No rule more explicit or certain than that contained in the treaty itself can, indeed, be prescribed. Cases as they occur necessarily depend upon the laws of the several states in which the fugitive may be arrested or found.

*Extradition under Treaty with France*, 4 Ops. Atty. Gen. 330.

What evidence is necessary to authorize an arrest and commitment depends upon the laws of the state or place where the criminal may be found.

Moore, Extradition & Rendition, § 344; *Muller's Case*, 5 Phila. 289, Fed. Cas. No. 9,913; *Re Farez*, 7 Blatchf. 345, Fed. Cas. No. 4,645; *Grin* v. *Shine*, 187 U. S. 181, *ante*, 130, 23 Sup. Ct. Rep. 98.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

The writ of habeas corpus cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings (*Ornelas* v. *Ruiz*, 161 U. S. 502, 40 L. ed. 787, 16 Sup. Ct. Rep. 689; *Terlinden* v. *Ames*, 184 U. S. 270, 46 L. ed. 534, 22 Sup. Ct. Rep. 484); and it was on the ground of want of jurisdiction that the writ was applied for in this instance before the commissioner had entered upon the examination; as also on the ground that petitioner should have been admitted to bail.

The contention is that the complaint and warrant did not charge an extraditable offense within the meaning of the extradition treaties between the United States and the United Kingdom of Great Britain and Ireland, because the offense was not criminal at common law, or by acts of Congress, or by the preponderance of the statutes of the states.

Treaties must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent. *Grin* v. *Shine*, 187 U. S. 181, *ante*, 130, 23 Sup. Ct. Rep. 98; *Tucker* v. *Alexandroff*, 183 U. S. 424, 46 L. ed. 264, 22 Sup. Ct. Rep. 195.

[58] *The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered a crime by both parties, and, as to the offense charged in this case, the treaty of 1889 embodies that principle in terms. The offense must be "made criminal by the laws of both countries."

We think it cannot be reasonably open to question that the offense under the British statute is also a crime under the 3rd paragraph of § 611 of the Penal Code of New York, brought forward from § 603 of the Code of 1882. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or officer of any company, is made the basis of surrender by the treaty. The British statute punishes the making, circulating, or publishing, with intent to deceive or defraud, of false statements or accounts of a body corporate or public company, known to be false, by a director, manager, or public officer thereof. The New York statute provides that if an officer or director of a corporation knowingly concurs in making or publishing any written report, exhibit, or statement of its affairs or pecuniary condition, containing any material statement which is false, he is guilty of a misdemeanor. The two statutes are substantially analogous. The making of such a false statement knowingly, under the New York act, carries with it the inference of fraudulent intent; but, even if this were not so, criminality under the British act would certainly be such under that of New York. Absolute identity is not required. The essential character of the transaction is the same, and made criminal by both statutes.

It may be remarked that the statutes of several other states agree with that of New York on this subject; and that §§ 73 and 74 of the act of Congress to define and punish crimes in the district of Alaska, 30 Stat. at L. 1253, chap. 429, and § 5209 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3497), in respect of the officers of national banks, are largely to the same effect as the English statute.

As the state of New York was the place where the accused was found and, in legal effect, the asylum to which he had fled, is the language of the treaty, "made criminal by the laws of *both countries," to be inter- [59] preted as limiting its scope to acts of Congress, and eliminating the operation of the laws of the states? That view would largely defeat the object of our extradition treaties by ignoring the fact that, for nearly all crimes and misdemeanors, the laws of the states, and not the enactments of Congress, must be looked to for the definition of the offense. There are no common-law crimes of the United States; and, indeed, in most of the states the criminal law has been recast in statutes, the common law being resorted to in aid of definition. *Benson* v. *McMahon*, 127 U. S. 457, 32 L. ed. 234, 8 Sup. Ct. Rep. 1240.

In July, 1844, Attorney General Nelson advised the Secretary of State, then Mr. Calhoun, that "cases, as they occur, necessarily depend upon the laws of the several states in which the fugitive may be arrested or found;" and in December of that year, Mr.

Calhoun wrote to the French minister: "What evidence is necessary to authorize an arrest and commitment depends upon the laws of the state or place where the criminal may be found." Moore, Extradition, § 344; *United States* v. *Warr*, 3 N. Y. Legal Obs. 346, Fed. Cas. No. 16,644.

So, Mr. Secretary Fish, in November, 1873, in replying to certain specified questions of the minister of the Netherlands, among other things, said: "That, in every treaty of extradition, the United States insists that it can be required to surrender a fugitive criminal only upon such evidence of criminality as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed;" and "that the criminal code of the United States applies only to offenses defined by the general government, or committed within its exclusive jurisdiction, or upon the high seas, or some navigable water, and that each state establishes and regulates its own criminal procedure, as well with respect to the definition of crimes as to the mode of procedure against criminals, and the manner and extent of punishment." Moore, Extradition, § 337*n*.

In *Muller's Case*, 5 Phila. 289, 292, the definition of the offense in the state where the fugitive was found was applied by the district court for the eastern district of Pennsylvania, and Judge Cadwalader said:

[60] *"In the series of treaties which have been mentioned, certain offenses, including forgery, are named with reference to their definitions in the system of general jurisprudence. But the treaties require the specific application of the definitions to be conformable, in particular cases, to the jurisprudence and legislation of the respective places where the parties may be arrested; and likewise require the application of local rules of decision as to the sufficiency of the evidence. The act in question — though generically forgery wherever criminal — might be specifically criminal in one place, but not in another. I thought that the question depended upon the law of Pennsylvania under the statute of 1860, and that the case on the part of the Saxon government had, therefore, been made out.

"There is no jurisprudence or common law of the government of the United States. . . . No legislation of their government, independently of the jurisprudence and legislation of the several states, can have been expected by those who made the treaties ever to give specific definitions of certain crimes mentioned in them. No such legislation as to forgery of private writings, which is the offense here charged, can have been expected. As to this crime, and others, local definitions and rules might be not less different in Ohio and in Pennsylvania than in Scotland and in England, or might be more different. In framing the treaty of 1842 with Great Britain, these local differences must have been mutually considered by the governments of the two contracting nations."

And this language is strikingly applicable to the supplemental treaty of 1889, framed, as it was, by Mr. Secretary Blaine, and that accomplished lawyer and publicist, then Sir Julian Pauncefote, who was thoroughly familiar with the dual system of this government. Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As, for instance, as to the slave trade; though criminal, yet, apparently because there had been peculiar local aspects, the crime was required to be "against the laws of both countries;" and so as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times. But it is enough if the particular variety was *criminal in [61] both jurisdictions, and the laws of both countries included the laws of their component parts.

In *Grin* v. *Shine* we applied the definition of embezzlement given by the laws of California; but there the petitioner himself appealed to that definition, and the case, though in many respects of value here, did not rule the precise point before us.

But we rule it now, and concur with Judge Lacombe, that when, by the law of Great Britain, and by the law of the state in which the fugitive is found, the fraudulent acts charged to have been committed are made criminal, the case comes fairly within the treaty, which otherwise would manifestly be inadequate to accomplish its purposes. And we cannot doubt that, if the United States were seeking to have a person indicted for this same offense under the laws of New York extradited from Great Britain, the tribunals of Great Britain would not decline to find the offense charged to be within the treaty because the law violated was a statute of one of the states, and not an act of Congress.

It is true that in the case of *Windsor* (1865), 6 Best & S. 522, a contrary view was expressed; but it should be observed that the charge was forgery, and it was held that the facts did not constitute forgery in England, and that the statute of New York defining the offense of forgery in the third degree could not properly be regarded as extending the force of the treaty to offenses not embraced within the definition of forgery at the time when the treaty was executed. So far as the conclusion is expressed by the eminent judges who united in that decision, that the treaty did not comprise offenses made such only by the legislation of particular states of the United States, it does not receive our assent.

The result is that we hold that the commissioner had jurisdiction, and that brings us to consider whether the commissioner or the circuit court erred in denying the application to be let to bail.

By § 1015 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 718), it is provided: "Bail shall be admitted upon all arrests in criminal cases where the offense is not pun-

ishable by death; and in such cases it may be taken by any of the persons authorized [62] by the preceding section *to arrest and imprison offenders." But this must be read with § 1014, the preceding section, and that is confined to crimes or offenses against the United States. *Rice* v. *Ames*, 180 U. S. 377, 45 L. ed. 582, 21 Sup. Ct. Rep. 406. These sections were originally contained in one section. Judiciary Act of 1789, 1 Stat. at L. 91, chap. 20, § 33.

Not only is there no statute providing for admission to bail in cases of foreign extradition, but § 5270 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3591), is inconsistent with its allowance after committal, for it is there provided that, if he finds the evidence sufficient, the commissioner or judge "shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

And § 5273 (U. S. Comp. Stat. 1901, p. 3596), provides that, when a person is committed "to remain until delivered up in pursuance of a requisition," and is not delivered up within two months, he may be discharged, if sufficient cause to the contrary is not shown.

The demanding government, when it has done all that the treaty and the law require it to do, is entitled to the delivery of the accused on the issue of the proper warrant, and the other government is under obligation to make the surrender; an obligation which it might be impossible to fulfil if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment. And the same reasons which induced the language used in the statute would seem generally applicable to release pending examination.

The subject was considered by the district court of Colorado in the case of *Carrier*, 57 Fed. 578, and Hallett, J., held that the matter of admitting to bail was not a question of practice; that it was dependent on statute; that although the statute of the United States in respect of procedure in extradition did not forbid bail in such cases, that was not enough, as the authority must be expressed; and that as there was no provision for bail in the act, bail could not be allowed.

And Judge Lacombe in the present case stated that applications to admit to bail in [63] such cases had, on several occasions, *been made to the circuit court, and that they had been uniformly denied.

In *Queen* v. *Spilsbury* [1898] 2 Q. B. 615, it was held that the Queen's Bench had, "independently of statute, by the common law, jurisdiction to admit to bail," but that was a case arising under the Fugitive Offenders Act [44 and 45 Vict. chap. 69], and the distinction existing ordinarily between rendition between different parts of Her Majesty's dominions, and cases arising under the Extradition Acts, was pointed out. The court, while ruling that the power to admit to bail existed, held that, as matter of judicial discretion, it ought not to be exercised in that case.

We are unwilling to hold that the circuit courts possess no power in respect of admitting to bail other than as specifically vested by statute, or that, while bail should not ordinarily be granted in cases of foreign extradition, those courts may not in any case, and whatever the special circumstances, extend that relief. Nor are we called upon to do so, as we are clearly of opinion, on this record, that no error was committed in refusing to admit to bail, and that, although the refusal was put on the ground of want of power, the final order ought not to be disturbed.

The affirmance of the final order leaves it open to the demanding government to withdraw the proceeding first initiated, and proceed on the subsequent application, the pendency of which, as called to our attention, we do not think required us to dismiss this appeal.

*Order affirmed.*

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*STATE OF TENNESSEE, *Complainant*, [64]

*v.*

STATE OF VIRGINIA.

(See S. C. Reporter's ed. 64-88.)

*Boundary between Tennessee and Virginia.*

The boundary line between the states of Tennessee and Virginia is established as described and delineated in the report of commissioners appointed to retrace and remark such line, with the modification necessitated by the compact with reference thereto expressed in Tenn. act January 28, 1901, and Va. act February 9, 1901, and assented to by Congress by joint resolution of March 3, 1901 (31 Stat. at L. 1465).

[No. 6, Original.]

*Submitted May 18, 1903. Decided June 1, 1903.*

ON MOTION to confirm the report of commissioners appointed to retrace and remark the boundary line between the states of Tennessee and Virginia. *Report confirmed* and boundary line established.

*Mr.* **Charles T. Cates, Jr.**, for complainant.

*Mr.* **W. A. Anderson** for defendant.

Mr. Chief Justice **Fuller** announced the decree of the court:

This cause came on to be heard on May 18, 1903, on the proceedings heretofore had herein, and upon the report of William C. Hodgkins, James B. Baylor, and Andrew H. Buchanan, commissioners appointed by the decretal order herein of April 30, 1900, to ascertain, retrace, remark, and re-establish the real, certain, and true boundary line between the states of Tennessee and Virginia,

as actually run and located from White Top mountain to Cumberland gap, under [65] proceedings had between *the two states in 1801–1803, and as adjudged and decreed by this court in its decree of April 3, 1893, in a certain original case in equity, wherein the state of Virginia was complainant and the state of Tennessee was defendant; which report is annexed hereto and made part hereof.

And it appearing to the court that said report was filed in this court on the 5th day of January, 1903, and that the same is unexcepted to by either party in any respect; therefore, upon the motion of the state of Tennessee by her attorney general, and of the state of Virginia by her attorney general, it is ordered that said report be, and the same is hereby, in all things confirmed.

It is thereupon ordered, adjudged, and decreed that the real, certain, and true boundary line between the states of Tennessee and Virginia, as actually run and located under the compact and proceedings had between the two states in 1801–1803, and as adjudged by this court on the 3d day of April, 1893, in said original cause in equity, wherein the state of Virginia was complainant and the state of Tennessee was defendant as aforesaid, was, at the institution of this suit, and now is, except as hereinafter shown, as described and delineated in said report filed herein on January 5, 1903, as aforesaid.

And it further appearing to the court, and it being so admitted by both parties, that since the institution of this suit and the decretal order of April 30, 1900, as aforesaid, a compact was entered into by the states of Tennessee and Virginia, expressed in the concurrent laws of said states, namely, the act of the general assembly of Tennessee, approved January 28, 1901, entitled "An Act to Cede to the State of Virginia a Certain Narrow Strip of Territory Belonging to the State of Tennessee, Lying Between the Northern Boundary Line of the City of Bristol, in the County of Sullivan, and the Southern Boundary Line of the City of Bristol, in the County of Washington, State of Virginia, Being the Northern Half of Main Street, of the said Two Cities," and the reciprocal act of the general assembly of Virginia, approved February 9, 1901, entitled "An Act to Accept the Cession by the State of Tennessee to the State of Virginia, of a Certain Narrow Strip of Terri- [66] tory Claimed as Belonging to *the State of Tennessee, and Described as Lying Between the Northern Boundary Line of the City of Bristol, in the County of Sullivan, State of Tennessee, and the Southern Boundary Line of the City of Bristol, in the County of Washington, State of Virginia, Being the Northern Half of the Main Street of the Said Two Cities."

And it further appearing that said compact received the consent of the Congress of the United States by joint resolution approved March 3, 1901, as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That a recent compact or agreement having been made by and between the states of Tennessee and Virginia, whereby the state of Tennessee, by an act of its legislature approved January twenty-eighth, nineteen hundred and one, ceded to the state of Virginia certain territory, specifically described in said act, and being the northern half of the main street between the cities of Bristol, Virginia, and Bristol, Tennessee, and the state of Virginia, by act of its general assembly, approved February ninth, nineteen hundred and one, having accepted said cession of the state of Tennessee, the consent of Congress is hereby given to said contract or agreement between said states, fixing the boundary line between said states as shown by said acts referred to, and the same is hereby ratified." [31 Stat. at L. 1405.]

And said commissioners, in their said report, having ascertained and recommended the straight line from the end of the "diamond-marked" or compact line of 1801–1803 to the corner of the states of North Carolina and Tennessee as the true boundary line between the states of Virginia and Tennessee between those two points, the court, approving said recommendation and finding of said commissioners, doth adopt the same.

And the court, being of opinion that it is proper to recognize the line so established by said last-mentioned compact of 1901 as the real, certain, and true interstate boundary line within and between said two cities, and to definitely determine and fix in this cause what is the real, true, and certain boundary line between said states throughout the entire length thereof, *from the corner of the [67] states of North Carolina and Tennessee, on Pond mountain, to the corner of Virginia and Kentucky, at Cumberland gap, doth therefore adjudge, order, and decree that the entire real, certain, and true boundary line between the states of Tennessee and Virginia is the line described and delineated in said report filed herein on January 5, 1903, modified as to so much of said line as lies between the two cities of Bristol, by the aforesaid compact of 1901 between the two states, and as so described, delineated, and modified said boundary line from the said North Carolina corner to the eastern end of the compact line of 1801–1803, known as the "diamond-marked" line, and thence to Cumberland gap, is hereby determined, fixed, and established.

It is further ordered, adjudged, and decreed that the compensation and expenses of the commissioners, and the expenditures attendant upon the discharge of their duties, be, and they are hereby, allowed at the several sums set forth in their report, as hereinbefore confirmed, and that said charges and expenses, together with all the costs of this suit to be taxed, be equally divided between the parties hereto.

It is further ordered that the clerk of

this court do, at the proper charges of the parties to this cause, deliver fifty printed copies of this decree, including said report, to the attorney general of each of said states.

The report of the commissioners, filed January 5, 1903, is as follows:

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your commissioners, appointed by the decree of this honorable court, dated April 30, 1900, to ascertain, retrace, remark, and re-establish the boundary line established between the states of Virginia and Tennessee, by the compact of 1803, which was actually run and located under proceedings had by the two states in 1801-1803, and was then marked with five chops in the shape of a diamond, and which ran from White Top mountain to Cumberland gap, respectfully represent that they have completed the du-[68]ties assigned to them by the said *decree of April 30, 1900, that they have retraced and remarked the said boundary line as originally run and marked with five chops in the shape of a diamond in the year 1802, and that, for the better securing of the same, they have placed upon the said line, besides other durable marks, monuments of cut limestone, four and a half feet long and seven inches square on top, with V's cut on their north faces and T's on their south faces, set three and a half feet in the ground, conveniently located as hereinafter more fully described, so that the citizens of each state and others, by reasonable diligence, may readily find the true location of said boundary; all of which is more particularly set forth in the detailed report of their operations, which your commissioners herewith beg to submit, together with two maps explanatory of the same, a list of the several permanent monuments and other durable marks, and a complete bill of costs and charges. And your commissioners further pray that this honorable court accept and confirm this report; that the line as marked on the ground by said commissioners in the years 1901 and 1902 be declared to be the real, certain, and true boundary between the states of Tennessee and Virginia; that your commissioners be allowed their expenses and reasonable charges for their own services in these premises, as shown on the bill of costs which forms a part of this report; and finally, that your commissioners be discharged from further proceedings in these premises.

William C. Hodgkins, [seal]
Commissioner.
James B. Baylor, [seal]
Commissioner.
Andrew H. Buchanan, [seal]
Commissioner.

Detailed report of the operations of the commission appointed by the Supreme Court of the United States (April 30, 1900) to retrace and remark the boundary line between the states of Tennessee and Virginia.

At the date of the above decree, and for several months thereafter, the state of Virginia had no funds available for the proceedings *ordered by the court, and none could be[69] had until there could be a session of the state legislature to make the needed appropriation. It was therefore necessary for your commissioners to seek an extension of the time within which they might make their report, and, upon the motion of the attorney general of Virginia, an extension was granted until the next term of court.

At a session of the general assembly of Virginia, held in the winter of 1900-1901, the sum of $5,000 was appropriated for the purpose of paying Virginia's share of the expenses of this boundary survey.

The Tennessee legislature had previously made a like appropriation.

Your commissioners therefore made preparations for beginning the execution of their duties under your decree of April 30, 1900, as early in the season of 1901 as the weather conditions should permit.

The commission held its first meeting at Washington, D. C., on May 16, 1901, and organized by choosing William C. Hodgkins, of the state of Massachusetts, as chairman; James B. Baylor, of the state of Virginia, as secretary, and Andrew H. Buchanan, of the state of Tennessee, as treasurer.

At this meeting there was a full discussion of the problem presented and of the method of work which might be most suitable under all the conditions. Arrangements were also made for procuring the necessary camp outfit and supplies.

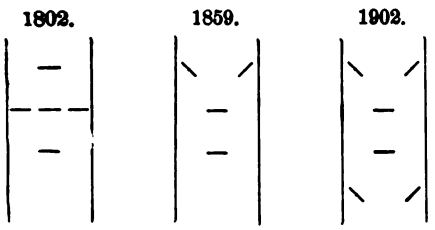
Through the courtesy of the superintendent of the United States Coast and Geodetic Survey, your commissioners were able to procure from that bureau, without charge, not only the outfit of tents and camp furniture required for the shelter and comfort of the party, but also the valuable instruments needed for the survey.

This relieved the states of Tennessee and Virginia of a considerable expense which would otherwise have been unavoidable. The two states were spared another heavy item of expense by the fact that each of your commissioners is a civil engineer and entirely familiar with work of this nature. It was therefore unnecessary to follow the usual course of employing *engineers or sur-[70] veyors to carry out the field-work under the direction of the commissioners. Instead of that, your commissioners themselves conducted all the field-work, hiring only such rodmen, axmen, etc., as were necessary from time to time. By such methods, and by exercising rigid economy in all of their expenditures, your commissioners have been able to complete the entire work, including the setting of cut-stone monuments, and also including the amount charged for their own remuneration, for the sum of $9,475.99, which is but little more than the amount charged to the state of Virginia alone by the joint commission of 1858-1859.

It having been decided at the first meeting

of the commission that the most convenient place for beginning field operations would be the city of Bristol, which is located directly upon the boundary line, the commission adjourned to that place.

Field-work was begun on May 22, 1901, with the examination of a portion of the line east of Bristol, where a number of trees were found which bore the marks of the surveys of 1802 and 1858–'59. As there has been considerable controversy and conflicting testimony in regard to the nature of these old marks, it may be well to show, by diagrams and photographs, the actual arrangement and appearance of those of both years, as well as of the somewhat different mark which was used for the present remarking by your commissioners.




While the marks made in 1858–'59 are still numerous in forested areas and are generally easily distinguishable, those made in 1802 are becoming scarce and sometimes are barely discernible when found.

71] *This is shown in the accompanying photograph of a large white-oak tree, upon which the marks of 1858–'59 can readily be traced, while only three of those made in 1802 can be distinguished, and those with difficulty. The marks of 1802 were apparently made with a small and light hatchet and on many trees which have a thick and rough bark the hatchet does not seem to have reached the wood, and in such cases the gradual exfoliation of the bark has often nearly or entirely obliterated the mark. Where the wood was wounded, a small burr has formed which can nearly always be recognized, but cuts which did not completely penetrate the bark have sometimes disappeared.

The marks left by the survey of 1858–'59 were found of very great value as guides to the older "diamond" marks of 1802. Both marks were often found on the same tree, and it was a rare occurrence to find the diamond mark without the mark of 1859, either above or below it. In fact, it was very soon noticed that the mere fact of finding the mark of 1858–'59 either above or below the normal position on a tree was an almost certain indication that a diamond mark had been found there at the date of the later marking, even though, through the action of time and the elements, all vestiges of it may now have disappeared. Since the date of the last survey, very many marked trees have been destroyed through various agencies, especially since the more rapid development of this section in recent years has caused a greater demand for lumber, and, in some places, the trees bearing the old marks are so far apart, and the marks themselves are so faint, that great trouble and delay would often have been experienced in the search for these old marks had it not been for the aid afforded by the marks of 1858–'59, which always proved reliable guides by which to find the older marks.

In this connection it may not be inappropriate for your commissioners to state that they everywhere found that the joint commission of 1859 did its work in a careful and conscientious manner, and that they believe its line, as marked on the growing timber, is identical with that marked by the joint commission *of 1802, and that full credence [72] should be given to statements of fact in the report of that survey.

From a point about a mile and a quarter east of Bristol, the line was traced without difficulty, other than that due to the broken nature of the country traversed, as far as the beginning of what is commonly known as the Denton valley offset.

At this point occurs the greatest and most remarkable irregularity in the whole course of this line, there being a deflection from the direct course of 66° 10′ for a distance of 8715.6 feet. The portion of the boundary east of the offset is further north than that west of the offset, so that the deflection is to the south in going westward from the eastern end of the line, the direction in which it was originally run out, or to the north in working eastward from Bristol, as was done in the present survey, for reasons of convenience. In either case, the deflection is to the left hand; but it is not the same in each case, as the two portions of the line east and west of the offset are not exactly parallel to each other. This difference of direction amounts to 1° 30′, as shown on the map of the line accompanying this report.

Owing to the long controversy over this offset, and the persistent assertions of certain parties that marked timber would be found on the eastern prolongation of the portion of the line extending from Bristol to Denton's valley, if the same were run out, your commissioners felt obliged, in order to settle the question for all time, to run out this line and make a careful search for marked timber along its course. This was accordingly done, and a careful examination of the timber on each side of the transit line was made as the work progressed; but with only negative results.

Although several weeks were spent in running this line across the series of very rough and heavily timbered mountains lying between Denton's valley and Pond mountain, near the corner of North Carolina, and although every story brought to the commissioners by people interested in the result was carefully examined, your commissioners were utterly unable to find, or to have pointed out to them, one authentic mark of the line of 1802, either on this line or anywhere in its vicinity.

*On the other hand, the "offset line" and [73] the portion of the line running eastward from the offset to the vicinity of the White Top mountain were found well marked;

both the 1802 and the 1858-'59 marks were found at frequent intervals.

In order to be assured that these marks were authentic, blocks were cut from several of these trees, at different points on said offset line, and the ages of the marks were determined by counting the rings of the annual growth. These tests showed that the marks were of the supposed age. The ages of the most important marks were verified by the United States Bureau of Forestry. As was found, in 1858-'59 the marking of the timber ceased (or began) on a comparatively low eminence, known as Burnt hill, which, from the neighboring heights of White Top or of Pond mountain, seems to be in the bottom of a hollow.

The apparent discrepancy between this situation and the language of the report of the joint commission of 1802, which reads—"Beginning on the summit of the mountain generally known as the White Top mountain," etc., has led some to suppose that the line should be extended further east, to the summit of the so-called "divide" or watershed between the tributaries of the Holston and New rivers.

There seems, however, nothing to support this theory except the somewhat hazy idea that the eastern end or point of beginning of this line ought to be on a summit.

As a matter of fact, the actual end of the line on Burnt hill is on quite as much of a summit as if it had been on the "divide," which in this place is so low and flat as to be scarcely perceptible as an elevation of any importance. It certainly could never be supposed to be the summit of White Top mountain, which towers far above it, its huge, dome-like bulk filling the northeastern horizon.

No marked trees of 1802 or of 1858-'59 could be found east of Burnt hill, though the line was produced through heavy timber of original growth to the "divide," and careful search was made for them. The same condition was found in 1859, as reported by the commission of that year. A point which that commission seems to have overlooked is the important fact that the eastern end of [74] the marked line at Burnt hill is almost *exactly in line between the corner of North Carolina, on Pond mountain, and the summit of White Top mountain. What more likely than that the commissioners of 1802, who agreed to lay out a line equally distant from the older lines, known as Walker's and Henderson's and beginning on the summit of the mountain generally known as the White Top mountain, should begin at the point where the Walker line reached the northwestern corner of North Carolina, and where, accordingly, the jurisdiction of Tennessee should begin, and run thence in the direction of the most important peak to the northward and eastward until they reached the desired middle point between the lines of Walker and Henderson, and from that point started on their westerly course. It is hard to understand why they should have omitted to mark this part of their line; but this small bit of boundary, extending from the northeast corner of Tennessee to the northwest corner of North Carolina, seems to have been somewhat overlooked in more recent proceedings. Your commissioners respectfully recommend that the straight line between these two points be declared to be the boundary, believing, as they do, in the absence of any marks to the contrary, that this was the original and true line. All of this section is composed of very rugged and densely wooded mountains, with but a scanty population.

The progress of the work in this mountainous and almost inaccessible region was delayed not only by the nature of the country and by the fact that, in this very worst part of the whole line, it was necessary to run out these two independent lines, doubling the labor to be expended, but also by the unfortunately rainy weather which was experienced. The frequent and heavy rains often stopped field-work, washed the few roads so badly that they became almost impassable, and raised the streams so high that sometimes, for days at a time, it was impossible to ford them.

It was not until September 21 that your commissioners were able to close work in the White Top region and return to Bristol, to start westward from that place toward Cumberland gap.

For the remainder of the season, however, both the weather and the nature of the country were much more favorable for *field [75] operations and excellent progress was made, though it was impossible to entirely complete the work before the approach of winter.

So far as the portion of the boundary passing through the central part of the city of Bristol is concerned, the labors of your commissioners were forestalled by a special act of the general assembly of the state of Tennessee, approved January 28, 1901, ceding to the state of Virginia the northern half of the main street of the two cities. The general assembly of Virginia accepted the cession by an act approved February 9, 1901, and the action of the two legislatures was subsequently ratified by the Congress and approved by the President of the United States, March 31, 1901. This cession covers, however, but a small part of the boundary, extending only from the northwest corner of the old town of Bristol on the west to the western boundary of the Bristol cemetery on the east. As it is important to guard against the possible renewal of this long-standing controversy, and as the town is already extending beyond the above limits, it was deemed proper to mark the old diamond line by monuments, just as if there had been no legal change in the boundary for this short distance. But your commissioners regret to report that they have been unable to reach a unanimous conclusion in regard to the true location of the said diamond line within and near the above limits.

Commissioners Hodgkins and Buchanan, after careful study of all the evidence of record, and after diligent examination of the ground, are of the opinion that the said dia-

mond line of 1802–1803 runs from monument No. 25, near the first marked tree east of Bristol, in a straight line, to monument No. 26, on the western boundary of the Bristol cemetery and on the north line of Main or State street; thence along the northern line of said Main or State street to "a planted stone in the edge of a field formerly owned by Z. L. Burson, being the northwest corner of the corporate territory of the old town of Bristol," referred to in the act of [76] cession *supra;* and thence in a straight *line to monument No. 28, in the fork of the main road and near the first marked trees west of Bristol.

Commissioner Baylor, on the other hand, after equally careful consideration of all the evidence of record, and diligent examination of the ground, is of the opinion that the said diamond line of 1802–1803 runs from monument No. 25, near the first marked tree east of Bristol, in a straight line to monument No. 27, situated just outside of the wall of the Bristol cemetery and on the middle line of Main or State street as it runs west from this point; and thence in a straight line along the middle of Main or State street to monument No. 28, near the center of the fork of the main road, and near the first marked trees of 1858–'59, west of Bristol.

The said line, running through the center of Main or State street, is just 30 feet south of monument No. 26 on the north property line of Main or State street, outside the western wall of Bristol cemetery.

Westward from Bristol, the boundary was retraced without difficulty by the marked trees, just as in the previous work to the eastward.

Only one marked deviation from the general course of the line was encountered during the remainder of the season. This was on the property formerly known as the Hickman place, in the vicinity of the village of Bloomingdale, Tennessee.

Here the line was found to have a deflection of 8° 30′ to the right, or north, for the distance of 316.18 feet. From the western end of this offset, the line resumed its general westerly course, and so continued until the end of the work of that year. As the season advanced, it became evident that, even under the most favorable conditions, it would be impossible to complete the survey without working far into the winter, which, on many accounts, was undesirable.

The attorneys general of the two states therefore joined in a request for a further extension of time within which your commissioners might file their report, and this honorable court thereupon extended that time until the opening of the October term, 1902.

The field operations for the season of 1901 [77] were closed at the *end of October, at which time the survey had been extended to the Clinch river, 43 miles east of Cumberland gap, the total length of boundary retraced being 70 miles, besides 16 miles of trail line run on the extension of the "straight line" from Denton's valley to Pond mountain.

Before the opening of field-work for the season 1902, a complaint reached your commissioners from a citizen of Johnson county, Tennessee, supposed to be reliable, to the effect that interested parties were interfering with the marks placed on the line the previous year, and that, in some cases at least, the monuments had not been properly placed by the persons employed for that purpose.

Although these statements seem scarcely credible, in view of the general interest taken in the work by the inhabitants, your commissioners, thought it best to investigate the matter, and to satisfy themselves by personal inspection that the monuments had remained undisturbed in their proper places.

This was accordingly done at the outset of the season's work and it was ascertained that the stories of falsification of the marking were without any foundation of fact, that all of the monuments between the northeast corner of Tennessee and Bristol had been properly set, and that none of them had been disturbed.

These preliminary operations occupied the time from June 23 to July 4, on which *your* day your commissioners returned to Bristol. After placing some additional monuments on the old line in and near Bristol, they proceeded to Gate City, Virginia, where the camp outfit had been stored at the close of work in the preceding autumn, and at once went into camp at Robinett, Tennessee, west of the North fork of Clinch river.

The survey of the boundary line was resumed at the point where it had been suspended the year before, at the crossing of Clinch river, near Church's ford.

From this point to Cumberland gap the line crosses a succession of mountains and valleys, with comparatively little level or cleared land. Little difficulty was experienced in tracing the line in this part of its course, the marked trees being generally found at frequent intervals. The line preserved its *general course as before, except [78] that two deflections to the northward were found which were similar to that found the year before near Bloomingdale.

The first of these occurred on the mountain called Wallen's ridge, where the line made a deflection of 19° to the north before reaching the summit, and kept that course for a distance of 4643.7 feet before resuming its usual direction. There were numerous trees with both the 1802 and 1859 marks on this deflected line.

The final deflection of 4° 10′ to the north for a distance of 6503.3 feet began at the "old furnace road" near Station creek, less than 3 miles from the west end of the line on Cumberland mountain. From the western end of this offset the line runs straight to the terminus.

There has been considerable controversy and litigation over these last 3 miles of the boundary, and a number of witnesses have testified in the case of *Virginia* against *Tennessee,* Supreme Court, United States, October term, 1891, that there were none of the marks of the previous surveys remaining between Station creek and the summit of Cumberland mountain, owing to the destruc-

tion of the timber in that area during the military operations of the Civil War.

Your commissioners were able to find, however, three trees well marked with the mark of the 1859 survey, and at least one of these bore evidence in the position of this mark that an old diamond mark was formerly visible above it.

These marked trees were found on the east and west part of the line west of the offset, and are in excellent alignment, and settled, beyond the possibility of doubt, the location of this part of the boundary, and hence the short remaining distance to the summit of Cumberland mountain. This line passes near and a little south of the old mill several times referred to in the case above cited, and thence across the Union Railroad station, leaving most of the town of Cumberland Gap in Tennessee. The summit of Cumberland mountain was reached on Saturday, August 23d, 1902, and on the following Monday the field-work of the survey was completed and the camp outfit was packed and shipped to Washington. Your commissioners then [79] *separated, Professor Buchanan returned to his home at Lebanon, Tennessee, to work up his field-notes; and Mr. Hodgkins to Washington to attend to business of the commission and to draft a report of its operation; while Mr. Baylor remained on the ground until September 13, superintending the placing of monuments along the part of the line surveyed in 1902.

In conclusion, your commissioners state that they have found the duties imposed upon them by your instructions often arduous and exacting, and that the survey just completed proved far more laborious, and was attended by greater hardships, than any of them had anticipated; but that they have nevertheless given the same careful attention to every part of it, and that they believe it to be correct throughout.

List of Monuments of Cut Limestone and Other Durable Marks, as Hereinafter More Fully Described.

(1)—At northeast corner of Tennessee, at Burnt hill.

(2)—On summit of Flat Spring ridge.

(3)—On Valley creek road, on John Toliver place.

(4)—On road from Laurel river to White Top mountain, near an old mill.

(5)—On road up Laurel river, near a double ford.

On summit of Iron mountain, near the north end of the rocky bluff, a cairn of rocks was erected.

(6)—At eastern foot Holston mountain, a short distance from Beaver Dam creek, and the Virginia and Carolina Railway.

Coast and Geodetic Survey triangulation station "Damascus" on summit of Holston mountain, a stone marked + (U S / C S)

(7)—On Rockhouse branch road in the valley, on Mary Nealy place.

(8)—On road from Barron Railway station to New Shady road, cut-stone monument of 1858–'59.

(9)—In woods, north of New Shady road, where the line changes its course to south 23° 50′ west (mag.) a marked deflection from the general course of the line.

*(10)—On the New Shady road, where [80] this deflected line crosses it.

(11)—In woods, on Little mountain, west of Cox creek, where this bearing of south 23° 50′ west (mag.) ends, and the line resumes its general course to the westward.

(12)—On road just north of cross-road leading to Thomas Denton place.

(13)—On road on hill on C. D. Short place.

(14)—On road on east bank of the south fork Holston river, cut-stone monument of 1858–'59.

(15)—On hill in George Garrett's cow lot, west and north of south fork Holston river.

(16)—On road to King's mill, near John Buckly house.

(17)—On road to King's mill, via Thomas place.

(18)—On summit of open hill east of Painter place, concrete monument.

(19)—On road running east of Painter house.

(20)—On road running west of Painter house, cut-stone monument of 1858–'59.

(21)—On road through woods west of Painter property.

(22)—On summit of first high ridge east of Paperville road.

(23)—On Paperville road, at Jones place.

(24)—On road west of Carmack house.

(25)—On Booher place, near first marked tree (of 1858–'59), east of Bristol.

(26)—On north property line of the main street of Bristol, outside the western wall of the cemetery. Commissioner Baylor does not consider this a part of the true line.

(27)—Outside the street wall of the Bristol cemetery, at the point where the average center line of Main street intersects said wall. Commissioners Hodgkins and Buchanan do not consider this a point on the boundary.

A stone post in the edge of a field, formerly owned by Z. L. Burson, at the northwest corner of the old corporate territory of the old town of Bristol. Commissioner Baylor does not consider this a point on the boundary.

(28)—In the fork of the main road, west of the town of Bristol.

*(29)—On road to Bristol, east of Worley [81] place.

(30)—On road to Bristol, west of Worley place.

Coast and Geodetic Survey triangulation station "Dunn" on summit of ridge, on old Dunn place, stone marked + (U S / C S)

(31)—On Dishner valley road.

(32)—On road to Bristol, east of Gum spring.

(33)—On road to Bristol, near Tallman house.

(34)—On road in valley, west of old abandoned railway bed.

(35)—On Scott road.

(36)—On road west of Akard place.

(37)—On road near Jackson place.

(38)—On Boozey creek road.

(39)—On road to Hilton ford, cut-stone monument 1858–'59.

(40)—On Timbertree road.

(41)—Between two roads just east of Gate City road.

(42)—In woods, west of Gate City road, where there is a deflection of 8° 30′ to the right, or north, from the general course of the line, on old Hickman place.

(43)—In woods northeast of Bloomingdale, where this 8° 30′ deflection from the general course of the line ends, in going westward, and line resumes its general course.

(44)—On road to Bloomingdale.

(45)—On Wall gap road.

(46)—On road up ravine

(47)—On Carter valley road.

(48)—On Gate City and Kingsport road, cut-stone monument of 1858–'59.

Coast and Geodetic Survey triangulation station "Cloud" on bluff of North Holston river, stone marked $\frac{\text{U S}}{+}$ $\frac{\text{C S}}{}$

(49)—On east bank of North Holston river.

(50)—On road on west bank of North Holston river.

(51)—At cross-roads on Stanley valley road, cut-stone monument of 1858–'59.

(52)—On Stanley valley road, on hill at turn in road.

[82] *(53)—On Cameron postoffice road.

(54)—On Stanley valley road, south of barn of N. J. Bussell, cut-stone monument of 1858–'59.

(55)—On Stanley valley road, cut-stone monument of 1858–'59.

(56)—On road which runs across Opossum ridge.

(57)—On Moore's gap road.

(58)—On Caney valley road.

(59)—On Little Poor valley road, south of Mary Field house.

(60)—On Poor valley road, cut-stone monument of 1858–'59.

On summit of Clinch mountain, cairn of rocks erected, a few feet south of the Coast and Geodetic Survey triangulation station "Wildcat," which station marked with $\frac{\text{U S}}{+}$ $\frac{\text{C S}}{}$ cut in sandstone rock.

(61)—On Clinch valley road.

(62)—On road on east bank of Clinch river, above Church's ford.

(63)—On road at Jane Bagley's house.

On summit of open hill east of Fisher valley road, line crosses solid rock. Small hole drilled in it, with T cut south of hole, and V north of it.

(64)—On Fisher valley road.

On summit of high ridge, east of Robinett line, crosses solid rock. Small hole drilled in it, with V cut on north side of hole, and T on south of it.

(65)—On road at Robinett.

On side of ridge at east edge of woods line crosses rock. Small hole drilled in it, with V cut on north side of hole and T on south of it.

On summit of Newman's ridge, line crosses rock similarly marked.

(66)—On Rogersville and Jonesville road.

(67)—On Little creek road.

(68)—On Sneedville and Black Water Salt Works road.

(69)—On Black Water valley road near J. Mullen's house. Coast and Geodetic Survey triangulation station "Powell," on*summit of Powell mountain, large sandstone rock marked $\frac{\text{U S}}{+}$ $\frac{\text{C S}}{}$ [83]

(70)—On Mulberry gap and Wallen creek road, near large poplar.

(71)—Near junction of Mulberry gap and Jonesville roads.

(72)—On east face of Wallen ridge, on edge of trail over ridge, where there is a deflection to the right, or north, of 19° from the general course of the line.

On summit of Wallen ridge line crosses large sandstone rock. Small hole cut in it with V. cut north of hole and T. south of it.

(73)—On west face of Wallen ridge, in open field, on the boundary fence of Mollie Thompson and J. W. Moore, where this deflection of 19° from the general course of the line ends, in going westward, and line resumes its general course.

(74)—On road east of Powell river, and north of Welch or Baldwin ford.

On rock bluff west of Powell river, a small hole was cut with V north of this hole and T south of it.

(75)—On Powell river and Sneedville road, on hill west of Powell river, rough stone monument with V cut on north face and T on south face.

(76)—On Powell river and Sneedville road.

(77)—On Martin creek road.

(78)—On Low hollow road.

(79)—On Four Mile creek road.

(80)—On Bayles' mill road.

(81)—On Ball's mill road.

Coast and Geodetic Survey triangulation station "Minter" on summit of hill, near gate and fence corner.

(83)—On road south of Jacob Estep's house.

(84)—On East Machine branch road.

(85)—On West Machine branch road.

(86)—On Dicktown road.

(87)—On Mud Hollow hole road, near large limestone spring.

(88)—On Hoskins' valley road, near large limestone spring.

*(89)—On George Souther's saw mill road. [84]

(90)—On Louisville and Nashville Railway, near Brook's crossing.

(91)—On old iron-works road, where there

is a deflection of 4° 10′ to the right, or north, from the general course of the line.

(92)—On Station creek road.

(93)—On east side of Poor valley ridge, where this deflection of 4° 10′ from the general course of the line ends, in going westward, and line resumes its general course.

(94)—On Cumberland gap and Virginia road, east of Cumberland gap.

(95)—On small hill just east of road connecting Cumberland gap with Old Virginia and Cumberland gap road, in the edge of the old town park.

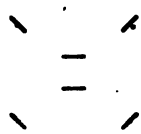
(96)—On side of open hill facing south, about 2½ squares east of the Tazewell and Kentucky road, at Cumberland gap.

(97)—On west side of Tazewell and Kentucky road, and just east of woolen factory at Cumberland gap.

(98)—At foot of Cumberland mountain, west of the Union Railway station, and in line with the south edge of the south chimney of said Union Railway station.

(99)—On summit of Cumberland mountain. The monument of cut limestone has "V" and "T" cut on its adjacent vertical faces, and "Corner" cut on its top. Its base is set in cement and broken rock, with one diagonal running east and west. The summit of the sandstone ledge was blasted in order to set this monument.

In addition to the cut-stone monuments and other durable marks, your commissioners marked with six chops, thus:—



the trees on and within 10 feet of this line on each side.

[85] *Your commissioners unanimously agree in recommending that the rights of individuals having claims or titles to lands on either side of said boundary line, as ascertained, remarked, and re-established by your commissioners, shall not in consequence thereof in anywise be prejudiced or affected, where said individuals have paid their taxes, in good faith, in the wrong state.

William C. Hodgkins, [seal.]
Commissioner.
James B. Baylor, [seal.]
Commissioner.
Andrew H. Buchanan, [seal.]
Commissioner.

October 13, 1902.

Report of the Treasurer of the Tennessee and Virginia Boundary Commission.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The treasurer of the commission appointed by the decree of this honorable court, dated April 30, 1900, to re-establish the boundary between the states of Virginia and Tennessee, herewith submits the abstracts of the monthly expenditures of the entire work,—ten in number,—beginning May, 1901, and ending September, 1902, as follows:

| | |
|---|---|
| No. 1. May, 1901 | $ 384.05 |
| No. 2. June, 1901 | 1083.75 |
| No. 3. July, 1901 | 1070.18 |
| No. 4. August, 1901 | 1197.76 |
| No. 5. September, 1901 | 1263.11 |
| No. 6. October, 1901 | 1565.63 |
| No. 7. June, 1902 | 262.13 |
| No. 8. July, 1902 | 1045.45 |
| No. 9. August, 1902 | 1245.34 |
| No.10. September, 1902 | 358.59 |
| | $9475.99 |
| Amount chargeable to each state | 4738.00 |

General Summary.

| | |
|---|---|
| *Remuneration of Commissioners, at $10 per day [86] | $5730.00 |
| Transportation to and from field | 274.04 |
| Transportation in field (about) | 1085.58 |
| Stone monuments | 678.90 |
| Labor, freight, etc. | 1707.47 |
| Total | $9475.99 |
| Cash received from Virginia | 4737.99 |
| Cash received from Tennessee | 4738.00 |
| Total | $9475.99 |

The above is respectfully submitted.

A. H. Buchanan,
Treasurer of the Boundary Commission.

J. C. W. United States Department of Agriculture, Bureau of Forestry, Washington, D. C.

Office of the Forester.

August 20, 1901.

This beech block came from the "offset" near its western end and just east of the "Shady road."

J. B. Baylor,
Commissioner.

Mr. J. B. Baylor, Tenn.-Va. Boundary Commission,
Abingdon, Virginia.

Dear Sir:—

Your letter of August 17, and also the beech block are at hand. In the absence of Mr. Sudworth, with whom your previous correspondence has been, I am glad to give you my opinion as to the questions stated in your letter.

Owing to the very slow growth of the tree from which this block was cut, in early life, it is not possible to count the annual rings, even with the aid of a strong magnifier, with absolute certainty of accuracy. The results I have obtained show that its age in 1802 was 96 years, and that its diameter, not including *bark, was about 6 inches, or about [87] 6½ inches, including the bark. There are five wounds shown in this block. Two of these occurred, in my judgment, forty-three years ago, or in the year 1858. The three older wounds I believe were made ninety-nine years ago, or in 1802.

This beech block will be carefully stored away in this bureau.

Very truly,
(Signed) Overton W. Price,
Acting Forester.

J. C. W. United States Department of Agriculture, Bureau of Forestry, Washington, D. C.

Division of Forest Investigation.

November 11, 1901.

This hemlock block came from near the eastern end of the "off-set line,"—a short distance from where the marked trees end.

J. B. Baylor,
Commissioner.

Mr. J. B. Baylor, Tenn.-Va. Boundary Commission,
Bloomingdale, Sullivan County, Tenn.

Dear Sir:—

The hemlock blocks sent to this office some time ago have remained unexamined so long on account of my absence from the office. I regret to have thus delayed the answer so long.

I have just examined the specimens, and find that the deeper scar in the larger of the two specimens was made in the year 1802. Ninety-nine annual rings were formed since the scar was made. This year's growth is still in a formative stage.

The somewhat superficial scar in the smaller specimen was made in 1858, 42 annual rings having been laid on since the mark was made. The last season's growth is not complete.

As requested in your letter of Sept. 8, these blocks will be retained subject to further advices from you.

Very truly yours,
(Signed) Geo. B. Sudworth, Chief.

[8C]*Property List Purchased for Field Outfit in the Boundary Survey.

| | |
|---|---|
| 3 saddles, bridles, and blankets | $27.50 |
| 1 cooking stove and repairs | 7.00 |
| 1 heating stove | 2.25 |
| 8 joints of stovepipe | 1.35 |
| 1 crowbar | .65 |
| 1 shovel | .85 |
| 1 grindstone | .90 |
| 6 axes | 3.90 |
| 2 files | .20 |
| 4 lamps | 1.00 |
| 1 saw (large) | 1.35 |
| 1 trowel | .50 |
| 2 pairs of tree-climbers | 3.50 |
| 1 cot | 2.50 |
| 1 office table | 2.50 |
| 1 dining table | 1.00 |
| Total | $56.95 |

Of the above, at the close of the field-work, the following were sold:

| | |
|---|---|
| 2 saddles | $3.00 |
| 2 stoves | 2.50 |
| 2 tables | 2.00 |
| 3 lamps | .50 |
| 1 grindstone | .50 |
| 1 saw | .75 |
| 2 axes | .65 |
| 1 cot | .50 |
| 1 shovel | .60 |
| Total | $11.00 |

For the remainder, not worn out, purchasers could not be found without the delay of a commissioner in the field, at a greater expense than they were worth. The proceeds of the sales made—$11.00—have been returned, one half to each state.

A. H. Buchanan, Treasurer.

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*MARY PHELPS MONTGOMERY, Executrix of the Last Will and Testament of James B. Montgomery, Deceased, *Plff. in Err.*, [89]

*v.*

CITY OF PORTLAND and the Port of Portland.

(See S. C. Reporter's ed. 89-107.)

*Navigable waters—state authority over—establishment of harbor lines.*

The extension of wharves beyond harbor lines established by local law, in navigable waters of the United States wholly within the limits of a state, cannot be justified by the relocation of such harbor lines by the Secretary of War acting under the authority of the river and harbor act of September 19, 1890, § 12 (25 Stat. at L. 400, 425, chap. 860), which forbids the construction or extension of any such structures beyond the harbor lines established under his direction, except under such regulations as he may prescribe, since Congress has not, by such act, indicated any purpose wholly to ignore the original power of the states to regulate the use of navigable waters entirely within their respective limits.

[No. 47.]

*Argued April 9, 1903. Decided May 18, 1903.*

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which reversed a judgment of the Circuit Court of Multnomah County dismissing a bill in a suit to prevent the extension of wharves beyond the established harbor lines, and granted the relief sought. *Affirmed.*

See same case below, 38 Or. 215, 62 Pac. 755

The facts are stated in the opinion.

*Mr.* **John H. Mitchell** argued the cause and filed a brief for plaintiff in error:

As to those subjects of commerce which are local or limited in their nature or sphere of operation, such as the erection of bridges, the establishment of harbor lines in harbors, etc., the city may prescribe regulations, until Congress assumes control of them, but as to such as are national in their character, and require uniformity of regulation, the power of Congress is exclusive, and until Congress acts such commerce is entitled to

NOTE.—*As to the establishment of dock or harbor lines*— see note to Grand Rapids v. Powers (Mich.) 14 L. R. A. 498.

*On the power of states over navigable rivers*—see notes to Swanson v. Mississippi & R. River Boom Co. (Minn.) 7 L. R. A. 673; Eisenbach v. Hatfield (Wash.) 12 L. R. A. 632; Mills v. United States (C. C. S. D. Ga.) 12 L. R. A. 673.

be free from state regulations, exactions, and burdens.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Pennsylvania* v. *Wheeling & B. Bridge Co.* 18 How. 421, 15 L. ed. 435; *Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Cannon* v. *New Orleans*, 20 Wall. 577, 22 L. ed. 417; *Wisconsin* v. *Duluth*, 96 U. S. 388, 24 L. ed. 672; *Turner* v. *Maryland*, 107 U. S. 38, 27 L. ed. 370, 2 Sup. Ct. Rep. 44; *South Carolina* v. *Georgia*, 93 U. S. 4, 23 L. ed. 782; *Parkersburg & O. River Transp. Co.* v. *Parkersburg*, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Brown* v. *Houston*, 114 U. S. 624, 29 L. ed. 258, 5 Sup. Ct. Rep. 1091; *Morgan's L. & T. R. S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 455, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114; *United States* v. *Duluth*, 1 Dill. 469, Fed. Cas. No. 15,001; *Ouahita & M. River Packet Co.* v. *Aiken*, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; Gould, Waters, § 138, p. 254; *Lauton* v. *Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; *Covington & C. Bridge Co.* v. *Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087.

Whenever Congress acts, then the power of the state is at an end, and if any conflict exists between the harbor lines established by the national and state governments respectively, those of the state must give way to those established by the general government.

Congress has jurisdiction, in the exercise of its power to regulate commerce, over the navigable waters of a river lying wholly within the limits of a single state.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Veazie* v. *Moor*, 14 How. 568, 14 L. ed. 545; *Willson* v. *Black Bird Creek Marsh Co.* 2 Pet. 251, 7 L. ed. 414; *Albany Bridge Case*, 2 Wall. 403, *sub nom. Coleman* v. *Hudson River Bridge Co.* 17 L. ed. 876; *Gilman* v. *Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *The Passaic Bridges*, 3 Wall. 782, *sub nom. Milnor* v. *New Jersey R. & Transp. Co.* 16 L. ed. 799; *Pound* v. *Turck*, 95 U. S. 459, 24 L. ed. 525; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158. 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

The action of Congress in enacting §§ 7, 12, of the river and harbor act of September 19, 1890 (26 Stat. at L. pp. 454, 455), conferring certain powers on the Secretary of War, is not a delegation of legislative powers, and said sections are constitutional.

*Wayman* v. *Southard*, 10 Wheat. 1–43, 6 L. ed. 253, 262; Cooley, Const. Lim. 137; Sutherland, Stat. Constr. § 68; *United States* v. *Eliason*, 16 Pet. 291, 10 L. ed. 968; *Gratiot* v. *United States*, 4 How. 80, 11 L. ed. 884; *Smith* v. *Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *Tilley* v. *Savannah, F. & W. R. Co.* 4 Woods, 427, 5 Fed. 641; *Chicago & N. W. R. Co.* v. *Dey*, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Re Griner*, 16 Wis. 427; *United States* v. *Ormsbee*, 74 Fed. 209; *Marshall Field & Co.* v. *Clark*, 143 U. S. 649–693, 36 L. ed. 294–310, 12 Sup. Ct. Rep. 495; *Locke's Appeal*, 72 Pa. 491, 13 Am. Rep. 716; *South Carolina* v. *Georgia*, 93 U. S. 13, 23 L. ed. 785; *Miller* v. *New York*, 109 U. S. 385, 27 L. ed. 971, 3 Sup. Ct. Rep. 228; *United States* v. *Moline*, 82 Fed. 596; *United States* v. *North Bloomfield Gravel Min. Co.* 81 Fed. 253; *State ex rel. Railroad & Warehouse Commission* v. *Chicago, M. & St. P. R. Co.* 38 Minn. 281, 37 N. W. 782; *State ex rel. Board of Transportation* v. *Fremont, E. & M. Valley R. Co.* 22 Neb. 313, 35 N. W. 118; *Stone* v. *Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *United States* v. *Romard*, 89 Fed. 157; *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *State* v. *Gerhardt*, 145 Ind. 439, 33 L. R. A. 313, 44 N. E. 469; *Illinois ex rel. Hunt* v. *Illinois C. R. Co.* 34 C. C. A. 138, 91 Fed. 955.

The power given to the Secretary of War by § 12 of the act of September 19, 1890, *supra*, to establish harbor lines, implies necessarily the power to modify, change, or create anew.

*United States* v. *Eliason*, 16 Pet. 291, 10 L. ed. 968; *United States* v. *Romard*, 89 Fed. 157.

The riparian owner in Oregon, in the absence of restrictive legislation, has the right by the common law to connect his shore line by means of wharves, piers, or docks constructed over the shoal or shallow waters immediately bordering upon his land, with the waters which are navigable in fact. This he has the right to do not only in his own interest as a riparian proprietor, but as well also in the interest of the public, and of national and interestate commerce.

*St. Paul & P. R. Co.* v. *Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Yates* v. *Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Weber* v. *State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798; *Dutton* v. *Strong*, 1 Black, 23, 17 L. ed. 29.

The question as to what constitutes a public nuisance must be determined by general and fixed laws, and it is not to be tolerated that the local municipal authorities of a state can declare any particular business or structure a nuisance in a summary mode and enforce its decree at its own pleasure. Whether a bridge or a pier is a public nuisance or not, whether the same is an obstruction to navigation and commerce or not, is a question of fact, and no simple declaration of a municipality can determine the question.

*Dutton* v. *Strong*, 1 Black, 32, 17 L. ed. 29; *Yates* v. *Milwaukee*, 10 Wall. 504, 19 L. ed. 986; Angell, Tide Waters, 196; *West Hartford* v. *Hartford Water Comrs.* 68 Conn. 323, 36 Atl. 786; *Milne* v. *Davidson*, 5 Mart. N. S. 409, 16 Am. Dec. 195; Cooley, Const. Lim. 6th ed. 741, note; *Everett* v. *Council Bluffs*, 46 Iowa, 67; *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 Ill. 44; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Smith* v. *Minto*, 30 Or. 353, 48 Pac. 166; 2 Dill. Mun. Corp. 4th

ed. § 800; *Grossman* v. *Oakland*, 30 Or. 478, 36 L. R. A. 593, 41 Pac. 5.

The provision of the city charter conferring power on the city of Portland, "to regulate the building of wharves and the driving of piles in the Willamette river within the limits of the city, and to establish a line beyond which wharves shall not be built nor piles be driven," does not authorize it to declare by a special ordinance that a private wharf is an obstruction to navigation and a public nuisance, if in point of fact it is not such obstruction or a public nuisance.

*Yates* v. *Milwaukee*, 10 Wall. 498, 19 L. ed. 984; *Smith* v. *Minto*, 30 Or. 353, 48 Pac. 166; *Grossman* v. *Oakland*, 30 Or. 478, 36 L. R. A. 593, 41 Pac. 5.

The location of the line by the city of Portland, and by the port of Portland, in front of respondent's property, in water averaging less than 1 foot in depth, and from bare ground at low water to not exceeding 2 feet in depth at any point, was an unreasonable exercise of municipal power.

*Yates* v. *Milwaukee*, 10 Wall. 498, 19 L. ed. 984; *Smith* v. *Minto*, 30 Or. 353, 48 Pac. 166; *Grossman* v. *Oakland*, 30 Or. 478, 36 L. R. A. 593, 41 Pac. 5.

The municipality must prove by evidence, other than the mere declaration of the city itself, that the structure does interfere with navigation or the improvement of the river or commerce, and that it is a public nuisance.

*Yates* v. *Milwaukee*, 10 Wall. 498, 19 L. ed. 984; Angell, Tide Waters, 196.

The authorities of a town will not be permitted to locate an imaginary deep-water line away from the navigable part of a river or bay and without making the water navigable up to that line, so as to deprive the riparian owners of the advantages of wharves, under a provision of law conferring upon such town the right to regulate the line of deep water to which wharves may be built.

*Wool* v. *Edenton*, 117 N. C. 1, 23 S. E. 40.

Whenever a police power is so exercised by a state as to come within the domain of Federal authority, as defined by the Constitution, the latter must prevail.

*Gibbons* v. *Ogden*, 9 Wheat. 1–210, 6 L. ed. 23–73; *Henderson* v. *Wickham*, 92 U. S. 259–272, 23 L. ed. 543; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650–661, 29 L. ed. 516–521, 6 Sup. Ct. Rep. 252; *Morgan's L. & T. R. & S. S. Co.* v. *Louisiana Bd. of Health*, 118 U. S. 464, 30 L. ed. 237, 6 Sup. Ct. Rep. 1114.

The police power does not extend to depriving any person of the lawful use of property without due process of law, and without just compensation.

*Re Jacobs*, 98 N. Y. 110, 50 Am. Rep. 636; *Re Cheesebrough*, 78 N. Y. 232; *Rockwell* v. *Nearing*, 35 N. Y. 302.

Wharves, levees, and landing places are essential to commerce by water, no less than a navigable channel and a clear river.

*Parkersburg & O. River Transp. Co.* v. *Parkersburg*, 107 U. S. 707, 27 L. ed. 590, 2 Sup. Ct. Rep. 732; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 205, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826.

*Mr.* **C. E. S. Wood** argued the cause, and, with *Mr. George H. Williams*, filed a brief for defendants in error:

Sec. 12 of the act of Congress of September 19, 1890 (26 Stat. at L. 455, chap. 907), is unconstitutional.

*United States* v. *Keokuk & H. Bridge Co.* 45 Fed. 178; *United States* v. *Rider*, 50 Fed. 406; *Mobile County* v. *Kimball*, 102 U. S. 699, 702, 26 L. ed. 240, 241; *Gilman* v. *Philadelphia*, 3 Wall. 725, 18 L. ed. 99; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *United States* v. *Bailey*, 1 McLean, 240, Fed. Cas. No. 14,495; *The Mining Debris Case*, 9 Sawy. 497, 18 Fed. 753.

The Secretary of War had no right to change or relocate established harbor lines.

The pleadings and evidence show affirmatively that the Secretary of War had no jurisdiction to change the established harbor lines of Portland.

Cooley, Const. Lim. § 406; *New Jersey R. & Transp. Co.* v. *Suydam*, 17 N. J. L. 30.

Montgomery had no right to drive piles or extend his wharf beyond the wharf lines established by the city of Portland.

*Lake Shore & M. S. R. Co.* v. *Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357.

To regulate the driving of piles or the building of wharves within the harbor of Portland is within the police powers of the city.

*Dubuque* v. *Stout*, 32 Iowa, 84, 7 Am. Rep. 171; *The W. H. Beamen*, 45 Fed. 129; *Cushing* v. *The John Frazer*, 21 How. 187, *sub nom. The Jas. Gray* v. *The John Fraser*, 16 L. ed. 108; *Hart* v. *Albany*, 9 Wend. 571, 24 Am. Dec. 165; *Vanderbilt* v. *Adams*, 7 Cow. 349; *New York City* v. *Miln*, 11 Pet. 132, 138, 9 L. ed. 659, 662; *License Cases*, 5 How. 574, 12 L. ed. 287; *Cooley* v. *Philadelphia Port Wardens*, 12 How. 319, 13 L. ed. 1094; *Crandall* v. *Nevada*, 6 Wall. 42, 18 L. ed. 747; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Thorpe* v. *Rutland & B. R. Co.* 27 Vt. 149, 62 Am. Dec. 625; *Boston & M. R. Co.* v. *York County Comrs.* 79 Me. 386, 10 Atl. 113.

Said § 12 did not exclude the jurisdiction of the state inside the harbor lines fixed by the Secretary in 1898.

*Veazie* v. *Moor*, 14 How. 574, 14 L. ed. 547.

Montgomery's right to build a wharf was subject to the provisions of §§ 4227, 4228 of the Oregon Code.

Gould, Waters, § 179; *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Com.* v. *Alger*, 61 Mass. 53.

The decision of the port of Portland is binding upon the plaintiff in erorr.

28 Am. & Eng. Enc. Law, p. 1046; 2 Dill. Mun. Corp. §§ 832, 836.

The port of Portland has the right to regulate the driving of piles or the building of wharves inside of the harbor lines fixed by the Secretary in 1898.

*People v. Williams*, 64 Cal. 499, 2 Pac. 393.

*Mr.* **Thomas D. Rambaut** also argued the cause for defendants in error.

Mr. Justice **Harlan** delivered the opinion of the court:

This writ of error brings up for review the final decree in a suit instituted in one of the courts of Oregon by the city of Portland and port of Portland against James B. Montgomery, who died during the progress of the cause, and was succeeded as defendant by his executrix, the present plaintiff in error.

The principal question in the case is whether, under the circumstances to be presently stated, Montgomery, as owner of land situated within the limits of Portland on the Willamette river, had the right to extend his wharves into the river beyond certain harbor lines established in 1892.

The city of Portland was authorized by its charter to regulate the building of wharves within its limits, and to establish a line beyond which wharves should not be built nor piles driven. That provision was in force on and after February 19th, 1891.

By an act of the Oregon legislature of February 18th, 1891, the inhabitants of the port of Portland were created a corporation "to so improve the Willamette river at the cities of Portland, East Portland, and Albina, and the Willamette and Columbia rivers between said cities and the sea, as that there shall be made and permanently main-[90]tained in said Willamette river *at said cities, and in the said Willamette and Columbia rivers between said cities and the sea, a ship channel of good and sufficient width, and having a depth at all points at mean low water, both at said cities and between said cities and the sea, of not less than 25 feet." And, so far as was necessary to carry out that object, the corporation was given full control of those rivers at those cities and between them and the sea, to the full extent that the state could grant the same, and was authorized to remove such obstructions from them and erect such works in them as were found necessary or convenient in creating and maintaining the required channel. The power so conferred was to be exercised by a board of commissioners. Such a board had been appointed and organized prior to the institution of this suit.

A copy of the act incorporating the port of Portland was sent to the Secretary of War, "who approved the same," and the work done by that port in improving the Willamette and Columbia rivers was conducted in conjunction with the United States engineers in charge of those rivers, and who acted under instructions from the Secretary of War. The engineers annually reported to the Secretary the nature and amount of such work.

By the river and harbor act of July 13th, 1892, amending the 7th section of the river and harbor act of September 19th, 1890, it was provided:

"§ 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly *of any state, until the location[91] and plan of such bridge or other works have been submitted to and approved by the Secretary of War; or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of [any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of] the channel of said navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments or other works under an act of the legislature of any state, over or in any stream, port, roadstead, haven or harbor, or other navigable water not wholly within the limits of such state." 26 Stat. at L. 454, chap. 907; 27 Stat. at L. 88, 110, chap. 158.

"§ 12. That section 12† of the river and harbor act of August 11, 1888, be amended and re-enacted so as to read as follows:

"Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby authorized, to cause such lines to be established, beyond which no piers, wharves, bulkheads, or other works shall be extended or deposits made, except under such regulations as may be prescribed from time to time by him; and any person who shall wilfully violate the provisions of this section, or any rule or regulation made by the Secretary of War in pursuance of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding $1,000, or imprisonment not exceeding one year, at the discretion of the

†"Sec. 12. Where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors, he may, and is hereby, authorized to cause such lines to be established, beyond which no piers or wharves shall be extended or deposits made except under such regulations as may be prescribed from time to time by him." 25 Stat. at L. 400, 425, chap. 860.

court, for each offense." 26 Stat. at L. 426, 455, chap. 907.

[92] *On the 9th day of August, 1892, the Secretary of War, proceeding—so the finding of facts states—under § 12 of the act of 1890, caused certain harbor lines to be established in the Willamette river within the limits of Portland. And by an ordinance adopted December 12th, 1892, the common council of the city adopted as its wharf lines the harbor lines so established.

On or about May 21st, 1898, Montgomery applied to the Secretary of War to have the above harbor lines relocated or located farther out in front of certain water lots belonging to him, his complaint being that, as established in 1892, those lines were too far inland. By order of the Secretary a public hearing was had on this application. A number of the leading business men of Portland attended and made protests against the proposed relocation. An account of this meeting, with all the papers relating to it, was sent to the chief of engineers, who made a report to the Secretary of War favorable to Montgomery's application. A map accompanied that report showing the proposed new line. Under date of September 23d, 1898, Mr. Meiklejohn, Acting Secretary of War, approved Montgomery's application, and assented to the proposed change or relocation of the harbor line.

Having been notified by the local United States engineer that the War Department had approved the new line, Montgomery began the construction of a wharf by the driving of piles partly outside of the line of 1892 and in front of his lots, but wholly inside of the relocated line as indicated on the above map. He did not drive any piles or place any obstruction in the river outside of the relocated line.

On or about November 2d, 1898, the board of commissioners of the port took official action about the new line and Montgomery's construction of wharves beyond the line of 1892. They declared of record that the extension of wharves into the river outside of the line of 1892 would greatly damage the port and its shipping interests, and they ordered Montgomery and those acting under him to cease the construction of any wharf beyond that line and at once to remove any piling or other obstruction that he may have placed in the river in front of his property [93] and *beyond such wharf line. Subsequently, on November 23d, 1898, the port commissioners took further action, and declared that the wharf proposed by said Montgomery would interfere with the navigation of the river by creating shoal places in its now navigable waters, and obstruct the work of making and maintaining a channel in the river 25 feet in depth, as provided for in the act incorporating the port of Portland.

Of this action by the local authorities Montgomery and those in his employment were notified in writing.

The suit was brought to prevent the continuance of the work upon which Montgomery entered The defendant resisted the relief asked, and insisted that the action of the Secretary of War gave him complete authority to proceed despite any objections urged by the city and port of Portland. The defense was sustained by a decree of the court of original jurisdiction, and the bill was dismissed. But that decree was reversed by the supreme court of Oregon, its conclusions of law being: That the wharf lines established on the 12th day of December, 1892, were then, and ever since have been, the legal and authorized wharf lines of the port of Portland; and that the respondent had no right to drive piles or extend any wharf beyond the wharf lines so established. The respondent, her attorneys, agents, servants, and employees were, by final order, enjoined from driving piles or putting any structure in the river outside of the wharf lines so established, and commanded to remove all piles driven or structures of any description erected therein, beyond said wharf lines. *Portland* v. *Montgomery*, 38 Or. 215, 62 Pac. 755.

This case cannot be distinguished in principle from *Cummings* v. *Chicago*, 188 U. S. 410, *ante*, 525, 23 Sup. Ct. Rep. 472, decided at the present term. In that case it appeared that the Secretary of War, proceeding *under the act of September 19th, 1890, [104] and other legislation of Congress, had given his assent to the rebuilding of a certain dock in Calumet river, within the limits of Chicago; which river, being one of the navigable waters of the United States, had been surveyed by the direction of the government, and for its improvement Congress had made appropriations from time to time. When that action was commenced there was in force an ordinance of the city of Chicago, enacted under the authority of the state, forbidding the construction of any pier, dock, or other structure in navigable waters within the limits of that city without first obtaining a permit from its department of public works. And the question was whether, under the acts of Congress, including that of 1890, the above ordinance was of any avail as against the permit of the Secretary.

The contention of the plaintiff was that Congress, by its appropriations for the improvement of Calumet river, had taken such complete possession of that stream as to deprive the local authorities of all power in respect of the building or maintenance of structures in that river. In determining that question the court took into consideration various enactments, including the 10th section of the river and harbor act of March 3d, 1899, chap. 425 (passed after the present suit was brought), as follows: "That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States, is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by

the chief of engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been rec-[105]ommended by the *chief of engineers and authorized by the Secretary of War prior to beginning the same." 30 Stat. at L. 1121, 1151, U. S. Comp. Stat. 1901, p. 3541.

In that case we recognized the doctrine as long established that the authority of a state over navigable waters entirely within its limits was plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several states. After referring to *Lake Shore & M. S. R. Co.* v. *Ohio* (1897) 165 U. S. 365, 366, 368, 41 L. ed. 747, 748, 17 Sup. Ct. Rep. 357, we said that if Congress had intended by its legislation, prior to that decision, "to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective states, and to supersede entirely the authority which the states, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the government would have been manifested by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended. We do not overlook the long-settled principle that the power of Congress to regulate commerce among the states 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *Brown* v. *Maryland*, 12 Wheat. 419, 446, 6 L. ed. 678, 688; *Brown* v. *Houston*, 114 U. S. 630, 29 L. ed. 260, 5 Sup. Ct. Rep. 1091. But we will not at this time make any declaration of opinion as to the full scope of this power, or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several states. Whether Congress may, against or without the expressed will of a state, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the states. The effect of that act, reason-[106]ably interpreted, is to make the erection *of a structure in a navigable river, within the limits of a state, depend upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the state acting by its constituted agencies."

There is nothing in the present case to distinguish it from the *Cummings Case*. While § 12 of the act of 1890 forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the Secretary of War, in navigable waters of the United States, "except under such regulations as may be prescribed from time to time by him," it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. Its general legislation so far means nothing more than that the regulations established by the Secretary in respect of waters, the navigation and commerce upon which may be regulated by Congress, shall not be disregarded even by the states. Congress has not, however, indicated its purpose to wholly ignore the original power of the states to regulate the use of navigable waters entirely within their respective limits. Upon the authority, then, of *Cummings* v. *Chicago*, and the cases therein cited — to which we may add *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811 — we hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a state cannot be said to be complete and absolute without the concurrent or joint assent of both the general and state governments. Of course, the right of the government to erect public structures in a navigable water of the United States rests upon different grounds.

In this view it is unnecessary to consider the general question discussed at the bar whether Congress has or not, by some of its enactments relating to structures in navigable waters, committed to the Secretary of War the determination of matters *that are[107] legislative in their nature, and which, under the Constitution, could only be determined, in the first instance, by Congress. It is sufficient now to say that the legislation upon which the defendant relies to justify the construction of the works in question does not, when reasonably interpreted, indicate any purpose upon the part of Congress to assume such complete and absolute control of the navigable waters of the United States as will make of no avail the action of the states in respect of the erection by private parties of structures in waters wholly within their respective limits.

*The judgment of the Supreme Court of Oregon is affirmed.*

BOARD OF COMMISSIONERS OF WILKES COUNTY and John H. Johnson, Sheriff and *Ex Officio* Treasurer of Wilkes County, *Petitioners*,

*v.*

W. N. COLER & COMPANY.

(See S. C. Reporter's ed. 107-116.)

*Railway aid—authority of county to subscribe to capital stock.*

**Any county near or through which a railroad running *via* Salem and Winston, North Carolina, in the direction of some point in the northwestern boundary line of that state, might pass, was authorized to take, and pay for in county bonds, capital stock of the Northwestern North Carolina Railroad Company, by the North Carolina Ordinance of March 8, 1868, incorporating such company for the purpose of constructing a line *via* Salem and Winston "to some point in the northwestern boundary line of the state, to be hereafter determined," and providing that counties subscribing stock to such company should do so in the same manner and subject to the same restrictions as were prescribed by N. C. Laws 1852, chap. 136, which empowered any county near or through which the railroad incorporated by that act should pass to subscribe for its stock, payable in county bonds.**

[No. 247.]

*Argued April 17, 20, 1903. Decided May 18, 1903.*

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of North Carolina establishing the validity of certain county bonds issued in aid of railway construction. *Affirmed.*

See same case below, 51 C. C. A. 399, 113 Fed. 725.

The facts are stated in the opinion.

*Mr.* **A. C. Avery** argued the cause and filed a brief for petitioners:

The settled line of decisions of the supreme court of North Carolina prior to October 1, 1889, when the Wilkes county bonds were issued, is in accord with the ruling in *Buncombe County* v. *Payne*, 123 N. C. 432, 31 S. E. 711, that a general act purportig to authorize "any and all counties to issue bonds would be invalid because of failure to provide for levying a special tax."

*Galloway* v. *Jenkins*, 63 N. C. 151; *Herring* v. *Dixon*, 122 N. C. 420, 29 S. E. 368; *State ex rel. Tate* v. *Haywood County*, 122 N. C. 812, 30 S. E. 352.

Construing its own laws, the supreme court of the state has differentiated the case of Wilkes county and the power of Wilkes county from that of Forsyth county. Under the established rule, the Federal court must lean towards that construction and assume that it is correct, until it satisfactorily appears that its conclusions are not well founded.

*Claiborne County* v. *Brooks*, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

In doubtful cases of construction, the Supreme Court has been influenced, as have other appellate courts, by the fact that the legislature of a state placed a given construction upon a statute of said state.

*Jarrolt* v. *Moberly*, 103 U. S. 580, 26 L. ed. 492; *Opinion of the Judges*, 114 N. C. 925.

The reference to the charter of the Atlantic & North Carolina Railroad Company operated to confer power to subscribe only on the counties specifically mentioned in the charter, Forsyth and Surry. Wilkes was not mentioned, and was not therefore made the donee of such power.

*Wilkes County* v. *Call*, 123 N. C. 316, 44 L. R. A. 252, 31 S. E. 481.

Under a settled line of decisions of the supreme court of North Carolina the word "near" is held to be too indefinite as a descriptive term to fix and determine location of a boundary line. It follows inevitably that the word cannot fix the location of a county or class of counties referred to in a statute.

*Cansler* v. *Fite*, 50 N. C. (5 Jones L.) 424; *Mizell* v. *Simmons*, 79 N. C. 182.

*Mr.* **John F. Dillon** argued the cause, and, with *Messrs. Harry Hubbard, John M. Dillon*, and *Charles Price*, filed a brief for respondents:

The ordinance enacted by the Constitutional Convention of the State of North Carolina, March 9, 1868, entitled "An Ordinance to Incorporate the Northwestern North Carolina Railroad Company," gave *per se*, clear and complete authority to issue the bonds in question.

*Hill* v. *Forsythe County*, 67 N. C. 367; *Belo* v. *Forsythe County*, 76 N. C. 489.

The county of Wilkes, having assented to the location of the road, and having voted bonds in aid of the company whose road was thus to be constructed, and was actually constructed, could not for one moment be heard in this court or any other to allege that the definite location of the road was not authorized.

*Tulare Irrig. Dist.* v. *Shepard*, 185 U. S. 1, 46 L. ed. 773, 22 Sup. Ct. Rep. 531.

If there was, in fact, legislative or legal authority for the issue of bonds, it is immaterial that the bonds recite another legislative act which did not give such authority.

*Wilkes County* v. *Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; *Anderson County* v. *Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; Dill. Mun. Corp. 4th ed. § 523; *Knox County* v. *Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed 93, 13 Sup. Ct. Rep. 267; *Cairo* v. *Zane*, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803; *Evansville* v. *Dennett*, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613.

NOTE.—*On the validity of bonds in aid of railroads*—see note to Sutliff v. Lake County Comrs. 37 L. ed. U. S. 145; Cantillon v. Dubuque & N. W. R. Co. (Iowa) 5 L. R. A. 726.

Mr. Justice **Harlan** delivered the opinion of the court:

This is an action against Wilkes county, [108] North Carolina, *upon certain bonds, each reciting that it was issued in payment of the subscription by that county to the capital stock of the Northwestern North Carolina Railroad Company, "by authority of an act of the general assembly of North Carolina, ratified the 20th day of February A. D. 1879, entitled 'An Act to Amend the Charter of the Northwestern North Carolina Railroad for the Construction of a Second Division from the Towns of Winston and Salem, in Forsyth County, up the Yadkin Valley, by Wilkesboro, to Patterson's Factory, Caldwell County,' and authorized by a vote of a majority of the qualified voters of Wilkes county, by an election regularly held for that purpose on the 6th day of November A. D. 1888, and by an order of the board of commissioners of Wilkes county made on the 1st day of April A. D. 1889."

Coler & Co., holders of some of the bonds, obtained a judgment against the county in the circuit court. The case was then carried to the circuit court of appeals, which certified certain questions to this court under the judiciary act of March 3d, 1891, chap. 517 (26 Stat. at L. 826, U. S. Comp. Stat. p. 547). Those questions were answered, and, the answers having been certified to the court below, the case was finally tried, resulting in the affirmance of the judgment against the county. *Wilkes County* v. *Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458, 51 C. C. A. 399, 113 Fed. 725. It is now here on writ of certiorari sued out by Wilkes county.

The facts out of which this litigation arose are fully set forth in the former opinion. It is necessary to restate some of them as well as to recall the points heretofore decided.

It appears that the principal question in the case, when formerly here, was as to the effect of the recitals in the bonds.

The plaintiffs contended that, being bona fide holders, they were entitled to assume that there had been a compliance with all the provisions of the act of February 20th, 1879, upon the authority of which the bonds purported to have been issued.

The defendant contended that, as the journals of the respective houses of the legislature did not show that the yeas and nays were entered on the second and third readings of the bill subsequently published as the act of February 20th, 1879, that act was void under § 14 of article 2 of the State Con- [109] stitution, *providing that "no law shall be passed . . . to impose any tax upon the people of the state, or to allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the general assembly, and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal."

This contention of the county was supported by several decisions of the supreme court of North Carolina that are referred to in our former opinion; and one of the questions propounded to this court was whether the circuit court should accept those decisions as controlling in respect of the alleged invalidity of the act of 1879. That question was answered in the affirmative, this court being of opinion that, as matter of propriety and right, the decision of the state court on the question as to what is a *law* of the state was binding upon the courts of the United States. 180 U. S. 506, 526, 45 L. ed. 642, 653, 21 Sup. Ct. Rep. 458.

That answer, of course, eliminated from the case the act of 1879 as giving authority to issue the bonds in suit; and it, therefore, became necessary to inquire whether such authority could be found elsewhere in the legislation of the state,—this court being of opinion that the invalidity of the act of 1879, as conferring power to issue the bonds, did not estop holders of bonds from showing that there was in fact ample authority to issue them.

It was insisted that sufficient authority was to be found in the ordinance of March 8th, 1868, passed by the convention that assembled at Raleigh, North Carolina, on January 14th, 1868, for the purpose of framing a constitution for that state.

By that ordinance, which took effect from its passage, it was provided: "That for the purpose of constructing a railroad of one or more tracks, from some point on the North Carolina Railroad, between the town of Greensboro, in Guilford county, and the town of Lexington, in Davidson county, running by way of Salem and Winston, in Forsyth county, to some point in the northwestern boundary line of the state, to *be hereafter [110] determined, a company is hereby incorporated under the name and style of the Northwestern North Carolina Railroad Company, with a capital stock of two millions of dollars, which shall have a corporate existence as a body politic for the space of ninety-nine years. . . . § 1. . . . That the capital stock of said company may be created by subscriptions on the part of individuals, corporations, and counties, in shares of $100. § 2. . . . That, after the organization of said company and the election of the president and other necessary officers, the officers so elected shall proceed, under the advice of the directors, to locate the eastern terminus of the Northwestern North Carolina Railroad, and shall proceed to construct said road, with one or more tracks, as speedily as practicable, in sections of 5 miles each, to the towns of Winston and Salem in Forsyth county, which portion of said railroad, when completed, shall constitute its first division: *Provided*, That if the distance from the nearest section to the towns of Winston and Salem be less than 5 miles, the same shall be considered a section. § 5. . . . That the stockholders of said company may pay the stock subscribed by them either in money, labor, or material for constructing said road, as the board of directors may deter-

mine, and that all counties or towns subscribing stock to said company shall do so in the same manner and under the same rules, regulations, and restrictions as are set forth and prescribed in the act incorporating the North Carolina & Atlantic Railroad Company [Atlantic & North Carolina Railroad Company], for the government of such towns and counties as are now allowed to subscribe to the capital stock of said company. § 12. . . . That the company shall have power to construct branches of said road, one of which shall run from the towns of Winston and Salem by way of Mount Airy, in Surry county, to the line of the state of Virginia." § 13.

The act incorporating the Atlantic & North Carolina Railroad Company, referred to in the ordinance of 1868, was passed in 1852. N. C. Laws 1852, pp. 484, 499. By § 33 of that act it was made "lawful for any incorporated town or county near or through [111] which said railroad may pass to *subscribe for such an amount of stock in said company as they shall be authorized to do by the inhabitants of said town or the citizens of said county, in manner and form as hereinafter provided." By § 35 it was provided "that if, upon the return of such constable, . . . it shall appear that a majority of the qualified voters of such town, and by the return of the sheriff that a majority of the qualified voters of such county, voting upon the question are in favor of the subscription, the corporate authorities of such town, and the justices of such county, shall appoint an agent to make the subscription in behalf of such town and county, to be paid for in the bonds of such town and county and on such time as shall be agreed on by said town officers and the justices of such county." N. C. Laws 1852, chap. 136.

After referring to certain decisions of the supreme court of North Carolina, relating to the ordinance of 1868,—particularly *Hill* v. *Forsythe County*, 67 N. C. 367, and *Belo* v. *Forsythe County*, 76 N. C. 489,—we said: "It results that when the bonds here in question were issued in 1889, it was the law of North Carolina that the ordinance of 1868, constituting the charter of the Northwestern North Carolina Railroad Company, was not superseded by the Constitution of 1868, but was in force and therefore gave power to counties *embraced by its provisions* to take stock in that company and pay for it in county bonds just as Forsyth county had done." 180 U. S. 529, 45 L. ed. 654, 21 Sup. Ct. Rep. 467.

Another principle announced in our former opinion was that the rights of the parties were to be determined by the law of the state as it was declared by the state court to be at the time the bonds were issued in the name of the county and put upon the market.

As indicating some of the points left undecided, we make this extract from our opinion:

"We have referred fully to the *Hill* and *Belo Cases* because of the earnest contention of learned counsel that under the law of North Carolina, as declared in those cases before the bonds in question were made, the ordinance of 1868, without the aid of subsequent legislation, gave full power to Wilkes county to issue such bonds. This view suggests various questions as to the *scope and [112] effect of that ordinance. Assuming, as we must, that the *Belo* and *Hill Cases* held that the ordinance of 1868 remained in force after the adoption of the Constitution, did the general power given by that ordinance to the Northwestern Railroad Company to construct a railroad from its eastern terminus, 'running by way of Salem and Winston, in Forsyth county, to *some* point in the northwestern boundary line of the state, *to be hereafter determined*,' invest Wilkes county with authority to subscribe to the stock of the company and to issue bonds in payment of such subscription? Was Wilkes county in the same category with Forsyth county? Was the route of the road northwest of Salem and Winston to some point in the northwestern boundary line of the state to be determined by the legislature or by the company? If by the legislature, was that route ever determined otherwise than by the act of 1879, which has been adjudged never to have become a law of the state? Did Wilkes county have authority, under the ordinance of 1868 alone, to aid, by a subscription of stock and bonds, the construction of the second division of the road referred to in the act of 1879, extending from the towns of Winston and Salem, up the valley of the Yadkin by way of Jonesville and Wilkesboro, in the county of Wilkes, to Patterson's Factory, in the county of Caldwell? These are matters about which we do not feel disposed to express an opinion under the very general and indefinite questions certified from the circuit court of appeals. Nor do we deem it proper to express any opinion as to the scope and the effect upon the rights of the parties of §§ 1996, 1997, 1998, and 1999 of the Code of North Carolina. The certified questions do not directly or explicitly relate to any question arising under those sections of the Code; and it is not appropriate that this court should, under the questions certified, consider and determine the entire merits of the case." 180 U. S. 532, 45 L. ed. 655, 21 Sup. Ct. Rep. 468.

That the qualified voters of Wilkes county gave their sanction to a subscription to the capital stock of the Northwestern North Carolina Railroad Company; that the bonds in suit are part of those issued in payment of such subscription; that stock was issued to the county to the full amount subscribed: that *the road desired by the people of the [113] county was constructed and is in operation; that for many years the county paid interest upon the bonds; and that the plaintiff purchased the bonds in suit for value and in good faith; these propositions are not disputed. However strongly these facts appeal to every one's sense of right and justice, they do not estop the county from raising the question of its power to have made the subscription and issued the bonds in question.

We repeat what was said in the former opinion,—indeed, what had been held in many previous decisions,—that, if there was an absolute want of power to issue the bonds in question, every purchaser of them was charged, in law, with notice of that fact, and could not look to the county in whose name they were issued. Such power could not be created by mere recitals in the bonds.

Did the county of Wilkes have power to issue these bonds? The plaintiff insists that the county had double legislative authority for issuing them;—first, under the ordinance of 1868 incorporating the Northwestern North Carolina Railroad Company; second, under the above sections of the Code of North Carolina of 1883.

We have seen that at the time the bonds were issued the ordinance of 1868 was in force and gave power to counties embraced by its provisions to take stock in the Northwestern North Carolina Railroad Company and pay for it in county bonds. This was held, in our former opinion, to be taken as the law of North Carolina, because so declared by the supreme court of that state when the bonds were issued, and therefore as the law by which the rights of the parties were to be determined. So that the vital inquiry, on this part of the case, is whether the road in question was embraced by the provisions of the ordinance of 1868, and therefore one that could be aided under that ordinance by county subscriptions and bonds. If so, Wilkes county was plainly in the same category as Forsyth county, and its bonds (issued in payment of the subscription made by it) must be sustained as valid upon the same grounds as the supreme court of North Carolina approved in reference to the bonds issued by Forsyth county.

Turning now to the ordinance of 1868, we [114] find that the Northwestern *North Carolina Railroad Company was incorporated to construct a railroad of one or more tracks "from some point on the North Carolina Railroad between the towns of Greensboro and Lexington, running by way of Salem and Winston in Forsyth county to some point in the northwestern boundary line of the state, to be hereafter determined." No question arises in the present case as to the route adopted for the road that was constructed from its beginning point or eastern terminus to Salem and Winston, two towns near each other. It was mandatory under the ordinance that the road should run by the way of Salem and Winston. The road that Wilkes county desired to be built was from Salem and Winston to Wilkesboro. That was the road in aid of the construction of which its bonds were issued. If a road from Salem and Winston to Wilkesboro was substantially in the direction of "the northwestern boundary line of the state," then it would be one authorized by the ordinance of 1868. The ordinance did not fix the particular point in the northwestern boundary at which the northwestern terminus of the road should be established. It was some point, on that boundary, to be thereafter determined. Unless the legislature interfered and itself fixed the northwestern terminus of the road, the railroad company had the power to establish it at its convenience or as the necessities of the situation required, taking care that whatever route was adopted the road as constructed from time to time was to be, substantially, in the direction of some point in what was reasonably to be deemed the northwestern boundary line of the state. Undoubtedly those interested in the enterprise, as well as the convention, contemplated that the road would be built mainly by money derived from municipal subscriptions and bonds. The railroad company was, therefore, left free to adopt a general route that would take the road "near or through" such counties as would aid the enterprise—no condition as to route being imposed except that the road should be in the direction of some point on the northwestern boundary line of the state. The authority of counties, by subscription of stock and bonds, to aid in the construction of a part of the road, did not depend upon the northwestern terminus being first established. If a county *had au- [115] thority, under any circumstances, to subscribe stock and issue bonds, that authority could be exercised with reference to that part of the road in which, by reason of its location, it was immediately concerned. We are of opinion that the part of the Northwestern North Carolina Railroad which is here in question was, in a substantial sense, in the direction of some point in the northwestern boundary line of the state,—due regard being had to the physical nature of the country through which it was to pass. The contention to the contrary cannot be sustained.

Looking further into the ordinance of 1868, we find that it contemplated and authorized subscriptions by counties. It provided that all counties and towns subscribing stock to said company should do so in the same manner and under the same rules, regulations, and restrictions as were set forth and prescribed in the charter of the Atlantic & North Carolina Railroad Company for the government of such towns and cities as were then allowed to subscribe to the capital stock of that company. Reading those provisions of the charter of the Atlantic & North Carolina Railroad Company into the ordinance of 1868, it is, we think, clear that any county near or through which the Northwestern North Carolina Railroad might pass (in the direction of some point in the northwestern boundary line of the state) could subscribe stock to be paid for by its bonds, provided, always, that the subscription was first approved by a majority of the qualified electors of the county voting upon the question of subscription. All these conditions were met in the case of Wilkes county. The qualified voters sustained the proposition to subscribe, and there is no substantial ground upon which to rest the contention that the county was without power, under the ordinance of 1868, to make the subscription in question and to issue its bonds in payment therefor.

Other questions relating to the ordinance of 1868 were discussed by counsel, but in

the view we take as to its scope and meaning those questions need not be noticed in this opinion.

The appellees further insist that ample authority to issue the bonds in suit is also found in §§ 1996, 1997, 1998, 1999, and 2000 of the Civil Code of North Carolina.

16] *We do not deem it necessary to determine the scope of those sections, for, as we have seen, Wilkes county, independently of those sections, had authority under the ordinance of 1868 to make the subscription and issue the bonds here in question. And this conclusion rests upon the law of North Carolina as declared by the supreme court of the state to have been at the time Wilkes county made its subscription and issued its bonds. This is sufficient to dispose of the case.

*The judgment is affirmed.*

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HENRY H. BOCKFINGER, *Appt.*,
*v.*
JOHN W. FOSTER, W. S. Robertson and A. C. Schnell; Trustees of Town Site Board No. 6, Oklahoma Territory.

(See S. C. Reporter's ed. 116–126.)

*Public lands—Oklahoma town sites—action does not lie to devest trustees of title.*

One claiming under the homestead laws of the United States cannot maintain a suit against Oklahoma town site trustees to devest them of the title held by them, under the act of May 14, 1890 (26 Stat. at L. 109, chap. 207, U. S. Comp. Stat. 1901, p. 1463), in trust for town site occupants, since, until conveyed to an occupant as provided in such act, the title remains, in every essential sense, in the United States.

[No. 175.]

*Argued February 26, 1903. Decided June 1, 1903.*

APPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which affirmed a decree of the District Court of Logan County sustaining a demurrer to and dismissing a complaint in an action to devest town site trustees of the title held by them under the Oklahoma town site act. *Affirmed.*

See same case below, 10 Okla. 488, 62 Pac. 799.

The facts are stated in the opinion.

*Mr.* **James R. Keaton** argued the cause, and, with *Messrs. John W. Shartel, Frank Wells, John H. Cotteral* and *C. G. Hornor*, filed a brief for appellant:

The legal title of the United States to the land in controversy passed to the town site trustees by the issuance of the patent.

*Paine* v. *Foster*, 9 Okla. 286, 60 Pac. 24; *United States* v. *Schurz*, 102 U. S. 402, 26 L. ed. 173; *Wilcox* v. *Jackson ex dem. M'Connel*, 13 Pet. 498, 10 L. ed. 264; *Re Emblen*, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487.

There is no provision in the patent or in the act under which it was issued for such land, or any portion thereof, to revert to the government in any event, and if such patent were procured by fraud or issued by mistake the only way the government or anyone else could avoid the same would be by an action in a court of equity.

*Van Wyck* v. *Knevals*, 106 U. S. 360, 27 L. ed. 201, 1 Sup. Ct. Rep. 336; *Germania Iron Co.* v. *United States*, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337.

The mere fact that this patent was made to trustees of an express trust has no tendency to defeat the passing of complete title, as, in order for a patentor to retain any interest in the title or estate conveyed, even though such conveyance is to trustees for certain specific uses, there must be a provision in the patent for the reversion of the estate to him in the event of the failure of the uses or purposes for which the grant was made.

*Stuart* v. *Easton*, 170 U. S. 384, 42 L. ed. 1078, 18 Sup. Ct. Rep. 650. See also *Bryan* v. *Forsyth*, 19 How. 334, 15 L. ed. 674; *Meehan* v. *Forsyth*, 24 How. 175, 16 L. ed. 730; *Cowell* v. *Colorado Springs Co.* 100 U. S. 55, 25 L. ed. 547; *Re Emblen*, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487.

If the title to the land in controversy passed from the United States by the issuance of the patent, it matters not that said title vested in trustees who were agents of the government, as these agents could be sued by one who had a prior right to and equity in the land the same as if they held the legal title thereto in any other capacity.

*United States* v. *Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

The fact that this court took jurisdiction of the subject-matter in the case of *Payne* v. *Robertson*, 169 U. S. 323, 42 L. ed. 764, 18 Sup. Ct. Rep. 337, and decided the same on its merits subsequent to the decision of *McDaid* v. *Oklahoma*, 150 U. S. 209, 37 L. ed. 1055, 14 Sup. Ct. Rep. 59, is conclusive of both questions upon which this case was decided in the court below, as that case was brought against the same town site trustees, and the identical questions upon which the case at bar was decided by the supreme court of Oklahoma were raised and urged therein.

*Mr. James R. Keaton* filed a separate reply brief for appellant:

The mere declaration of the uses to which the granted premises are to be applied does not ordinarily import a condition.

*Long* v. *Moore*, 19 Tex. Civ. App. 363, 48 S. W. 43; *Olcott* v. *Gabert*, 86 Tex. 123, 23 S. W. 985; *Farnham* v. *Thompson*, 34 Minn. 331, 57 Am. Rep. 59, 26 N. W. 9; *Ryan* v. *Porter*, 61 Tex. 106.

If it be conceded that the legal title to the land in controversy had passed from the government itself when this action was brought, then it matters not in what set of officers or agents such title vested, as they could properly be sued by one having prior and paramount equities in the land.

*United States* v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

If appellant is entitled to any relief whatever, it is that prayed for in his bill.

*James* v. *Germania Iron Co.* 46 C. C. A. 476, 107 Fed. 597; *Steele* v. *Spencer*, 1 Pet. 558, 7 L. ed. 261.

*Mr.* **Marsden C. Burch** argued the cause and filed a brief for appellees:

The town site trustees are in law and in fact officers of the United States, holding the property involved in the issue for and in behalf of the United States.

*McDaid* v. *Williams*, 150 U. S. 209, 37 L. ed. 1055, 14 Sup. Ct. Rep. 59.

Only when public lands are disposed of in such a manner as finally to devest the United States of its title so that such lands become the subject of a private right is it proper for a court of equity to assume jurisdiction in the premises and correct any wrong of a legal character which has occurred under the government's administration, redress any wrongs of private parties, and dispose of the property according to the very right of the matter involved.

*Johnson* v. *Towsley*, 13 Wall. 72, 20 L. ed. 485.

Mr. **Horace Speed** also argued the cause for appellees.

Mr. Justice **Harlan** delivered the opinion of the court:

This case involves the construction of the act of Congress passed May 14th, 1890, entitled "An Act to Provide for Town Site Entries of Land in What is Known as 'Oklahoma,' and for Other Purposes." 26 Stat. at L. 109, chap. 207 (U. S. Comp. Stat. 1901, p. 1463).

As the purpose and scope of the act can be ascertained only by examining all of its provisions, it is here given in full:

[117] *"§ 1. That so much of the public lands situate in the territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupany for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as town sites, for the several use and benefit of the occupants thereof, by three trustees, to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1457), as near as may be; and when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees, including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such town site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees: *Provided*, That the Secretary of the Interior may, when practicable, cause more than one town site to be entered and the trust thereby created executed in the manner herein provided by a single board of trustees, but not more than seven boards of trustees in all shall be appointed for said territory, and no more than two members of any of said boards shall be appointed from one political party.

"§ 2. That in the execution of such trust, and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site the subject of entry hereunder, shall be taken as evidence of the occupancy by the holder thereof of the lot or lots therein descrited, except that, where there is an adverse claim to said property, such certificate shall only be prima facie evidence of the claim of occupancy of the holder: *Provided*, That nothing in this act contained shall be so construed as to make valid any claim now invalid of those who entered upon and occupied said lands in violation of the laws of the United States *or the proclamation of [118] the President thereunder: *Provided further*, That the certificates hereinbefore mentioned shall not be taken as evidence in favor of any person claiming lots who entered upon said lots in violation of law or the proclamation of the President thereunder.

"§ 3. That lots of land occupied by any religious organization, incorporated or otherwise, conforming to the approved survey within the limits of such town site, shall be conveyed to or in trust for the same.

"§ 4. That all lots not disposed of as hereinbefore provided for shall be sold, under the direction of the Secretary of the Interior, for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if, in the judgment of the Secretary, such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

"§ 5. That the provisions of sections four, five, six, and seven of an act of the legislature of the state [of] Kansas, entitled 'An Act Relating to Town Sites,' approved March second, eighteen hundred and sixty-eight, shall, so far as applicable, govern the trustees in the performance of their duties hereunder.

"§ 6. That all entries of town sites now pending, on application hereafter made under this act, shall have preference, at the local land office, of the ordinary business of the office, and shall be determined as speedily as possible; and if an appeal shall be taken from the decision of the local office in any such case to the Commissioner of the General Land Office, the same shall be made special, and disposed of by him as expeditiously as the duties of his office will permit; and so if an appeal should be taken to the Secretary of the Interior. And all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act; and upon the application of the trustees

herein provided for, such entries shall be prosecuted to final issue in the names of such trustees, without other formality; and when final entry is made, the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided.

19] *"§ 7. That the trustees appointed under this act shall have the power to administer oaths, to hear and determine all controversies arising in the execution of this act, shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office, and become part of the records of the same, and all conveyances executed by them shall be acknowledged before an officer duly authorized for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day while actually employed, and such traveling and other necessary expenses as the Secretary may authorize, and the Secretary of the Interior shall also provide them with necessary clerical force, by detail or otherwise.

"§ 8. That the sum of ten thousand dollars or so much thereof as may be necessary is hereby appropriated to carry into effect the provisions of this act, except that no portion of said sum shall be used in making payment for land entered hereunder, and the disbursements therefrom shall be refunded to the Treasury from the sums which may be realized from the assessments made to defray the expense of carrying out the provisions of this act." 26 Stat. at L. 110, chap. 207 (U. S. Comp. Stat. 1901, p. 1464).

The complaint shows that the appellees are the trustees of town site board number six, duly constituted and appointed by the Secretary of the Interior, and assigned to the town site of West Guthrie, Oklahoma territory, and had acquired the legal title to the western half of section eight, of township sixteen, north of range two, in Logan county, in that territory.

Bockfinger, claiming to have become entitled, under the homestead laws of the United States, to the southwest quarter of that land,—which was embraced within the town site boundary,—brought this suit in a territorial district court against the appellees as town site trustees. The relief sought was a decree that the trustees hold the title in trust for his use and benefit, and be compelled to convey to him.

The defendants demurred to the complaint upon several grounds, among others, upon the ground that the court had no jurisdiction of the subject of the action nor of the 20] defendants *in their capacity as town site trustees. The demurrer was sustained, and the plaintiff electing to stand on his complaint, the suit was dismissed. Upon appeal to the supreme court of the territory, the decree of the district court was affirmed.

The decisive question in the case is whether the plaintiff's claim to the land can be made the subject of a suit against the town site trustees as such. Upon a careful scrutiny of the provisions of the act of 1890, we are of opinion that this question must be answered in the negative. The plaintiff asked a decree declaring that the title acquired by the trustees under the act of Congress for the use of town site occupants be held in trust for and conveyed to him. But no such relief could have been granted if the title acquired by the trustees was held by them in trust for the purposes of the act of Congress, and if, in every substantial sense, so far as real ownership is concerned, the land still belonged to the United States.

That the title was so held by the town site trustees is, we think, clear. They did not hold an indefeasible title as of private right, with power to dispose of the land at will, but only as trustees for such occupants as should be ascertained, in the mode prescribed by the act of Congress, to be entitled to particular lots within the town site boundary. The trust was not, in any sense, of a permanent character. Its creation by Congress was only a step towards the ultimate transmission of the title of the United States to occupants under the town site act. The United States retained its hold on the land until the title by proper conveyances should pass absolutely from it or *from its officers [121] or agents, the town site trustees, to such occupants. When an occupant thus acquired title, anyone who claimed that he was entitled to the land could litigate the matter with the occupant in some court of competent jurisdiction; for, as between the United States and the occupant, the former had then parted with its title.

It is suggested that, under this view, many years might elapse before the person to whom, as occupant, the land was awarded, could be sued by the person claiming a superior right to that acquired by the town site trustees for the use and benefit of occupants. This is true, but it cannot alter the fact that, under the act of Congress, the title remained, in every essential sense, in the United States, until conveyed to the occupant. The United States, as the primary owner of the land, could prescribe the terms upon which it could be disposed of to occupants. A suit against the town site trustees to compel them, without regard to the act of Congress, to convey to one who was not an occupant within the meaning of that act, was a suit to compel them to convey land which really belonged to the United States. Such a suit, it is plain, might defeat the execution of the act of Congress.

The general principle was fully stated in *Johnson* v. *Towsley*, 13 Wall. 72, 20 L. ed. 485, in which this court, after observing that it had firmly refused to interfere with the Land Department in its administration of the public lands, *so long as the title was in the United States*, said: "On the other hand, it has constantly asserted the right of the proper courts to inquire, *after the title had passed from the government, and the question became one of private right*, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that

title should hold absolutely as his own or as trustee for another."

This was the ground upon which the court proceeded in *McDaid* v. *Oklahoma*, 150 U. S. 209, 37 L. ed. 1055, 14 Sup. Ct. Rep. 59, in which case the question was as to the right of town site trustees to withhold a deed pending an appeal to the Commissioner of the General Land Office. In that case it became necessary to declare the scope and meaning of the act of 1890.

[122] *After referring to a decision of the Land Department, under the act of 1890, to the effect that "the issue of the patent to town site trustees under the act was not a disposition of the government title, but a conveyance in trust, to be held under the direction of the Secretary of the Interior," the court in that case, speaking by Chief Justice Fuller, said: "This proposition is denied, and it is insisted that the authority of the Secretary relates solely to public lands the title to which is still in the United States, and that, by the issue of the patent to town site trustees, the title passes, and all control over the lands embraced therein is lost. Hence, that in this case the title of the United States passed by the patent to the trustees, and that they held it thereafter in trust for the occupants, free from the control of the Land Department. Reference is made to *Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848, and like cases, to the point that when a patent has been awarded, issued, delivered, and accepted, all right to control the title or to decide on the right to the title has passed from the executive department of the government. But those cases refer to the legal title directly and finally conferred, and the principle invoked can only be applicable on the assumption that, by the town site conveyance, title was granted to the Oklahoma trustees for the purpose of devesting the government of all authority and control over the final disposition of the property, and not for the purpose of putting title in the trustees as agents of the government for the execution of the trust devolving upon them as such. Whether this assumption is justified or not must depend upon the terms and true construction of the act of May 14th, 1890."

The court then examined the several sections of the act of 1890, and proceeded: "In the light of these provisions we perceive no reason for doubting that the trustees appointed by the Secretary under the act, and whose compensation and expenses were fixed by him, were agents of the government for the purpose of carrying out the trust thereby created, to the extent and as specified, and this included the ascertainment of the beneficiaries in the first instance, and the transfer of the title to them. While, on the final entry, the title of the United States was to be conveyed to the trustees, such [123] conveyance was *explicitly declared as made 'for the uses and purposes in the act provided,' and among these uses and purposes was the determination of controversies between contesting claimants by the trustees, who were to administer oaths, pass on evidence, and keep a record of their proceedings, to be deposited in the Land Department. They unquestionably acted in that regard as the representatives of the government, and their decisions were properly subject to that appeal to the Commissioner and the Secretary, for which the Secretary's regulations provided. As matter of convenience, the trustees were the instrumentality for the transmission of title in respect of lands disposed of to actual holders, while the Secretary, notwithstanding the patent, was the medium as to surplus lands, which he could not be if the legal title had definitively passed to the trustees by the patent for the whole site. The result is the same if the 4th section be construed as directing the Secretary to cause the trustees to execute the conveyance therein referred to. The trust upon which the title was held was to be discharged in accordance with the regulations, and was necessarily subject to the supervisory power of the Department of the Interior. Section 2387 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1457) confirms this view, for the town sites there referred to were to be entered by the corporate authorities of the town, if incorporated, or, if not, by the judge of the county court for the county in which the town was located, and the trust as to the disposal of the lots and proceeds of the sales thereof was to be executed in accordance with such regulations as might be prescribed by the legislative authority of the state or territory in which the town might be situated; while, under this special act in reference to Oklahoma, the entry was to be made by trustees appointed by the Secretary, and the trust conducted under such regulations as might be established by him. In the one case, the government parted with its connection with the land when the patent issued to the local authority; in the other, the government retains its connection by having the entry made by its own agents, and the trust executed in the manner it directs. By the scheme of this act, the title is held in trust for the occupying claimants, it is true, but also in trust *sub modo* for the government until the [124] rightful claimants and the undisposed of or surplus lands are ascertained."

It is suggested that the question in the *McDaid Case* was not the same as the one now under consideration. That is true, but the decision in that case required the court to determine the meaning of the act of Congress of 1890; consequently, what was said in the *McDaid Case* as to the scope of the act is pertinent here.

Several cases were cited in argument as sustaining such a construction of the act of Congress as would authorize a suit like this. We allude to *Re Emblen*, 161 U. S. 52, 56, 40 L. ed. 613, 616, 16 Sup. Ct. Rep. 487, 488; *Germania Iron Co.* v. *United States*, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337; and *Payne* v. *Robertson*, 169 U. S. 323, 42 L. ed. 764, 18 Sup. Ct. Rep. 337.

In *Emblen's Case* it appeared that pending a contest before the Secretary of the Interior between Emblen and Weed as to

whom a patent should be issued for a tract of land in Colorado, Congress passed an act [28 Stat. at L. 599, chap. 15] confirming Weed's entry, and directing that a patent issue to him, which was done. Then Emblen sought by mandamus to compel the Secretary to rehear the case, and to decide the issue between him and Weed, independently of the act of Congress, which was alleged to be unconstitutional. This court, speaking by Mr. Justice Gray, said: "Such being the state of the case, it is quite clear that (even if the act of Congress was unconstitutional, which we do not intimate) the writ of mandamus prayed for should not be granted. The determination of the contest between the claimants of conflicting rights of pre-emption, as well as the issue of a patent to either, was within the general jurisdiction and authority of the Land Department, and cannot be controlled or restrained by mandamus or injunction. After the patent has once been issued, the original contest is no longer within the jurisdiction of the Land Department. The patent conveys the legal title to the patentees; and cannot be revoked or set aside, except upon judicial proceedings instituted in behalf of the United States. The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. All this is clearly settled by previous decisions of this court, including some of those on which the petitioner most relies" —citing *Johnson* v. *Towsley*, 13 Wall. 72, 20 [25] L. ed. 485; **Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848; *Marquez* v. *Frisbie*, 101 U. S. 473, 25 L. ed. 800; *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 636, 26 L. ed. 875; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Monroe Cattle Co.* v. *Becker*, 147 U. S. 47, 37 L. ed. 72, 13 Sup. Ct. Rep. 217; *Turner* v. *Sawyer*, 150 U. S. 578, 586, 37 L. ed. 1189, 1191, 14 Sup. Ct. Rep. 192. So far from militating against the doctrine of the *McDaid Case* the above observations sustain the views there expressed. The patent referred to in the *Emblen Case* was a formal, regular patent, designed to pass the title of the United States, and to invest the patentee with all the rights of the United States in the land.

In *Germania Iron Co.* v. *United States*, 165 U. S. 379, 383, 41 L. ed. 754, 756, 17 Sup. Ct. Rep. 337, the question was whether the court could by decree, in a writ brought by the United States, cancel a patent that had been issued by inadvertence and mistake, and thereby restore the jurisdiction of the Land Department to determine such disputed questions of fact as involved the title to the land patented. That suit was maintained and the patent was canceled. It is clear that the decision has no bearing on the question now before us.

In *Payne* v. *Robertson* the question as to the right to maintain a suit directly against the town site trustees for the purpose of devesting them of the title to the land in dispute does not appear to have been raised by the parties; it certainly was not decided by the court. The sole question, the court took care to say, was whether, by reason of his entry into the territory, and his presence there, under the circumstances stated, the plaintiff, who was a deputy marshal of the United States, was disqualified from making a homestead entry immediately upon the lands being opened for settlement. The court held against the plaintiff on that point, and that being conclusive of the case, the judgment of this court was placed entirely upon that ground. It was not necessary to go farther and decide the question here presented.

Nor is there anything in *Wilcox* v. *Jackson ex dem. M'Connell*, 13 Pet. 498, 10 L. ed. 264, and *United States* v. *Schurz*, 102 U. S. 402, 26 L. ed. 173, at all in conflict with the decisions in the above cases. Both the *Wilcox* and *Schurz Cases* recognize the principle that after the title to public lands *has [126] passed from the United States, that is, after the Land Department has performed the last act in the series necessary to pass the title of the government, the courts will, as between parties asserting conflicting rights in such lands, determine, by appropriate judicial proceedings, which of the parties has the better right. But those cases equally recognize the principle that the courts will not interfere with the Land Department in its control and disposal of the public lands, under the legislation of Congress, so long as the title in any essential sense remains in the United States.

Without further reference to authorities, we adjudge that, until the title to lands within any town site boundary has been finally disposed of as provided in the act of 1890, no suit can be maintained against the town site trustees to devest them of the title held by them in trust for occupants under that act; although a town site occupant, after receiving title under the act, may be sued by anyone claiming to have acquired, under the homestead laws, a right to the lands prior and superior to that held by the town site trustees for the use and benefit of town site occupants.

*The decree of the Supreme Court of Oklahoma is affirmed.*

Mr. Justice **White** dissented.

Mr. Justice **McKenna** did not hear the argument of this case nor participate in the decision.

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*A. D. JAMES, United States Marshal for [127] the Western District of Kentucky, and The United States, *Appts.*,

*v.*

HENRY BOWMAN.

(See S. C. Reporter's ed. 127-142.)

*Constitutional law—power of Congress under 15th Amendment—validity of statute against wrongful individual acts—bribery of negro voters—statutory construction—limiting operation to sustain validity.*

1. The provision which is made by U. S. Rev.

NOTE.—*On bribery of voters*—see note to

Stat. § 5507 (U. S. Comp. Stat. 1901, p. 3712), for the punishment of individuals who, by means of bribery, prevent persons to whom the right of suffrage is guaranteed by U. S. Const. 15th Amend. from exercising that right, cannot be sustained as an exercise of the power granted to Congress by such Amendment, to prevent the denial of such right by state action.

2. The operation of U. S. Rev. Stat. § 5507 (U. S. Comp. Stat. 1901, p. 3712), which was manifestly enacted to punish the bribery at all elections, state and Federal, of persons guaranteed the right to vote by U. S. Const. 15th Amend., cannot be limited by judicial construction, for the purpose of sustaining its constitutionality, to the bribery of voters at elections for Federal officers.

[No. 213.]

*Argued March 16, 1903. Decided May 4, 1903.*

APPEAL from the District Court of the United States for the Western District of Kentucky to review a judgment granting a writ of habeas corpus to a person indicted for bribing negro voters to refrain from voting, in violation of U. S. Rev. Stat. § 5507. *Affirmed.*

Statement by Mr. Justice **Brewer:**

In December, 1900, an indictment was found by the United States district court for the district of Kentucky against the appellee, Henry Bowman, and one Harry Weaver, based upon § 5507 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3712). The indictment charged, in substance, that certain "men of African descent, colored men, negroes, and not white men," being citizens of Kentucky and of the United States, were, by means of bribery, unlawfully and feloniously intimidated and prevented from exercising their lawful right of voting at a certain election held in the fifth congressional district of Kentucky on the 8th day of November, 1898, for the election of a representative in the Fifty-sixth Congress of the United States.

[128] *No allegation is made that the bribery was because of the race, color, or previous condition of servitude of the men bribed. The appellee, Henry Bowman, having been arrested and held in default of bail, sued out a writ of habeas corpus on the ground of the unconstitutionality of § 5507. The district judge granted the writ, following reluctantly the decision of the circuit court of appeals for the sixth circuit, in *Lackey* v. *United States*, 53 L. R. A. 660, 46 C. C. A. 189, 107 Fed. 114. From that judgment the government has taken this appeal.

Section 5507 is as follows:

"Sec. 5507. Every person who prevents, hinders, controls, or intimidates another from exercising, or in exercising the right of suffrage, to whom that right is guaranteed by the Fifteenth Amendment to the Constitution of the United States, by means of bribery or threats of depriving such person of employment or occupation, or of ejecting such person from a rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, shall be punished as provided in the preceding section."

The 15th Amendment provides:

"Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

"Sec. 2. The Congress shall have power to enforce this article by appropriate legislation."

*Solicitor General* **Hoyt** argued the cause, and, with *Mr. W. R. Harr*, filed a brief for appellants:

The power of Congress over Federal elections is not derived primarily or entirely from the 15th Amendment, which is said to be the exclusive source of its authority to interfere at state elections, but comes from other provisions of the Constitution.

*Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

The extent of the authority possessed by Congress over its own elections has been conclusively determined by the decisions of this court.

*Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Clarke*, 100 U. S. 399, 25 L. ed. 715; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152.

The principles announced in *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152, are decisive of the questions presented by this record.

Citizens of the United States, without regard to race, color, or previous condition of servitude, who are otherwise qualified to vote, are the persons, and the only persons, to whom the right of suffrage is guaranteed by the 15th Amendment, and consequently the persons referred to in U. S. Rev. Stat. § 5507 (U. S. Comp. Stat. 1901, p. 3712).

*Slaughter House Cases*, 16 Wall. 37, 71, 72, 21 L. ed. 402, 407; *United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563.

The propriety of referring to the act from which a section of the Revised Statutes is taken, for the purpose of ascertaining its meaning, where any ambiguity exists, has been often affirmed by this court.

*Ex parte Crow Dog*, 109 U. S. 556, *sub nom. Ex parte Kang-Gi-Shun-Ca*, 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *United States* v. *Le Bris*, 121 U. S. 278, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; *United States* v. *Hirsch*, 100 U. S. 33, 25 L. ed. 539; *United States* v.

State *ex rel.* Clements v. Humphreys (Tex.) 5 L. R. A. 217.

*On the construction and effect of the 15th Amendment to the Federal Constitution*—see note to United States v. Reese, 23 L. ed. U. S. 563.

*On construction of statutes*—see notes to Riggs v. Palmer (N. Y.) 5 L. R. A. 340; United States v. Saunders, 22 L. ed. U. S. 736; Maillard v. Lawrence, 14 L. ed. U. S. 925, and Blake v. National City Bank, 23 L. ed. U. S. 119.

*Bowen*, 100 U. S. 508, 513, 25 L. ed. 631, 632.

The title of an act may be considered in determining the intention of the legislature.

*Church of Holy Trinity* v. *United States*, 143 U. S. 457, 462, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; *Coosaw Min. Co.* v. *South Carolina*, 144 U. S. 550, 563, 36 L. ed. 537, 542, 12 Sup. Ct. Rep. 689.

The fact that the section in which an ambiguity is found is penal in its nature, and therefore to be construed strictly, does not preclude resort to the original act for the purpose of discovering the legislative intention.

*United States* v. *Lacher*, 134 U. S. 624, 626, 33 L. ed. 1080, 1082, 10 Sup. Ct. Rep. 625.

The necessary effect of the 15th Amendment in prohibiting discrimination against citizens of the United States in the matter of voting because of their race, color, or previous condition is to secure or guarantee that right to all such citizens, of whatever color, white as well as black, who are otherwise qualified under the state law to exercise it.

*Ex parte Yarbrough*, 110 U. S. 665, 28 L. ed. 279, 4 Sup. Ct. Rep. 152.

*Mr.* **Swagar Sherley** argued the cause, and, with *Mr. W. B. Dixon*, filed a brief for appellee:

The 15th Amendment is the only source of power that Congress has as to state elections; and both as to state and Federal elections the power it confers upon Congress for the punishment of offenses against the suffrage is limited to offenses against citizens because of race prejudice, etc., and when committed by the United States or a state, or some officer or agent of the United States or a state.

*United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563; *United States* v. *Cruikshank*, 1 Woods, 308, Fed. Cas. No. 14,897; *United States* v. *Cruikshank*, 92 U. S. 555, 23 L. ed. 592.

U. S. Rev. Stat. § 5507 (U. S. Comp. Stat. 1901, p. 3712), upon which the indictment is founded, is based by its terms upon the 15th Amendment, but is not appropriate legislation thereunder.

*Lackey* v. *United States*, 53 L. R. A. 660, 46 C. C. A. 189, 107 Fed. 114.

It is not within the province of the courts to so limit a statute by judicial construction as to make it operate only as to that which Congress may rightfully prohibit and punish.

*United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563; *Trade-mark Cases*, 100 U. S. 82, *sub nom. United States* v. *Steffens*, 25 L. ed. 550; *United States* v. *Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601.

**Mr. Justice Brewer** delivered the opinion of the court:

The single question presented for our consideration is whether § 5507 can be upheld [136] as a valid enactment, for, if *not, the indictment must also fall, and the defendant was rightfully discharged. On its face the section purports to be an exercise of the power granted to Congress by the 15th Amendment, for it declares a punishment upon anyone who, by means of bribery, prevents another to whom the right of suffrage is guaranteed by such amendment from exercising that right. But that amendment relates solely to action "by the United States or by any state," and does not contemplate wrongful individual acts. It is in this respect similar to the following clauses in the 14th Amendment:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Each of these clauses has been often held to relate to action by a state, and not by individuals. As said in *Virginia* v. *Rives*, 100 U. S. 313, 318, *sub nom. Ex parte Virginia*, 25 L. ed. 667, 669:

"The provisions of the 14th Amendment of the Constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals."

Again, in *Ex parte Virginia*, 100 U. S. 339, 346, 25 L. ed. 676, 679:

"They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."

Again, in *United States* v. *Cruikshank*, 92 U. S. 542, 554, 23 L. ed. 588, 592:

"The 14th Amendment prohibits a state from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government *is [137] in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty."

In *Civil Rights Cases*, 109 U. S. 3, 13, 27 L. ed. 835, 840, 3 Sup. Ct. Rep. 18, 22:

"And so in the present case, until some state law has been passed, or some state action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the 14th Amendment, no legislation of the United States un-

der said amendment, nor any proceeding under such legislation, can be called into activity; for the prohibitions of the amendment are against state laws and acts done under state authority. Of course, legislation may, and should, be provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, state laws, or state action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty, and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the state legislatures, and to supersede them. It is absurd to affirm that, because the rights of life, liberty, and property (which include all civil rights that men have) are by the amendment sought to be protected against invasion on the part of the state without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a state to any persons of the equal protection of the laws is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation; that is, such as may be [138] necessary *and proper for counteracting such laws as the states may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the states may commit or take, and which, by the amendment, they are prohibited from committing or taking."

*United States* v. *Harris*, 106 U. S. 629, 639, 27 L. ed. 290, 294, 1 Sup. Ct. Rep. 601, 609:

"The language of the amendment does not leave this subject in doubt. When the state has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty, or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the state, as enacted by its legislative, and construed by its judicial, and administered by its executive, departments, recognize and protect the rights of all persons,—the amendment imposes no duty, and confers no power, upon Congress."

See also *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Scott* v. *McNeal*, 154 U. S 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 233, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581.

But we are not left alone to this reasoning from analogy. The 15th Amendment itself has been considered by this court, and the same limitations placed upon its provisions. In *United States* v. *Reese*, 92 U. S. 214, 217, 23 L. ed. 563, 564, we said:

"The 15th Amendment does not confer the right of suffrage upon anyone. It prevents the states, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption this could be done. It was as much within the power of a state to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the *amendment has invested [139] the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the 2d section of the Amendment, Congress may enforce by 'appropriate legislation.'"

In passing it may be noticed that this indictment charges no wrong done by the state of Kentucky, or by anyone acting under its authority. The matter complained of was purely an individual act of the defendant. Nor is it charged that the bribery was on account of race, color, or previous condition of servitude. True, the parties who were bribed were alleged to be "men of African descent, colored men, negroes, and not white men," and again, that they were "persons to whom the right of suffrage and the right to vote was then and there guaranteed by the 15th Amendment to the Constitution of the United States." But this merely describes the parties wronged as within the classes named in the amendment. They were not bribed because they were colored men, but because they were voters. No discrimination on account of race, color, or previous condition of servitude is charged.

These authorities show that a statute which purports to punish purely individual action cannot be sustained as an appropriate exercise of the power conferred by the 15th Amendment upon Congress to prevent action by the state through some one or more of its official representatives, and that an indictment which charges no discrimination on account of race, color, or previous condition of servitude is likewise destitute of support by such amendment.

But the contention most earnestly pressed is that Congress has ample power in respect to elections of representatives in Congress; that the election which was held, and at which this bribery took place, was such an election; and that therefore under such general power this statute and this indictment can be sustained. The difficulty with this

contention is that Congress has not by this section acted in the exercise of such power. It is not legislation in respect to elections 140]of Federal *officers, but is leveled at all elections, state or Federal, and it does not purport to punish bribery of any voter. but simply of those named in the 15th Amendment. On its face it is clearly an attempt to exercise power supposed to be conferred by the 15th Amendment in respect to all elections, and not in pursuance of the general control by Congress over particular elections. To change this statute, enacted to punish bribery of persons named in the 15th Amendment at all elections, to a statute punishing bribery of any voter at certain elections would be in effect judicial legislation. It would be wresting the statute from the purpose with which it was enacted and making it serve another purpose. Doubtless even a criminal statute may be good in part and bad in part, providing the two can be clearly separated, and it is apparent that the legislative body would have enacted the one without the other, but there are no two parts to this statute. If the contention be sustained, it is simply a transformation of the statute in its single purpose and scope. This question has been by this court in two cases carefully considered and fully determined. In *United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563, there was an indictment, one count of which was based upon the 3d and another upon the 4th section of the act of May 31, 1870 (16 Stat. at L. 140, chap. 114, U. S. Comp. Stat. 1901, p. 506) the 5th section of which act is substantially repeated in § 5507, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3712). It is true that, as stated, § 4 contains "no words of limitation or reference, even, that can be construed as manifesting any intention to confine its provisions to the terms of the 15th Amendment. That section has for its object the punishment of all persons who by force, bribery, etc., hinder, delay, etc., any person from qualifying or voting." And it is also true that the government expressly waived the consideration of all claims not arising out of the enforcement of the 15th Amendment to the Constitution. Nevertheless the decision is directly in point. We said (p. 221, L. ed. p. 565):

"We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it 141]operate *only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. . . . To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

Again, in the *Trade-Mark Cases*, 100 U. S. 82, *sub nom. United States* v. *Steffens*, 25 L. ed. 550, the validity of an indictment under the 4th and 5th sections of the act of Congress to punish the counterfeiting of trademarks (19 Stat. at L. 141, chap. 274) was considered. The congressional enactments at that time attempted to authorize trademarks generally, and the statute referred to was equally general. It was held that under the Constitution Congress did not have control over the subject of trademarks generally, and, referring to the contention that to a limited extent it had, we said (p. 98, L. ed. p. 553):

"It has been suggested that if Congress has power to regulate trademarks used in commerce with foreign nations and among the several states, these statutes shall be held valid in that class of cases, if no further. . . . While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enforce the valid part where they are distinctly separable, so that each can stand alone, it is not within the judicial province to give to the *words used by Congress a narrower meaning [142] than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body. This precise point was decided in *United States* v. *Reese*, 92 U. S. 214, 23 L. ed. 563. In that case Congress had passed a statute punishing election officers who should refuse to any person lawfully entitled to do so the right to cast his vote at an election. This court was of the opinion that, as regarded the section of the statute then under consideration, Congress could only punish such denial when it was on account of race, color, or previous condition of servitude. It was urged, however, that the general description of the offense included the more limited one, and that the section was valid where such was in fact the cause of denial. But the court

said" (and then follows the quotation we have already made from that case).

We deem it unnecessary to add anything to the views expressed in these opinions. We are fully sensible of the great wrong which results from bribery at elections, and do not question the power of Congress to punish such offenses when committed in respect to the election of Federal officials. At the same time it is all-important that a criminal statute should define clearly the offense which it purports to punish, and that when so defined it should be within the limits of the power of the legislative body enacting it. Congress has no power to punish bribery at all elections. The limits of its power are in respect to elections in which the nation is directly interested, or in which some mandate of the national Constitution is disobeyed; and courts are not at liberty to take a criminal statute, broad and comprehensive in its terms and in these terms beyond the power of Congress, and change it to fit some particular transaction which Congress might have legislated for if it had seen fit.

*The judgment of the District Court is affirmed.*

Mr. Justice **McKenna** took no part in the decision of this case.

Mr. Justice **Harlan** and Mr. Justice **Brown** dissented.

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[143] *SWAN & FINCH COMPANY, *Appt.*,
*v.*
UNITED STATES.

(See S. C. Reporter's ed. 143-147.)

*Duties—drawback on exportation—goods consumed on voyage.*

The drawback provided for by the act of Congress of August 27, 1894, § 22 (28 Stat. at L. 551, chap. 349), re-enacted as the act of July 24, 1897, § 30 (30 Stat. at L. 211, chap. 11, U. S. Comp. Stat. 1901, p. 1991), "on the exportation" of articles manufactured from imported materials on which duties had been paid, will not be allowed on goods placed on board a vessel bound for a foreign port, to be used and consumed on board the vessel during its voyage, and in fact so used and consumed.

[No. 258.]

*Argued April 22, 23, 1903. Decided May 18, 1903.*

APPEAL from the Court of Claims to review a judgment denying the right to a drawback of duties on goods manufactured from imported materials, used and consumed by a vessel bound to a foreign port. *Affirmed.*

Statement by Mr. Justice **Brewer:**

Section 22 of the act of August 27, 1894 (28 Stat. at L. 551, chap. 349), re-enacted as § 30 of the act of July 24, 1897 (30 Stat. at L. 211, chap. 11, U. S. Comp. Stat. 1901, p. 1991), is as follows:

"Sec. 22. That where imported materials on which duties have been paid are used in the manufacture of articles manufactured or produced in the United States, there shall be allowed on the exportation of such articles a drawback equal in amount to the duties paid on the materials used, less one per centum of such duties: *Provided*, That when the articles exported are made in part from domestic materials the imported materials, or the parts of the articles made from such materials, shall so appear in the completed articles that the quantity or measure thereof may be ascertained: *And provided further*, That the drawback on any article allowed under existing law shall be continued at the rate herein provided. That the imported materials used in the manufacture or production of articles entitled to drawback of customs duties when exported shall, in all cases where drawback of duties paid on such materials is claimed, be identified, the quantity of such materials used and the amount of duties paid thereon shall be ascertained, the facts of the manufacture or production of such articles in *the United [144] States and their exportation therefrom shall be determined, and the drawback due thereon shall be paid to the manufacturer, producer, or exporter, to the agent of either, or to the person to whom such manufacturer, producer, exporter, or agent shall in writing order such drawback paid, under such regulations as the Secretary of the Treasury shall prescribe."

During the years 1895, 1896, 1897, the appellant, a corporation engaged in business as importer, manufacturer, and exporter of oils at New York city and elsewhere in the United States, having used in the manufacture of certain kinds of lubricating oils imported rape seed oil on which duties had been paid, placed on board of vessels bound for foreign ports, lubricating oils so manufactured, and claimed a drawback of the duties paid on the imported rape seed oil used therein. The Treasury Department allowed and paid the drawback on such manufactured oils as were shipped to foreign countries and there relanded, but refused to pay any on such as were placed on board for use and consumed in use on the vessels. The appellant brought this suit in the court of claims to recover the drawbacks on the last-named oils. That court decided against it (37 Ct. Cl. 101), and from such decision this appeal was taken.

*Mr.* **William B. King** argued the cause, and, with *Mr. George A. King*, filed a brief for appellant:

The word "exportation" has two meanings: (1) Its primary, general, or essential meaning—to carry or send out of a place, and (2) Its secondary, specific, or especial meaning—to send out from one country to another.

Murray's Philological Dict. title "Export;" Webster's Dict. title "Export;" Century

Dict. title "Export;" Standard Dict. title "Export;" Anderson's Dict. title "Export;" Black's Dict. title "Export."

Which meaning is to be preferred in this statute is to be decided by finding which is more in accord with the purpose of the statute.

Black, Constr. & Interpretation of Laws, p. 56.

The purpose of the drawback law is to place the American manufacturer in a position equal to that of his foreign competitor in those markets where the protective tariff laws of the United States can give no advantage to the American.

*Campbell* v. *United States*, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759; *Tide Water Oil Co.* v. *United States*, 171 U. S. 210, 216, 43 L. ed. 139, 140, 18 Sup. Ct. Rep. 837; *Schlitz Brewing Co.* v. *United States*, 35 Ct. Cl. 110

Whenever the question has been clearly presented for judicial decision, it has been uniformly held that exportation was complete upon leaving the port, and that reland-ing in a foreign country is not an essential of exportation.

*Sampson* v. *Peaslee*, 20 How. 571, 15 L. ed. 1022; *Irvine* v. *Redfield*, 23 How. 170, 16 L. ed. 418; *Greely* v. *Thompson*, 10 How. 225, 13 L. ed. 397; *Forman* v. *Peaslee*, Fed. Cas. No. 4,941; *Muller* v. *Baldwin*, 43 L. J. Q. B. N. S. 164.

The essential to importation is entrance, just as the essential to exportation is exit.

*Marriott* v. *Brune*, 9 How. 619, 13 L. ed. 282; *Lawder* v. *Stone*, 187 U. S. 281, *ante*, 178, 23 Sup. Ct. Rep. 79; *American Sugar Ref. Co.* v. *United States*, 181 U. S. 610, 45 L. ed. 1024, 21 Sup. Ct. Rep. 830.

Several cases in this court have laid down the principle that in the Constitution the word "export" is used in relation to foreign commerce, and not interstate or domestic commerce.

*Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Woodruff* v. *Parham*, 8 Wall. 123, 19 L. ed. 382; *Brown* v. *Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Dooley* v. *United States*, 183 U. S. 151, 46 L. ed. 129, 22 Sup. Ct. Rep. 62.

In an English case where the question arose whether "exportation" in a statute included domestic trade, it was defined in its broader meaning of carrying out of port.

*Stockton & D. R. Co.* v. *Barrett*, 11 Clark & F. 600.

Where goods leave the United States only temporarily, the owner intending to reland them in this country, there is no exportation, because the intent is absent. The courts hold the purpose of permanent absence essential to the exportation.

*United States* v. *The Forrester*, Newberry, Adm. 81, Fed. Cas. No. 15,132; *Kidd* v. *Flagler*, 54 Fed. 367; *Kennedy* v. *United States*, 37 C. C. A. 25, 95 Fed. 127.

*Assistant Attorney General* **Pradt** argued the cause and filed a brief for appellee:

It is to be assumed that the words and phrases are used in their technical meaning, if they have acquired one.

Endlich, Interpretation of Statutes, § 2; *Ex parte Hall*, 1 Pick. 261; *Brocket* v. *Ohio & P. R. Co.* 14 Pa. 243, 53 Am. Dec. 534; *State* v. *Smith*, 5 Humph. 396.

This rule has found especial application by this court in the interpretation of statutes relating to the revenue laws.

*American Net & Twine Co.* v. *Worthington*, 141 U. S. 471, 35 L. ed. 822, 12 Sup. Ct. Rep. 55; *Two Hundred Chests of Tea*, 9 Wheat. 430, 438, 6 L. ed. 128, 129; *Maddock* v. *Magone*, 152 U. S. 368, 38 L. ed. 482, 14 Sup. Ct. Rep. 588; *De Jonge* v. *Magone*, 159 U. S. 569, 40 L. ed. 263, 16 Sup. Ct. Rep. 119.

The word "exportation" has a well-known restricted technical meaning.

Anderson, title "Export;" Black, title "Export;" Bouvier, title "Exportation;" English (1899), title "Exportation;" Jacobs-Tomlins, title "Exportation;" Rapalje & Lawrence, title "Exportation;" Wharton, title "Exportation;" Century, title "Export;" Standard, title "Exportation;" Webster, title "Export."

The words "imports," "exports," and "exportation" have frequently received judicial definition, and in every case in which the words were employed in their commercial sense they have been held to apply to foreign commerce,—to goods shipped from one country to another in foreign trade, and in no such instance were the words given their general meaning.

*Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Woodruff* v. *Parham*, 8 Wall. 123, 131, 19 L. ed. 382, 384; *De Lima* v. *Bidwell*, 182 U. S. 176, 45 L. ed. 1048, 21 Sup. Ct. Rep. 743; *Kidd* v. *Flagler*, 54 Fed. 367, Reversed in 24 C. C. A. 123, 45 U. S. App. 461, 78 Fed. 341; *United States* v. *The Forrester*, Newberry, Adm. 81, Fed. Cas. No. 15,-132.

The essential element of an importation or an exportation, in its constitutional sense, is the intent to reland the goods in some foreign port.

*The Mary*, 1 Gall. 206, Fed. Cas. No. 9,-183; *McLean* v. *Hager*, 31 Fed. 604; *Forman* v. *Peaslee*, Fed. Cas. No. 4,941; *Clarke* v. *Clarke*, 3 Woods, 408, Fed. Cas. No. 2,846.

The meaning of the word as employed in the Constitution must be given to it in the statutes of the United States.

*Kentucky Railroad Tax Cases*, 115 U. S. 334, *sub nom. Cincinnati, N. O. & T. P. R. Co.* v. *Kentucky*, 29 L. ed. 418, 6 Sup. Ct. Rep. 57.

This court has construed the purpose of the drawback provision to be not only the encouragement of manufactures in this country, but the enlargement of our trade with foreign countries.

*Tide Water Oil Co.* v. *United States*, 171 U. S. 216, 43 L. ed. 141, 18 Sup. Ct. Rep. 837.

If there can be any ambiguity found in the statute, the doubt should be solved in favor of the government, since the claimant is claiming the benefit of a special privilege,—exemption from the burden of a general statute.

*Hannibal & St. J. R. Co.* v. *Missouri River Packet Co.* 125 U. S. 271, 31 L. ed. 736, 8 Sup. Ct. Rep. 874.

No mere omission, no mere failure to provide for contingencies which it may seem wise to have specifically provided for, justify any judicial addition to the language of the statute.

*United States* v. *Goldenberg*, 168 U. S. 103, 42 L. ed. 398, 18 Sup. Ct. Rep. 3.

Mr. Justice **Brewer** delivered the opinion of the court:

The statute allows the drawback "on the exportation," and the question is whether goods placed on board a vessel bound for a foreign port, to be used and consumed on board the vessel during its voyage, and in fact so used and consumed, are exported.

The careful opinion of the court of claims, which, in general, we approve and to which we refer, relieves us from the necessity of an extended discussion. Whatever primary [145] meaning *be indicated by its derivation, the word "export," as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country. "As the legal notion of emigration is a going abroad with an intention of not returning, so that of exportation is a severance of goods from the mass of things belonging to this country with an intention of uniting them to the mass of things belonging to some foreign country or other." 17 Ops. Atty. Gen. 583.

True, the context may sometimes give to the word a narrower meaning, and in the execution of the administrative affairs of government it may have been applied to cases in which there was not in the full sense of the term an exportation, yet these are exceptions and do not destroy its general signification. It cannot mean simply a carrying out of the country, for no one would speak of goods shipped by water from San Francisco to San Diego as "exported," although in the voyage they are carried out of the country. Nor would the mere fact that there was no purpose of return justify the use of the word "export." Coal placed on a steamer in San Francisco to be consumed in propelling that steamer to San Diego would never be so designated. Another country or state as the intended destination of the goods is essential to the idea of exportation.

Counsel for appellant, after quoting from several dictionaries, say:

"These definitions show that the word has two meanings:

"(1) Its primary, general or essential meaning,—to carry or send out of a place; and

"(2) Its secondary, specific or especial meaning,—to send out from one country to another.

"Of all goods sent out of this country but a small proportion fails to reach a foreign country; the amount consumed or lost at sea is minute in comparison. In ordinary use, therefore, the foreign destination is implied. We claim that, however usual, it is not essential, and that here the original and primary definition of the word should be applied to goods carried out of the country on vessels in the foreign trade, although they never reach a foreign country."

To this we are unable to yield our assent: *First. The fact that the words "export" [146] and "exportation" are, as we have indicated, generally used in the sense of transportation from this to a foreign country, makes against the contention that it is here used in a different sense.

Second. The purpose with which the drawback statute was enacted is against it. In *Campbell* v. *United States*, 107 U. S. 407, 413, 27 L. ed. 592, 595, 2 Sup. Ct. Rep. 759, 765, we said:

"The purpose of the drawback provision is to make duty free, imports which are manufactured here and then returned whence they came or to some other foreign country.—articles which are not sold or consumed in the United States."

So, also, in *Tide Water Oil Co.* v. *United States*, 171 U. S. 210, 216, 43 L. ed. 139, 18 Sup. Ct. Rep. 837, 839:

"The object of the section was evidently, not only to build up an export trade, but to encourage manufactures in this country, where such manufactures are intended for exportation, by granting a rebate of duties upon the raw or prepared materials imported, and thus enabling the manufacturer to compete in foreign markets with the same articles manufactured in other countries."

Third. The uniform construction placed by the department charged with the execution of the statute has been against it.

Fourth. Being a governmental grant of a privilege or benefit it is to be construed in favor of the government and against the party claiming the grant. Where the burden is placed upon a citizen, if there be a doubt as to the extent of the burden it is resolved in favor of the citizen, but where a privilege is granted any doubt is resolved in favor of the government. In *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616, 30 L. ed. 1012, 1015, 7 Sup. Ct. Rep. 1240, 1244, the one rule was thus stated:

"We are of opinon that the decision of the circuit court was correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer 'as duties are never imposed on the citizen upon vague or doubtful interpretations.' *Powers* v. *Barney*, 5 Blatchf. 202, Fed. Cas. No. 11,361; *United States* v. *Isham*, 17 Wall. 496, 504, 21 L. ed. 728, 730; *Gurr* v. *Scudds*, 11 Exch. 190, 191; *Adams* v. *Bancroft*, 3 Sumn. 384, Fed. Cas. No. 44." See also *American Net & Twine Co.* v. *Worthington*, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55.

*On the other hand, in *Hannibal & St. J.* [147] *R. Co.* v. *Missouri River Packet Co.* 125 U. S. 260, 271, 31 L. ed. 731, 735, 8 Sup. Ct. Rep. 874, 880, we said, citing several authorities:

"But if there be any doubt as to the proper construction of this statute (and we think there is none), then that construction must be adopted which is most advantageous

to the interests of the government. The statute, being a grant of a privilege, must be construed most strongly in favor of the grantor."

For these reasons we think *the judgment of the Court of Claims was correct, and it is affirmed.*

Mr. Justice **Brown** and Mr. Justice **Peckham** dissented.

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MUTUAL RESERVE FUND LIFE ASSOCIATION, *Appt.*,

*v.*

JAMES S. PHELPS and Fidelity Trust & Safety Vault Company.

(See S. C. Reporter's ed. 147-160.)

*Service of process on foreign corporation—service on state officer after cancelation of license—Federal courts—enjoining proceedings in state courts.*

1. The cancelation, by the insurance commissioner of Kentucky, of the license to do business in that state, granted to an insurance company which had consented, pursuant to Ky. Stat. 1899, § 631, that service of process upon such commissioner in any action brought in the state should be a valid service upon the company, does not render such service insufficient to bring that company into a court of the state as a party defendant to a suit brought by a citizen of such state upon a cause of action which arose out of transactions between the parties while the insurance company was carrying on business in Kentucky under the license.

2. A Federal court is without jurisdiction to enjoin proceedings in a state court sought to be removed to the Federal court, where such proceedings are not removable because regarded by the state court merely as supplementary in character and as a mere continuation of an action already passed into judgment, and in aid of the execution of such judgment.

[No. 263.]

*Argued April 24, 27, 1903. Decided May 18, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which reversed a decree of the Circuit Court for the District of Ken-

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NOTE.—*As to service of process on foreign corporations*—see notes to Foster v. Charles Betcher Lumber Co. (S. D.) 23 L. R. A. 490; Eldred v. American Palace-Car Co. 45 C. C. A. 3.

*That a foreign corporation must be engaged in business within the state in order to validate service of process upon it*—see note to Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 591.

*As to conflict of jurisdiction between Federal and state courts*—see Louisville Trust Co. v. Cincinnati, 22 C. C. A. 356, and note. And see note to J. I. Case Plow Works v. Finks, 26 C. C. A. 50.

*On injunction against suit in foreign jurisdiction*—see note to Thorndike v. Thorndike (Ill.) 21 L. R. A. 71.

*As to enjoining proceedings in Federal courts*—see notes to Clapp v. Otoe County, 45 C. C. A. 591; Central Trust Co. v. Grantham, 27 C. C. A. 575, and Garner v. Second Nat. Bank, 16 C. C. A. 90.

*Service on state officer as service on foreign corporation.*

Service on an insurance commissioner, as prescribed by statute, is sufficient as against a foreign insurance company that has appointed him agent for that purpose. Osborne v. Shawmut Ins. Co. 51 Vt. 278.

Valid service of summons on a misdemeanor indictment against a foreign insurance company may be made under Ky. Stat. § 631, requiring consent to service of process on the insurance commissioner "in any action," and Crim. Code, § 147, providing that process upon indictments shall be served as in civil actions. Ætna Ins. Co. v. Com. 106 Ky. 864, 45 L. R. A. 355, 51 S. W. 624.

Statutes prescribing this method for service of process on foreign insurance companies do not preclude service in the manner prescribed for foreign corporations generally. Howard v. Prudential Ins. Co. 1 App. Div. 135, 37 N. Y. Supp. 832; Silver v. Western Assur. Co. 3 App. Div. 572, 38 N. Y. Supp. 335; Green v. Equitable Mut. Life & Endowment Asso. 105 Iowa, 628, 75 N. W. 635; Mutual Reserve Fund Life Asso. v. Cleveland Woolen Mills, 27 C. C. A. 212, 54 U. S. App. 290, 82 Fed. 508; Connecticut Mut. L. Ins. Co. v. Spratley, 99 Tenn. 322, 44 L. R. A. 442, 42 S. W. 145, Affirmed in 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

The provision of Va. Code, chap. 53, for the service of process on the auditor of public accounts during any vacancy in the agency to accept service for a foreign insurance company, does not apply to such companies as are conducted on the assessment plan, but as to such companies the method of service is pointed out by Va. act of May 18, 1887, which makes no provision for service during the existence of any such vacancy. Millan v. Mutual Reserve Fund Life Asso. 103 Fed. 764.

There is some conflict as to whether a foreign corporation doing business within the state without complying with a statute requiring, as a condition precedent, the designation of a state official to accept service of process, is bound by service on such official.

Service under such circumstances has been held to be at least prima facie sufficient. Knapp, S. & Co. Co. v. National Mut. F. Ins. Co. 30 Fed. 607.

And the company has been held estopped by such a course to deny the validity of such service. Ehrman v. Teutonia Ins. Co. 1 McCrary, 123, 1 Fed. 471; Masons' Fraternal Acci. Asso. v. Riley, 60 Ark. 578, 31 S. W. 148; Sparks v. National Masonic Acci. Asso. 73 Fed. 277; Sparks v. National Masonic Acci. Asso. 100 Iowa, 458, 69 N. W. 678; Modern Woodmen v. Noyes, 158 Ind. 503, 64 N. E. 21.

To the same effect is Old Wayne Mut. Life Asso. v. Flynn (Ind. App.) 66 N. E. 57, where the court said that a foreign insurance company cannot go into the state of Pennsylvania and do business therein and evade the provisions of a statute of that state requiring the filing of a stipulation authorizing service of process on an insurance commissioner or some designated agent, by failing to comply with the law.

So where defendant admits in the pleadings that it was a foreign corporation engaged in the

tucky enjoining further proceedings in a state court, and remanded the cause, with directions to dismiss the bill. *Affirmed.*

See same case below, 50 C. C. A. 339, 112 Fed. 453.

Statement by Mr. Justice **Brewer:**

Section 631, Kentucky Statutes 1899 (Laws 1893, chap. 171, § 94), reads as follows:

[148] *"Sec. 631. Before authority is granted to any foreign insurance company to do business in this state, it must file with the commissioner a resolution adopted by its board of directors consenting that service of process upon any agent of such company in this state, or upon the commissioner of insurance of this state, in any action brought or pending in this state, shall be a valid service upon said company; and if process is served upon the commissioner it shall be his duty to at once send it by mail, addressed to the company at its principal office; and if any company shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, remove said suit or proceeding to any Federal court, or shall institute any suit or proceeding against any citizen of this state in any Federal court, it shall be the duty of the commissioner to forthwith revoke all authority to such company and its agents to do business in this state, and to publish such revocation in some newspaper of general circulation published in the state."

On May 10, 1893, the appellant, the Mutual Reserve Fund Life Association, hereinafter called the association, acting under said section, by resolution of its board of directors, consented that the insurance com-

business of fire insurance within the state, it is conclusively presumed against it that before so doing it duly assented as required by Kan. Gen. Stat. 1889, chap. 50a, § 41, that in actions brought against it jurisdiction might be obtained by service upon the superintendent of insurance in the manner prescribed by that statute which authorized it to do business in the state upon compliance with its terms. German Ins. Co. v. Hall, 1 Kan. App. 43, 41 Pac. 69.

But the Rhode Island supreme court has held that jurisdiction of a foreign insurance company, doing business in the state without complying with the provisions of a statute which requires it, before doing business, to appoint the insurance commissioner to accept service of process, cannot be acquired by service on such commissioner, where the facts appear from plaintiff's own showing that the defendant has not appeared to plead to the jurisdiction, and is not shown to have received notice either actual or constructive. Lubrano v. Imperial Council, O. of U. F. 20 R. I. 27, 38 L. R. A. 546, 37 Atl. 345. The court distinguished Ehrman v. Teutonia Ins. Co. 1 McCrary, 123, 1 Fed. 471, and Sparks v. National Masonic Acci. Asso. 73 Fed. 277, *supra*, pointing out that in those cases the defendant appeared and pleaded to the jurisdiction, and that the return on the writ showed a valid service prima facie, and said that no presumption that the defendant had discharged its statutory duty by appointing the person therein designated as its agent to accept service could be said to arise in the face of a record which showed as a matter of fact that the defendant had not complied with the statute.

In Rothrock v. Dwelling-House Ins. Co. 161 Mass. 423, 23 L. R. A. 863, 37 N. E. 206, which was an action to enforce a judgment recovered in the courts of another state against a foreign insurance company, the court refused to follow Ehrman v. Teutonia Ins. Co. 1 McCrary, 123, 1 Fed. 471, *supra*. The court pointed out that in that case the defendant had notice of the suit and appeared and sought to set up a want of jurisdiction, but said that this difference might not be very material, and added: "It seems to us that the question before us is not whether the defendant would be estopped from setting up its failure to comply with the law to relieve itself from liability under its contract, but whether the plaintiff presents a case which comes within the terms of the statute on which the jurisdiction of the court must be founded. Unless the statute applies to a case like this the service was improperly made, and it is as if there had been no service. In our opinion unless the stipulation is filed a foreign insurance company has no right to do business in the state, and if it violates the law in that respect no service can be made upon the auditor and no jurisdiction can be obtained there on which to found a judgment against it. The remedy provided is by a punishment of the corporation and of such others as have disregarded the requirements of the statute."

The provision of Me. Rev. Stat. tit. 4, chap. 49, § 63, authorizing service of process against a foreign insurance company to be made on the insurance commissioner "in case no agent of such company can be found" does not apply to companies which have never done business or had an agent or officer or attorney in the state. Hazeltine v. Mississippi Valley F. Ins. Co. 55 Fed. 743.

And where the company had withdrawn from the state of Maine before service, the New York supreme court refused to enforce a default judgment *in personam* rendered by a court of the former state on service of process upon the commissioner of insurance. People v. Commercial Alliance L. Ins. Co. 7 App. Div. 297, 40 N. Y. Supp. 269. It was insisted in this case that, as the summons bore date before that of the company's withdrawal from the state, the service was valid because an action is deemed to be begun on the day the writ or summons is dated; but the court said that so far as foreign insurance corporations are concerned jurisdiction is acquired by the service of a writ or summons, and that where, on the date of such service the company was not doing business within the state, the Maine court had no jurisdiction over it to render a judgment enforceable outside of the state.

So the right to serve process on any of the former agents of a foreign insurance company or upon the auditor of public accounts under Va. Code, chap. 53, was terminated by the withdrawal of the company from the state. Millan v. Mutual Reserve Fund Life Asso. 103 Fed. 764.

But a foreign insurance company which has consented, pursuant to Ky. act of April 5, 1893, § 94, to service of process upon the commissioner of insurance does not, by ceasing to do business in the state, preclude service on that official in an action on the contract of insurance previously made in the state. Home Ben. Soc. v. Muehl, 22 Ky. L. Rep. 1378, 59 S. W. 520; Germania Ins. Co. v. Ashby, 23 Ky. L. Rep. 1564, 65 S. W. 611; MUTUAL RESERVE FUND LIFE ASSO. v. PHELPS.

Earlier cases in the lower Federal courts

missioner of Kentucky should be authorized to receive service of process in any action brought or pending in Kentucky, and also that like valid service of process might be made upon every agent then or thereafter acting for it in Kentucky.

On October 10, 1899, the insurance commissioner canceled the license which had theretofore been issued to the association, and gave it notice that from and after that date all authority granted by his department to it, and all licenses issued to the agents of the association to do business in the state of Kentucky, were revoked. And from and after that date the association had no agent or agents in the state of Kentucky and did no new business whatever in the state, but at one time, for the convenience of the holders of certificates residing in Jefferson county, permitted them to remit dues and assessments through the Western Bank, located in the city of Louisville.

*On February 28, 1900, James S. Phelps[149] commenced an action in the circuit court of Jefferson county, Kentucky, against the association, alleging that on July 8, 1885, he had made application for membership in it, and that on July 16, 1885, his application had been approved and certificate of policy of insurance issued to him. Breaches of the agreement on the part of the defendant were alleged, and a judgment asked for $1,994.20. A summons was issued and served on the insurance commissioner, and an alias summons was also issued and served upon Ben Frese, as the managing agent and chief officer and agent of the association in Jefferson county. The defendant appeared specially and moved to quash the service on each summons. The motion was heard on

which held that the authority of the insurance commissioner to accept service conferred by resolution of a foreign insurance company adopted pursuant to Ky. Stat. § 631, ceased when the company's license to do business in the state was revoked, and it had in consequence ceased to do such business and had withdrawn its agents from the state (Friedman v. Empire L. Ins. Co. 101 Fed. 535; Swann v. Mutual Reserve Fund Life Asso. 100 Fed. 922), being squarely in conflict with MUTUAL RESERVE FUND LIFE ASSO. v. PHELPS, must be regarded as overruled by it.

In some states the statutes provide that stipulations to accept service of process on the state official shall be irrevocable so long as any liability of the stipulating foreign insurance company to any resident of the state continues.

Where the statute so provides, service on such official is not invalid because the company had ceased doing business in the state and had revoked its agencies, provided the policy sued on was issued while the company was doing business in the state. Collier v. Mutual Reserve Fund Life Asso. 119 Fed. 617.

Nor in such case is the revocation of the license permitting a foreign insurance company to do business in the state, coupled with the subsequent attempted revocation by the company of its stipulation authorizing service of process on the insurance commissioner, effectual to preclude such service in an action founded upon the liability growing out of a policy issued while the stipulation was in force. Magoffin v. Mutual Reserve Fund Life Asso. 87 Minn. 260, 91 N. W. 1115.

Nor can the company by ceasing to do business within the state revoke, as to an outstanding liability, its power of attorney appointing the insurance commissioner to accept service, where the statute provides that "the authority thereof shall continue in force irrevocable so long as any liability of the company remains outstanding in this commonwealth." Biggs v. Mutual Reserve Fund Life Asso. 128 N. C. 5, 37 S. E. 955; Moore v. Mutual Reserve Fund Life Asso. 129 N. C. 31, 39 S. E. 637.

Where the statute so provides, service so made will confer jurisdiction of suits by a nonresident against the corporation, although it has ceased to do business in the state, so long as suits against the corporation by citizens of the state are pending in the state courts or until it has been decided at the time of bringing such suit that it had no existing liabilities within the state. Youmans v. Minnesota Title Ins. & T. Co. 67 Fed. 282.

A foreign insurance company which had complied with a Tennessee statute requiring it to deposit with the secretary of state a power of attorney to accept service of process to be irrevocable so long as the company transacted business in the state or left outstanding or unsatisfied policies, although it might subsequently retire from the state or be excluded by its laws, may be so served where it retired from the state before that act was repealed by Tenn. Acts 1895, chap. 160, requiring the state treasurer or insurance commissioner to be the officer appointed to accept service, and consequently failed to make an appointment under that act. D'Arcy v. Mutual L. Ins. Co. 108 Tenn. 567, 69 S. W. 768.

But service upon the superintendent of insurance of a summons to a foreign insurance company does not give the state courts jurisdiction of an action on a policy fully executed in another state, although the company had at one time been authorized to do business in the state and had filed with the superintendent the written consent to such service required as a condition of doing business in the state by Kan. Gen. Stat. 1897, chap. 74, § 104, where long prior to the issuance of the policy its license to do business in the state had been revoked, since which time it had not maintained any agency or transacted any business therein. Mutual Reserve Fund Life Asso. v. Boyer (Kan.) 50 L. R. A. 538, 61 Pac. 387.

A foreign insurance company which transacted no business in the state between the time when the statute went into effect, requiring such companies as a condition precedent to doing any business in the state to consent to service of process on the state auditor, and the time of filing such consent, is not bound by a service of a notice of garnishment on such officer during that period. Greaves v. Posner, 111 Iowa, 651, 82 N. W. 1022.

For other cases on the question of the validity of service as the basis of a judgment *in personam* against a foreign corporation which is not doing business within the state, see note to Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 591.

Insurance effected by correspondence through the mails, by a foreign corporation having no place of business or agent in the state, is held not to constitute "doing business" in the state, within the meaning of a statute authorizing service upon the insurance commissioner for a foreign insurance company. Romaine v. Union Ins. Co. 55 Fed. 751.

But an insurance company whose agents solicit in another state applications for insurance, and forward them to the home office, which

affidavits, and overruled. The defendant taking no further action, judgment was rendered on May 19, 1900, in favor of the plaintiff and against it for $1,994 with interest.

On August 4, 1900, the plaintiff filed an amended and supplemental petition, in which he alleged the filing of the original petition, the judgment, the issue of execution, a return of *nulla bona;* that the defendant had a large number of policy holders in the state who at stated times and regular intervals became indebted to it for premiums and assessments upon its policies of insurance, and prayed for a general attachment, or in lieu thereof the appointment of a receiver to take charge of the business and property of the defendant in Kentucky, and that all revenues and income accruing to it from policy holders and other debtors be ordered paid to the receiver. Upon the filing of this amended and supplemental petition the court appointed the Fidelity Trust & Safety Vault Company, the other appellee, hereinafter called the company, a receiver of all the property of the defendant in Kentucky, directed it to receive and collect all moneys and debts now owing or hereafter to accrue to the said defendant, and ordered all debtors of the association to pay to the receiver all premiums and assessments which might become due or owing to it; such receivership to continue until the judgment of the plaintiff and all costs and expenses had been paid, and then to terminate. The company qualified as such receiver, and gave notice to the policy holders of the defendant.

*On August 22, 1900, the association applied by petition and bond for a removal of the case to the circuit court of the United States for the district of Kentucky, which application was denied. It does not appear that any copy of the record was filed in the Federal court. But it commenced this suit in that court against Phelps (the judgment creditor) and the company, to enjoin them from further proceeding under the order made by the state court. The court issued an injunction, as prayed for. 103 Fed. 515. On February 2, 1901, the defendants moved to dissolve the injunction, which motion was overruled and an appeal taken to the United [150]

mails certificates to the applicants and collects the dues by mail and local collectors, is within the provisions of a statute of such state requiring any foreign insurance company desiring to transact any business by agents in such state to authorize the superintendent of the insurance department to accept service of process. Sparks v. National Masonic Acci. Asso. 73 Fed. 277.

The plaintiffs in an action against a foreign insurance company are not deprived of the benefit of the provision authorizing service of process upon the auditor of state because they happen to be the agents of the corporation. Rehm v. German Ins. & Sav. Inst. 125 Ind. 135, 25 N. E. 173.

But an appointment of the superintendent of insurance as attorney for a foreign corporation for the purpose of service of process, sent with an application for permission to do business in the state to insurance agents and brokers, who has proposed to procure the admission of the corporation into the state, is ineffectual, at least for the purpose of an action by such agents for services and expenditures, where the superintendent has refused to admit the company to the state, and the application has been withdrawn. Richardson v. Western Home Ins. Co. 20 N. Y. S. R. 820, 8 N. Y. Supp. 873.

The individual name of the superintendent of insurance need not be stated in a certificate appointing him as the agent of a foreign insurance company for service of process. Laffin v. Travelers' Ins. Co. 121 N. Y. 713, 24 N. E. 934.

Service on the deputy of the secretary of state is held in Lonkey v. Keyes Silver Min. Co. 21 Nev. 312, 17 L. R. A. 351, 31 Pac. 57, to be insufficient, under a statute authorizing service on the secretary of state as agent of the corporation.

And service of process on the deputy insurance commissioner at the office of commissioner is not service on the latter, within the meaning of a statute authorizing service of process for foreign insurance companies upon the insurance commissioner. Old Wayne Mut. Life Asso. v. Flynn (Ind. App.) 66 N. E. 57.

But in South Pub. Co. v. Fire Asso. of Philadelphia, 67 Hun, 41, 21 N. Y. Supp. 675, the clerk of the superintendent of insurance, who was specially designated by him for the purpose, was held his representative to receive service for a foreign insurance company, where the superintendent had been appointed to receive and accept service, and himself gave a written admission of service.

To the same effect is Quinn v. Royal Ins. Co. 81 Hun, 207, 30 N. Y. Supp. 714, where the absence of the superintendent of insurance from the city of Albany, New York, when the summons to a foreign insurance company was received by the sheriff for service was held not to estop the insurance company from claiming the benefit of a provision of the policy in suit, limiting the time for the commencement of actions thereon, because the law requires the superintendent of insurance to appoint a deputy upon whom, in his absence, the powers and duties of the office should devolve, and the service of summons in such case upon the deputy would have been good.

But conceding by way of argument that service on the chief deputy of the Pennsylvania insurance commissioner would confer jurisdiction over a foreign insurance company which had authorized the commissioner to accept service, by virtue of the statutory authority conferred on the chief deputy to act during the absence or inability of the insurance commissioner and perform such duties as are attached to that office, such service is insufficient where the return fails to show that the person served was the chief deputy, and that the commissioner was not present and able to receive service himself. Reynolds v. Supreme Conclave I. O. of H. 9 Pa. Dist. R. 622.

Service of summons by mail on the superintendent of insurance, of which he makes a written admission, was held insufficient by the circuit court of the United States in Farmer v. National Life Asso. 50 Fed. 829, 28 Abb. N. C. 421, under N. Y. Laws 1884, chap. 346, § 1, authorizing service on him in a suit against a foreign insurance company which has appointed him its attorney on whom process "may be served" with the same effect as if the company or association existed in this state.

This was in a case removed from a state court. But on the same state of facts and apparently in the identical case (though how it came back into the state court does not appear) it was subsequently held by the general term

States circuit court of appeals for the sixth circuit. By that court the decision of the circuit court was reversed February 4, 1902 (50 C. C. A. 339, 112 Fed. 453), and the case remanded with directions to dismiss the bill of complaint. From such decree the association appealed to this court.

***Messrs.* William D. Guthrie and Edmund F. Trabue** argued the cause, and, with *Messrs. George Burnham, Jr.*, and *Sewell T. Tyng*, filed a brief for appellant:

A circuit court of the United States has jurisdiction to enjoin the execution or enforcement of a judgment of a state court which is wholly void for want of jurisdiction.

*Northern P. R. Co.* v. *Kurtzman*, 82 Fed. 241; *Terre Haute & I. R. Co.* v. *Peoria & P. U. R. Co.* 82 Fed. 943.

Proceedings in a state court never deprive a party of liberty or property without due process of law, the mere entry of a judgment or order touches neither. It is the attempt at enforcement which presents the question of constitutional right and calls for protection. If, then, the order be void upon its face, ordinarily a defense thereto is ample at law; but if valid upon its face, as in the case at bar, equity will relieve.

*York* v. *Texas*, 137 U. S. 15, 20, 34 L. ed. 604, 605, 11 Sup. Ct. Rep. 9; *Pennoyer* v. *Neff*, 95 U. S. 714, 732, 24 L. ed. 565, 572.

The Federal courts will not restrain the institution of suits in a state court under unconstitutional statutes, as in *Fitts* v. *McGhee*, 172 U. S. 516, 529, 43 L. ed. 535, 541, 19 Sup. Ct. Rep. 269, or in any way interfere with proceedings therein; but as soon as those proceedings ripen into an alleged judgment, which judgment is void, the steps of individuals seeking to enforce it may be enjoined within the principle of *Osborn* v. *Bank of United States*, 9 Wheat. 738, 6 L. ed. 204, and *Smyth* v. *Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

However, anxious and solicitous the Federal courts may be to avoid conflicts of jurisdiction, they cannot deny suitors due protection of their constitutional rights.

*Baltimore & O. R. Co.* v. *Wabash R. Co.* 119 Fed. 678.

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of the supreme court in New York that written admission of service by the superintendent of insurance in New York, who has been appointed an attorney to receive service for the foreign insurance company, constitutes a sufficient service, although the summons was sent him by mail. Farmer v. National Life Asso. 67 Hun, 119, 21 N. Y. Supp. 1056.

The delivery of a summons to the sheriff for service on the superintendent of insurance, though within the time specified in the policy for bringing actions thereon, is not sufficient to confer jurisdiction of a foreign insurance company when not served within that time, as the case is not governed by the provision of N. Y. Code Civ. Proc. § 399, declaring that an attempt to commence an action is equivalent to the commencement thereof within the meaning of the provisions of that act limiting the time for commencing an action when the summons is delivered to the sheriff with the intent that it should be actually served. Quinn v. Royal Ins. Co. 81 Hun, 207, 30 N. Y. Supp. 714.

The refusal of the insurance commissioner to receive process against a foreign insurance company, which he has power to receive, will not prevent such attempted service from being effectual. Knapp, S. & Co. Co. v. National Mut. F. Ins. Co. 30 Fed. 607.

The forwarding of a copy of summons by the superintendent of insurance to the secretary of the foreign insurance company, and of another copy to the general agent of the company if resident in the state, though required by Kan. Gen. Stat. 1889, chap. 50a, § 41, is not essential to jurisdiction, at least where the company in fact received notice of the commencement of the action in due time to prepare its defense. German Ins. Co. v. Hall, 1 Kan. App. 43, 41 Pac. 69.

The jurisdictional requirement of Nev. Stat. 1889, p. 47, that the foreign corporation had no agent in the state upon whom service of summons might be made, does not sufficiently appear from the record so as to sustain service upon the secretary of state where such record only shows that the company had no agent within the county of the sheriff making the return, and that any attempt on his part to show that there were no agents in any of the other counties of the state would be in excess of his power under the statute authorizing his return. Brooks v. Nevada Nickel Syndicate, 24 Nev. 311, 53 Pac. 597.

Although a summons in an action in the city court of New York cannot ordinarily be served outside of the city, an implied exception is made in respect to service on a foreign insurance company by the statute authorizing service upon the superintendent of insurance, and he may be served at his office in Albany. People ex rel. Firemen's Ins. Co. v. New York City Ct. Justices, 38 N. Y. S. R. 147, 11 N. Y. Supp. 773.

But service of a summons directed to a foreign insurance company upon the state auditor in one county, requiring the defendant to appear and answer in a circuit court of another county, conferred no jurisdiction on that court, where the state statutes, after making special provision for certain actions, direct that "every other action" may be brought in any county in which the defendant or one of several defendants resides or is summoned. Masons' Fraternal Acci. Asso. v. Riley, 60 Ark. 578, 31 S. W. 148.

Under Mo. Laws 1885, p. 184, authorizing service of process for a foreign insurance company on the state superintendent of insurance, a justice of the peace in one county could not acquire jurisdiction of such corporation by service of summons on the superintendent of insurance in another county. United States Mut. Acci. Ins. Co. v. Reisinger, 43 Mo. App. 571.

This statute having been amended by Mo. Rev. Stat. 1889, § 5912, so as to authorize service on the superintendent of insurance of process issued from any court of record, justice of the peace, or other inferior court, it was held in Fink v. Lancashire Ins. Co. 60 Mo. App. 673, that the Louisiana court of common pleas acquired jurisdiction of a suit against a foreign insurance company by service on the superintendent of the insurance department in the city of St. Louis, Missouri.

Summons served on the superintendent of insurance in Kansas in a suit against a foreign insurance company must be directed to the superintendent, but otherwise is the same in form as a summons in other cases. Westchester F. Ins. Co. v. Coverdale, 48 Kan. 446, 29 Pac. 682; German Ins. Co. v. Hall, 1 Kan. App. 43, 41 Pac. 69.

The cases presenting the closest analogy to the present question are those brought in the Federal courts for relief by way of injunction against judgments of state courts obtained by fraud, and to restrain proceedings thereon.

*Marshall* v. *Holmes*, 141 U. S. 589, 599, 35 L. ed. 870, 874, 12 Sup. Ct. Rep. 62.

Another class of analogous cases is where suit is brought in equity to obtain relief against judgments based upon the unauthorized appearance of attorneys.

*French* v. *Hay*, 22 Wall. 238, 248, 22 L. ed. 801, 857; *Robb* v. *Vos*, 155 U. S. 13, 38, 39 L. ed. 52, 61, 15 Sup. Ct. Rep. 4.

The case of an injunction against acts done by authority of proceedings in a state court after jurisdiction has been transferred by a valid removal to a circuit court of the United States, is a fair illustration of appellant's position.

*French* v. *Hay*, 22 Wall. 238, 248, 22 L. ed. 854, 857; *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497, *sub nom. Kern* v. *Huidekoper*, 26 L. ed. 497, 498; *Wagner* v. *Drake*, 31 Fed. 849.

A state court may disregard the process of a Federal court which was void because issued and executed on Sunday.

*Gumbel* v. *Pitkin*, 124 U. S. 131, 146, 31 L. ed. 374, 379, 8 Sup. Ct. Rep. 379.

Where the case shows an admitted abuse of process, this may be enjoined, though the validity of the judgment upon which it is based be not attacked.

*Julian* v. *Central Trust Co.* 53 C. C. A. 438, 115 Fed. 956.

Other cases, in which interference by injunction or otherwise have been held improper, are not inconsistent with the position that there can be no interference with jurisdiction where jurisdiction is shown not to exist.

*Shields* v. *Coleman*, 157 U. S. 168, 182, 39 L. ed. 660, 665, 15 Sup. Ct. Rep. 570; *Central Nat. Bank* v. *Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Simpson* v. *Ward*, 80 Fed. 561.

In order to determine the invalidity of and give relief against a state-court order alleged to be void for want of jurisdiction, it is not necessary to exercise an appellate or revisory jurisdiction over that court.

*Johnson* v. *Waters*, 111 U. S. 640, 667, 28 L. ed. 547, 556, 4 Sup. Ct. Rep. 619; *Marshall* v. *Holmes*, 141 U. S. 589, 599, 35 L. ed. 870, 874, 12 Sup. Ct. Rep. 62.

The fact, if it be a fact, that relief could have been obtained in some state court, does not in the slightest degree affect the right to obtain the same relief in the circuit court of the United States, where the requisite jurisdictional facts are present, as in the case at bar.

*Arrowsmith* v. *Gleason*, 129 U. S. 86, 98, 32 L. ed. 630, 634, 9 Sup. Ct. Rep. 237.

It appears, however, that the courts in Kentucky are prohibited by statute (Civ. Code, § 285) from enjoining the execution of a judgment of another court of the state, though the judgment be concededly void.

*Jacobson* v. *Wernert*, 19 Ky. L. Rep. 662, 41 S. W. 281.

So that in a case like the one at bar, where an injunction is necessary to prevent irreparable injury, no relief could be had except in a Federal court.

That the courts of the United States are not bound by such a statute limiting the powers of the state courts cannot be doubted.

*Barrow* v. *Hunton*, 99 U. S. 80, 82, 83, 85, 25 L. ed. 407, 408, 409; *Marshall* v. *Holmes*, 141 U. S. 590, 598, 35 L. ed. 871, 873, 12 Sup. Ct. Rep. 62.

There is no valid pending proceeding in the state court, and, therefore, there is properly no jurisdiction to be interfered with.

*Wagner* v. *Drake*, 31 Fed. 849.

The state court's determination in favor of its own jurisdiction is not conclusive in the circuit court.

*Rose* v. *Himely*, 4 Cranch, 241, 268, 2 L. ed. 608, 617; *Elliott* v. *Peirsol*, 1 Pet. 328, 340, 7 L. ed. 164, 170; *Harris* v. *Hardeman*, 14 How. 334, 341, 14 L. ed. 444, 447; *Starbuck* v. *Murray*, 5 Wend. 148, 21 Am. Dec. 172; *Thompson* v. *Whitman*, 18 Wall. 457, 468, 21 L. ed. 897, 901; *Cooper* v. *Newell*, 173 U. S. 555, 565, 43 L. ed. 808, 811, 19 Sup. Ct. Rep. 506; *Robb* v. *Vos*, 155 U. S. 13, 38, 39 L. ed. 52, 61, 15 Sup. Ct. Rep. 4; *French* v. *Hay*, 22 Wall. 238, 243, 252, 22 L. ed. 854, 857; *Gordon* v. *Longest*, 16 Pet. 97, 104, 10 L. ed. 900, 902; *Home L. Ins. Co.* v. *Dunn*, 19 Wall. 214, 224, 22 L. ed. 68, 69; *Removal Cases*, 100 U. S. 457, 475, 25 L. ed. 593, 600; *New Orleans, M. & T. R. Co.* v. *Mississippi*, 102 U. S. 135, 26 L. ed. 96; *Kern* v. *Huidekoper*, 103 U. S. 485, 492, 26 L. ed. 354, 357, 103 U. S. 494, 497, 26 L. ed. 497, 498.

The mere fact that the state court, in a case decided after the appointment, has held that the agency continued, does not affect the right or duty of the Federal court to determine whether the corporation was or was not actually served within the jurisdiction. Otherwise, the state courts could in such cases determine conclusively their own jurisdiction under the pretense of construing a statute.

*Swann* v. *Mutual Reserve Fund Life Asso.* 100 Fed. 922; *Friedman* v. *Empire L. Ins. Co.* 101 Fed. 535; *Mutual Reserve Fund Life Asso.* v. *Boyer*, 62 Kan. 31, 50 L. R. A. 538, 61 Pac. 387; *St. Clair* v. *Cox*, 106 U. S. 350, 353, 27 L. ed. 222, 223, 1 Sup. Ct. Rep. 354.

The inquiry whether a state court acquires jurisdiction of the person of the defendant is essentially a Federal question, upon which the decision of a state court is clearly not conclusive (*Pennoyer* v. *Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 609, 43 L. ed 569, 571, 19 Sup. Ct. Rep. 308), any more than it would be in the case of the construction of a contract created by statute.

An appointment of a state officer by a foreign corporation as agent for service of process, pursuant to a statute requiring it as a condition to entering the state, does not continue in effect after withdrawal or exclusion of the corporation from the state.

*Forrest* v. *Pittsburgh Bridge Co.* 53 C. C. A. 577, 116 Fed. 357; *Mutual Reserve Fund Life Asso.* v. *Boyer*, 62 Kan. 31, 50 L. R. A. 538, 61 Pac. 387; *Millan* v. *Mutual Reserve Fund Life Asso.* 103 Fed. 764; *Swann* v. *Mutual Reserve Fund Life Asso.* 100 Fed. 922; *Friedman* v. *Empire L. Ins. Co.* 101 Fed. 535; *People* v. *Commercial Alliance L. Ins. Co.* 7 App. Div. 297, 40 N. Y. Supp. 269.

The Federal court may judge for itself upon the sufficiency to meet the constitutional requirement of due process.

*McCord Lumber Co.* v. *Doyle*, 38 C. C. A. 34, 97 Fed. 22; *Moredock* v. *Kirby*, 118 Fed. 180; *Cady* v. *Associated Colonies*, 119 Fed. 420; *St. Clair* v. *Cox*, 106 U. S. 350, 355, 27 L. ed. 222, 223, 1 Sup. Ct. Rep. 354; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 617, 43 L. ed. 569, 574, 19 Sup. Ct. Rep. 308; *Williamson* v. *Berry*, 8 How. 495, 540, 12 L. ed. 1170.

The "amended and supplemental petition" in which the receiver was appointed was essentially a suit of a civil nature in equity.

*Barrow* v. *Hunton*, 99 U. S. 80, 85, 25 L. ed. 407, 408; *Bondurant* v. *Watson*, 103 U. S. 281, 286, 26 L. ed. 447, 448; *Marshall* v. *Holmes*, 141 U. S. 589, 598, 35 L. ed. 870, 873, 12 Sup. Ct. Rep. 62.

As such, it was removable under the judiciary act of 1875 as amended by the act of August 13, 1888. It is no longer open to question that such a creditor's bill on a judgment of a state court may be filed in a United States circuit court.

*Mississippi Mills* v. *Cohn*, 150 U. S. 202, 207, 37 L. ed. 1052, 1054, 14 Sup. Ct. Rep. 75.

The fact that at the time the bill of complaint in the present suit was filed—one day after the filing of the petition for removal—the removal record had not yet been filed in the United States circuit court was immaterial.

*Baltimore & O. R. Co.* v. *Koontz*, 104 U. S. 5, 13, 26 L. ed. 643, 645; *National S. S. Co.* v. *Tugman*, 106 U. S. 118, 122, 27 L. ed. 87, 89, 1 Sup. Ct. Rep. 58.

If the case was removable, there should be no reasonable doubt of the power of the circuit court to enjoin the defendant Phelps and the receiver from further proceeding in the state court, within the cases of *French* v. *Hay*, 22 Wall. 238, 248, 22 L. ed. 854, 857 and *Dietzsch* v. *Huidekoper*, 103 U. S. 494, 497, *sub nom. Kern* v. *Huidekoper*, 26 L. ed. 497, 498.

***Mr.* Benjamin F. Washer** argued the cause, and, with *Messrs. Frederick Forcht, William H. Field*, and *Norton L. Goldsmith*, filed a brief for appellees:

A foreign insurance company which has been doing business within a state through its agents does not cease to do business therein when it withdraws its agents and ceases to obtain or ask for new risks or obtain new policies, while, at the same time, its old policies continue in force.

*Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

A life insurance company which is merely collecting premiums and paying losses on old policies is still "doing business" within the meaning of the statute regulating foreign corporations, and within the meaning of tax laws.

Kerr, Ins. § 26.

The Kentucky court of appeals, considering the statute of its own state, holds a foreign insurance company to be in court when served with summons as the appellant here was served by process executed on the commissioner.

*Home Ben. Soc.* v. *Muehl*, 22 Ky. L. Rep. 1264, 60 S. W. 371; *Germania Ins. Co.* v. *Ashby*, 23 Ky. L. Rep. 1564, 65 S. W. 611.

These decisions of the Kentucky court of appeals are controlling upon all other courts, both state and Federal.

*Commercial Bank* v. *Buckingham*, 5 How. 317, 12 L. ed. 169; *Lawler* v. *Walker*, 14 How. 149, 14 L. ed. 364; *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80.

The decision of the state court, relative to the agencies of both the commissioner and Frese, and the authority of these parties to receive service of process for the defendant, was not open to review or reversal by the United States circuit court. All questions raised and determined in the state court were, as to the Federal court, *res judicata.*

*Moch* v. *Virginia F. & M. Ins. Co.* 4 Hughes, 61, 10 Fed. 696.

The proceedings subsequent to the rendition of the judgment were not removable.

*Dere* v. *Strother*, 10 Fed. 406.

No case was shown permitting a removal.

*Cook* v. *Whitney*, 3 Woods, 715, Fed. Cas. No. 3,166; *Claflin* v. *McDermott*, 20 Blatchf. 522, 12 Fed. 375; *Cortes Co.* v. *Thannhauser*, 20 Blatchf. 59, 9 Fed. 226; Desty, Fed. Proc. 9th ed. p. 448.

The petition for removal, if considered as contemplating the entire cause, certainly came too late. The original petition was filed on February 28, 1900, the defendant summoned March 1, 1900, the motion to remove made on August 22, 1900. Under the Kentucky practice the defendant has twenty days, after service of summons, to answer.

*Fidelity Trust & Safety Vault Co.* v. *Newport News & M. Valley Co.* 70 Fed. 403.

The circuit court of the United States had no jurisdiction to enjoin proceedings in a state court.

*Diggs* v. *Wolcott*, 4 Cranch, 179, 2 L. ed. 587; *Taylor* v. *Carryl*, 20 How. 583, 15 L. ed. 1028; *Peck* v. *Jenness*, 7 How. 612, 12 L. ed. 841; *Covell* v. *Heyman*, 111 U. S. 179, 28 L. ed. 391, 4 Sup. Ct. Rep. 355; *Senior* v. *Pierce*, 31 Fed. 628; *Kohn* v. *Ryan*, 31 Fed. 638; *Rothschild* v. *Hasbrouck*, 65 Fed. 284; *Re Hall & S. Co.* 73 Fed. 530; *Leathe* v. *Thomas*, 38 C. C. A. 75, 97 Fed. 136; *Mills* v. *Provident Life & Trust Co.* 40 C. C. A. 394, 100 Fed. 344; *Southern Bank & T. Co.* v. *Folsom*, 21 C. C. A. 568, 43 U. S. App. 713, 75 Fed. 929; *American Asso.* v. *Hurst*, 7 C. C. A. 598, 16 U. S. App. 325, 59 Fed. 5; *Hutchinson* v. *Green*, 2 McCrary, 471, 6 Fed. 838; *Renselaer & S. R. Co.* v. *Bennington & R. R. Co.* 18 Fed. 617; *Yick Wo* v. *Crowley*, 26 Fed. 207; *Rhodes & J. Mfg. Co.* v. *New Hampshire*,

70 Fed. 721; *Dillon* v. *Kansas City Suburban Belt R. Co.* 43 Fed. 111; *Missouri, K. & T. R. Co.* v. *Scott*, 4 Woods, 386, 13 Fed. 793; *Tarble's Case*, 13 Wall. 401, *sub nom. United States* v. *Tarble*, 20 L. ed. 598; *Gates* v. *Bucki*, 4 C. C. A. 116, 12 U. S. App. 69, 53 Fed. 964.

*Mr. Benjamin F. Washer* also filed a supplemental brief for appellees:

The process of garnishment after judgment is clearly a mode of execution. Its purpose is to obtain satisfaction of the judgment out of the debtor's effects which are in a third person's hands.

*Dere* v. *Strother*, 10 Fed. 406.

Every court is left to decide for itself in what way and by what procedure its judgments and decrees are to be enforced; subject, of course, to review by its own appellate tribunals.

*Riggs* v. *Johnson County*, 6 Wall. 198, 18 L. ed. 777; *Central Nat. Bank* v. *Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403.

On the right of courts of coequal, concurrent jurisdiction to impede and obstruct the proceedings of each other, see *Gumbel* v. *Pitkin*, 124 U. S. 156, 31 L. ed. 382, 8 Sup. Ct. Rep. 379.

In *Evans* v. *Gorman*, 115 Fed. 403, a United States circuit court decided that under § 720 of the Revised Statutes. (U. S. Comp. Stat. 1901, p. 581), and the comity between courts of concurrent jurisdiction, it had no power to enjoin proceedings in a state court notwithstanding the positive allegations of the bill that the state court was without jurisdiction and acting fraudulently.

Mr. Justice **Brewer** delivered the opinion of the court:

Many questions were elaborately discussed by counsel both orally and in brief, but we are of the opinion that the decisions of two or three will dispose of the case. First, the service of summons on the insurance com-[157]missioner was sufficient to bring *the association into the state court as party defendant. It was stipulated between the parties that the outstanding policies existing between the association and citizens of Kentucky were continued in force after the action of the insurance commissioner on October 10, 1899, and that on said policies the association had collected and was collecting dues, premiums, and assessments. It was, therefore, doing business within the state. *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308. The plaintiff was a citizen of Kentucky, and the cause of action arose out of transactions had between the plaintiff and defendant while the latter was carrying on business in the state of Kentucky under license from the state. Under those circumstances the authority of the insurance commissioner to receive summons in behalf of the association was sufficient. Such was the ruling of the court of appeals of Kentucky. *Home Ben. Soc.* v. *Muehl*, 22 Ky. L. Rep. 1378, 59 S. W. 520. In that case the society while doing business in the state issued the policy sued on, but in April, 1894, before the action was brought, ceased to do business and withdrew all of its agents. Service on the commissioner was held good. The court, in its opinion, after referring to the statute of 1870 and the change made by § 631, under which this service was made, said (p. 1379, S. W. p. 521):

"It is sufficient to say that the agency created by the act of 1893 is, in its terms, broader than that created by the act of 1870. The words of the later statute express no limitation. Whatever limitation shall be applied to it must be by implication. And when we consider the purpose of the act it becomes clear that it would be frustrated by the construction contended for. There is no need of the right to serve process upon the insurance commissioner so long as the company has agents in the state, and we think the purpose of the section was to provide a means of obtaining service of process upon foreign companies which no longer had agents in the state upon whom process might be served in suits upon contracts made in this state, whatever may be held as to suits upon contracts entered into elsewhere." See also *Germania Ins. Co.* v. *Ashby*, 23 Ky. L. Rep. 1564, 65 S. W. 611.

*Such decision of the highest court of Ken-[158]tucky, construing one of its own statutes, if not controlling upon this court, is very persuasive, and it certainly is controlling unless it be held to be merely an interpretation of a contract created by the statute. As an original question, and independently of any expression on the part of the court of appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit to controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the state leaves the corporation without any person upon whom process can be served. In order to remedy this defect some states, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent official of the state, so that the death, removal, or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement

of their claims. It is true in this case the association did not voluntarily withdraw from the state, but was in effect by the state prevented from engaging in any new business. Why this was done is not shown. It must be presumed to have been for some good and sufficient reason, and it would be a harsh construction of the statute that, because the state had been constrained to compel the association to desist from engaging in any futher business, it also deprived its citizens who had dealt with the association [159] of *the right to obtain relief in its courts. We conclude therefore, that the service of summons on the insurance commissioner was sufficient to bring the association into the state court, and, there being nothing else to impeach the judgment, it must be considered as valid.

Again, the proceeding for the appointment of a receiver was not a new and independent suit. It was not in the strictest sense of the term a creditor's bill. It did not purport to be for the benefit of all creditors, but simply a proceeding to enable the plaintiff in the judgment to obtain satisfaction thereof, satisfaction by execution at law having been shown to be impossible by the return of *nulla bona*. It is what is known as a supplementary proceeding. It is a proceeding known to the jurisprudence of many states, and one whose validity in those states has been recognized by this court. *Williams* v. *Hill*, 19 How. 246, 15 L. ed. 570; *Atlantic & P. R. Co.* v. *Hopkins*, 94 U. S. 11, 24 L. ed. 48; *Ex parte Boyd*, 105 U. S. 647, 26 L. ed. 1200; *Canal & C. Streets R. Co.* v. *Hart*, 114 U. S. 654, 29 L. ed. 226, 5 Sup. Ct. Rep. 1127. It is recognized in some cases in Kentucky. *Well* v. *Deposit Bank*, 18 Ky. L. Rep. 156, 35 S. W. 625; *Caldwell* v. *Deposit Bank*, 22 Ky. L. Rep. 684, 58 S. W. 589. This proceeding was treated by the state court as one merely supplemental in its character. It was initiated by the filing of an amended and supplementary petition. It was a mere continuation of the action already passed into judgment, and in aid of the execution of such judgment. As such it was not subject to removal to the Federal court, the time therefor prescribed by the statute having passed. 24 Stat. at L. 554, chap. 373, U. S. Comp. Stat. 1901, p. 514; *Martin* v. *Baltimore & O. R. Co.* 151 U. S. 673-684, *sub nom. Gerling* v. *Baltimore & O. R. Co.* 38 L. ed. 311, 315, 14 Sup. Ct. Rep. 533. Being a mere continuation of the action at law, and not removable to the Federal court, the latter had no jurisdiction to enjoin the proceedings under it. It is contended that such a supplementary proceeding is not warranted by the laws of Kentucky; that there is no statute of that state justifying it. But it has been sanctioned by the judgment of the court in which the proceeding was had, and cannot be treated by the Federal courts as unauthorized. *Laing* v. *Rigney*, 160 U. S. 531, 40 L. ed. 525, 16 Sup. Ct. Rep. 366. See also *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475, 478, 35 L. ed. 824, 826, 12 Sup. Ct. Rep. 28. If not warranted by the law of the state relief must be sought by review *in the appellate court of the state, and not [160] by collateral attack in the Federal court.

*For these reasons we think the decision of the Court of Appeals of the Sixth Circuit was right, and it is affirmed.*

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## ATLANTIC & PACIFIC TELEGRAPH COMPANY, *Plff. in Err.*, *v.* CITY OF PHILADELPHIA.

(See S. C. Reporter's ed. 160-169.)

*Interstate commerce — validity of license tax on telegraph poles and wires — reasonableness — when a question for the jury.*

1. A telegraph company, though engaged in interstate commerce, may be compelled by a municipality to pay a reasonable license fee for the enforcement of local government supervision of its poles and wires.
2. The reasonableness of a municipal license charge of $1 per telegraph pole and $2.50 for each mile of overhead telegraph wires within the city limits must be submitted to the jury, where there is testimony that the actual cost of maintenance, repairs, and supervision by the telegraph company was less than one half the sum thus charged by the city for supervision alone, and that an additional charge of $1 per mile for underground wires had been removed as an inducement to the removal of all overhead wires.

[No. 163.]

*Argued February 24, 1903. Decided June 1, 1903.*

IN ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment for plaintiff in an action by the city of Philadelphia to recover license charges imposed by it upon a telegraph company. *Reversed* and remanded for a new trial.

See same case below on motion by defendant to enter judgment with the re-

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NOTE.—*On state regulation of interstate or foreign commerce*—see notes to Norfolk & W. R. Co. v. Com. (Va.) 13 L. R. A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041; and Postal Teleg. Cable Co. v. Adams, 39 L. ed. U. S. 311.

*On license taxes as affecting intestate commerce*—see notes to Rothermel v. Meyerle (Pa.) 9 L. R. A. 366; American Fertilizing Co. v. North Carolina Bd. of Agri. (C. C. E. D. N. C.) 11 L. R. A. 179.

*As to limit of amount of license fees*—see note to State *ex rel.* Tol v. French (Mont.) 30 L. R. A. 415.

*On the power of states to control or impose burdens upon interstate telegraph and telephone companies*—see note to Postal Teleg. Cable Co. v. Baltimore (Md.) 24 L. R. A. 161.

*For cases collated on the question as to the validity of charges on telegraph and telephone poles and wires*—see note to Western U. Teleg. Co. v. New Hope, *ante*, 240.

duction specified in the reserved point. 109 Fed. 55.

Statement by Mr. Justice **Brewer:**

This action was commenced in the common pleas court of Philadelphia on December 31, 1891, to recover the sum of $3,715 as license fees alleged to be due the city for the six preceding years. The case was removed by the defendant to the circuit court of the United States for the eastern district of Pennsylvania. A trial was had before the court and a jury, which resulted in a verdict and judgment for the plaintiff for a part of the sum claimed, which judgment was thereafter reversed by the circuit court of appeals. A second trial was had in April, 1901, before the court and a jury, which resulted in a verdict and judgment for the full amount claimed, with interest. From such judgment the case was brought to this court directly on writ of error, on the ground that it involved the construction and application of the Constitution of the United States; that the action was brought to recover from the telegraph company certain license charges imposed by the city which the company claimed the city had no right or power to impose, for the reason that it was a regulation of commerce between the states.

*Messrs.* **John F. Dillon** and **H. B. Gill** argued the cause, and, with *Messrs. Silas W. Pettit, George H. Fearons, Rush Taggart, Henry D. Estabrook,* and *Messrs. Brown & Wells,* filed a brief for plaintiff in error:

The pretended power of the city of Philadelphia to impose the tax in question is derived solely from its possession of the "powers, rights, privileges, and immunities incident to a municipal corporation and necessary for the proper government of the same," and from no other source whatsoever. But this does not confer power to enact the ordinances in question.

Cooley, Taxn. 597.

Under the law of Pennsylvania the property of the telegraph company necessary to the exercise of its franchises is not taxable by the municipality.

*Lehigh Coal & Nav. Co.* v. *Northampton County,* 8 Watts & S. 334; *Railroad Co.* v. *Berks County,* 6 Pa. 70; *Schuylkill Nav. Co.* v. *Berks County,* 11 Pa. 202; *New York & E. R. Co.* v. *Sabin,* 26 Pa. 242; *West Chester Gas Co.* v. *Chester County,* 30 Pa. 232; *Ridgway Light & Heat Co.* v. *Elk County,* 191 Pa. 465, 43 Atl. 323.

The commonwealth owns the franchise of every highway, and no municipal corporation has any power over them except in so far as it is delegated to it by the state.

*O'Connor* v. *Pittsburgh,* 18 Pa. 187; *Stormfeltz* v. *Manor Turnp. Co.* 13 Pa. 555; *Millvale* v. *Evergreen R. Co.* 131 Pa. 1, 7 L. R. A. 369, 18 Atl. 993; *Com.* v. *Erie & N. E. R. Co.* 27 Pa. 339, 67 Am. Dec. 471; *Philadelphia & T. R. Co.'s Case,* 6 Whart. 25, 36 Am. Dec. 202; *Northern Liberties* v. *Northern Liberties Gas Co.* 12 Pa. 318; *Mercer* v. *Pittsburgh, Ft. W. & C. R. Co.* 36 Pa. 99; *Danville, H. & W. R. Co.* v. *Com.* 73 Pa. 29; *Pittsburgh's Appeal,* 115 Pa. 4, 7 Atl. 778; *Williamsport Pass R. Co.* v. *Williamsport,* 120 Pa. 1, 13 Atl. 496; *Homestead Street R. Co.* v. *Pittsburg & H. Electric Street R. Co.* 166 Pa. 162, 27 L. R. A. 383, 30 Atl. 950, 955; 2 Dill. Mun. Corp. 3d ed. § 657.

The charge cannot be imposed in this case for the purpose of providing an insurance or guarantee fund to insure the municipality from damages for which it may be held liable by reason of the construction and maintenance of telegraph poles and wires.

*Smith* v. *St. Louis & S. W. R. Co.* 181 U. S. 248, 45 L. ed. 847, 21 Sup. Ct. Rep. 803; *Philadelphia* v. *Western U. Teleg. Co.* 2 Inters. Com. Rep. 728, 40 Fed. 616.

No right exists to impose a larger charge than will reimburse to the municipality the expense of regulation.

Cooley, Const. Lim. 6th ed. 242; Cooley, Taxn. 2d ed. pp 597, 598; Dill. Mun. Corp. 3d ed. § 768; *The Laundry License Case,* 22 Fed. 701; *State, Benson, Prosecutor,* v. *Hoboken,* 33 N. J. L. 280; *State, North Hudson County R. Co., Prosecutors,* v. *Hoboken,* 41 N. J. L. 71; *Saginaw* v. *Swift Electric Light Co.* 113 Mich. 660, 72 N. W. 6.

Under the guise of the power to regulate, a city cannot exercise the power to tax.

*New York* v. *Second Ave. R. Co.* 32 N. Y. 261; *Cincinnati* v. *Bryson,* 15 Ohio, 625, 45 Am. Dec. 593; *Mays* v. *Cincinnati,* 1 Ohio St. 268; *Dunham* v. *Rochester,* 5 Cow. 462; *Jackson* v. *Newman,* 59 Miss. 385, 42 Am. Rep. 367; Dill. Mun. Corp. § 764; Cooley, Taxn. 2d ed. 573, 597; *Gibbons* v. *Ogden,* 9 Wheat. 213, 6 L. ed. 74.

The tax imposed by the city in this case exceeds the limits prescribed by the authorities.

*Philadelphia* v. *Western U. Teleg. Co.* 82 Fed. 797; *Philadelphia* v. *Atlantic & P. Teleg. Co.* 42 C. C. A. 325, 102 Fed. 254; *St. Louis* v. *Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485.

The plaintiff in error is engaged in interstate commerce, and the business it transacts is in itself commerce, and by virtue of the act of Congress of July 24, 1866, and its acceptance thereof, said telegraph company is entitled to all the privileges and immunities, and is subject to all the restrictions, which flow from the power given to Congress by the Constitution to regulate commerce, and the legislation in that behalf enacted by Congress.

*Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co.* v. *Texas,* 105 U. S. 460, 26 L. ed. 1067; *Leloup* v. *Port of Mobile,* 127 U. S. 640, 32 L. ed. 311, 8 Sup. Ct. Rep. 1380.

The plaintiff in error as an interstate commerce company, whose business is commerce itself, and in the nature of the postal service has the right to invoke the protection of the Constitution of the United States against this attempt to burden and regulate interstate commerce.

*State Tax on Railway Gross Receipts,* 15 Wall. 299, *sub nom. Philadelphia & R. R. Co.* v. *Pennsylvania,* 21 L. ed. 169; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania,* 122

U. S. 326, 30 L. ed. 1200, 7 Sup. Ct. Rep. 1118.

Interstate commerce cannot be taxed at all by the state, and the fact that the tax is imposed by a law or an ordinance purporting to be an enforcement of the police power, or a privilege tax, can make no difference in the application of the rule.

*Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 32 L. ed. 637, 9 Sup. Ct. Rep. 256; *McCall* v. *California*, 136 U. S. 104, 34 L. ed. 391, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Brennan* v. *Titusville*, 153 U. S. 289, 38 L. ed. 719, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Crutcher* v. *Kentucky*, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851; *Hannibal & St. J. R. Co.* v. *Husen*, 95 U. S. 465, 24 L. ed. 527; *Minnesota* v. *Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer* v. *Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Cotting* v. *Kansas City Stock Yards Co.* 183 U. S. 79, *sub nom. Cotting* v. *Godard*, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *St. Louis Consol. Coal Co.* v. *Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252.

Even where the regulation imposed was in relation to the selling of intoxicating liquors, which is peculiarly a matter of police cognizance, this court has held that the power must be so exercised as not to operate as a burden on or regulation of interstate commerce.

*Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lyng* v. *Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725.

A license tax, irrespective of whether the amount is much or little, where levied upon the occupation itself, or upon the means of carrying on the business, is, where the business carried on is interstate commerce, a direct burden upon interstate commerce.

*Brown* v. *Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *Brennan* v. *Titusville*, 153 U. S. 304, 38 L. ed. 724, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Henderson* v. *Wickham*, 92 U. S. 259, 23 L. ed. 543.

In the Mississippi case the tax was only $1 per mile of wire, which was "in lieu of other state, county, and municipal taxes" (*Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360), and it would seem that a charge which amounts to nearly four times that much, and levied as a charge for inspection alone, is manifestly exorbitant and practically a tax, and therefore a regulation of interstate commerce, for the transaction of which these poles and wires are necessary appliances.

The property of a telegraph company is liable to taxation by a state on the same basis as all other property is so liable, a tax which the plaintiff in error has always paid to the state of Pennsylvania.

*Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961.

And even where the tax is imposed in form as a privilege tax, but is "in lieu of other state, county, and municipal taxes," and the amount of the tax is made dependent in fact upon the value of the property of the taxpayer situated within the jurisdiction of the state imposing the same, it will, nevertheless, and notwithstanding its form, be held valid and sustained by this court.

*Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360.

And so a state may impose a specific tax on each telegraph message which the company sends over its line wholly within the state imposing such tax, but not upon messages sent by officers of the United States on public business, and not upon messages sent or received to or from points without the state. The power to tax such messages is confined to messages sent from one place to another exclusively within the jurisdiction of the state imposing the tax.

*Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067.

And so a state may tax the gross receipts of a telegraph company derived from business transacted exclusively within the state.

*Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co.* v. *Alabama State Bd. of Assessment*, 132 U. S. 472, *sub nom. Western U. Teleg. Co.* v. *Seay*, 33 L. ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161.

Again, it has been held that a license tax imposed by a municipality duly authorized thereto by the state upon, *inter alia*, "telegraph companies or its agencies, each, for business done exclusively within the city of Charleston, and not including any business done to or from points without the state, and not including any business done for the government of the United States, its officers, or agents, $500,"—was valid.

*Postal Teleg. Cable Co.* v. *Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094.

But the reasoning of these cases is wholly inconsistent with the right of a state, or of a municipality under the law of a state, to require a telegraph company to take out a license for the transaction of its business, or to impose upon it a tax for such license.

See *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

*Mr.* **John L. Kinsey** argued the cause, and, with *Mr. James Alcorn*, filed a brief for defendant in error:

It is lawful for a state to impose taxes upon property owned and used within it by a corporation of another state, even when such corporation is engaged in interstate commerce, and the exaction of a license tax is

a valid exercise of power by municipal corporations, in order to cover expenses to which they may be put in the enforcement of their police rules and regulations.

*Philadelphia* v. *Western U. Teleg. Co.* 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257; *Postal Teleg. Cable Co.* v. *Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094; *Philadelphia* v. *Atlantic & P. Teleg. Co.* 42 C. C. A. 325, 102 Fed. 258.

There is a presumption in favor of the validity of the action of the legislative body, and the evidence to justify a court in holding otherwise must be clear and convincing.

*Philadelphia* v. *Western U. Teleg. Co.* 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 460.

The amount of the license charges rests with the city councils in the first instance, and it is only where such discretion has been manifestly abused that the courts are justified in interfering.

*Allentown* v. *Western U. Teleg. Co.* 148 Pa. 119, 23 Atl. 1070.

With practically the same evidence before them as was submitted by the plaintiff in error upon the trial of this case, the United States court of appeals determined that the ordinances imposing the charges now claimed by the city of Philadelphia against the Atlantic & Pacific Telegraph Company were valid.

*Philadelphia* v. *Western U. Teleg. Co.* 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454; *Philadelphia* v. *Atlantic & P. Teleg. Co.* 42 C. C. A. 325, 102 Fed. 258.

The highest court of the state of Pennsylvania has considered these ordinances, and whether the charges imposed are reasonable or not, and has determined those charges to be reasonable, and the ordinances valid.

*Taylor* v. *Postal Teleg. Cable Co.* 202 Pa. 583, 52 Atl. 128; *Chester City* v. *Western U. Teleg. Co.* 154 Pa. 466, 25 Atl. 1134; *Allentown* v. *Western U. Teleg. Co.* 148 Pa. 117, 23 Atl. 1070; *Philadelphia* v. *American U. Teleg. Co.* 167 Pa. 406, 31 Atl. 628; *Chester* v. *Philadelphia, R. & P. Teleg. Co.* 148 Pa. 120, 23 Atl. 1070.

The supreme court of the state of New York in *Philadelphia* v. *Postal Teleg. Cable Co.* 67 Hun, 21, 21 N. Y. Supp. 556, considered the same ordinances as imposed the charges in this case, and held them to be valid, and the charges reasonable.

Whether a license fee is exacted under the power to regulate or the power to tax, is a matter of indifference, if the power to do either exists.

*Postal Teleg. Cable Co.* v. *Charleston*, 153 U. S. 692, 38 L. ed. 871, 4 Inters. Com. Rep. 637, 14 Sup. Ct. Rep. 1094.

The defendant in error does not admit the position of the plaintiff in error, that a tax could not be levied upon a telegraph company because it is engaged in interstate business.

*Ibid.*; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 31 Sup. Ct. Rep. 790; *Wiggins Ferry Co.* v. *East St. Louis*, 107 U. S. 365, 27 L. ed. 419, 2 Sup. Ct. Rep. 257.

So far as concerns the right of the plaintiff in error to occupy the public streets and highways of the defendant in error, without being subject to the regulations of the municipal authorities, the defendant in error disputes that position.

*Philadelphia* v. *Western U. Teleg. Co.* 2 W. N. C. 455; *St. Louis* v. *Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485.

The defendant in error, a municipal corporation, has the right in the exercise of its police power to impose upon the plaintiff in error license fees for the poles and wires erected on and run along the public highways.

22 Am. & Eng. Enc. Law, New ed. p. 918; *Philadelphia* v. *Western U. Teleg. Co.* 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454; *Western U. Teleg. Co.* v. *Philadelphia* (Pa.) 11 Cent. Rep. 192, 12 Atl. 144; *Allentown* v. *Western U. Teleg. Co.* 148 Pa. 117, 23 Atl. 1070; *Chester* v. *Philadelphia, R. & P. Teleg. Co.* 148 Pa. 120, 23 Atl. 1070; *Chester City* v. *Western U. Teleg. Co.* 154 Pa. 466, 25 Atl. 1134; *Philadelphia* v. *American U. Teleg. Co.* 167 Pa. 406, 31 Atl. 628; *North Braddock* v. *Central Dist. & Printing Teleg. Co.* 11 Pa. Super. Ct. 24; *New Hope* v. *Western U. Teleg. Co.* 16 Pa. Super. Ct. 306; *Taylor* v. *Postal Teleg. & Cable Co.* 16 Pa. Super. Ct. 344, Affirmed in 202 Pa. 583, 52 Atl. 128.

The license fees charged by the ordinances of 1881 and 1883 by the defendant in error on the plaintiff in error were imposed as police regulations.

*Western U. Teleg. Co.* v. *Philadelphia* (Pa.) 11 Cent. Rep. 192, 12 Atl. 144; *Philadelphia* v. *American U. Teleg. Co.* 167 Pa. 406, 31 Atl. 628; *Allentown* v. *Western U. Teleg. Co.* 148 Pa. 117, 23 Atl. 1070; *Chester* v. *Philadelphia, R. & P. Teleg. Co.* 148 Pa. 120, 23 Atl. 1070; *Chester City* v. *Western U. Teleg. Co.* 154 Pa. 464, 25 Atl. 1134; *Taylor* v. *Postal Teleg. Cable Co.* 202 Pa. 583, 52 Atl. 128.

A license fee under police regulations is distinct from a tax.

22 Am. & Eng. Enc. Law, New ed. p. 917.

Where the power to license is not evidently abused and made a pretext for doing what is a violation of constitutional right, the courts ought not to interfere with municipal discretion.

*Van Baalen* v. *People*, 40 Mich. 258.

The reasonableness of the charges was a question to be determined by the court, and not by the jury.

*Philadelphia* v. *Western U. Teleg. Co.* 32 C. C. A. 246, 60 U. S. App. 398, 89 Fed. 454; *Com.* v. *Worcester*, 3 Pick. 462; 1 Dill. Mun. Corp. 4th ed. p. 404; *Clason* v. *Milwaukee*, 30 Wis. 316; *New Hope* v. *Western U. Teleg. Co.* 16 Pa. Super. Ct. 306.

Mr. Justice **Brewer** delivered the opinion of the court:

The question presented is as to the valid-

ity of the charges imposed by the ordinances [162] of the city of Philadelphia upon the *defendant (plaintiff in error), a corporation engaged in interstate commerce. Few questions are more important or have been more embarrassing than those arising from the efforts of a state or its municipalities to increase their revenues by exactions from corporations engaged in carrying on interstate commerce. There have been many cases, in whose decision some propositions have been adjudicated so often as to be no longer open to discussion.

First. As said by Mr. Justice Bradley, speaking for the court, in *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 492, 30 L. ed. 694, 696, 1 Inters. Com. Rep. 45, 46, 7 Sup. Ct. Rep. 592, 593:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several states, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation."

In addition to the many cases referred to by him, the following subsequent decisions may also be cited: *Fargo* v. *Michigan*, 121 U. S. 230, 246, *sub nom. Fargo* v. *Stevens*, 30 L. ed. 888, 894, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336, 346, 30 L. ed. 1200, 1201, 1205, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347, 357, 30 L. ed. 1187, 1189, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; *Bowman* v. *Chicago & N. W. R. Co.* 125 U. S. 465, 497, 31 L. ed. 700, 711, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 648, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Asher* v. *Texas*, 128 U. S. 129, 131, 32 L. ed. 368, 369, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 148, 32 L. ed. 637, 639, 9 Sup. Ct. Rep. 256; *Leisy* v. *Hardin*, 135 U. S. 100, 110, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Lyng* v. *Michigan*, 135 U. S. 161, 34 L. ed. 150, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *McCall* v. *California*, 136 U. S. 104, 109, 34 L. ed. 391, 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Re Rahrer*, 140 U. S. 545, 555, *sub nom. Wilkerson* v. *Rahrer*, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; *Brennan* v. *Titusville*, 153 U. S. 289, 304, 38 L. ed. 719, 723, 4 Inters. Com. Rep. 658, 14 Sup. Ct. Rep. 829; *Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 471, 38 L. ed. 1047, 1055, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *United States* v. *E. C. Knight Co.* 156 U. S. 1, 21, 39 L. ed. 325, 332, 15 Sup. Ct. Rep. 249; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Stockard* v. *Morgan*, 185 U. S. 27, 46 L. ed. 785, 22 Sup. Ct. Rep. 576.

Second. No state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce. *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 211, 29 L. ed. 158, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Pickard* v. *Pullman Southern Car Co.* 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Fargo* v. *Michigan*, 121 U. S. 230, 245, *sub nom. Fargo* v. *Stevens*, 30 L. ed. 888, 894, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336, 30 L. ed. 1200, 1201, 3 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Leloup* v. [163] *Port of Mobile*, 127 U. S. 640, 645, 32 L. ed. 311, 313, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 1; *Lyng* v. *Michigan*, 135 U. S. 161, 166, 34 L. ed. 150, 153, 3 Inters. Com. Rep. 143, 10 Sup. Ct. Rep. 725; *McCall* v. *California*, 136 U. S. 104, 113, 34 L. ed. 391, 394, 10 Sup. Ct. Rep. 881; *Crutcher* v. *Kentucky*, 141 U. S. 47, 58, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 220, 41 L. ed. 683, 695, 17 Sup. Ct. Rep. 305.

Third. This immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory, and employed in interstate commerce. *State Tax on Railway Gross Receipts*, 15 Wall. 284, 293, *sub nom. Philadelphia & R. R. Co.* v. *Pennsylvania*, 21 L. ed. 164, 167; *Delaware Railroad Tax*, 18 Wall. 206, 232, *sub nom. Minot* v. *Philadelphia, W. & B. R. Co.* 21 L. ed. 888, 896; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 464, 26 L. ed. 1067, 1068; *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196, 211, 29 L. ed. 158, 164, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Maryc* v. *Baltimore & O. R. Co.* 127 U. S. 117, 123, 32 L. ed. 94, 96, 8 Sup. Ct. Rep. 1037; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 649, 32 L. ed. 311, 314, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Atty. Gen.* v. *Western U. Teleg. Co.* 141 U. S. 40, 35 L. ed. 6, 28, 11 Sup. Ct. Rep. 889; *Pittsburgh, C. C. & St. L. R. Co.* v. *Backus*, 154 U. S. 421, 38 L. ed. 1031, 14 Sup. Ct. Rep. 1114; *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 220, 41 L. ed. 683, 695, 17 Sup. Ct. Rep. 305.

Fourth. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing, at least, the franchise is not derived from the United States. *Delaware Railroad Tax*, 18 Wall. 206, 232, *sub nom. Minot* v. *Philadelphia, W. & B. R. Co.* 21 L. ed. 888, 896; *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 696, 39 L. ed. 311, 316, 5 Inters.

Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *New York, L. E. & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431, 437, 39 L. ed. 1043, 1045, 15 Sup. Ct. Rep. 896; *Central P. R. Co.* v. *California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1, 18, 41 L. ed. 49, 55, 16 Sup. Ct. Rep. 1054; *Western U. Teleg. Co.* v. *Missouri ex rel. Gottlieb*, 190 U. S. 412, *post*, 1116, 23 Sup. Ct. Rep. 730.

Fifth. No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor. *Western Union Packet Co.* v. *St. Louis*, 100 U. S. 423, 25 L. ed. 688; *Cincinnati, P. B. S. & P. Packet Co.* v. *Catlettsburg*, 105 U. S. 559, 26 L. ed. 1169; *Parkersburg & O. River Transp. Co.* v. *Parkersburg*, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; *Huse* v. *Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313; *Ouachita & M. River Packet Co.* v. *Aiken*, 121 U. S. 444, 30 L. ed. 976, 1 Inters. Com. Rep. 379, 7 Sup. Ct. Rep. 907; *St. Louis* v. *Western U. Teleg. Co.* 148 U. S. 92, 37 L. ed. 380, 13 Sup. Ct. Rep. 485, 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; *Postal Teleg. Cable Co.* v. *Baltimore*, 156 U. S. 210, 39 L. ed. 399, 15 Sup. Ct. Rep. 356; *Richmond* v. *Southern Bell Teleph. & Teleg. Co.* 174 U. S. 761, 771, 43 L. ed. 1162, 1167, 19 Sup. Ct. Rep. 778.

[164] *The tax sought to be collected in this case was not a tax upon the property or franchises of the company, nor in the nature of rental for occupying certain portions of the street. Neither was it a charge for the privilege of engaging in the business of interstate commerce, but it was one for the enforcement of local governmental supervision, such as was presented in *Western U. Teleg. Co.* v. *New Hope*, 187 U. S. 419, *ante*, 240, 23 Sup. Ct. Rep. 204, where we said (p. 427, *ante*, p. 244, Sup. Ct. Rep. p. 205):

"This license fee was not a tax on the property of the company, or on its transmission of messages, or on its receipts from such transmission, or on its occupation or business, but was a charge in the enforcement of local governmental supervision, and, as such, not in itself obnoxious to the clause of the Constitution relied on."

Following that decision, we hold that the city of Philadelphia had power to pass such an ordinance as this, requiring the company to pay a reasonable license fee for the enforcement of local governmental supervision. In other words, if a corporation, although engaged in the business of interstate commerce, so carries on its business as to justify, at the hands of any municipality, a police supervision of the property and instrumentalities used therein, the municipality is not bound to furnish such supervision for nothing, and may, in addition to ordinary property taxation, subject the corporation to a charge for the expense of the supervision.

But it does not follow from this that a municipality is not subject to any restraint in the amount of the charge which it so exacts. True, it is often said that a license tax is, in its nature, arbitrary; that it is not necessarily graduated by the value of the property invested in the business licensed, or its profitableness. But such observations are pertinent only in case the license is resorted to for the purposes of revenue. When it is authorized only in support of police supervision, the expense of such supervision determines the amount of the charge; and, if it were possible to prove in advance the exact cost, that would be the limit of the tax. In the nature of things, that, however, is ordinarily impossible; and so the municipality is at liberty to make the charge large enough to cover any reasonable anticipated *expenses. It is authorized to fix such charge [165] in advance, and need not wait until the end of the period for which the license is granted. It may not act arbitrarily or unreasonably, but the risk may rightfully be cast upon the licensee, and the charge cannot be avoided because it subsequently appears that it was somewhat in excess of the actual expense of the supervision, nor can the licensee then recover the difference between the amount of the license and such cost.

Now, the license in question is, as stated, confessedly not for the purpose of raising revenue. Indeed, if it were, as it appears by the affidavit of defense that the company had paid all taxes charged upon its property as property, it might be obnoxious to a complaint of double taxation. It is not like the tax in *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. ed. 311, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360, which, although called a privilege tax, was in fact a property tax, and the only property tax upon the company, in respect to which we said (p. 696, L. ed. p. 315, Inters. Com. Rep. p. 13, Sup. Ct. Rep. p. 270):

"Doubtless no state could add to the taxation of property, according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce; but the value of property results from the use to which it is put, and varies with the profitableness of that use; and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property, or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution."

We pass, therefore, to consider the question of the reasonableness of this license charge. Prima facie, it was reasonable. *Western U. Teleg. Co.* v. *New Hope*, 187 U. S. 419, *ante*, 240, 23 Sup. Ct. Rep. 204. It devolved upon the company to show that it was not. The case, as we have seen, was tried before the court and a jury. Upon the testimony, the court instructed the jury to find for the plaintiff the full amount claimed. In support of this action, it is contended that the question of reasonableness was one to be determined by the court, and

166]not by the jury, and, further, *that there was no testimony from which either a court or jury could find that the charge was unreasonable.

It may be conceded that, generally speaking, whether an ordinance be reasonable is a question for the court. As said by Judge Dillon, in his work on Municipal Corporations (4th ed. vol. 1, § 327): "Whether an ordinance be reasonable and consistent with the law or not *is a question for the court*, and not the jury, and evidence to the latter on this subject is inadmissible." While that may be correct as a general statement of the law, and especially in cases in which the question of reasonableness turns on the character of the regulations prescribed, yet, when it turns on the amount of a license charge, it may rightly be left for the determination of a jury. There are many matters which enter into the consideration of such a question, not infrequently matters which are disputed and in respect to which there is contradictory testimony. As said by Mr. Justice Shiras, when presiding in the court of appeals in the third circuit, in a similar case (*Philadelphia* v. *Western U. Teleg. Co.* 32 C. C. A. 246, 253, 60 U. S. App. 398, 413, 89 Fed. 454, 461):

"When it is said, in some of the cases, that such a question is for the determination of the court, it is not meant that the question may not properly be submitted to a jury. What is meant by such observations is that courts are not precluded from considering the reasonableness of the legislative act prescribing the terms and amount of the charges. . . . Regarding, then, the issue to be tried as one of fact, we think it is one which, from its nature, is eminently fit for the determination of a jury. The expenses attending direct regulations and oversight are not only to be considered, but also the incidental cost to which the municipality is subjected in providing for and maintaining a proper system of supervision. We cannot undertake to specify all the particulars which should be brought into view where the reasonableness of a municipal ordinance is challenged in a court; but we think that the rule laid down in Cooley, Const. Lim. (ed. 1886) p. 242, may be safely adopted: 'A municipal corporation may impose, under the police power, such a charge for the license as will cover the nec-
[167]essary expenses *of issuing it, and the additional labor of officers and other expenses thereby incurred.'"

It is urged by the city that, inasmuch as the license fees here charged are the same as those charged by the borough of New Hope, the validity of which was sustained in *Western U. Teleg. Co.* v. *New Hope*, 187 U. S. 419, *ante*, 240, 23 Sup. Ct. Rep. 204, it necessarily follows that the charges here imposed are reasonable. But this is a mistake. What is reasonable in one municipality may be oppressive and unreasonable in another. "In determining this question the court will have to regard all the circumstances of the particular city or corporation, the objects sought to be attained, and the necessity which exists for the ordinance. Regulations proper for a large and prosperous city might be absurd or oppressive in a small and sparsely populated town, or in the country." 1 Dill. Mun. Corp. 4th ed. § 327.

The reasonableness of this license charge being tried before a jury, the parties were entitled to a finding of the jury upon that question of fact, unless the testimony was such as to compel a decision one way or the other, in which case the court might be justified in directing a verdict. After a careful review of the evidence, we are constrained to believe that it was not such as to exclude any other conclusion than that directed by the court. We do not hold that it was not sufficient to sustain a finding by the jury to that effect, but simply that there were matters presented from which a jury might rightfully conclude that the ordinance and license charges were unreasonable. Without noticing all the evidence, we content ourselves with these matters. On January 6, 1881, an ordinance was passed by the city councils imposing a license fee of $1 for each and every telegraph pole erected or maintained in the city. Another ordinance, of date March 30, 1883, regulating underground conduits, wires, and cables, and providing for license charges for underground and overhead wires, imposed an annual license charge of $2.50 per mile of wire for overhead telegraph wires, and $1 per mile for underground wires. Upon these ordinances the claim was made against the company. On August 5, 1886, a further ordinance was passed, removing all charges upon underground *wires. The chief of the electrical[168]
bureau of the city, without objection, testified that the removal of all charges on underground wires in 1886 was " as an inducement to have the wires placed underground, and the only requirement was that whoever did it should supply the city or furnish the city with one duct or chamber for the use of the city. There was no other charge connected with it. It was to remove all license charges, to have them place their wires underground." There was evidence of the expenses of the electrical bureau for the years in question, and that such electrical bureau supervised all electrical work upon the streets, but there was no testimony definitely disclosing how much of the labor of that bureau was in respect to telegraph wires and poles, and how much in respect to electric light wires and poles, although there was evidence of the general manner in which the electrical bureau conducted its work of supervision and the matters which came within the scope of its attention. On the other hand, the company showed the extent of its own supervision and the cost of repair, maintenance, and supervision, which, for the years from 1885 to 1891, inclusive, amounted to only $1.60⅞ per mile. There was also proof of the number of electric light lamps, poles, and miles of wire within the city, and other kindred facts.

Now, the comparison of all this evidence, the determination of its weight and effect, and whether the charge made by the city for

supervision was reasonable or not, should have been left to the jury. As there was testimony that the actual cost of maintenance, repair, and supervision by the company was, during the years in question, less than one half that charged by the city for supervision alone, and as it appeared that at first the license fee per mile of overhead wire was $2.50, and of underground wire $1, and that within three years thereafter all charges in respect to underground wire were taken away, and, as the head of the electrical department declared, so taken away for the purpose of inducing the removal of overhead wires and placing them all underground, a jury might have found that the ordinance was unreasonable. It might have come to the conclusion that the charge was [169] not made simply to meet the expenses of supervision, but rather to make a charge so burdensome as to compel the company to remove its wires from poles and put them in conduits. We do not say that a city has not, by virtue of its police powers, authority directly to compel the removal of wires from poles to conduits, but it may be questionable whether a city can seek the same results by an excessive and unreasonable charge upon overhead wires. We think, therefore, the court erred in withdrawing the case from the jury.

Before concluding, we repeat that we are not intending to express any opinion as to the effect of the testimony as a whole, or to intimate what the verdict of a jury ought to be, nor do we mean to imply that there must be satisfactory evidence of the actual cost of supervision. All we mean to decide is that there was sufficient testimony to go to the jury, and obtain its judgment whether the ordinance passed by the city, and the charges imposed thereby, were, considering all the circumstances of the case, reasonable or oppressive.

*The judgment is reversed*, and the case remanded, with instructions to set aside the verdict and grant a new trial.

Mr. Justice **White**, Mr. Justice **Peckham**, and Mr. Justice **McKenna** concurred in the judgment.

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B. M. PATTERSON, Edward Jansen, Sven Freeman, *et al.*, *Appts.*,

*v.*

BARK EUDORA, whereof Alfred E. Dickson is Master.

(See S. C. Reporter's ed. 169-179.)

*Shipping—statute forbidding advance pay to seamen—liberty to contract—application of statute to foreign vessels.*

1. Seamen shipping in an American port on a foreign vessel engaged in foreign commerce are within the protection of the act of December 21, 1898 (30 Stat. at L. 755, 763, chap. 28, U. S. Comp. Stat. 1901, pp. 3071, 3080), § 24, making it a misdemeanor to pay any seaman wages in advance, and providing that advance payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, which provisions are expressly declared applicable "as well to foreign vessels as to vessels of the United States," although such act is entitled "An Act to Amend the Laws Relating to American Seamen."
2. The liberty of contract guaranteed by U. S. Const. 14th Amend. is not invaded by the provisions of the act of December 21, 1898, § 24, making it a misdemeanor to pay any seaman wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned.
3. The restriction on contracts of seamen engaged in interstate or foreign commerce, which is made by the provisions of the act of December 21, 1898, § 24, making it a misdemeanor to pay any seaman wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, is a valid exercise of the power of Congress to regulate commerce.
4. Congress was not without power to provide by the act of December 21, 1898, § 24, that the provisions of that section, making it a misdemeanor to pay any seaman wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, should extend to seamen shipping in an American port on a foreign vessel engaged in interstate commerce.

[No. 278.]

*Argued May 1, 1903. Decided June 1, 1903.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Third Circuit presenting the question whether the provisions of the statute prohibiting advance payment of wages to seamen were applicable to seamen shipping in a port of the United States on a foreign vessel, and whether, if so applicable, the statute was valid. *Answered in the affirmative.*

Statement by Mr. Justice **Brewer**:

On December 21, 1898 (30 Stat. at L. 755, 763, chap. 28, U. S. Comp. Stat. 1901, pp. 3071, 3080), Congress passed an act entitled "An Act to Amend the Laws Relating to American Seamen, for the Protection of Such Seamen, and to Promote Commerce." The material portion thereof is found in § 24, which amends § 10 of chapter 121 of the Laws of 1884, so as to read:

"Sec. 10. (*a*) That it shall be, and is hereby, made unlawful in any case to pay

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NOTE.—*On the constitutionality of statutes restricting contracts and business*—see note to State v. Loomis (Mo.) 21 L. R. A. 789.

*On the power of Congress to regulate commerce*—see notes to State *ex rel.* Corwin v. Indiana & O. Oil, Gas & Min. Co. (Ind.) 6 L. R. A. 579; Bullard v. Northern P. R. Co. (Mont.) 11 L. R. A. 246; *Re* Wilson (D. C.) 12 L. R. A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L. ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216, and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person. Any person paying such advance wages shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than four times the amount of the wages so advanced, and may also be imprisoned for a period not exceeding six months, at the discretion of the court. The payment of such advance wages shall in no case, excepting as herein provided, absolve the vessel or the master or owner thereof from full payment of wages after the same shall have been actually earned, and shall be no defense to a libel, suit, or action for the recovery of such wages. If any person [11] shall demand or receive, either directly *or indirectly, from any seaman or other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall, for every such offense, be liable to a penalty of not more than one hundred dollars."

"(f) That this section shall apply as well to foreign vessels as to vessels of the United States; and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for a similar violation; provided that treaties in force between the United States and foreign nations do not conflict."

The appellants were seamen on board the British bark Eudora, and filed this libel for wages in the district court of the United States for the eastern district of Pennsylvania. By an agreed statement of facts it appears that on January 22, 1900, they shipped on board such bark to serve as seamen for and during a voyage from Portland, Maine, to Rio and other points, not to exceed twelve months, the final port of discharge to be in the United States or Canada, with pay at the rate of one shilling for forty-five days and twenty dollars per month thereafter. At the time of shipment twenty dollars was paid on account of each of them, and with their consent, to the shipping agent through whom they were employed. On the completion of the voyage, they, having performed their duties as seamen, demanded wages for the full term of service, ignoring the payment made, at their instance, to the shipping agent. The advanced payment and contract of shipment were not contrary to, or prohibited by, the laws of Great Britain. It was contended, however, that they were prohibited by the act of Congress, above quoted, and that such act was applicable. The district court entered a decree dismissing the libel. 110 Fed. 430. On appeal to the circuit court of appeals for the third circuit, that court certified the following questions to this court:

"First. Is the act of Congress of December 21, 1898, properly applicable to the contract in this case?

"Second. Under the agreed statement of [172] facts above set *forth, upon a libel filed by said seamen, after the completion of the voyage, against the British vessel, to recover wages which were not due to them under the terms of their contract or under the law of Great Britain, were the libellants entitled to a decree against the vessel?"

*Mr.* **Joseph Hill Brinton** argued the cause and filed a brief for appellants:

Under the earlier acts there was no question as to their applicability to the shipment of all seamen on American soil.

*The State of Maine*, 22 Fed. 734.

The title can only be resorted to as a means of construction where an ambiguity exists in the language of the act or where a usual construction would lead to absurdity.

Endlich, Interpretation of Statutes, § 58; *United States* v. *Fisher*, 2 Cranch, 358, 2 L. ed. 304.

The act applies to British subjects shipping upon a British vessel in an American port.

*The Kestor*, 110 Fed. 432; *The Troop*, 117 Fed. 557.

The "law of the flag" has no application where the interests extend beyond the internal or municipal affairs of the vessel.

*The Olga*, 32 Fed. 329; *The Brantford City*, 29 Fed. 373.

That the "law of the flag" would apply where a foreign crew is shipped in a foreign land on a foreign vessel has rarely been questioned.

*Covert* v. *The Wexford*, 3 Fed. 577; *The Adolph*, 7 Fed. 501; *The Angela Maria*, 35 Fed. 430.

But the question has frequently arisen as to the treatment of seamen on foreign vessels who have shipped in American ports, where treaties confer exclusive jurisdiction on the consuls. In those cases our courts have invariably refused to entertain jurisdiction where the ends of justice fail to require it. The moment, however, the conduct of the officers of the vessel amounts to a discharge of such seamen, or the cruelty is of such a character as to demand interference, such treaties have been to that extent suspended.

*The Burchard*, 42 Fed. 608; *The Welhaven*, 55 Fed. 80; *The Maric*, 49 Fed. 286; *The Belgenland*, 114 U. S. 355, 29 L. ed. 152, 5 Sup. Ct. Rep. 865; *The Salomoni*, 29 Fed. 534; *Bolden* v. *Jensen*, 70 Fed. 505.

A vessel while in a foreign port is subject to local laws in matters pertaining to contracts there effected.

*The Napoleon*, Olcott, 208, Fed. Cas. No. 10,015; *Patch* v. *Marshall*, 1 Curt. C. C. 452, Fed. Cas. No. 10,793; Wharton, International Law, § 33; *The Troop*, 117 Fed. 557.

No court has ever doubted the legislative power to protect the shipment and discharge of seamen within its territory.

*Ex parte D'Olivera*, 1 Gall. 474, Fed. Cas. No. 3,967; *United States* v. *Kellum*, 19 Blatchf. 372, 7 Fed. 843; *United States* v. *McArdle*, 2 Sawy. 367, Fed. Cas. No. 15,653; *United States* v. *Anderson*, 10 Blatchf. 226, Fed. Cas. No. 14,447; *Leary* v. *Lloyd*, 3 El. & El. 178; Kay, Shipmaster & Seamen, § 769; *Grant* v. *United States*, 7 C. C. A. 436,

15 U. S. App. 243, 58 Fed. 694; *The Kestor*, 110 Fed. 557; *The Brantford City*, 29 Fed. 394; *The Troop*, 117 Fed. 557.

*Mr.* **Horace L. Cheyney** argued the cause, and, with *Mr. John F. Lewis*, filed a brief for appellee:

A seaman who ships upon a vessel becomes a seaman of the nationality of that vessel.

*Re Ross*, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897.

Congress or this country alone has not power to change the laws of nations.

*The Scotia*, 14 Wall. 170, *sub nom. Sears* v. *The Scotia*, 20 L. ed. 822.

The contract of shipment entered into in this case by the seamen of "The Eudora" was to be performed exclusively upon British territory, and therefore its validity is to be determined by the British law.

*London Assur. Co.* v. *Companhia de Moagens do Barreiro*, 167 U. S. 149, 42 L. ed. 113, 17 Sup. Ct. Rep. 785; *Coghlan* v. *South Carolina*, 142 U. S. 101, 35 L. ed. 951, 12 Sup. Ct. Rep. 150; *Hall* v. *Cordell*, 142 U. S. 116, 35 L. ed. 956, 12 Sup. Ct. Rep. 154; *Andrews* v. *Pond*, 13 Pet. 65, 10 L. ed. 61; *Miller* v. *Tiffany*, 1 Wall. 310, 17 L. ed. 543; *Pritchard* v. *Norton*, 106 U. S. 124, 27 L. ed. 104, 1 Sup. Ct. Rep. 102; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469.

The sovereignty of this country is coextensive with its territory only, and Congress possesses no power of legislation upon British territory.

Hall, International Law, 4th ed. § 10.

The word "commerce" has a double significance, including traffic, that is, the buying and selling or interchange of commodities and commercial intercourse or the carriage of those commodities.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Lottery Case*, 188 U. S. 321, *sub nom. Champion* v. *Ames*, *ante*, 492, 23 Sup. Ct. Rep. 321.

The term has been held to include not only the carriage of merchantable commodities, but also the carriage of passengers (*Smith* v. *Turner*, 7 How. 283, 12 L. ed. 702), bills of lading, because they represent the goods carried (*Woodruff* v. *Parham*, 8 Wall. 123, 19 L. ed. 382), and the transmission of ideas, wishes, orders and intelligence by telegraph (*Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 347, 30 L. ed. 1187, 7 Sup. Ct. Rep. 1126). It has also been held to include navigation (*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23).

But as the term has been used in the decided cases it is almost equivalent to commercial intercourse or to the carriage and transportation of goods.

*Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23.

Under the power to regulate interstate commerce the Federal government has the power to improve navigable streams and to remove natural obstructions to navigation or commerce (*Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 239), or an obstruction to interstate carriage by a mob (*Re Debs*, 158 U. S. 564, 39 L. ed. 1092, 15 Sup. Ct. Rep. 900).

The authority to regulate interstate commerce gives Congress the power to regulate the instrumentalities thereof.

*Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. Rep. 207.

The decisions have not clearly defined what constitute these instrumentalities or the scope of the regulation thereof, but it must be assumed that Congress has the right to regulate the navigation of a ship in a broader sense than that term was used in *Gibbons* v. *Ogden*, 9 Wheat. 1, 6 L. ed. 23.

But such regulation of the ship as an instrumentality of commerce must be limited to its business as a ship engaged in the carriage of goods or passengers, and not to those incidental contracts which ship owners may enter into for the purpose of carrying on their business as carriers.

The contract in this case is similar to one of insurance, which this court held not to be commerce, but a contract merely in aid of commerce.

*Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Hooper* v. *California*, 155 U. S. 648, 39 L. ed. 297, 15 Sup. Ct. Rep. 207.

A vessel is a detached, floating portion of the territory of the country whose flag it flies.

*The Scotia*, 14 Wall. 170, *sub nom. Sears* v. *The Scotia*, 20 L. ed. 822; *Re Ross*, 140 U. S. 453, 35 L. ed. 581, 11 Sup. Ct. Rep. 897; *Wilson* v. *McNamee*, 102 U. S. 572, 26 L. ed. 234; *The Lamington*, 87 Fed. 752; 1 Kent, Com. 26; Wheaton, International Law, Dana's ed. 106; 3 Wharton, International Law, 228; 1 Vattel, Law of Nations, chap. 19, § 216; Bluntschli, International Law, § 319; *Seagrove* v. *Parks* [1891] 1 Q. B. 551; *Wildenhus's Case*, 120 U. S. 1, *sub nom. Mali* v. *Keeper of Common Jail*, 30 L. ed. 565, 7 Sup. Ct. Rep. 385; *United States* v. *Rodgers*, 150 U. S. 249, 37 L. ed. 1071, 14 Sup. Ct. Rep. 109.

An American vessel, registered or enrolled in accordance with the laws of the United States, being thus a detached portion of the national territory, and not a part of the territory of any particular state, Congress, over such vessels, has the same police power as the various states have over the territory within their limits.

*United States* v. *DeWitt*, 9 Wall. 41, 19 L. ed. 593.

Bearing in mind this distinction between the power of Congress over American and foreign vessels, it is obvious that Congress may have greater legislative power over the former than the latter; and the validity of a provision governing American vessels, therefore, is not the true test of the validity of legislation attempting to control contracts entered into by seamen with foreign vessels while lying at our ports.

The prohibition contained in the act of 1898 against the payment of wages to a seaman in advance is a violation of the liberty to contract guaranteed by the Constitution.

*Allgeyer* v. *Louisiana*, 165 U. S. 579, 41 L. ed. 832, 17 Sup. Ct. Rep. 427.

While it is true that it is largely in the discretion of the legislatures of the several

states or of Congress to decide when public policy requires the prohibition of certain contracts, yet, on the other hand, the mere fact that the enactment purports to be for the regulation of commerce, the protection of public safety, public health, or public morals is not conclusive upon the courts.

*Mugler* v. *Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Lawton* v. *Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Booth* v. *Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *Otis* v. *Parker*, 187 U. S. 606, *ante*, 323, 23 Sup. Ct. Rep. 168; *Lottery Case*, 188 U. S. 321, *sub nom. Champion* v. *Ames*, *ante*, 492, 23 Sup. Ct. Rep. 321.

Only general principles can be declared, and no fixed or invariable rule can be applied to such cases. It is a question for the determination of the court in each case whether the statute is in violation of the fundamental rights guaranteed by the Constitution.

*Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; *Booth* v. *Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425; *Otis* v. *Parker*, 187 U. S. 606, *ante*, 323, 23 Sup. Ct. Rep. 168.

Courts have declined to take jurisdiction over claims of foreign seamen, where there would be no hardship in compelling them to go to courts of the country of the vessel.

*The Walter A. Wallet*, 66 Fed. 1011; *The Belgenland*, 114 U. S. 355, 29 L. ed. 152, 5 Sup. Ct. Rep. 860; *The Catherine*, 1 Pet. Adm. 104; *The Forsoket*, 1 Pet. Adm. 197.

Not only does this rule apply to wages cases, but to all questions governing the rights and duties of seamen upon foreign vessels.

*The Sirius*, 47 Fed. 825; *The Amalia*, 3 Fed. 652; *The Kambria*, 100 Fed. 118.

The British law has been applied to cases of personal injuries upon British vessels while on the high seas or in British waters.

*The Egyptian Monarch*, 36 Fed. 773; *The Lamington*, 87 Fed. 752.

*Assistant Attorney General Beck* filed a brief for the United States.

Mr. Justice **Brewer** delivered the opinion of the court:

Applying the ordinary rules of construction, it does not seem to us doubtful that the act of Congress, if within its power, is applicable in this case. The act makes it unlawful to pay any seaman wages in advance, makes such payment a misdemeanor, and in terms provides that such payment shall not absolve the vessel or its master or owner for full payment of wages after the same shall have been actually earned. And further, it declares that the section making these provisions shall apply as well to foreign vessels as to vessels of the United States, provided that treaties in force between the United States and foreign nations do not conflict. It is true that the title of the act of 1898 is "An Act to Amend the Laws Relating to American Seamen," but it has been held that the title is no part of a statute, and cannot be used to set at naught its obvious meaning. The extent to which it can be used is thus stated by Chief Justice Marshall in *United States* v. *Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313:

"Neither party contends that the title of an act can control plain words in the body of the statute; and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain, nothing is left to construction. *Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and, in such case, the title claims a degree of notice and will have its due share of consideration." [173]

See also *Yazoo & M. Valley R. Co.* v. *Thomas*, 132 U. S. 174, 188, 33 L. ed. 302, 307, 10 Sup. Ct. Rep. 68; *United States* v. *Oregon & C. R. Co.* 164 U. S. 526, 541, 41 L. ed. 541, 545, 17 Sup. Ct. Rep. 165; *Price* v. *Forrest*, 173 U. S. 410, 427, 43 L. ed. 749, 755, 19 Sup. Ct. Rep. 434; Endlich, Interpretation of Statutes, §§ 58, 59. When, as here, the statute declares, in plain words, its intent in reference to a prepayment of seamen's wages, and follows that declaration with a further statement that the rule thus announced shall apply to foreign vessels as well as to vessels of the United States, it would do violence to language to say that it was not applicable to a foreign vessel.

But the main contention is that the statute is beyond the power of Congress to enact, especially as applicable to foreign vessels. It is urged that it invades the liberty of contract which is guaranteed by the 14th Amendment to the Federal Constitution, and reference is made to *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, 431, in which we said:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose, to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."

Further, that even if the contract be one subject to restraint under the police power, that power is vested in the states, and not in the general government, and any restraint, if exercised at all, can only be exercised by the state in which the contract is entered into; that the only jurisdiction possessed by Congress in respect to such matters is by virtue of its power to regulate commerce, interstate and foreign; that the regulation of commerce does not carry

with it the power of controlling contracts [174]*of employment by those engaged in such service, any more than it includes the power to regulate contracts for service on interstate railroads, or for the manufacture of goods which may be intended for interstate or foreign commerce; and, finally, that the validity of a contract is to be determined by the law of the place of performance, and not by that of the place of the contract; that the contract in this case was one entered into in the United States, to be performed on board a British vessel, which is undoubtedly British territory, and therefore its validity is to be determined by British law, and that, as conceded in the question, sustains its validity.

We are unable to yield our assent to this contention. That there is, generally speaking, a liberty of contract which is protected by the 14th Amendment, may be conceded; yet such liberty does not extend to all contracts. As said in *Frisbie* v. *United States*, 157 U. S. 160, 165, 39 L. ed. 657, 659, 15 Sup. Ct. Rep. 586, 588:

"While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property."

And that the contract of a sailor for his services is subject to some restrictions was settled in *Robertson* v. *Baldwin*, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326, in which §§ 4598 and 4599, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 3115, 3116), in so far as they require seamen to carry out the contracts contained in their shipping articles, were held not to be in conflict with the 13th Amendment, and in which a depri- [175]vation of personal *liberty not warranted in respect to other employees was sustained as to sailors. We quote the following from the opinion (p. 282, L. ed. p. 718, Sup. Ct. Rep. p. 329):

"From the earliest historical period, the contract of the sailor has been treated as an exceptional one, and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained—as Molloy forcibly expresses it—'to rot in her neglected brine.' Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion or absence without leave during the life of the shipping articles."

If the necessities of the public justify the enforcement of a sailor's contract by exceptional means, justice requires that the rights of the sailor be in like manner protected. The story of the wrongs done to sailors in the larger ports, not merely of this nation, but of the world, is an oft-told tale, and many have been the efforts to protect them against such wrongs. One of the most common means of doing these wrongs is the advancement of wages. Bad men lure them into haunts of vice, advance a little money to continue their dissipation, and, having thus acquired a partial control, and by liquor dulled their faculties, place them on board the vessel just ready to sail and most ready to return the advances. When once on shipboard, and the ship at sea, the sailor is powerless and no relief is availing. It was in order to stop this evil, to protect the sailor, and not to restrict him of his liberty, that this statute was passed. And, while in some cases it may operate harshly, no one can doubt that the best interests of seamen as a class are preserved by such legislation.

Neither do we think there is in it any trespass on the rights *of the states. No question [176] is before us as to the applicability of the statute to contracts of sailors for services wholly within the state. We need not determine whether one who contracts to serve on a steamboat between New York and Albany, or between any two places within the limits of a state, can avail himself of the privileges of this legislation, for the services contracted for in this case were to be performed beyond the limits of any single state, and in an ocean voyage. Contracts with sailors for their services are, as we have seen, exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the state, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce.

Finally, while it has often been stated that the law of the place of performance determines the validity of a contract (*London Assur. Co.* v. *Companhia de Moagens do Barreiro*, 167 U. S. 149, 160, 42 L. ed. 113, 120, 17 Sup. Ct. Rep. 785), yet that doctrine does not control this case. It may be remarked, in passing, that it does not appear that the contract of shipment or the ad-

vance payment were made on board the vessel. On the contrary, the stipulated fact is that the "seamen were engaged in the presence of the British vice consul at the port of New York." The wrongful acts were, therefore, done on the territory and within the jurisdiction of the United States. It is undoubtedly true that, for some purposes, a foreign ship is to be treated as foreign territory. As said by Mr. Justice Blackburn, in *Queen* v. *Anderson*, L. R. 1 C. C. 161, "A ship which bears a nation's flag is to be treated as a part of the territory of that nation. A ship is a kind of floating island." Yet when a foreign merchant vessel comes into our ports, like a foreign citizen coming into our territory, it subjects itself to the jurisdiction of this country. In *The Exchange* v. *M'Faddon*, 7 Cranch, 116, 136, 146, 3 L. ed. 287, 293, 297, this court held that a public armed vessel in the service of a sovereign at peace with the United States is not within the ordinary jurisdiction of our tribunals while within a port of the [177] United *States. In the opinion, by Chief Justice Marshall, it was said that "the jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source. This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory." And, again, after holding it "to be a principle of public law that national ships of war, entering the port of a friendly power, open for their reception, are to be considered as exempted, by the consent of that power, from its jurisdiction," he added: "Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction, either by employing force, or by subjecting such vessels to the ordinary tribunals."

Again, in *Wildenhus's Case*, 120 U. S. 1, *sub nom. Mali* v. *Hudson County Common Jail Keeper*, 30 L. ed. 565, 7 Sup. Ct. Rep. 385, in which the jurisdiction of a state court over one charged with murder, committed on board a foreign merchant vessel in a harbor of the state, was sustained, it was said by Mr. Chief Justice Waite (pp. 11, 12, L. ed. p. 567, Sup. Ct. Rep. p. 387):

"It is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless, by treaty or otherwise, the two countries have come to some different understanding or agreement. . . . From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so, by comity, it came to be generally understood among civilized nations *that all matters of discipline and all [178] things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce should require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority."

It follows from these decisions that it is within the power of Congress to prescribe the penal provisions of § 10, and no one within the jurisdiction of the United States can escape liability for a violation of those provisions on the plea that he is a foreign citizen or an officer of a foreign merchant vessel. It also follows that it is a duty of the courts of the United States to give full force and effect to such provisions. It is not pretended that this government can control the action of foreign tribunals. In any case presented to them, they will be guided by their own views of the law and its scope and effect; but the courts of the United States are bound to accept this legislation, and enforce it whenever its provisions are violated. The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly withdrawn, it may be extended upon such terms and conditions as the government sees fit to impose. And this legislation, as plainly as words can make it, imposes these conditions upon the shipment of sailors in our harbors, and declares that they are applicable to foreign, as well as to domestic, vessels. Congress has thus prescribed conditions which attend the entrance of foreign vessels into our ports, and those conditions the courts are not at liberty to dispense with. The interests of our own shipping require this. It is well said by *counsel for the government [179] in the brief which he was given leave to file:

"Moreover, as 90 per cent of all commerce in our ports is conducted in foreign vessels, it must be obvious that their exemption from these shipping laws will go far to embarrass domestic vessels in obtaining their quota of seamen. To the average sailor it is a consideration while in port to have

his wages in part prepaid; and if, in a large port like New York, 90 per cent of the vessels are permitted to prepay such seamen as ship upon them, and the other 10 per cent, being American vessels, cannot thus prepay, it will be exceedingly difficult for American vessels to obtain crews. This practical consideration, presumably, appealed to Congress and fully justified the provision herein contained."

We are of the opinion that it is within the power of Congress to protect all sailors shipping in our ports on vessels engaged in foreign or interstate commerce, whether they belong to citizens of this country or of a foreign nation; and that our courts are bound to enforce those provisions in respect to foreign, equally with domestic, vessels.

*The questions, therefore, certified by the Court of Appeals, will each be answered in the affirmative.*

Mr. Justice **Harlan** concurred in the judgment.

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ANTON JOHANSON, *Plff. in Err.*,
*v.*
STATE OF WASHINGTON.

(See S. C. Reporter's ed. 179-186.)

***Public lands—selections in lieu of school sections—effect of approval by Secretary of Interior.***

1. The approval by the Secretary of the Interior of a selection of public land in lieu of school sections, made by one claiming to be the agent of a territory, is, if nothing more, a withdrawal from private entry of the selected land, which continues until the approval of the selection is set aside.
2. The provisions for selection of public land in lieu of school sections, which are made by the act of February 26, 1859 (11 Stat. at L. 385, chap. 58, U. S. Comp. Stat. 1901, p. 1381), are, as to cases not provided for by the special provisions of the act of March 2, 1853 (10 Stat. at L. 179, chap. 90, § 20, Rev. Stat. § 1947), for such selection by the territory of Washington, as applicable to that territory as to any other territory.
3. The Secretary of the Treasury was not designated as the officer to make selections of public lands in lieu of school sections by the provision of the act of February 26, 1859, requiring such selections to be made "in accordance with the principles of adjustment and the provisions" of the act of Congress of May 20, 1826 (4 Stat. at L. 179, chap. 83), which act provided for selection by that officer; but such provision must, in view of the creation of the Interior Department by the act of March 3, 1849 (9 Stat. at L. 395, chap. 108), and the transfer, to the Secretary thereof, of the supervising powers of the Secretary of the Treasury in respect to public lands, be construed simply as describing the general mode of procedure.
4. The approval, by the Secretary of the Interior, of a selection of public lands in lieu of school sections, by a person authorized to represent the territory of Washington, being that of the officer charged with the supervision of the landed interests of the United States, should, unless some direction of Congress manifestly has been violated, be held to be conclusive on the transfer of title.
5. Past, as well as future, approval by the Secretary of the Interior of selections of public land in lieu of school sections, was covered by the provision of the act of December 18, 1902 (32 Stat. at L. 756, chap. 5), confirming title of the state of Washington to lands so selected, "when the same shall have been approved by the Secretary of the Interior."

[No. 282.]

*Argued May 1, 1903. Decided June 1, 1903.*

IN ERROR to the Supreme Court of the State of Washington to review a judgment which affirmed a judgment of the Superior Court of King County in favor of plaintiff in an action of ejectment. *Affirmed.*

See same case below, 26 Wash. 668, 67 Pac. 401.

Statement by Mr. Justice **Brewer:**

This was an action of ejectment brought in the superior court of King county, Washington. The case was tried by the court without a jury. An agreed statement of facts was submitted, upon which the court found the following facts and conclusions of law:

"1. That the north half of the southwest quarter and the northwest quarter of the southeast quarter of section 3, township 25 north, range 4 east, is of the value of $20,000, and was selected by Phillip H. Lewis, as agent for King county, Washington territory, by filing a list of this and other lands, designated as list No. 2 of indemnity school selection, at the land office at Olympia, Washington territory, May 24, 1870, under an act of Congress approved March 2, 1853, and an act of Congress approved February 26, 1859, which said selection was approved by Secretary C. Delano, January 27, 1872.

"2. March 13, 1893, Anton Johanson made application to enter the land aforesaid under the homestead laws, and at that time made a settlement thereon; he has ever since lived on said land; his application was rejected by the local land office, and subsequently appealed to the Commissioner of the General Land Office, and finally to the Secretary of the Interior, who, *on December 18, 1895, de-[181] cided adversely to Anton Johanson.

"From the foregoing facts the court finds as conclusions of law:

"1. That the plaintiff was, on the 13th day of March, 1893, seised in fee and possessed and entitled to the possession of said north half of the southwest quarter and the northwest quarter of the southeast quarter, section 3, township 25 north, range 4 east.

"2. That on the said 13th day of March, 1893, defendant unlawfully entered said premises and ejected the plaintiff therefrom, and unlawfully retains possession thereof."

The judgment of the superior court having been affirmed by the supreme court of

the state (26 Wash. 668, 67 Pac. 401), the case was brought here on error.

*Mr.* **C. W. Corliss** argued the cause, and, with *Messrs. Henry W. Lung, John F. Main,* and *O. C. McGilvra,* filed a brief for plaintiff in error:

There can be no reservation of public lands except by some treaty, law, or authorized act of the executive department.

*Wolsey* v. *Chapman,* 101 U. S. 755, 25 L. ed. 915; *United States* v. *Fitzgerald,* 15 Pet. 407, 10 L. ed. 785.

Repeals of statutes by implication are not favored.

*Chew Heong* v. *United States,* 112 U. S. 536, 28 L. ed. 770, 5 Sup. Ct. Rep. 255; *South Carolina* v. *Stoll,* 17 Wall. 425, 21 L. ed. 650; *Ex parte Crow Dog,* 109 U. S. 556, *sub nom. Ex parte Kang-Gi-Shun-Ca,* 27 L. ed. 1030, 3 Sup. Ct. Rep. 396; *Fitzgerald* v. *Champneys,* 30 L. J. Ch. N. S. 782, 2 Johns. & H. 31.

The land in controversy was, together with other lands, reserved by the United States for the express purpose of granting the lands for common-school purposes.

*Barkley* v. *United States,* 3 Wash. Terr. 522, 19 Pac. 36.

This reserved right in the government must give it control over these lands as absolute as that of any owner could be.

*Ibid.*

At no time has Congress understood the mere reservation of the lands for school purposes to be equivalent to a conveyance of the same to the people of the territory.

*United States* v. *Elliot,* 12 Utah, 119, 41 Pac. 720.

The policy of the Federal government in favor of settlers has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land comprehending their improvements over that of any other person.

*Clements* v. *Warner,* 24 How. 394, 16 L. ed. 695.

The party who takes the initiatory step in such cases, if followed up to patent, is deemed to have acquired the better right as against others to the premises.

*Shepley* v. *Cowan,* 91 U. S. 330, 23 L. ed. 424.

The state right of selection could not be made to the prejudice of the rights of others.

*Aurrecoechea* v. *Bangs,* 114 U. S. 381, 29 L. ed. 170, 5 Sup. Ct. Rep. 892.

*Mr. C. W. Corliss* filed a separate brief for plaintiff in error:

A defective selection cannot be cured by a relinquishment, and amended so as to defeat the rights of claims initiated prior to amendment.

*Barclay* v. *California,* 6 Land Dec. 699.

*Mr.* **W. B. Stratton** argued the cause and filed a brief for defendant in error:

To review the decision of the state court upon a question of fact is not within the jurisdiction of this court.

*Dower* v. *Richards,* 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Bartlett* v. *Lockwood,* 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; *Egan* v. *Hart,* 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Hedrick* v. *Atchison, T. & S. F. R. Co.* 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922.

A writ of error brings up matters of law only.

*Dower* v. *Richards,* 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452.

The selection made by Lewis as agent for King county, Washington territory was approved by the Secretary of Interior, January 27, 1872. Such approval operated as a selection by the proper executive department of the Federal government under the act of February 26, 1859.

*Todd* v. *Washington,* 24 Land Dec. 106; *Re Bailey,* 5 Land Dec. 216.

The authority of the agent cannot here be drawn in question.

*Keane* v. *Brygger,* 3 Wash. 348, 28 Pac. 653; *Sharpstein* v. *Washington,* 13 Land Dec. 378; *Moore* v. *Robbins,* 96 U. S. 535, 24 L. ed. 848.

Not only did the Secretary of the Interior in 1872 approve the selection made by King county through its agent, Lewis, as shown by the stipulation, but in the year 1895 the Secretary of the Interior also approved the same selection. This approval of 1895 related back to the time of the selection.

*Keane* v. *Brygger,* 3 Wash. 348, 28 Pac. 653.

The construction given to statutes by those charged with the duty of executing them should not be overruled without cogent reasons.

*Ibid.*

If a statute is ambiguous, contemporaneous and uniform executive construction is regarded as decisive.

*Brown* v. *United States,* 113 U. S. 568, 28 L. ed. 1079, 5 Sup. Ct. Rep. 648; *Edwards* v. *Darby,* 12 Wheat. 210, 6 L. ed. 604; *United States* v. *State Bank,* 6 Pet. 29, 8 L. ed. 308; *McSorley* v. *Hill,* 2 Wash. 638, 27 Pac. 552.

A reservation is in itself an appropriation for a trust purpose.

*Vincennes University* v. *Indiana,* 14 How. 273, 14 L. ed. 418; *Wilcox* v. *Jackson ex dem. M'Connel,* 13 Pet. 498, 10 L. ed. 264.

The reservation and selection under the acts of 1853 and 1859 have the same force and effect as a grant.

*Re Bailey,* 5 Land Dec. 216.

The reservation made by the selection of the land in controversy while the territorial government existed continues until the selection is canceled.

*Re Wheeler,* 11 Land Dec. 381; *Re Smith,* 11 Land Dec. 382.

The state of Washington may have recognized its right to lieu lands under the terms of § 10 of the enabling act, but it has never done anything in recognition of the contention of the plaintiff in error, that lands selected under the acts of 1853 and 1859 do not belong absolutely to the state in perpetual trust for the common schools.

*Re Barclay,* 4 Land Dec. 390.

The reserved lands being held by the territory in perpetual trust for the common schools, could Congress pass any law that would affect the trust?

*Minnesota* v. *Bachelder*, 1 Wall. 109, 17 L. ed. 551.

Whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale would be construed to embrace it, or to operate upon it, although no reservation were made of it.

*Wilcox* v. *Jackson ex dem. M'Connel*, 13 Pet. 513, 10 L. ed. 271.

The selections made by the county commissioners and approved by Secretary Delano in the year 1872, under the acts of 1853 and 1859, operated at least as a reservation of the land in question.

This reservation has never been destroyed, nor has the land ever become a part of the public domain subject to entry by settlers.

*Ibid.; Leavenworth & G. R. Co.* v. *United States*, 92 U. S. 745, 23 L. ed. 639.

The enabling act should be construed with the acts of 1853 and 1859, and if this is done then lieu selections might be made on account of deficiencies arising from natural causes.

*Sharpstein* v. *Washington*, 13 Land Dec. 378; *Re Bailey*, 5 Land Dec. 216; *Re Smith*, 11 Land Dec. 382.

Mr. Justice **Brewer** delivered the opinion of the court:

Under the statutes of Washington, an action in form similar to the old action of ejectment may be maintained in favor of one who has a superior title, whether legal or equitable. Ballinger's Anno. Codes & Statutes, §§ 5509, 5508. No patent is shown to have been issued by the general government, and the question, therefore, is whether the state obtained an equitable title by virtue of the selection and approval disclosed in the findings of fact.

The first contention of plaintiff in error is that no authority is shown for Phillip H. Lewis to act as agent for King county or the territory of Washington in making the selection. We pass the assertion that, in the brief of counsel for plaintiff in error in the state court, the right of Lewis to act for the [182] county *was conceded. It is enough that Lewis, assuming to act as agent, made the selection, and that his selection was approved by the Secretary of the Interior; for the state, the successor of the territory, by commencing this action, and claiming the benefit of his act as agent, ratified and confirmed what he did as agent. Besides, whether he had authority to so act is not a Federal question, but one whose decision by the state court is final.

Coming now to the Federal question, the approval by the Secretary of Interior of a selection made by one claiming to be the agent of a territory or state of land in lieu of school sections 16 and 36 is, if nothing more, in effect a withdrawal from private entry of the selected land, and such withdrawal continues until the approval of the selection is itself set aside. Whether such selection, so approved, shall afterwards ripen into a full legal title or not, is immaterial so far as the question of withdrawal is concerned. In the case at bar, at the time of the selection and approval, there was no settlement, no private right, nothing to interfere between the United States and the territory of Washington, or prevent a selection of this tract in lieu of an ordinary school section. When, therefore, the Secretary of the Interior approved the selection, it at least operated to withdraw the land from private entry. A claim in behalf of the territory had been presented, and that claim had been approved by the proper officer of the United States. While the land remained subject to such claim and approval, no individual could come in and question its validity. Johanson's attempt to make a homestead was wrongful, and gave him no rights whatever in the land.

But, further, the title of the state is good. For the material parts of the statutes bearing upon this question, see note at foot of this page.†

*Now we remark that, from the legislation [183] of Congress, nothing is clearer than that the policy of the government has been a generous one in respect to grants for school purposes. *Cooper* v. *Roberts*, 18 How. 173, 15 L. ed. 338; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650,

†Act March 2, 1853, establishing the territory of Washington (10 Stat. at L. 179, chap. 90, § 20, § 1947, Rev. Stat.):

"Sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said territory. And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated, be, and they are hereby, authorized to locate other lands, to an equal amount in sections or fractional sections, as the case may be, within their respective counties, in lieu of said sections so occupied."

Act of February 26, 1859 (11 Stat. at L. 385, chap. 58, U. S. Comp. Stat. 1901, p. 1381):

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That where settlements, with a view to pre-emption, have been made before the survey of the lands in the fields, which shall be found to have been made on sections sixteen or thirty-six, said sections shall be subject to the pre-emption claim of such settler; and if they, or either of them, shall have been or shall be reserved or pledged for the use of schools or colleges in the state or territory in which the lands lie, other lands of like quantity are hereby appropriated in lieu of such as may be patented by pre-emptors; and other lands are also hereby appropriated to compensate deficiencies for school purposes, where said sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever: *Provided*, That the lands by this section appropriated shall be selected and appropriated in accordance with the principles of adjustment and the provisions of the

[184] *and cases cited in the opinion. And, as was said by Mr. Justice Field in *Winona & St. P. R. Co.* v. *Barney*, 113 U. S. 618, 625, 28 L. ed. 1109, 1111, 5 Sup. Ct. Rep. 606, 609, acts making grants "are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

Tested by this rule, it is obvious that Congress intended that Washington should receive full sections 16 and 36, or, in case of a failure by reason of prior settlement or from natural causes, the equivalent of such [185] sections, and designated the Secretary *of the Interior as the officer to approve any selections made by the territory. The act of 1859 is as applicable to Washington as to any other territory, notwithstanding that there was a special statute passed in 1853 in respect to it. While ordinarily a special law is not repealed by a subsequent general statute, unless the intent so to do is obvious, yet there is no rule which prevents the latter from applying to cases not provided for by the former. It is true the act of 1859 refers to the act of 1826 in reference to selections, and the act of 1826 designated the Secretary of the Treasury as the officer to select. At that time the Land Department was under the supervision of the Secretary of the Treasury. But by the act of March 3, 1849 (9 Stat. at L. 395, chap. 108), the Interior Department was created, and the supervising powers of the Secretary of the Treasury in respect to public lands were transferred to the Secretary of the Interior. The act of 1859 is to be taken, not as specially designating the Secretary of the Treasury as the officer to make the selections, but simply as describing the general mode of procedure in respect thereto. This is obvious from its language, which is that the selection and appropriation shall be "in accordance with the principles of adjustment and the provisions of the act of Congress, May 20, 1826."

Further, it must be remembered that the general supervision of the affairs of the Land Department is now vested in the Secretary of the Interior, and that, unless Congress clearly designates some other officer to act in respect to such matters, it will be assumed that he is the officer to represent the government. *Catholic Bishop* v. *Gibbon*, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779. If some one authorized to represent the territory of Washington made a selection, and it was approved by the Secretary of the Interior, such action, being that of the officer charged with the supervision of the landed interests of the United States, should, unless some direction of Congress has manifestly been violated, be held to be conclusive upon the transfer of title.

But still further, it appearing that some question had been mooted as to the intent of Congress in respect to these matters, the confirmatory statute of 1902 was enacted, and that obviously removes all doubt. It confirms the title to selected lands, *"when [186] the same shall have been approved by the

act of Congress of May twentieth, eighteen hundred and twenty-six, entitled 'An Act to Appropriate Lands for the Support of Schools in Certain Townships and Fractional Townships Not Before Provided For.'"

Section 2 of the act of Congress approved May 20, 1826 (4 Stat. at L. 179, chap. 83):

"Sec. 2. *And be it further enacted*, That the aforesaid tracts of land shall be selected by the Secretary of the Treasury, out of any unappropriated public lands within the land district where the township for which any tract is selected may be situated; and when so selected, shall be held by the same tenure, and upon the same terms, for the support of schools in such township, as section number sixteen is, or may be held, in the state where such township shall be situated."

Section 10 of the act of February 22, 1889, for the admission of Washington and other territories into the Union (25 Stat. at L. 679, chap. 180):

"That upon the admission of each of said states into the Union, sections numbered sixteen and thirty-six in every township of said proposed states, and, where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said states for the support of common schools, such indemnity lands to be selected within said states in such manner as the legislature may provide, with the approval of the Secretary of the Interior."

(32 Stat. at L. 756, chap. 5. Dec. 18, 1902.)

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases where sections sixteen and thirty-six, or either or any of them, or any portion thereof, have been occupied by actual settlers prior to survey thereof, and the county commissioners of the counties in which said sections so occupied as aforesaid are situated, have, under said act of Congress of March second, eighteen hundred and fifty-three, located or selected other lands in sections or fractional sections, as the case may be, within their respective counties, in lieu of said section so occupied as aforesaid, the lands so located or selected, when the same shall have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said state by said act of February twenty-second, eighteen hundred and eighty-nine, and the title of said state thereto is hereby confirmed.

"Sec. 2. That where any lands appropriated by Congress to said territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six were fractional in quantity, or where one or both were wanting by reason of the township being fractional, or from any natural cause whatever, or where sections sixteen or thirty-six were patented by pre-emptors, have been selected and appropriated as provided in said act of Congress of February twenty-sixth, eighteen hundred and fifty-nine, the land so selected and appropriated, when the same shall have been approved by the Secretary of the Interior, shall be deemed and taken to have been granted to said state of Washington by the said act of February twenty-second, eighteen hundred and eighty-nine, and the title thereto confirmed."

Secretary of the Interior." This does not refer alone to future action by the Secretary, but ratifies that which he has already done. He has approved this selection, and the act of 1902 places the title of the state beyond controversy.

For these reasons we think the *judgment of the Supreme Court of Washington is right, and it is affirmed.*

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## OREGON & CALIFORNIA RAILROAD COMPANY, *Appt.*, *v.* UNITED STATES.

(See S. C. Reporter's ed. 186-197.)

*Public lands—claims under Oregon donation act—right to perfect after abandonment—selection of abandoned lands by railroad company as lieu lands.*

1. No right to perfect claims, under the Oregon donation act of September 27, 1850 (9 Stat. at L. 496, chap. 76), to lands which have been abandoned before completing the requisite residence thereon, was given by the provisions of the act of July 26, 1894 (28 Stat. at L. 122, chap. 163, U. S. Comp. Stat. 1901, p. 1522), according the donees the right "to make and file final proofs and fully establish their rights to donations,"—especially in view of the 2d section, which authorizes the Commissioner of the Land Office to cancel a claim proved to be invalid or abandoned, and the 3d section, which expressly saves adverse claims arising under any law other than the donation act.
2. Lands on which a settlement was made under the Oregon donation act of September 27, 1850 (9 Stat. at L. 496, chap. 76), and the act of February 14, 1853 (10 Stat. at L. 158, chap. 69), amendatory thereof, but which were abandoned, without compliance with the conditions as to residence or proof, fifteen years before their selection as lieu lands under the grant of July 25, 1866 (14 Stat. at L. 239, chap. 242), to the Oregon Central Railroad Company, were not "reserved" from sale, within the meaning of that act, so as to prevent the grant from attaching to such lands, although the donation notification had not been formally canceled.

[No. 188.]

*Argued March 4, 1903. Decided May 4, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Oregon for the cancelation of a patent issued by the United States to a railroad company for lands selected by it as within the indemnity limits of a congressional grant. *Reversed* and remanded to the Circuit Court, with directions to dismiss the bill.

See same case below, 48 C. C. A. 520, 109 Fed. 514.

NOTE.—*As to land grants to railroads*—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

Statement by Mr. Justice **Brown**:

This was a bill in equity filed by the United States, in the circuit court for the district of Oregon, to compel a reconveyance *by the railroad company, as the successor [187] and assignee of the Oregon Central Railroad Company, of certain lands within the indemnity limits of the land grant to such company of July 25, 1866 (14 Stat at L. 239, chap. 242), for which land one John W. Hines, on November 22, 1853, seventeen years before the definite location of the line of the road, had filed a donation notification under the Oregon donation act of September 27, 1850 (9 Stat. at L. 496, chap. 76), and the act of February 14, 1853 (10 Stat. at L. 158, chap. 69), amendatory thereto. These lands the President of the United States, on July 12, 1871, patented to the railroad company by an alleged mistake and without the knowledge of the adverse claim of Hines. By reason of this prior donation the patent was averred to be void, and its cancelation was prayed under the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), authorizing the Attorney General to institute necessary proceedings to cancel patents erroneously issued to railroad companies.

The defendant in its plea averred an approval of its map of definite location January 29, 1870, a selection of the lands prior to July 12, 1871, and the further fact that Hines abandoned the land without having paid for it, or residing thereon four years; nor was he residing thereon at the time the defendant selected the same.

The circuit court decreed the cancelation of the patent, and the court of appeals affirmed the decree.

*Mr.* **Maxwell Evarts** argued the cause and filed a brief for appellant:

The status of indemnity lands at the time of selection by the railroad is what determines its right thereto.

*Ryan* v. *Central P. R. Co.* 99 U. S. 388, 25 L. ed. 305.

Whatever interest in the land (if any) Hines acquired by the filing of his donation notification at once reverted to the government upon his abandonment of the land.

*Hall* v. *Russell*, 101 U. S. 503, 25 L. ed. 829; *Vance* v. *Burbank*, 101 U. S. 514, 25 L. ed. 929; *Maynard* v. *Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723.

If the patent to the land in dispute was canceled and the land restored to the public domain, the railroad company would be free to again select it and demand from the United States a new patent therefor. This is a sufficient ground for dismissing the bill.

*United States* v. *Central P. R. Co.* 26 Fed. 479; *Germania Iron Co.* v. *United States*, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337; *United States* v. *San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850.

*Mr.* **Charles W. Russell** argued the cause and filed a brief for appellee:

The practice of the Land Department has been to treat land subject to a valid donation

notification as other than public lands. A new entry was not allowed without a contest, and such claims were held to be excepted from grants of public land to railroad companies, though not mentioned in excepting clauses.

*Oregon & C. R. Co.* v. *Kuebel*, 22 Land Dec. 308; *Dyer* v. *Oregon & C. R. Co.* 23 Land Dec. 569.

The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.

*Newhall* v. *Sanger*, 92 U. S. 763, 23 L. ed. 769; *Bardon* v. *Northern P. R. Co.* 145 U. S. 538, 36 L. ed. 806, 12 Sup. Ct. Rep. 856.

Admitting that the conditions on which the donation was made had to be, and had not been complied with prior to 1870,—that Hines had gone away from the land and was not then residing on it,—in spite of all this, the land was not free public land.

See *Lee* v. *Summers*, 2 Or. 266; *Blakesly* v. *Caywood*, 4 Or. 279; *Chapman* v. *School Dist. No. 1*, Deady, 108 Fed. Cas. No. 2,607.

Mr. Justice **Brown** delivered the opinion of the court:

This case is similar to two recent cases bearing the same title, in the first one of which (189 U. S. 103, *ante*, 726, 23 Sup. Ct. Rep. 615) a patent of certain lands within the indemnity limits of the same road, dated February 20, 1893, was canceled in favor of certain entrymen under the homestead laws of the United States, who had settled upon these lands at sundry dates from 1869 to [188] *1890, and before the defendant company had selected the lands in question as indemnity lands, or had received a patent. The court found that, "when the company's lists were approved, neither the Commissioner nor the Secretary had any knowledge of the adverse claims of the above settlers to the lands upon which they respectively resided;" and held that the Land Department had no authority, simply upon the definite location of the road, to withdraw from the operation of the pre-emption and homestead laws lands within its *indemnity* limits, and that such order did not prevent an occupancy by homestead settlers *within such limits* up to the time of the approval of the selection made by the railroad company of lieu lands, and that, as it appeared the lands were actually occupied by homestead settlers at the time they were selected by the railroad company, such lands were not open to selection, although such selection was prior to the application of the settlers for entry under the homestead laws. It appeared in the case that the settlers had moved with due diligence to perfect and protect the right acquired by their occupancy of the lands, but were unable to obtain formal entry of the same, because the lands had not been surveyed. "At the time the settler went upon the land in good faith to make it his home and to perfect his title under the homestead laws there was nothing of record that stood in the way of his right to occupy the lands and to remain thereon until he could perfect his title by formal entry under the homestead laws."

The second case was like unto the first, except that there had been a long delay by the Land Department in having the land surveyed. It was held that the Land Department had acted "with all convenient speed" within the meaning of the act of 1870 (16 Stat. at L. 94, chap. 69, § 2), making the land grant. 189 U. S. 116, *ante*, 732, 23 Sup. Ct. Rep. 620.

In both of these cases, however, the lands were in actual occupation of settlers under the homestead laws at the time selection was made by the railroad company and the patents issued.

In this case the settlement was made under the Oregon donation act (9 Stat. at L. 496, chap. 76), the 4th section of which enacts that "there shall be and hereby is, granted to every white *settler or occupant [189] of the public lands, . . . who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act, the quantity of one-half section, or 320 acres of land," etc.; and by the 1st section of the amendatory act of 1853 (10 Stat. at L. 158, chap. 69), it was provided that settlers under the former act, in lieu of the term of continued occupation after settlement, as provided by said act, shall be permitted, after occupation for two years of the land so claimed, to pay into the hands of the surveyor general of said territory at the rate of $1.25 per acre of the land so claimed. The plea alleges that Hines abandoned the land without having paid for it under the act of 1853, or residing on it for four years under the original act; and the case turns upon the question whether, by the mere filing of the donation notification in 1853, and the subsequent abandonment of the lands, they fall within the category of those which had been "granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of," within the meaning of the act of July 25, 1866, granting lands for the construction of this road. Clearly the lands do not fall literally within either of the above designations, and, unless a claim existing of record to the lands—which claim had in fact been abandoned for fifteen years—operates to prevent the selection of such lands by the railroad company, such company takes a good title to them.

That a railway grant does not attach to lands which at the time of the definite location of the land have been sold, pre-empted, reserved, or otherwise disposed of by the United States for any purpose, has been so often decided by this court as to be no longer open to question. *Leavenworth, L. & G. R. Co.* v. *United States*, 92 U. S. 733, 23 L. ed. 634; *Newhall* v. *Sanger*, 92 U. S. 761, 23 L. ed. 769; *Doolan* v. *Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228; *United States* v. *McLaughlin*, 127 U. S. 428, 32 L. ed. 213, 8 Sup. Ct. Rep. 1177; *Cameron* v. *United States*, 148 U. S. 301, 37 L. ed. 459, 13 Sup. Ct. Rep. 595; *Carr* v. *Quigley*, 149 U. S. 652, 37 L. ed. 885, 13 Sup. Ct. Rep.

961. These cases, however, merely apply the language of the statutes to variant circumstances. Neither of them turns upon the effect of a claim which has been canceled or abandoned before or after the attachment of the railroad grant, either by the definite lo-[190]cation of the line or by *the selection of the lands as lieu lands within the indemnity limits.

That question was first considered in *Kansas P. R. Co.* v. *Dunmeyer*, 113 U. S. 639, 28 L. ed. 1125, 5 Sup. Ct. Rep. 566, which involved the title to part of an odd-numbered section within the place limits of the Union Pacific Railroad Company's grants of 1862, 1864, and 1866. The facts were that one Miller made a homestead entry upon this section July 20, 1856, which was valid if the land was then public land. The line of definite location was filed September 21, 1866, so that the entry of Miller brought the land within the exception in the grant as land to which the homestead claim attached at the time the line of the road was definitely fixed. It was argued by the company that, although the homestead entry had attached to the land, and Miller had entered upon it within the time prescribed by law, erected a house upon it, and brought his family to live upon it, and made the tract his home until the spring of 1870, yet that he afterwards abandoned his homestead claim, bought the land from the railroad company, and paid for it, and sold the land to Dunmeyer, who had obtained a conveyance from the company. From this it was argued that the exception no longer operated, and the land had reverted to the company. But it was held that, as Miller's claim was an existing one of public record when the railroad map was filed, it was excepted from the land grant, notwithstanding the subsequent abandonment. The case is readily distinguishable from the one under consideration in the fact that Miller had not only entered upon the land, but was in actual possession of it at the time of the definite location of the road, and that he did not abandon his entry until nearly four years after the line of definite location was filed.

A case not dissimilar is that of *Bardon* v. *Northern P. R. Co.* 145 U. S. 535, 36 L. ed. 806, 12 Sup. Ct. Rep. 856. That case arose from a land grant to the Northern Pacific Company of July 2, 1864 (13 Stat. at L. 365, chap. 217), under which act the company proceeded to designate the general route of its road, and afterwards to have its line definitely fixed. The date when the line was definitely fixed is not stated in the report, and is not treated as material, but it appears that on September 12, 1855, one [191]Robinson settled upon the land, filed *his declaration under the pre-emption laws, but died without filing proof or paying the government for the land. On August 5, 1865, this pre-emption claim was canceled for alleged failure to furnish proof of continuous residence prior to July 30, 1857. It was held that, as it appeared the premises had been taken up on the pre-emption claim of Robinson before the railroad grant took effect, and that the cancelation had not then been made, nor for more than a year afterwards, such cancelation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation which applied to land *then* public.

In the consideration of the present case, we are not embarrassed by either of these adjudications, since in one case the lands were not only actually occupied by the homestead claimant at the time the railroad grant took effect, but in both cases the proof of such occupation was of record in the proper office, and the lands were abandoned in one case, and the certificate canceled in the other after that date, while in this case the land was abandoned fifteen years before the lands were selected by the company, and nothing remained to indicate that the land was reserved, except the donation notification in the office of the surveyor general.

Two other cases are more directly in point. In *Hastings & D. R. Co.* v. *Whitney*, 132 U. S. 357, 33 L. ed. 363, 10 Sup. Ct. Rep. 112, the grant was made to the railroad July 4, 1866, and the line definitely located March 7, 1867. In May, 1865, one Turner applied, through his attorney, to enter the land in question as a homestead. The affidavit did not state that Turner's family, or any member thereof, was residing on the land, or that there was any improvement thereon, and, as a matter of fact, no member of his family was residing, or ever did reside, on said land, and no improvement was made thereon by anyone. The entry was allowed and stood upon the records of the Land Office uncanceled until September 30, 1872, when the entry was canceled. The land was subsequently, in 1877, entered by Whitney as a homestead and a patent delivered. It was held that the homestead entry of Turner excepted it from the operation of the land grant, notwithstanding the entry was invalid on its face. "So long as it *remains[192] a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and, therefore, precludes it from subsequent grants."

In *Whitney* v. *Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796, one Jones, in May, 1854, settled upon a quarter section of public land in California, and as soon as the land was surveyed (in 1857) declared his intention to claim it as a pre-emption right, paid the fees required by law, and caused notice of the same to be filed in the proper government record. He occupied the tract until 1859, when he left for England and never returned. The land was found to be within the place limits of the grant to the Central Pacific Railroad Company of 1862. This company filed its map of definite location in 1864, and demanded the section in question. In 1885 the pre-emption entry of Jones was canceled. It was held that, the tract being subject to the claim of Jones at the time when the grant to the railroad com-

pany took effect, it was excepted from the operation of that grant, and that after the cancelation of that entry it became part of the public domain, and that such cancelation did not inure to the benefit of the railroad company.

The latest case upon the subject, however, is that of *Northern P. R. Co.* v. *De Lacey*, 174 U. S. 622, 43 L. ed. 1111, 19 Sup. Ct. Rep. 791. In that case the railroad company had filed its map of definite location March 26, 1884. On April 9, 1869, one John Flett filed a declaratory statement of his intention to purchase the land under the pre-emption laws. In the fall of the same year, Flett left the land and did not thereafter reside on the same, although it appears that, in September, 1870, he went to the local land office and told the officers that he had come to prove his claim. He was told that he had lost it, as it had become railroad land. He acquiesced in this statement. In 1887, eighteen years after his original entry, Flett submitted proof in support of his pre-emption claim, founded upon his declaratory statement. A hearing was had in the presence of all the parties, which finally resulted in a decision of the Secretary of the Interior, September 28, 1891, awarding the [193] land in controversy *to the railroad company. Flett's declaratory statement was not formally canceled upon the records until December 23, 1891. A suit brought in the circuit court by the railroad company resulted in its favor, but the decree was reversed by the court of appeals, and the case brought here for review.

It was contended that at the time, March 26, 1884, when the map of definite location was filed, the declaratory statement of Flett, filed in the local land office in 1869, remained there as a record, and was an assertion of a pre-emption claim, and that, under the case of *Whitney* v. *Taylor*, 158 U. S. 85, 39 L. ed. 906, 15 Sup. Ct. Rep. 796, the land described in that statement was excepted from the grant to the railroad company. The question was presented, whether the proceedings in the case of Flett were of such a character as to prevent the grant to the company from taking effect at the time of filing its map of definite location, March 26, 1884. It was held that, under the 2d section of the act of July 14, 1870 (16 Stat. at L. 279, chap. 272), claimants of pre-emption rights must make proper proof and payment of the lands claimed within eighteen months after the date prescribed for filing their declaratory notices shall have expired; that under the act of March 3, 1871 (16 Stat. at L. 601), twelve months in addition to that provided in the first act were given to the claimants to make proof and payment; that, adding the eighteen months given by the first act to the twelve months given by the second act, all claimants of pre-emption rights were given thirty months to make the proper proof and payment for the lands claimed; and that "whether such proof and payment were made would be matter of record, and if they were not so made the original claim was canceled by operation of law, and required no cancelation on the records of the Land Office to carry the forfeiture into effect. The law forfeited the right and canceled the entry just as effectually as if the fact were evidenced by an entry upon the record." The case of *Whitney* v. *Taylor* was distinguished upon the ground that, in that case, "there was no period within which a pre-emptor was compelled to prove up and pay for his claim, except that it should be done before the land was offered at public sale by the proclamation of the President." It was held that, as the thirty months allowed *to Flett had expired years before the [194] filing of the map of definite location, there was no existing claim at that time, and that the grant of the railroad company took effect. "Thereafter there was no claim, for it had ceased and determined, and with reference to the right it was of no more validity after the expiration of that time than if the statement had never been filed."

Recurring now to the case under consideration, it appears that by the 6th section of the Oregon donation act (9 Stat. at L. 498, chap. 76), it was incumbent upon the settler to notify the surveyor general, within three months from the commencement of his settlement, of the precise tract claimed by him; and by § 7, within twelve months from the time the settlement commenced, he must prove to the satisfaction of the surveyor general that the settlement and cultivation required by the act had been commenced, and that at any time after the expiration of four years from such settlement might prove the fact of continual residence and cultivation required by the 4th section, when, upon such proof being made, the surveyor general issues the proper certificate, forwards the same to the Commissioner of the General Land Office, whose duty it is to issue patents for the land.

It is true that by the act of July 26, 1894 (28 Stat. at L. 122, chap. 163, U. S. Comp. Stat. 1901, p. 1522), where proof of settlement had been made under the donation acts and notice given as required by law, but there had been a failure to execute and file in the Land Office proof of continued residence and cultivation of the land so settled upon, so as to entitle the donees to patents, such claimants, their heirs, devisees, assigns, and grantees, were given the right, until January 21, 1896, "to make and file final proofs and fully establish their rights to donations" under the aforesaid act of Congress, and, upon failure to do so, they were to be held to have abandoned their claims. But by § 2 of the same act the Commissioner of the Land Office was given the right, if such right existed, "to allow or direct hearings to be instituted to show that a donation claimant has abandoned the lands described in his notice, or prevent the Commissioner, when it is proved that such claim is invalid or abandoned, from canceling *the same upon [195] the official records, and thereafter disposing of the lands as a part of the public domain;" and by § 3, "nothing in this act contained shall be construed to impair or affect any adverse claims arising under any law of the

United States other than said donation act, to or in respect of the lands in this act referred to."

It is entirely clear that the position of the government in this case is not strengthened by anything contained in this act, since it was intended only for the relief of those who had resided continuously upon and cultivated the lands specified in the original donation notification, but had through mistake or negligence omitted to make and file their final proofs and fully establish their rights to such donations. Such donees were given until January 1, 1896, to make such final proof and obtain their patents; but they were not given thereby the right to perfect their claims to lands which they had abandoned before completing a continued residence of four years thereon. This inference is rendered only the more clear by the 2d section, which authorizes the Commissioner, when it is proved that such claim is invalid or abandoned, to cancel the same upon the official records, and by the 3d section, which expressly saves adverse claims arising under any law other than the donation act.

It is clear that title to the land here in question never passed from the United States under the donation acts of 1850 and 1853, since the donation was only made to those "who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act." *Hall* v. *Russell*, 101 U. S. 503, 25 L. ed. 820; *Maynard* v. *Hill*, 125 U. S. 190, 31 L. ed. 654, 8 Sup. Ct. Rep. 723. As these conditions were never complied with, the land continued to be the property of the United States, to which the railroad grant subsequently attached, unless such grant was defeated by the fact that the donation notification still remained of record in the office of the surveyor general. As the land had neither been "granted, sold, . . . occupied by homestead settlers, preempted, or otherwise disposed of," the bill can only be sustained upon the ground that at the time land was selected it was "reserved" from sale. But for what purpose [196] was it reserved? Not for the donation settler, since he had abandoned the land fifteen years before; not for the United States, since every possible encumbrance had been removed from them, and they had lapsed into their original conditions of public lands, open to pre-emption or sale. It is true the donation notification had not been formally canceled, but the donation acts made no provision for such cancelation, although it may, perhaps, have been within the power of the Land Department to take such action even prior to the act of 1894. This, however, was not done, and the land might have remained in that condition permanently, had not some other person applied to enter or purchase it by showing that it had been abandoned by the original donee. But, if this may be done by an individual pre-emptor, why may not a railroad company do the same thing by claiming the land under its grant, and showing in defense to this suit that it had actually been abandoned? It may be said that presumptively the land had been reserved, as shown by the donation notification, and for aught that appeared the donee might still be in possession; but we know of no reason why the railroad company may not show the actual facts as well as an individual who might desire to enter the land upon his own account. Even admitting that the donation notification was on file in the office of the surveyor general, there was no proof, required by § 7 of the act to be filed within twelve months from the time of settlement, that the settlement and cultivation required by the act had been commenced; nor after the expiration of four years from such settlement was there any proof of continual residence or cultivation, required by the same section. The record which informed the company that the land had been settled by a donee also apprized it that the provision of the statute had not been complied with. We think that, considering the fact that fourteen years had elapsed since the original settlement, the railroad company would be authorized to infer that the donee had abandoned the land, as in fact appears to have been the case. Under the facts of this case, we think the lands were not reserved within the meaning of the granting act.

But, even if the position of the government be correct, and the patent be subject to [197] cancelation, we see nothing to prevent the railroad company from again selecting the same land to make good its losses within the limits of its primary grant, no intermediate rights being shown to have accrued. If such be the fact, it would be useless to direct the cancelation of the patent, as it would become the duty of the Land Department to issue immediately a new one for the same property. *Germania Iron Co.* v. *United States*, 165 U. S. 379, 41 L. ed. 754, 17 Sup. Ct. Rep. 337; *United States* v. *Central P. R. Co.* 26 Fed. 479.

*The decrees of the courts below are therefore reversed and the case remanded to the Circuit Court for the District of Oregon, with directions to dismiss the bill.*

Mr. Justice **McKenna**, having filed the bill in this case as Attorney General, did not participate in this decision.

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## TERRITORY OF HAWAII, *Appt.*,
*v.*
## OSAKI MANKICHI.

(See S. C. Reporter's ed. 197-249.)

*Hawaiian annexation — effect of Newlands Resolution on criminal procedure.*

Criminal proceedings by grand and petit juries as prescribed by U. S. Const. Amends. 5, 6, were not substituted for the existing criminal procedure in the Hawaiian Islands by their annexation, "as a part of the territory of the United States and subject to the sov-

ereign dominion thereof," by the Newlands resolution of July 7, 1898 (30 Stat. at L. 750), accepting the cession theretofore made by the Republic of Hawaii, and continuing the municipal legislation of such islands not inconsistent with such resolution "nor contrary to the Constitution of the United States," until Congress should otherwise determine.

[No. 219.]

*Argued March 4, 5, 1903. Decided June 1, 1903.*

APPEAL from the District Court of the United States for the Territory of Hawaii to review a decree discharging on habeas corpus a person convicted of manslaughter upon an indictment not found by a grand jury and upon a verdict rendered upon the agreement of nine jurors. *Reversed* and remanded, with instructions to dismiss the petition.

Statement by Mr. Justice **Brown:**

This was a petition by Mankichi for a writ of habeas corpus to obtain his release from the Oahu convict prison, where he is confined upon conviction for manslaughter, in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, the other three dissenting from the verdict.

Following the usual course of procedure in the Republic of Hawaii, prior to its incorporation as a territory of the United States, the prisoner was tried upon an indictment much in the form of an information at common law, by the attorney general, and indorsed "a true bill, found this 4th day of May, A. D. 1899. A. Perry, first judge of the circuit court," etc.

From an order of the United States district court, discharging the prisoner, the attorney general of the territory appealed to this court.

*Mr.* **Edmund P. Dole** and *Solicitor General* **Richards** argued the cause and filed a brief for appellant:

Although the Constitution of the United States is the supreme law of the land in every state, it is settled beyond controversy that the 5th and 6th Amendments do not apply to states.

*Spies* v. *Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21; *Barron* v. *Baltimore*, 7 Pet. 243, 247, 8 L. ed. 672, 674; *Livingston* v. *Moore*, 7 Pet. 469, 552, 8 L. ed. 751, 781; *Fox* v. *Ohio*, 5 How. 410, 434, 12 L. ed. 213, 223; *Smith* v. *Maryland*, 18 How. 71, 76, 15 L. ed. 269, 271; *Withers* v. *Buckley*, 20 How. 84, 91, 15 L. ed. 816, 819; *Pervear* v. *Massachusetts*, 5 Wall. 475, 479, 18 L. ed. 608, 609; *Twitchell* v. *Pennsylvania*, 7 Wall. 321, 325, 19 L. ed. 223, 224; *New York Supreme Ct. Justices* v. *Murray*, 9 Wall. 274, 278, 19 L. ed. 658, 660; *Edwards* v. *Elliott*, 21 Wall. 532, 557, 22 L. ed. 487, 492; *Walker* v. *Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *United States* v. *Cruikshank*, 92 U. S. 542, 552, 23 L. ed. 588, 591; *Pearson* v. *Yewdall*, 95 U. S. 294, 296, 24 L. ed. 436, 437; *Davidson* v. *New Orleans*, 96 U. S. 97, 101, 24 L. ed. 616, 618; *Kelly* v. *Pittsburgh*, 104 U. S. 79, 26 L. ed. 658; *Presser* v. *Illinois*, 116 U. S. 252, 265, 29 L. ed. 615, 619, 6 Sup. Ct. Rep. 580.

In the absence of congressional legislation directly or impliedly extending these Amendments, the like reasons apply with even greater force to a civilized nation which surrenders its sovereignty to the United States, and has nothing but its old legal machinery for protecting itself from anarchy until Congress shall provide a new government.

*Barron* v. *Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Ex parte Ah Oi*, 13 Hawaiian Rep. 553; *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 7 L. ed. 242; *Geofroy* v. *Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295; *Downes* v. *Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

*Solicitor General Richards* also filed a separate brief for appellant:

Grand juries were not used nor unanimous verdicts required to convict in the Hawaiian islands at the time of the cession.

*Republic* v. *Edwards*, 11 Hawaiian Rep. 571.

Congress had power to provide a temporary government, not subject to all the restrictions of the Constitution, until it could frame a permanent government and incorporate the islands as a part of the United States.

*Downes* v. *Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

The resolution of annexation did not incorporate the islands within the United States and render them subject to all the limitations of the Constitution applicable throughout the United States.

*Ibid.*

The existing government continued in the exercise of all its powers, under the resolution, until Congress should organize the islands.

*Edwards Case*, 11 Hawaiian Rep. 571.

The distinction between natural or fundamental rights and artificial or remedial rights, under the Constitution, is pointed out by Mr. Justice Brown in the opinion in *Downes* v. *Bidwell*, 182 U. S. 282, 45 L. ed. 1104, 21 Sup. Ct. Rep. 770.

That the right to be indicted by a grand jury and be tried by a petit jury is not fundamental, that the 5th and 6th Amendments enforcing this right apply only to the Federal courts, and that a citizen of the United States in a criminal prosecution in a state court may be deprived of his life, liberty, or property, by due process of law, without indictment by a grand jury and without unanimity in the verdict of a petit jury, is the established doctrine of this court.

*Brown* v. *New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Bolln* v. *Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; *Maxwell* v. *Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494.

Chief Justice Marshall said in *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 541, 7

L. ed. 254, that acquired territory becomes a part of the nation to which it is annexed either on the terms stipulated in the treaty of cession, or on such as the new master shall impose.

If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution.

*Downes* v. *Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

The presumption is that the government of Hawaii in offering to cede the islands, and Congress in accepting this proposition and annexing them, intended that the existing government of the islands should continue without interruption until another could be provided by Congress.

*Holden* v. *Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

*Mr. Edward P. Dole* also filed a separate brief for appellant:

The law does not countenance the absurd or sanction the impossible.

*Re Ross*, 140 U. S. 464, 35 L. ed. 586, 11 Sup. Ct. Rep. 897.

The construction which both parties put upon the contract of annexation is beyond dispute.

22 Ops. Atty. Gen. 153, 249.

Whether certain provisions of the Constitution of the United States are applicable to the annexed territory depends upon its situation and its relations with the United States.

*Downes* v. *Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

*Messrs.* **Frederic R. Coudert, Jr.**, and **Paul Fuller** argued the cause, and, with *Messrs. George A. Davis, F. M. Brooks*, and *Charles Fred Adams*, filed a brief for appellee:

The power of Congress to deal with newly acquired territory has been held to be absolute and almost unlimited.

*Insular Cases*, 182 U. S. 1–391, 45 L. ed. 1041–1146, 21 Sup. Ct. Rep. 742, 743, 762, 770, 827; *Church of Jesus Christ of L. D. S.* v. *United States*, 136 U. S. 44, 34 L. ed. 491, 10 Sup. Ct. Rep. 792; *Shively* v. *Bowlby*, 152 U. S. 1, 48, 38 L. ed. 331, 349, 14 Sup. Ct. Rep. 548.

The difference in legal status between the treaty-acquired Spanish possessions and Congress-annexed Hawaii is stated in terms by Mr. Justice Gray in *Downes* v. *Bidwell*, 182 U. S. 345, 45 L. ed. 1128, 21 Sup. Ct. Rep. 770.

Where the Constitution has been once formally extended by Congress to territories, neither Congress nor the territorial legislature can enact laws inconsistent therewith.

*Downes* v. *Bidwell*, 182 U. S. 271, 45 L. ed. 1100, 21 Sup. Ct. Rep. 770.

Congressional extension carries with it the so-called common-law amendments.

*Springville* v. *Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717.

The situation of Hawaii was such that Congress evidently intended to incorporate the islands into the United States.

The present law allowing conviction upon agreement by nine jurors was not passed until 1847.

*Hawaii* v. *Edwards*, 11 Hawaiian Rep. 571.

All the details discoverable by reference to the legislation and the Constitution mentioned in the joint resolution are, both in logic and in law, to be deemed enacted by Congress precisely as if every syllable of those details had been actually and explicitly spelled out in the literal text of the resolution itself.

Broom, Legal Maxims, 7th Am. ed. p. 625.

The requirement of the Constitution, that prosecutions must be initiated by the presentment or indictment of a grand jury, by necessary implication gives to the courts invested with the jurisdiction to entertain such prosecutions, all powers and authority necessary for the organizing and utilizing of the grand jury.

*United States* v. *Hill*, 1 Brock. 156, Fed. Cas. No. 15,364; *Ex parte Wilson*, 114 U. S. 425, 29 L. ed. 92, 5 Sup. Ct. Rep. 935; *Clawson* v. *United States*, 114 U. S. 487, 29 L. ed. 183, 5 Sup. Ct. Rep. 949; *Ex parte Edwards*, 13 Hawaiian Rep. 47.

To argue that the words "nor contrary to the Constitution" mean nothing, but were employed to show that Congress understood the Constitution to carry some vague kind of humanitarianism based upon a supposed "law of nature" into Hawaii, is utterly unsound and wholly fanciful.

*Messrs. Paul Fuller, Frederic R. Coudert, Jr., George A. Davis*, and *F. M. Brooks* filed an additional brief for appellee:

Among the "essential principles upon which our system of government rests, and which are embodied in the Constitution," is the right of everyone living under the sovereignty of the United States to be free from any prosecution for crime at the hands of the central authority to which the government of the Union was deputed, unless after indictment by a grand jury of his fellows; and the right to be acquitted, unless found guilty by the unanimous verdict of a petit jury of twelve.

*Callan* v. *Wilson*, 127 U. S. 549, 550, 32 L. ed. 226, 8 Sup. Ct. Rep. 1301.

It is contrary to the Constitution of the United States that any person should be held to answer for a capital crime unless on a presentment or indictment of a grand jury, and that in a criminal prosecution a conviction should be had by the verdict of nine members of the jury.

*Ex parte Bain*, 121 U. S. 1, 30 L. ed. 849, 7 Sup. Ct. Rep. 781; *Thompson* v. *Utah*, 170 U. S. 349, 42 L. ed. 1066, 18 Sup. Ct. Rep. 620; *Springville* v. *Thomas*, 166 U. S. 707, 41 L. ed. 1172, 17 Sup. Ct. Rep. 717.

*Messrs. George A. Davis* and *F. M. Brooks* also filed a brief for appellee:

This prisoner was tried in United States territory without the indictment of a grand jury by a circuit judge, who was continued in office under the Newlands Resolution. The President of the United States had the power to remove the judge who tried this prisoner, and yet it is contended that the Constitution

did not apply. The words of the Resolution are, "Municipal legislation not contrary to the Constitution of the United States shall remain in force until Congress shall otherwise determine."

See *United States* v. *Arredondo*, 6 Pet. 691–748, 8 L. ed. 547–568; *Haver* v. *Yaker*, 9 Wall. 32, *sub nom. Jecker* v. *Magee*, 19 L. ed. 571; *Davis* v. *Police Jury*, 9 How. 280, 13 L. ed. 138.

The national government of the Union, by the voice of the people, had added these islands and made them a part of the body politic and corporate, and the United States government was then invested with supreme authority here for national purposes, with power to exercise all such authority that was expressly or impliedly committed to its jurisdiction by the Constitution.

Potter's Dwarr. Stat. p. 333.

Congress, which is only the creature of the Constitution, cannot make any change in the fundamenal law.

Potter's Dwarr. Stat. p. 355.

The Constitution of the United States is an original, written, Federal, and social compact, freely and voluntarily entered into by the several states and ratified by the people, and the Federal government is bound by that Constitution to every citizen of the United States.

*Ibid.*

Trials, therefore, at least such as are criminal, are to be regular and conducted in their essential features, not by statute but by the common law. This is the constitutional guaranty.

Potter's Dwarr. Stat. p. 437.

Grand juries alone can find probable cause to put a prisoner on trial under an indictment by finding a true bill.

*Ex parte Bain*, 121 U. S. 1, 2, 30 L. ed. 849, 850, 7 Sup. Ct. Rep. 781; *Hill* v. *People*, 16 Mich. 351; *United States* v. *Taylor*, 11 Fed. 471; *Cancemi* v. *People*, 18 N. Y. 129; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935.

The conviction was absolutely null and void. There was nothing before the court on which it could hear evidence or pronounce sentence. This case comes within the principles laid down by this court.

*Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Wilson*, 114 U. S. 425, 29 L. ed. 92, 5 Sup. Ct. Rep. 935.

Any nation acquiring territory by treaty, or otherwise, must hold it subject to the Constitution and laws of its own government, and not according to the laws of the government ceding it.

1 Wharton's Dig. Int. Law, p. 4; *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565.

The rights and powers of sovereignty of a nation over its territory cease on the transfer of that sovereignty to another government by cession of its territory. The power to preserve peace and order may remain in the officers previously appointed by the ceding state until the actual presence of the agents of the succeeding government, but this does not imply that sovereign power remains in the former nation.

*United States* v. *Reynes*, 9 How. 127, 13 L. ed. 74; *Davis* v. *Police Jury*, 9 How. 280, 13 L. ed. 138; *Montault* v. *United States*, 12 How. 47, 13 L. ed. 887; *United States* v. *D'Auterive*, 10 How. 609, 13 L. ed. 560.

Every action of the supreme court of the Hawaiian islands relative to the United States, which impairs the supremacy of the national authority and the rights of persons under the Constitution of the United States, is void.

*Texas* v. *Wight*, 7 Wall. 700, 19 L. ed. 227; *Horn* v. *Lockhart*, 17 Wall. 570, 21 L. ed. 657; *Sprott* v. *United States*, 20 Wall. 459, 22 L. ed. 371.

The provision in the national Constitution relating to trials by jury and to criminal prosecutions applies to the territories of the United States.

*Thompson* v. *Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

The Hawaiian islands at the time of the finding of the true bill upon this indictment were territory of the United States. The United States acquired this territory by resolution of Congress and the Senate, and accepted it, and they held it subject to the Constitution of the United States government, and not according to the laws of the Hawaiian islands, which in this respect are contrary to, and in direct conflict with, the United States Constitution.

1 Wharton's Dig. Int. Law, p. 4; *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565.

Mr. Justice **Brown** delivered the opinion of the court:

The question involved in this case is an extremely simple one. The difficulty is in fixing upon the principles applicable to its solution. By a joint resolution adopted by Congress, July 7, 1898 (30 Stat. at L. 750), known as the Newlands resolution, and with the consent of the Republic of Hawaii, signified in the manner provided in its Constitution, the Hawaiian islands and their dependencies were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "The municipal legislation of the Hawaiian islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States*, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." The material parts of this resolution are printed in the margin.† Though the resolution was passed

†Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States (30 Stat. at L. 750).

Whereas the government of the Republic of Hawaii having, in due form signified its consent, in the manner provided by its Constitution, to cede, absolutely and without reserve, to the United States of America, all rights of sovereignty of whatsoever kind in and over the Hawaiian islands and their dependencies, and also to cede and transfer to the United States the

[210] July 7, the *formal transfer was not made until August 12, when, at noon of that day, the American flag was raised over the government house, and the islands ceded with appropriate ceremonies to a representative of the United States. Under the conditions named in this resolution, the Hawaiian is-
[211] lands remained under *the name of the "Republic of Hawaii" until June 14, 1900, when they were formally incorporated by act of Congress under the name of the "territory of Hawaii." (31 Stat. at L. 141, chap. 339.) By this act the Constitution was formally extended to these islands (§ 5), and special provisions made for impaneling grand juries, and for unanimous verdicts of petty juries. (§ 83.)

The question is whether, in continuing the municipal legislation of the islands not contrary to the Constitution of the United States, it was intended to abolish at once the criminal procedure theretofore in force upon the islands, and to substitute immediately, and without new legislation, the common-law proceedings by grand and petit jury, which had been held applicable to other organized territories (*Webster* v. *Reid*, 11 How. 437, 13 L. ed. 761; *American Pub. Co.* v. *Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Thompson* v. *Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620), though we have also held that the states, when once admitted as such, may dispense with grand juries (*Hurtado* v. *California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292), and perhaps also allow verdicts to be rendered by less than a unanimous vote (*American Pub. Co.* v. *Fisher*, 166 U. S. 464, 41 L. ed. 1079, 17 Sup. Ct. Rep. 618; *Thompson* v. *Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620).

In fixing upon the proper construction to be given to this resolution, it is important to bear in mind the history and condition of the islands prior to their annexation by Congress. Since 1847 they had enjoyed the blessings of a civilized government, and a system of jurisprudence modeled largely upon the common law of England and the United States. Though lying in the tropical zone, the salubrity of their climate and the fertility of their soil had attracted thither large numbers of people from Europe and America, who brought with them political ideas and traditions which, about sixty years ago, found expression in the adoption of a code of laws appropriate to their new conditions. Churches were founded, schools opened, courts of justice established, and civil and criminal laws administered upon substantially the same principles which prevailed in the two countries from which most of the immigrants had come. Taking the lead, however, in a change which has since been adopted by several of the United States, no provision was made for grand juries, and criminals were prosecuted *upon indictments [212] found by judges. By a law passed in 1847, the number of a jury was fixed at twelve, but a verdict might be rendered upon the agreement of nine jurors. The question involved in this case is whether it was intended that this practice should be instantly changed, and the criminal procedure embodied in the 5th and 6th Amendments to the Constitution be adopted as of August 12, 1898, when the Hawaiian flag was hauled down and the American flag hoisted in its place.

If the words of the Newlands resolution, adopting the municipal legislation of Hawaii, "not contrary to the Constitution of the United States," be literally applied, the petitioner is entitled to his discharge, since that instrument expressly requires (Amendment 5) that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indict-

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absolute fee and ownership of all public, government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian islands, together with every right and appurtenance thereunto appertaining: Therefore,

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That said cession is accepted, ratified, and confirmed, and that the said Hawaiian islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

. . . . . .

Until Congress shall provide for the government of such islands, all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

The existing treaties of the Hawaiian islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nation. The municipal legislation of the Hawaiian islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian islands, the existing customs relations of the Hawaiian islands with the United States and other countries shall remain unchanged.

. . . . . .

There shall be no further immigration of Chinese into the Hawaiian islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian islands as they shall deem necessary or proper.

ment of a grand jury;" and (Amendment 6), that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." But there is another question underlying this and all other rules for the interpretation of statutes, and that is, What was the intention of the legislative body? Without going back to the famous case of the drawing of blood in the streets of Bologna, the books are full of authorities to the effect that the intention of the lawmaking power will prevail, even against the letter of the statute; or, as tersely expressed by Mr. Justice Swayne in *Smythe* v. *Fiske*, 23 Wall. 374, 380, 23 L. ed. 47, 49: "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the lawmaker is the law." A parallel expression is found in the opinion of Mr. Chief Justice Thompson of the supreme court of the state of New York (subsequently Mr. Justice Thompson of this court), in *People* v. *Utica Ins. Co.* 15 Johns. 358, 381, 8 Am. Dec. 243: "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of the statute is not within the statute, unless it be within the intention of the makers."

Without going farther, numerous illustrations of this maxim are found in the re-
[213] ports of our own court. Nowhere is the *doctrine more broadly stated than in *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278, in which an act of Congress, providing that if "any person shall knowingly and wilfully obstruct or retard the passage of the mail, or of any driver or carrier," was held not to apply to a state officer who held a warrant of arrest against a carrier for murder, the court observing that no officer of the United States was placed by his position above responsibility to the legal tribunals of the country, and to the ordinary processes for his arrest and detention when accused of felony. "All laws," said the court, "should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter." A case was cited from Plowden, holding that a statute which punished a prisoner as a felon who broke prison did not extend to a prisoner who broke out when the prison was on fire, "for he is not to be hanged because he would not stay to be burned." Similar language to that in *Kirby's Case* was used in *Carlisle* v. *United States*, 16 Wall. 147, 153, 21 L. ed. 426, 429.

In *Atkins* v. *Fibre Disintegrating Co.* 18 Wall. 272, 21 L. ed. 841, it was held that a suit *in personam* in admiralty was not a "civil suit" within the 11th section of the judiciary act, though clearly a civil suit in the general sense of that phrase, and as used in other sections of the same act. See also *Re Louisville Underwriters*, 134 U. S. 488, 33 L. ed. 991, 10 Sup. Ct. Rep. 587. So in *Heydenfeldt* v. *Daney Gold & Silver Min. Co.* 93 U. S. 634, 638, 23 L. ed. 995, 996, it was said by Mr. Justice Davis: "If a literal interpretation of any part of it [a statute] would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment." To the same effect are the *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511, in which many cases are cited and reviewed, and *Lau Ow Bew* v.[214] *United States*, 144 U. S. 47, 59, 36 L. ed. 340, 345, 12 Sup. Ct. Rep. 517. In this latter case it was held that a statute requiring the permission of the Chinese government, and the identification of "every Chinese person other than a laborer, who may be entitled by said treaty or this act [of Congress] to come within the United States," did not apply to "Chinese merchants already domiciled in the United States, who, having left the country for temporary purposes, *animo revertendi*, seek to re-enter it on their return to their business and their homes." Said the Chief Justice: "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

Two recent English cases are instructive in this connection: In *Plumstead Dist. Bd. of Works* v. *Spackman*, L. R. 13 Q. B. Div. 878, 887, it was said by the Master of Rolls, afterwards Lord Esher: "If there are no means of avoiding such an interpretation of the statute" (as will amount to a great hardship), "a judge must come to the conclusion that the legislature by inadvertence has committed an act of legislative injustice; but, to my mind, a judge ought to struggle with all the intellect that he has, and with all the vigor of mind that he has, against such an interpretation of an act of Parliament; and, unless he is forced to come to a contrary conclusion, he ought to assume that it is impossible that the legislature could have so intended." See also *Ex parte Walton*, L. R. 17 Ch. Div. 746.

Is there any room for construction in this case, or, are the words of the resolution so plain that construction is impossible? There are many reasons which induce us to hold that the act was not intended to interfere with the existing practice, when such interference would result in imperiling the peace and good order of the islands. The main objects of the resolution were, 1st, to accept the cession of the islands theretofore made by the Republic of Hawaii, and to annex the same "as a part of the territory of the

United States, and subject to the sovereign dominion thereof;" 2d, to abolish all existing treaties with various nations, and to recognize only treaties between the United States and such foreign nations; 3d, to continue the existing laws and customs regu-[215]lations, so far as they were not *inconsistent with the resolution, or contrary to the Constitution, until Congress should otherwise determine. From the terms of this resolution it is evident that it was intended to be merely temporary and provisional; that no change in the government was contemplated, and that, until further legislation, the Republic of Hawaii continued in existence. Even its name was not changed until 1900, when the "territory of Hawaii" was organized. The laws of the United States were not extended over the islands until the organic act was passed on April 30, 1900, when, so careful was Congress not to disturb the existing condition of things any further than was necessary, that it was provided (§ 5) that only "the laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory as elsewhere in the United States." There was apparently some discretion left to the courts in this connection. *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 299, 23 L. ed. 898, 901. The fact, already mentioned, that Congress, in this organic act, inserted a provision for the empaneling of grand juries and for the unanimity of verdicts, indicates an understanding that the previous practice had been pursued up to that time, and that a change in the existing law was contemplated.

Of course, under the Newlands Resolution, any new legislation must conform to the Constitution of the United States; but how far the exceptions to the existing municipal legislation were intended to abolish existing laws must depend somewhat upon circumstances. Where the immediate application of the Constitution required no new legislation to take the place of that which the Constitution abolished, it may be well held to have taken immediate effect; but where the application of a procedure hitherto well known and acquiesced in left nothing to take its place, without new legislation, the result might be so disastrous that we might well say that it could not have been within the contemplation of Congress. In all probability the contingency which has actually arisen occurred to no one at the time. If it had, and its consequences were foreseen, it is incredible that Congress should not have provided against it.

If the negative words of the resolution, "nor contrary to the Constitution of the [216]United States," be construed as imposing *upon the islands every provision of a Constitution which must have been unfamiliar to a large number of their inhabitants, and for which no previous preparation had been made, the consequences in this particular connection would be that every criminal in the Hawaiian islands convicted of an infamous offense between August 12, 1898, and June 14, 1900, when the act organizing the territorial government took effect, must be set at large; and every verdict in a civil case rendered by less than a unanimous jury held for naught. Surely, such a result could not have been within the contemplation of Congress. It is equally manifest that such could not have been the intention of the Republic of Hawaii in surrendering its autonomy. Until then it was an independent nation, exercising all the powers and prerogatives of complete sovereignty. It certainly could not have anticipated that, in dealing with another independent nation, and yielding up its sovereignty, it had denuded itself, by a negative pregnant, of all power of enforcing its criminal laws according to the methods which had been in vogue for sixty years, and was adopting a new procedure for which it had had no opportunity of making preparation. The legislature of the Republic had just adjourned, not to convene again until some time in 1900, and not actually convening until 1901. The resolution on its face bears evidence of having been intended merely for a temporary purpose, and to give time to the Republic to adapt itself to such form of territorial government as should afterwards be adopted in its organic act.

The language of Mr. Buchanan, then Secretary of State, in holding that the military government established in California did not cease to exist with the treaty of peace, but continued as a government *de facto* until Congress should provide a territorial government, is peculiarly applicable to this case. "The great law of necessity justifies this conclusion. The consent of the people is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest." [*Cross* v. *Harrison*] 16 How. 184, 14 L. ed. 897.

*It is insisted, however, that, as the com-[217]mon law of England had been adopted in Hawaii by the Code of 1897, it was within the power of the courts to summon a grand jury, and that such action might have been taken and criminals tried upon indictments properly found, and convicted by a unanimous verdict. The suggestion is rather fanciful than real, since § 1109 of the Code of 1897, adopting the common law of England, contained a proviso that "no person shall be subject to criminal proceedings except as provided by the Hawaiian laws." These laws provided expressly (§ 616, Penal Laws of 1897) as follows: "The necessary bills of indictment shall be duly prepared by a legal prosecuting officer, and be duly presented to the presiding judge of a court before the arraignment of the accused, and such judge shall, after examination, certify upon each bill of indictment whether he finds the same a true bill or not." The question thus squarely presented to every judge in the Republic was, whether he was bound

to summon a grand jury under the Newlands resolution, when no provision existed by law for impaneling the same, or their payment, and when, in so doing, he was obliged to ignore the plain statute of his own country.

It is not intended here to decide that the words "nor contrary to the Constitution of the United States" are meaningless. Clearly, they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, when the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: "Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process or confiscating private property for public use without compensation, remain in force after an annexation of the territory to the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?" We would even go farther, and say that most, if not all, the privileges and immunities contained in the [218] Bill of Rights of the Constitution *were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being.

Inasmuch as we are of opinion that the status of the islands and the powers of their provisional government were measured by the Newlands Resolution, and the case has been argued upon that theory, we have not deemed it necessary to consider what would have been its position had the important words "nor contrary to the Constitution of the United States" been omitted, or to reconsider the questions which arose in the *Insular Tariff Cases* regarding the power of Congress to annex territory without, at the same time, extending the Constitution over it. Of course, for the reasons already stated, the questions involved in this case could arise only from such as occurred between the taking effect of the joint resolution of July 7, 1898, and the act of April 30, 1900, establishing the territorial government.

*The decree of the District Court for the territory of Hawaii must be reversed,* and the case remanded to that court, with instructions to dismiss the petition.

Mr. Justice **White** and Mr. Justice **McKenna**, concurring:

The court in its opinion disposes of the case solely by a construction of the act of Congress. Conceding, *arguendo*, that such view is wholly adequate to decide the cause, I concur in the meaning of the act as expounded in the opinion of the court, and, in the main, with the reasoning by which that interpretation is elucidated. I prefer, however, to place my concurrence in the judgment upon an additional ground which seems to me more fundamental. That ground is this: That as a consequence of the relation which the Hawaiian islands occupied towards the United States, growing out of the resolution of annexation, the provisions of the 5th and 6th Amendments *of [219] the Constitution concerning grand and petit juries were not applicable to that territory, because whilst the effect of the resolution of annexation was to acquire the islands, and subject them to the sovereignty of the United States, neither the terms of the resolution nor the situation which arose from it served to incorporate the Hawaiian islands into the United States, and make them an integral part thereof. In other words, in my opinion, the case is controlled by the decision in *Downes* v. *Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

The resolution of Congress annexing the islands, it seems to me, makes the conclusion just stated quite clear, and manifests that it was not intended to incorporate the islands *eo instanti*, but, on the contrary, that the purpose was, whilst acquiring them, to leave the permanent relation which they were to bear to the government of the United States to await the subsequent determination of Congress. By the resolution the islands were annexed, not absolutely, but merely "as a part of the territory of the United States," and were simply declared to be subject to its sovereignty. The minutest examination of the resolution fails to disclose any provision declaring that the islands are incorporated and made a part of the United States, or endowing them with the rights which would arise from such relation. On the contrary, the resolution repels the conclusion of incorporation. Thus it provided for the government of the islands by a commission to be appointed by the President, until Congress should have opportunity to create the government which would be deemed best. Further, it stipulated "until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian islands, the existing customs relations of the Hawaiian islands with the United States and other countries shall remain unchanged." And, if possible, to make the purpose of Congress yet clearer, the act provided that "the President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian islands as they shall deem necessary or proper." All these provisions, in my opinion, clearly point out that, whilst the purpose was to acquire *and extend the sovereignty of the United [220] States over the islands, it was proposed only to provide, by the resolution of annexation, a provisional government until Congress

should become possessed of the information necessary to enable it to determine what should be the permanent status of the annexed territory. And the meaning of the resolution of annexation thus indicated by its terms is reflexly demonstrated by the act "To Provide a Government for the Territory of Hawaii," approved April 30, 1900, by which the islands were undoubtedly made a part of the United States in the fullest sense and given a territorial form of government. When the two acts are put in contrast and the declarations in the later act are considered, which were not found in the earlier act, and which, it is to be presumed, were intentionally omitted from the resolution providing for annexation, I can see no reason for holding that the mere act of annexation accomplished the result which was brought about by the subsequent law containing the more comprehensive provisions.

The mere annexation not having effected the incorporation of the islands into the United States, it is not an open question that the provisions of the Constitution as to grand and petit juries were not applicable to them. *Hurtado* v. *California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Re Ross*, 140 U. S. 473, *sub nom. Ross* v. *McIntyre*, 35 L. ed. 583, 11 Sup. Ct. Rep. 897; *Bolln* v. *Nebraska*, 176 U. S. 83, and cases cited on page 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; *Maxwell* v. *Dow*, 176 U. S. 584, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; and *Downes* v. *Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770.

Nor is there anything in the provision in the act of annexation relating to the operation of the Constitution in the annexed territory which militates against the conclusions previously expressed. The text of the resolution on this subject is as follows:

"The municipal legislation of the Hawaiian islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution, nor contrary to the Constitution of the United States, nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

Now, in so far as the Constitution is concerned, the clause subjecting the existing legislation which was provisionally continued *to the control of the Constitution, [221] clearly referred only to the provisions of the Constitution which were applicable, and not to those which were inapplicable. In other words, having, by the resolution itself, created a condition of things absolutely incompatible with immediate incorporation, Congress, mindful that the Constitution was the supreme law, and that its applicable provisions were operative at all times, everywhere, and upon every condition and persons, declared that nothing in the joint resolution continuing the customs legislation and local law should be considered as perpetuating such laws, where they were inconsistent with those fundamental provisions of the Constitution which were, by their own force, applicable to the territory with which Congress was dealing.

To say the contrary would be but to declare that Congress had provided for the continuance of the tariff and other legislation, whilst, at the same time, it had enacted that that result should not be brought about. It would, moreover, lead to the assumption that provisions of the Constitution which were inapplicable to the particular situation should yet govern and control that condition.

Mr. Justice **McKenna** authorizes me to say that he also concurs in the result for the foregoing reasons.

Mr. Chief Justice **Fuller**, with whom concurred Mr. Justice **Harlan**, Mr. Justice **Brewer**, and Mr. Justice **Peckham**, dissenting:

In my opinion, the final order of the district court should be affirmed.

Mankichi was tried on an information filed May 4, 1899, charging him with the commission of the crime of murder on March 26 of that year, and was found guilty of manslaughter in the first degree by the verdict of nine jurors. The statutes of Hawaii prior to July 7, 1898, provided for such trial and conviction.

July 7, 1898, the "Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States" was approved. *30 Stat. [222] at L. 750. Surrender of sovereignty and possession was effected August 12, 1898.

The act "To Provide a Government for the Territory of Hawaii" was approved April 30, 1900. 31 Stat. at L. 141, chap. 339.

If Articles of Amendment 5 and 6 were applicable to the territory of Hawaii after August 12, 1898, the district judge was right, and Mankichi was entitled to be discharged.

The annexation resolution contained three sections, and, omitting the 2d and 3d as not material here, is given in the margin.†

†Whereas the government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its Constitution, to cede, absolutely and without reserve, to the United States of America, all rights of sovereignty of whatsoever kind in and over the Hawaiian islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian islands, together with every right and appurtenance thereunto appertaining: Therefore:

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States, and are subject to the sovereign dominion thereof, and that all and singular the property and rights hereinbefore mentioned are vested in the United States of America.

The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian islands; but the Congress of the United States shall enact special laws for

[223] *By the specific language of this resolution no legislation which was contrary to the Constitution of the United States remained in force.

The language is plain and unambiguous, and resort to construction or interpretation is absolutely uncalled for. To tamper with the words is to eliminate them.

This is not one of those rare cases where adherence to the letter leads to manifest absurdity, as in *United States* v. *Kirby*, 7 Wall. 482, 19 L. ed. 278, and the illustrations there drawn by Mr. Justice Field from Puffendorf and Plowden.

The argument *ab inconvenienti*, without more, is an unsafe guide, and departure from the plain meaning tends to usurp legislative functions. Besides, that argument has no application here. Courts in Hawaii have had criminal law jurisdiction for more than half a century; and they had power to im-[224]panel a *grand jury (*United States* v. *Hill*, 1 Brock, 159, Fed. Cas. No. 15,364), and to direct the petit jury of twelve that conviction could only be had by a unanimous verdict.

In giving the instructions which accompanied the joint resolution, Mr. Justice Day, then Secretary of State, under date of July 8, 1898, said: "These recitals, it will be observed, are made in the language of the treaty of annexation concluded at Washington on the 16th day of June, 1897. They, as well as the other terms of that treaty, were advisedly incorporated into the joint resolution, because they embodied the terms of cession, which have not only been agreed upon by the two governments, but which have also been ratified by the government of the Republic of Hawaii."

The reference is to a proposed treaty signed by Secretary Sherman on the part of the United States, and by three commissioners on the part of Hawaii, to which the advice and consent of the Senate was not given.

The preamble to this treaty expressed the "desire of the government of the Republic of Hawaii that those islands should be incorporated into the United States as an integral part thereof and under its sovereignty," and that the two governments "have determined to accomplish by treaty an object so important to their mutual and permanent welfare."

The language of the remainder of the treaty is reproduced in the joint resolution, including the provision that the municipal legislation of Hawaii should remain in force when not inconsistent with the resolution or any existing treaty of the United States nor contrary to the Constitution of the United States.

By the resolution, Congress provided for the government of Hawaii under the authority of the United States. All the civil, judicial, and military powers exercised by the officers in the islands were vested in the appointees of the President, and were to be exercised "in such manner as the President of the United States shall direct." The President prorogued the legislature; reappointed the officers "of the Republic of Hawaii as it existed just prior to the transfer of sovereignty; required such officers to take an oath of allegiance to the United *States; and re-[225] quired all bonded officers to renew their bonds to the government of the United States."

All existing treaties of Hawaii were abrogated; further immigration of the Chinese was prohibited except as allowed "by the laws of the United States;" the customs laws of Hawaii, and its municipal legislation not contrary to the Constitution of the United States, were continued in force until Congress should otherwise determine.

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their management and disposition: *Provided*, That all revenue from, or proceeds of, the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands, for educational and other public purposes.

Until Congress shall provide for the government of such islands, all the civil, judicial, and military powers exercised by the officers of the existing government in said islands shall be vested in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers, and fill the vacancies so occasioned.

The existing treaties of the Hawaiian islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution nor contrary to the Constitution of the United States nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian islands, the existing customs relations of the Hawaiian islands with the United States and other countries shall remain unchanged.

The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing government and the present commercial relations of the Hawaiian islands are continued as hereinbefore provided, said government shall continue to pay the interest on said debt.

There shall be no further immigration of Chinese into the Hawaiian islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian islands.

The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian islands, who shall, as soon as reasonably practicable, recommend to Congress such legislation concerning the Hawaiian islands as they shall deem necessary or proper.

Commissioners were to be and were appointed to recommend to Congress such legislation as they might "deem necessary and proper."

The act of April 30, 1900, was the result of their report, and provided further government, dealing with details, and permanent instead of temporary. But, while temporary under the resolution, it was nevertheless a system of government, and the territory was under the sovereignty of the United States, and governed by its agencies.

By the resolution, the annexation of the Hawaiian islands became complete, and the object of the proposed treaty, that "those islands should be incorporated into the United States as an integral part thereof, and under its sovereignty," was accomplished.

The exceptions in respect of customs relations and the prohibition of the immigration of the Chinese, embodied in the treaty agreement and in the resolution, could not destroy the effect of incorporation or of the extension of the Constitution. If this were possible, the act of April 30, 1900, would be open to the same objection.

It was said at the bar that the words "contrary to the Constitution of the United States" were inserted as a declaration that certain "fundamental rights and principles, the basis of all free government, which cannot with impunity be transcended," were to be protected in Hawaii; that certain limitations of the Constitution applied "wherever the jurisdiction of the United States extends." But, in that view, the insertion of the phrase was superfluous and accomplished nothing.

Nor were we informed what those fundamental rights are. This is not a question of [226] natural rights, on the one hand, and *artificial rights on the other, but of the fundamental rights of every person living under the sovereignty of the United States in respect of that government. And among those rights is the right to be free from prosecution for crime unless after indictment by a grand jury, and the right to be acquitted unless found guilty by the unanimous verdict of a petit jury of twelve.

In *Callan* v. *Wilson*, 127 U. S. 540, 549, 32 L. ed. 223, 226, 8 Sup. Ct. Rep. 1301, it was said by Mr. Justice Harlan, speaking for the court: "And as the guaranty of a trial by jury, in the 3d article, implied a trial in that mode and according to the settled rules of the common law, the enumeration, in the 6th Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, *and so far as the agencies of the general government were concerned*, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty, and property."

Common-law rights are described in the ordinance of 1787 as "fundamental principles of civil and religious liberty," and the amendments embodying common-law rights were demanded, as the preamble of the act of Congress proposing them declares, "in order to prevent misconstruction or abuse" of the powers of the general government.

Assuming, solely for the sake of argument, that the mere fact of annexation might not in itself have at once extended to the inhabitants of Hawaii all the rights, privileges, and immunities guaranteed by the Constitution, and that Congress had the power to impose limitations in that regard, I think not only that Congress did not do so in the particulars in question, but that, in re-enacting existing legislation, Congress, by the terms of the resolution, intentionally invalidated so much thereof as in these particulars was inconsistent with the Constitution. The presumptions are all opposed to any capitulation in the matter of common-law institutions.

Mr. Justice **Harlan**, dissenting:

This case is of such exceptional importance in respect of the *principles announced [227] by my brethren of the majority, that I deem it not inappropriate to state my views in a separate opinion.

I entirely concur with the Chief Justice in holding that the accused was properly discharged from custody. Whether the legality of his detention be tested by the Constitution or alone by the joint resolution of Congress, approved July 7th, 1898, providing "for annexing the Hawaiian islands to the United States," his imprisonment was, in my judgment, wholly unauthorized.

What, at the time of the arrest and trial of the accused, were the relations existing between the United States and Hawaii? By what law were the personal rights of the people of Hawaii to be then determined? The decision of the case depends upon the answer to these questions.

In 1897 a treaty was made between the United States and the Republic of Hawaii, which was signed by Secretary Sherman on behalf of the United States, and by three commissioners on the part of Hawaii. Senate Report No. 681, 55th Congress, 2d Sess., March 16th, 1898.

The preamble to that treaty expressed the "desire of the government of the Republic of Hawaii that those islands shall be *incorporated* into the United States *as an integral part thereof and under its sovereignty*." It also recited the determination of the two governments "to accomplish by treaty an object so important to their mutual and permanent welfare."

The treaty stipulated that, until Congress provided for the government of such islands, all the civil, judicial, and military powers exercised by the officers of the existing government in the islands should be vested in such person or persons, and be exercised in such manner, as the President of the United States directed, and that the President should have power to remove said officers, and fill the vacancies so occasioned; also that the municipal legislation of the Hawaiian islands "not inconsistent with this treaty *nor contrary to the Constitution of the United States*, nor to any existing treaty

of the United States, shall remain in force until the Congress of the United States shall otherwise determine."

[228] *The treaty was not formally ratified, but its object was accomplished by the passage of the joint resolution of July 7th, 1898. 30 Stat. at L. 750.

In order that the full scope of that resolution may be seen, it is here given in full:

"Whereas the government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its Constitution, to cede absolutely and without reserve to the United States of America *all rights of sovereignty of whatsoever kind* in and over the Hawaiian islands and their dependencies, and also to cede and transfer to the United States the absolute fee and ownership of all public, government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian islands, together with every right and appurtenance thereunto appertaining: Therefore,

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That said cession is accepted, ratified, and confirmed, and that the said Hawaiian islands and their dependencies be, and they are hereby, annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof, and that, all and singular, the property and rights hereinbefore mentioned are vested in the United States of America.

"The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian islands; but the Congress of the United States shall enact special laws for their management and disposition: *Provided*, That all revenue from or proceeds of the same, except as regards such part thereof as may be used or occupied for the civil, military, or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian islands for educational and other public purposes.

"Until Congress shall provide for the government of such islands, all the civil, judicial, and military powers exercised by the officers of the existing government in said [229] islands shall be vested *in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct; and the President shall have power to remove said officers and fill the vacancies so occasioned.

"The existing treaties of the Hawaiian islands with foreign nations shall forthwith cease and determine, being replaced by such treaties as may exist, or as may be hereafter concluded, between the United States and such foreign nations. The municipal legislation of the Hawaiian islands, not enacted for the fulfilment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine.

"Until legislation shall be enacted extending the United States customs laws and regulations to the Hawaiian islands, the existing customs relations of the Hawaiian islands with the United States and other countries shall remain unchanged.

"The public debt of the Republic of Hawaii, lawfully existing at the date of the passage of this joint resolution, including the amounts due to depositors in the Hawaiian Postal Savings Bank, is hereby assumed by the government of the United States; but the liability of the United States in this regard shall in no case exceed four million dollars. So long, however, as the existing government and the present commercial relations of the Hawaiian islands are continued as hereinbefore provided, said government shall continue to pay the interest on said debt.

"There shall be no further immigration of Chinese into the Hawaiian islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; and no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian islands.

"The President shall appoint five commissioners, at least two of whom shall be residents of the Hawaiian islands, who shall, as soon as reasonably practicable, *recommend* to *Congress* such legislation concerning the Hawaiian islands as they shall deem necessary or proper.

*"§ 2. That the commissioners hereinbefore [230] provided for shall be appointed by the President, by and with the advice and consent of the Senate.

"§ 3. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated, and to be immediately available, to be expended at the discretion of the President of the United States of America, for the purpose of carrying this joint resolution into effect."

Under date of July 8th, 1898, the Secretary of State transmitted a copy of this joint resolution to the United States envoy extraordinary and minister plenipotentiary accredited to Hawaii, with instructions as to his duty in the premises.

Referring to the preamble of that resolution, the Secretary, in his letter of instructions, said: "These recitals, it will be observed, are made in the language of the treaty of annexation concluded at Washington on the 16th day of June, 1897. They, as well as the other terms of that treaty, were advisedly incorporated in the joint resolution, because they embody the terms of cession which have not only been agreed upon by the two governments, but which have also been ratified by the government of the Republic of Hawaii. The joint resolution, therefore, accepts, ratifies, and con-

firms, on the part of the United States, the cession formally agreed to and approved by the Republic of Hawaii. As, by the adoption of the joint resolution, the cession of the Hawaiian islands and their dependencies to the United States is thus concluded, it is assumed that no further action will be necessary on the part of the Hawaiian government beyond the formalities of transfer. Should that government, however, desire to take any further action, formally confirmatory of what has been done, no objection will be interposed on the part of the United States. When all preliminaries shall have been settled, you are instructed to accept, in the name of the United States, the formal transfer of the sovereignty and property of the Hawaiian government, and to raise the American flag, with such suitable ceremonies as may be agreed on for the occasion. It [231] may be advisable *for the Hawaiian government to deliver to you an inventory of the public property transferred to the United States. There are several provisions of the joint resolution to which it is deemed proper specially to refer. Until Congress shall provide for the government of Hawaii, 'all the civil, judicial, and military powers exercised by the officers of the existing government' are to be vested in such person or persons, and to be exercised in such manner, as the President of the United States shall direct. In the exercise of the power thus conferred upon him by the joint resolution, the President hereby directs that the civil, judicial, and military powers in question shall be exercised by the officers of the Republic of Hawaii as it existed just prior to the transfer of sovereignty, subject to his power to remove such officers and to fill the vacancies. All such officers will be required at once to take an oath of *allegiance to the United States*, and all the military forces will be required to take a similar oath; and all bonded officers will be required *to renew their bonds to the government of the United States*. The powers of the minister of foreign affairs will, upon the transfer of the sovereignty and property of Hawaii to the United States, necessarily cease, so far as they relate to the conduct of diplomatic intercourse between Hawaii and foreign powers. The municipal legislation of Hawaii, except such as was enacted for the fulfilment of the treaties between that country and foreign nations, and except such as is inconsistent with the joint resolution, or *contrary to the Constitution of the United States*, or to any existing treaty of the United States, is to remain in force till the Congress of the United States shall otherwise determine. The existing customs relations of Hawaii with the United States and with other countries are to remain unchanged till Congress shall have extended the customs laws and regulations of the United States to the islands. Under these various provisions, the government of the islands will proceed without interruption. Upon the completion of the formalities of the transfer, your functions as envoy extraordinary and minister plenipotentiary to Hawaii will necessarily cease. . . . These instructions will be borne to you by Rear Admiral Joseph N. Miller, U. S. Navy, who will proceed *to Honolulu in the U. S. S. Phila- [232] delphia, and who, together with the commander of the United States military forces present, will act with you in the ceremonies attending the formal transfer of the islands to the United States."

So that the Secretary of State gave the representative of the United States to understand that the joint resolution and the treaty had the same object in view, namely, to incorporate Hawaii into the United States "as an integral part thereof and under its sovereignty."

Proceeding in our examination of the history of annexation, we find that under date of August 15th, 1898, the United States minister made his official report as to what was done in execution of the joint resolution, annexing Hawaii to the United States. That report contains the details of the ceremonies attending the formal transfer of the sovereignty and property of the Hawaiian government to the United States. From it the following extract is made:

"At a quarter before 12 [on August 12th, 1898] the ceremonies opened with prayer, at the conclusion of which I [the United States minister] arose, and, addressing President Dole, said: 'Mr. President, I present you a certified copy of a joint resolution of the Congress of the United States, approved by the President on July 7th, 1898, entitled "Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States." This joint resolution accepts, ratifies, and confirms on the part of the United States the cession formally consented to and approved by the Republic of Hawaii.' . . . President Dole, taking the copy of the resolutions, said: 'A treaty of political union having been made, and the cession formally consented to by the Republic of Hawaii having been accepted by the United States of America, I now, in the interest of the Hawaiian body, politic, and with full confidence in the honor, justice, and friendship of the American people, yield up to you, as the representative of the government of the United States, the sovereignty and public property of the Hawaiian islands;' and, waving his hand to his chief of staff, the Hawaiian flag was saluted by the battery of the Hawaiian national guard, in which salute our ships in the harbor joined. Then the Hawaiian band played *Hawaii Ponoi for [233] the last time, taps were sounded, and the Hawaiian flag came down, and was taken possession of by the Hawaiian corporal of the guard. Then, replying to President Dole, I said: 'Mr. President, in the name of the United States, I accept the transfer of the sovereignty and property of the Hawaiian government. The admiral commanding the United States naval forces in these waters will proceed to perform the duty intrusted to him.' Thereupon the American flag was raised as the band played the Star Spangled Banner, and saluted."

The United States minister then congratu-

lated "his *fellow-countrymen*," on "the inevitable consummation of the national policies and the natural relations between the two countries *now formally and indissolubly united*." He urged the Hawaiians not to rest content in the enjoyment of free institutions, but "to help maintain them in the spirit they will be extended to you, in the spirit you have sought them, in the spirit of fraternity and equality, in the spirit of the Constitution itself, *now the supreme law of the land*." The oath of allegiance was thereupon administered by the Chief Justice of Hawaii to the officers of that country, each one swearing that he would "support and defend the Constitution of the United States of America against all enemies, foreign and domestic."

It is thus perceived that the Republic of Hawaii ceded, absolutely and without reserve, to the United States of America, all rights and sovereignty of whatsoever kind in and over the Hawaiian islands and their dependencies, as well as the absolute fee and ownership of all public, government, or Crown lands, public buildings or edifices, ports, harbors, military equipment, and all other public property of every kind and description belonging to the government of the Hawaiian islands, together with every right and appurtenance thereunto appertaining; that the cession was accepted, ratified, and confirmed by Congress, and that the Hawaiian islands and their dependencies were "annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof;" and, what is of vital moment in this case, that such municipal legislation of the islands as was not "*con-*[234]*trary to the Constitution of the *United States*"—and therefore *only* such legislation as was consistent with that instrument—was to remain in force until Congress otherwise determined. Necessarily, therefore, if regard be had merely to the action of Congress, all local legislation inconsistent with the Constitution ceased to have any force in Hawaii after that country thus passed under the sovereign dominion of the United States.

After the passage of the joint resolution, and after the formal transfer of Hawaii to the United States, namely, in 1899, Osaki Mankichi, a subject of Japan, was tried in one of the courts of Hawaii for the alleged crime of murder. He was convicted of the crime of manslaughter in the first degree, and sentenced to imprisonment for twenty years at hard labor. Although the crime was of an infamous nature, there was no presentment or indictment of a grand jury, and the verdict was rendered by only nine of the twelve persons composing the petit jury.

Having been placed in prison pursuant to the verdict and sentence, the accused, in 1901, sued out a writ of habeas corpus from the district court of the United States for the territory of Hawaii, and was discharged, upon the ground that his trial, conviction, sentence, and imprisonment were in violation of the Constitution of the United States, in that he was not proceeded against upon the presentment or indictment of a grand jury, nor found guilty by the unanimous verdict of the petit jury, but only by a majority of the jurors. Hence this appeal.

It should be here stated that by the act of Congress of April 30th, 1900, chap. 339, a territorial government was organized over the islands which had been acquired under the joint resolution of 1898, and those islands were designated as the territory of Hawaii. In that act provision was made for grand juries, and also for petit juries in criminal cases, to be composed, as at common law, of twelve persons. It was also declared that "no person should be convicted in any criminal case except by unanimous verdict of the jury." 31 Stat. at L. 141, 157. It is not contended that that act can have any effect upon the decision of the present case, because the trial, conviction, sentence, and imprisonment *of the accused all [235] occurred after the formal transfer to the United States pursuant to the joint resolution of 1898, and before the passage of the above act of 1900. We must consequently determine the legality of the proceedings against Mankichi by the law as it was between the date of the acquisition of sovereignty over the islands by the United States, and the date of the passage of the act of 1900. To that question I now address myself.

It must be assumed that the trial of the accused was in accordance with the municipal law of Hawaii as it existed prior to the approval of the joint resolution of 1898. The contrary is not asserted by the accused. But it is conceded by the court that if the words "contrary to the Constitution of the United States" in that resolution are interpreted according to their usual, ordinary meaning, and if the validity of the trial be tested by the provisions of that instrument, then the prisoner is entitled to his discharge. Nevertheless, it is now held that, although the United States acquired, on the passage of that resolution, "all rights of sovereignty of whatsoever kind" in and over the Hawaiian islands and their dependencies; although Hawaii then became "an integral part" of the United States, and subject to its "sovereign dominion;" although the United States obtained the absolute fee and ownership of all public, government, or Crown lands, public buildings or edifices, ports, harbors, military equipments, and all other public property belonging to Hawaii; although all its officers took an oath of allegiance to the United States; yet, persons there charged with infamous crimes could not, as of right, before the passage of the act of 1900, invoke for their protection, when prosecuted for crime, the guarantees relating to grand and petit juries found in the Constitution of the United States,—the supremacy of which instrument was, in effect, declared by the joint resolution when existing municipal legislation contrary to its provisions was superseded.

Practically, under the view taken by the court, and so far as those guarantees were concerned, if Congress had not chosen to provide a system of criminal procedure—as

it did by the act of 1900—for the govern-
[236] ment, tribunals, and people of Hawaii *then, for an indefinite time,—it may have been for a century,—the courts in Hawaii, although acting under and by the authority of the United States, might have tried persons there for capital or infamous crimes in a mode confessedly "contrary to the Constitution of the United States." The Constitution, speaking with commanding authority to all who exercise power under its sanction, declares that "*no* person shall be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury;" and it as clearly forbids a conviction in any criminal prosecution except upon the unanimous verdict of a petit jury. In other words, neither the life nor the liberty of any person can be taken, under the authority of the United States, except in the mode thus prescribed. Yet the present holding is that these constitutional requirements need not have been regarded in Hawaii at any time prior to the act of 1900, although that country was an integral part of the United States, and with its inhabitants, was subject, in all respects, to our sovereign dominion. It follows, under the view of the court, that Congress, by nonaction simply, could have kept in force even such municipal legislation of the Hawaiian islands relating to criminal trials as was in palpable conflict with the Constitution of the United States.

I dissent altogether from any such view. It assumes the possession by Congress of power quite as omnipotent as that possessed by the English Parliament. It assumes that Congress, which came into existence, and exists, only by virtue of the Constitution, can withhold fundamental guarantees of life and liberty from peoples who have come under our complete jurisdiction; who, to use the words of the United States minister, have become our fellow-countrymen; and over whose country we have acquired the authority to exercise sovereign dominion. In my judgment, neither the life nor the liberty nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal acting under its authority, by any form of procedure inconsistent with the Constitution of the United States. If the accused had committed the crime of murder in the territory of Arizona; if he had been convicted in any
[237] *court in that territory, except under a presentment or indictment of a grand jury, and by the unanimous verdict of a petit jury; and if he had been then sentenced to be hanged, and was hanged, the judge of the court pronouncing the sentence would have been guilty of judicial murder. Of that the decisions of this court leave no room to doubt; for it has been adjudged repeatedly that the people of the organized territories, as well as the people of the District of Columbia, are entitled, by force of the Constitution alone, to the guarantees of life, liberty, and property found in the Constitution. And yet the result of the present judgment is that the hanging of the accused in Hawaii, an integral part of the United States, after a trial for murder committed there, but not upon indictment of a grand jury or on a verdict concurred in by all of the petit jury, could be sustained as legal if the case had arisen at any time prior to the act of 1900. This result has been achieved by the easy method of declaring that when Congress provided that only the municipal legislation of Hawaii not contrary to the Constitution should remain in force, it did not mean what its express words implied according to their ordinary signification; that Congress had no reference to the provisions of the Constitution relating to criminal prosecutions, but intended that the modes of criminal procedure in operation in Hawaii should remain in force until Congress otherwise provided, even if they were, as they are admitted to be, contrary to the Constitution,—thus conceding to Congress the power of suspending the constitutional guarantees of life and liberty among a people undeniably subject to the authority and jurisdiction of the United States as completely as are the people of our organized territories.

Three members of the court, constituting the majority, who concurred in the *judgment* in *Downes* v. *Bidwell*, 182 U. S. 244, 288, 289, 291, 292, 45 L. ed. 1088, 1106-1108, 21 Sup. Ct. Rep. 770, 787-789 distinctly held that "the government of the United States was born of the Constitution," and that all the powers enjoyed by it, or which it may exercise, must be derived, either expressly or by implication, from that instrument; that that instrument, in respect of every function of the government, "is everywhere and at all times potential, in so far as its provisions are applicable;" that wherever a power is given by the *Consti-[238] tution, and a limitation imposed upon its exercise, "such restriction operates upon and confines every action on the subject within its constitutional limits;" that, "as Congress, in governing the territories, is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising this authority necessarily limit its power on this subject;" that "every provision of the Constitution which is applicable to the territories is also controlling therein;" and that "in the case of the territories, as in every other instance, when a provision of the Constitution is invoked, the question which arises is not whether the Constitution is operative, for that is self-evident, but whether the provision relied on is applicable." In these views the minority in *Downes* v. *Bidwell*, constituting four other members of this court, substantially concurred.

The petit jury system existed in Hawaii long before the passage of the joint resolution. But it was inconsistent with the Constitution of the United States, in that it allowed a verdict of guilty in a criminal case by a majority of the jurors. Where was the difficulty in applying in Hawaii the constitutional provi-

sion forbidding such a verdict? To have applied that provision to Hawaii would not, in any essential sense, have imposed upon that country a new system for the trial of crimes. It would have only enforced the existing mode of trial so as to conform to the constitutional requirement in respect of petit juries. It would have left untouched the petit jury system in Hawaii, except as it was contrary to the Constitution. Whatever may be said as to the absence of a grand jury system in Hawaii, it cannot, I think, be said, with any show of reason, that the constitutional provision relating to petit juries was inapplicable in Hawaii after its annexation to this country. Nothing stood in the way of the court instructing the jury in a criminal case, arising after annexation, that unanimity among the jurors as to the verdict was essential under the Constitution.

In my opinion, the Constitution of the United States became the supreme law of Hawaii immediately upon the acquisition by the United States of complete sovereignty [239] over the Hawaiian *islands, and without any act of Congress formally extending the Constitution to those islands. It then, at least, became controlling, beyond the power of Congress to prevent. From the moment when the government of Hawaii accepted the joint resolution of 1898, by a formal transfer of its sovereignty to the United States,—when the flag of Hawaii was taken down, by authority of Hawaii, and in its place was raised that of the United States,—every human being in Hawaii charged with the commission of crime there could have rightly insisted that neither his life nor his liberty could be taken, as punishment for crime, by any process, or as the result of any mode of procedure, that was inconsistent with the Constitution of the United States. Can it be that the Constitution is the supreme law in the states of the Union, in the organized territories of the United States, between the Atlantic and Pacific oceans, and in the District of Columbia, and yet was not, prior to the act of 1900, the supreme law in territories and among peoples situated as were the territory and people of Hawaii, and over which the United States had acquired all rights of sovereignty of whatsoever kind? A negative answer to this question, and a recognition of the principle that such an answer involves, would place Congress above the Constitution. It would mean that the benefit of the constitutional provisions designed for the protection of life and liberty may be claimed by some of the people subject to the authority and jurisdiction of the United States, but cannot be claimed by others equally subject to its authority and jurisdiction. It would mean that the will of Congress, not the Constitution, is the supreme law of the land for certain peoples and territories under our jurisdiction. It would mean that the United States may acquire territory by cession, conquest, or treaty, and that Congress may exercise sovereign dominion over it, outside of and in violation of the Constitution, and under regulations that could not be applied to the organized territories of the United States and their inhabitants. It would mean that, under the influence and guidance of commercialism and the supposed necessities of trade, this country had left the old ways of the fathers, as defined by a written Constitution, and entered upon a new way, in following *which the American people will lose [240] sight of, or become indifferent to, principles which had been supposed to be essential to real liberty. It would mean that, if the principles now announced should become firmly established, the time may not be far distant when, under the exactions of trade and commerce, and to gratify an ambition to become the dominant political power in all the earth, the United States will acquire territories in every direction, which are inhabited by human beings, over which territories, to be called "dependencies" or "outlying possessions," we will exercise absolute dominion, and whose inhabitants will be regarded as "subjects" or "dependent peoples," to be controlled as Congress may see fit, not as the Constitution requires nor as the people governed may wish. Thus will be engrafted upon our republican institutions, controlled by the supreme law of a written Constitution, a colonial system entirely foreign to the genius of our government and abhorrent to the principles that underlie and pervade the Constitution. It will then come about that we will have two governments over the peoples subject to the jurisdiction of the United States,—one, existing under a written Constitution, creating a government with authority to exercise only powers expressly granted and such as are necessary and appropriate to carry into effect those so granted; the other, existing outside of the written Constitution, in virtue of an unwritten law, to be declared from time to time by Congress, which is itself only a creature of that instrument.

I stand by the doctrine that the Constitution is the supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction. I could not otherwise hold without conceding the power of Congress, the creature of the Constitution, by mere nonaction, to withhold vital constitutional guarantees from the inhabitants of a territory governed by the authority, and only by the authority, of the United States. Such a doctrine would admit of the exercise of absolute, arbitrary legislative power under a written Constitution full of restrictions upon Congress, and designed to limit the separate departments of *government to the exercise of only ex- [241] pressly enumerated powers and such other powers as may be implied therefrom,—each department always acting in subordination to that instrument as the supreme law of the land. Indeed, it has been announced by some statesmen that the Constitution should be interpreted to mean not what its words naturally, or usually, or even plainly, import, but what the apparent necessities of the hour, or

the apparent majority of the people, at a particular time, demand at the hands of the judiciary. I cannot assent to any such view of the Constitution. Nor can I approve the suggestion that the status of Hawaii and the powers of its local government are to be "measured" by the resolution of 1898, without reference to the Constitution. It is impossible for me to grasp the thought that that which is admittedly contrary to the supreme law can be sustained as valid.

I have so far considered the case principally in the light of the results that must, as I think, follow from the interpretation placed by the majority on the joint resolution of 1898. But, in my judgment, Congress should not be held to have intended to do what is now attributed to it. When it declared that the municipal legislation of Hawaii *not* "contrary to the Constitution of the United States" should remain in force, it meant that legislation contrary to that instrument should not remain in force after annexation. Those words were inserted out of abundant caution, to make it certain that no municipal legislation of Hawaii contrary to the Constitution should thereafter be regarded as in force. If the above words did not have that effect, for what purpose were they inserted? What local legislation was declared to be abrogated, if not that which was "contrary to the Constitution?" Under the view taken by the court, those words in the joint resolution are made wholly inoperative.

It is said to be evident from the terms of the joint resolution that Congress intended it to be merely temporary and provisional. Of course, some further legislation by Congress was contemplated in order to provide a complete territorial government for Hawaii. But in language perfectly direct and explicit, Congress said that *in the meantime* [242] no municipal legislation *of Hawaii should be enforced that was "contrary to the Constitution of the United States." And yet a trial conducted in a mode forbidden by that instrument is now sustained as legal.

It is also said that "the *laws* of the United States" were not extended over the islands until the organic act of April 30th, 1900, was passed. But, by the joint resolution of 1898, Congress—assuming that action upon its part to that end was necessary—did extend the *Constitution* over the Hawaiian islands when it declared that the municipal legislation of Hawaii "not contrary to the Constitution of the United States" should remain in force. And yet the court decides that, although the trial of Mankichi, if tested by the Constitution, was illegal, it must be sustained from the necessities of the case.

Again, it is said that the words "contrary to the Constitution" in the joint resolution referred only to such provisions of that instrument as were *applicable* to Hawaii; and in support of that view, reference is made to that part of the resolution which keeps alive existing customs regulations between Hawaii and the United States and other countries. It seems to me that the argument based on that clause of the resolution is misleading and fallacious. Customs regulations are not determined by the Constitution. The authority to make them is given by that instrument to Congress; and it was for Congress to say what should be the nature of the customs regulations to be observed in Hawaii. Its direction that existing Hawaiian regulations of customs duties should remain in force until otherwise ordered was, in legal effect, an adoption of them by Congress for the time being. Now, the provisions as to grand and petit juries are in the Constitution, and could not be altered by Congress under any power it possessed. Their applicability, before civil tribunals, in a territory of the United States, was determinable by the Constitution itself. In other words, if the Constitution was in force at all in Hawaii, prior to the act of 1900, it was in force there for all it ordained, in respect, at least, of the guarantees of life and liberty. To sustain the prosecution of Mankichi upon the ground that Congress did not intend to supersede the local law permitting a *verdict in criminal cases by a majority of [243] the petit jury, but did intend to keep such law in force until altered or abrogated by Congress, is, in effect, to say that, if Congress so ordered, persons charged with crime in Hawaii could, consistently with the Constitution, be tried before a single judge. It is not perceived why the argument based upon the provision as to customs regulations does not lead, logically, to such a result, nor how that provision can have any bearing upon the present case, unless it be that the power of Congress over criminal proceedings in Hawaii, involving the life and liberty of a freeman, is as full, comprehensive, and complete as it is over mere customs regulations. I cannot go that far in upholding the power of Congress over what some are pleased to call our "dependencies" or "outlying possessions," and the "subjects" therein residing.

It is again said that the annexation of Hawaii, and the transfer of its sovereignty, of whatsoever kind, to the United States, did not so *incorporate* it into the United States as to make the Constitution supreme, in *all* respects, in that newly acquired territory. As the two countries desired that Hawaii, upon annexation, should become "an integral part" of the United States; as all the civil, military, and judicial officers of Hawaii were required to take, and did take, an oath of allegiance to the United States; as Hawaii passed under the "sovereign dominion" of the United States and became subject to all valid laws, civil and criminal, that Congress might enact; as its people may be subjected to punishment for any crime or offense committed against the United States; as by the authority of Hawaii the Hawaiian flag has come down, and in its place that of the United States substituted; and as Hawaiians cannot rightfully invoke for their protection the authority of any government except that of the United States,—in view of these relations between the two countries, it is, to my mind, inconceivable that Hawaii was not so far incorporated into the United States that the Constitution was in force there, after

the passage of the joint resolution of 1898, in respect, at least, of those personal rights which that instrument expressly guarded [244]against infringement *by any tribunal deriving authority from its provisions.

It is further said that under the joint resolution of 1898 any *new* legislation must conform to the Constitution of the United States. This must mean that after the passage of that resolution the Constitution was operative in Hawaii to prevent new legislation inconsistent with its provisions, but was not operative there so as to prevent the enforcement of local enactments or regulations that were confessedly in violation of that instrument. I cannot forbear saying that this view of the Constitution is most extraordinary. It does not commend itself to my judgment. I had supposed that when the Constitution came into operation in any country or over any people, all local laws, customs, or usages, within the same jurisdiction, that were inconsistent with its provisions, necessarily ceased to have any legal force whatever; otherwise, the declaration of the Constitution, that it was the supreme law of the land, would be meaningless.

But it is said that while *most, if not all*, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply "*from the moment of annexation*," yet the two rights created by the constitutional provisions as to grand and petit jurors "are not fundamental in their nature, but concern merely a method of procedure."

It is a new doctrine, I take leave to say, in our constitutional jurisprudence, that the framers of the Constitution of the United States did not regard those provisions, and the rights secured by them, as fundamental in their nature. It is an indisputable fact in the history of the Constitution that that instrument would not have been accepted by the required number of states, but for the promise of the friends of that instrument, at the time, that immediately upon the adoption of the Constitution, amendments would be proposed and made that should prevent the infringement by any *Federal* tribunal or agency, of the rights then commonly regarded as embraced in Anglo-Saxon liberty; among which rights, according to universal belief at that time, were those secured by the provisions relating to grand and petit juries. Whatever may be the pow[245]er of the *states in respect of grand and petit juries, it is firmly settled that the Constitution absolutely forbids the trial and conviction, in a *Federal* civil tribunal, of any one charged with crime, otherwise than upon the presentment or indictment of a grand jury, and the unanimous verdict of a petit jury, composed, as at common law, of twelve jurors.

In *Ex parte Milligan*, 4 Wall. 120, 121, 18 L. ed. 295, 296, the accused, not in the Army of the United States, was tried by a Federal military court-martial for a crime against the United States, alleged to have been committed in a state that adhered to the Union, and he was denied the right to a trial by jury. This court, referring to the provisions of the Federal Constitution relating to criminal offenses and proceedings, said: "These securities for personal liberty, thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. . . . Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

In *Ex parte Bain*, 121 U. S. 1, 12, 13, 30 L. ed. 849, 853, 7 Sup. Ct. Rep. 781, 787, the court, referring to the constitutional provision relating to grand juries, said: "It is never to be forgotten that, in the construction of the language of the Constitution here relied on, as, indeed, in all other instances *where construction becomes necessary, we[246] are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had, for a long time, been absorbed in considering the arbitrary encroachments of the Crown on the liberty of the subject, and were imbued with the common-law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did . . in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged."

In *Thompson* v. *Utah*, 170 U. S. 343, 349-351, 42 L. ed. 1061, 1066, 1067, 18 Sup. Ct. Rep. 620, 622, 623, which was a case arising in an organized territory, the question was whether the jury referred to in the original Constitution of the United States, and in the 6th Amendment, was a jury constituted as it was at common law of twelve persons, neither more nor less. This court said: "When Magna Charta declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by

twelve jurors. . . . When Thompson committed the offense of grand larceny in the territory of Utah,—which was under the complete jurisdiction of the United States for all purposes of government and legislation,—the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. . . . When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons."

Nevertheless, it is contended that the constitutional provisions in question are not fundamental in their nature; that whether a person charged, for instance, with murder, shall be convicted and hung pursuant to a verdict rendered by a majority of the petit jury, rather than by all the jurors, is only "a method of procedure." My judgment refuses assent to this doctrine. I believe it to be most mischievous in every aspect. The provisions as to grand and petit juries are [247] in the Constitution, and *the mandatory character of that instrument ought not to be disregarded. What tribunal, deriving its authority from the United States, can rightfully hold them to be immaterial? Whether those provisions are fundamental in their nature or not, no Federal civil tribunal, existing under the Constitution, and under a solemn obligation to maintain and defend it, can properly or safely ignore them. If the local law under which Mankichi was tried and convicted was contrary to any provision of the Constitution, that instrument should have been respected, whatever the nature of such provision.

The opinion of the court contains observations to the effect that some persons, heretofore convicted of crime in the Hawaiian courts, will escape punishment if the joint resolution of 1898 is so interpreted as to make Congress mean what, it is conceded, the words "contrary to the Constitution of the United States" naturally import. In the eye of the law, that is of no consequence. The cases cited by the court fall far short of sustaining the proposition that the court may reject the plain, obvious meaning of the words of a statute in order to remedy what it deems an omission by Congress. The consequences of a particular construction may be taken into account only when the words to be construed are ambiguous. If, after the passage of the joint resolution, the local authorities proceeded in the prosecution of crimes under municipal laws palpably contrary to the Constitution, the fault was theirs. They were informed by the joint resolution of 1898, by the Secretary of State, as well as by the proclamation of President McKinley, announcing the annexation of Hawaii to the United States, that only local legislation not contrary to the Constitution should remain in force. Their fault cannot justify the court in disregarding the express command of Congress that only municipal legislation that was consistent with the Constitution should remain in force in Hawaii. If the accused is held in palpable violation of that instrument, we cannot shrink from discharging him because of its effect upon convictions in other cases. We must interpret the law as it is written. As just stated, the doctrine is well settled that, when the meaning of a statute is plain, there is no room for interpretation. The *consequences [248] are for the lawmaking power. If the intention of the legislature "is expressed in a manner devoid of contradiction and ambiguity, there is no room for interpretation or construction, and the judiciary are not at liberty, on considerations of policy or hardship, to depart from the words of the statute; that they have no right to make exceptions, or insert qualifications, however abstract justice or the justice of the particular case may seem to require it." Sedgw. Stat. & Const. Law, 253, 328. "We are bound to take the act of Parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws." *Jones* v. *Smart*, 1 T. R. 44, 52. "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare *ita lex scripta est*, to follow, and to obey. Nor, if a principle so just and conclusive could be overlooked, could there well be found a more unsafe guide in practice than mere policy and convenience." Story, Const. § 426. "I shall always deem it a duty to conform to the expressions of the legislature, to the letter of the statute, when free from ambiguity and doubt; without indulging a speculation either upon the impolicy or the hardship of the law." Mr. Justice Chase, in *Priestman* v. *United States*, 4 Dall. 30, note, 1 L. ed. 728, *note*. When, therefore, Congress, in words of perfectly clear and free from doubt, declared that the municipal legislation of Hawaii not contrary to the Constitution should remain in force, does not the court usurp the function of making laws, when it rules that certain municipal legislation of Hawaii was in force, although it was manifestly contrary to the Constitution? Can it depart from the plain, distinct words of the statute, upon any ground of policy or to remedy an omission by Congress?

I am of opinion: 1. That when the annexation of Hawaii was completed, the Constitution—without any declaration to that effect by Congress, and without any power of Congress to prevent it—became the supreme law for that country, and, therefore, it forbade the trial and conviction of the accused for murder otherwise than upon a presentment or an indictment of a grand jury, and by the unanimous verdict of a petit jury. *2. That [249] if the legality of such trial and conviction is to be tested alone by the joint resolution of 1898, then the law is for the accused, because Congress, by that resolution, abrogated, or forbade the enforcement of, any municipal law of Hawaii so far as it authorized a trial for an infamous crime otherwise than in the mode prescribed by the Constitution of the United States; and that any other construction of the resolution is for-

bidden by its clear, unambiguous words, and is to make, not to interpret, the law.

The judgment of the District Court of the United States for Hawaii, discharging the accused, should be affirmed.

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WILLIAM L. SNYDER, Executor, *Plff. in Err.*,
*v.*
BERNARD BETTMAN, Collector.

(See S. C. Reporter's ed. 249–260.)

*Constitutional law—Federal succession tax on bequest to municipality.*

A succession tax imposed under the authority of the act of Congress of June 13, 1898 (30 Stat. at L. 448, chap. 448, U. S. Comp. Stat. 1901, p. 2286), upon a bequest to a municipality for public purposes, is not unconstitutional as a tax upon an agency of the state, since such tax, being collected from the property while in the hands of the executor, who is required by § 30 of that act to liquidate it "before payment and distribution to the legatees," cannot be regarded as a tax upon the municipality, although it may operate incidentally to reduce the bequest by the amount of the tax.

[No. 230.]

*Argued April 7, 8, 1903. Decided June 1, 1903.*

IN ERROR to the Circuit Court of the United States for the Southern District of Ohio to review a judgment sustaining a demurrer to a petition in an action by an executor to recover from a collector of internal revenue the amount of a succession tax paid under protest upon a legacy bequeathed to a municipality in trust for public purposes. *Affirmed.*

Statement by Mr. Justice **Brown:**

This was an action brought by the executor of David L. Snyder against the collector of internal revenue to recover $22,000, succession tax upon a legacy of $220,000 bequeathed to the city of Springfield, Ohio, in trust to expend the income in the maintenance, improvement, and beautifying of a public park of the city, known as Snyder park, including any extension thereof which said city might acquire. Such tax having been paid under protest, this action was brought to secure a refunding of the same.

[250] *A demurrer to the petition having been sustained by the circuit court, and final judgment entered, the case was brought here by writ of error.

NOTE.—*As to succession-tax laws generally*—see notes to *Re* Howe (N. Y.) 2 L. R. A. 825; Wallace v. Myers (C. C. S. D. N. Y.) 4 L. R. A. 171; Com. v. Ferguson (Pa.) 10 L. R. A. 240; *Re* Romaine (N. Y.) 12 L. R. A. 401; Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

*As to limitations on taxing power from mutual independence of Federal and state governments*—see note to Grether v. Wright, 23 C. C. A. 515.

*Mr.* **J. E. Bowman** argued the cause and filed a brief for plaintiff in error:

The tax in question is a charge upon the legatee for the privilege of succeeding to the property.

*Knowlton* v. *Moore*, 178 U. S. 60, 44 L. ed. 977, 20 Sup. Ct. Rep. 747; *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

The tax is an excise tax levied by the Federal government upon its subjects, the people of the United States, for the privilege of exercising the right to succeed to property under the laws of the several states.

This is in accord with the elementary principles of taxation. It is the exaction of money or services from individuals as and for their respective shares of contribution to any public burden, for the purpose of enabling the government to execute and discharge its functions.

25 Am. & Eng. Enc. Law, 12.

It is a contribution imposed by government on individuals for the services of the state.

Miller, Const. p. 235.

Taxation implies tribute from the governed to some form of sovereignty.

*West Hartford* v. *Hartford Water Comrs.* 44 Conn. 360.

Taxation is a charge levied by the sovereign power upon the property of its subjects. It is not a charge upon its own property, nor upon property over which it has no dominion. This excludes the property of the state, whether lands, revenues, or other property, and the property of the United States.

*People* v. *McCreery*, 34 Cal. 432; *Van Brocklin* v. *Anderson*, 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670.

No state has any power to impose an income tax upon the salary of an officer of the United States.

*Dobbins* v. *Erie County*, 16 Pet. 435, 10 L. ed. 1022.

The United States has no power to impose an income tax upon the salary of a state officer.

*Buffington* v. *Day*, 11 Wall. 113, 20 L. ed. 122.

Congress did not intend by the internal revenue laws to tax property belonging to the states, or to municipal corporations.

*United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 21 L. ed. 597.

The power to levy taxes, or to impose assessments for benefits, can only be exercised on the governed, and not on the governing power, whether state or Federal.

*Van Brocklin* v. *Anderson*, 117 U. S. 151, 29 L. ed. 845, 6 Sup. Ct. Rep. 670; *Fagan* v. *Chicago*, 84 Ill. 227.

The United States has no power under the Constitution to tax either the instrumentalities or the property of a state.

*Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 584, 39 L. ed. 820, 15 Sup. Ct. Rep. 673.

*Assistant Attorney General* **Beck** argued the cause and filed a brief for defendant in error:

The tax imposed by the war-revenue act is not imposed upon the property of the city of Springfield, but upon the estate of David L. Snyder, and his bequest did not become the property of the city of Springfield until after it had been diminished by the payment of the tax.

*United States* v. *Perkins*, 163 U. S. 628, 41 L. ed. 288, 16 Sup. Ct. Rep. 1073.

The Federal government has a right to impose upon the assets of decedent a tax before its transmission to the legatee.

*Plummer* v. *Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774; *Murdock* v. *Ward*, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775; *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747.

Mr. Justice **Brown** delivered the opinion of the court:

This case involves the single question whether it is within the power of the Federal government, and within the spirit of the act of Congress of June 13, 1898 (30 Stat. at L. 448, chap. 448, U. S. Comp. Stat. 1901, p. 2286), to impose a succession tax upon a bequest to a municipal corporation of a state for a corporate and public purpose.

The case is, to a certain extent, the converse of those of the *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, and *Plummer* v. *Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774. In the first of these we held it to be within the competency of the state of New York to impose a similar tax upon a bequest to the Federal government, incidentally deciding that the inheritance tax of the state was "in reality a limitation upon the power of a testator to bequeath his property to whom he pleases, a declaration that, in the exercise of that power, he shall contribute a certain percentage to the public use;" and (2) that the tax was not a tax upon the property itself, but upon its transmission by will or descent. In *Plummer* v. *Coler* we held the incidental fact that the property bequeathed is composed in whole or in part of Federal securities did not invalidate the state tax or the law under which it was imposed, although it was accepted as undeniable that the state could not, in the exercise of the power of taxation, tax obligations of the United States, and, correlatively, that bonds issued by a state, or under its authority by its municipal bodies, were not taxable by the United States.

It is insisted, however, that the case under consideration is distinguished from those above cited, in the fact that the inheritance tax of New York was but a condition annexed to the power of a testator to dispose [251] of his property by will, and *that such power, being purely statutory, the state has the right to annex such conditions to it as it pleases. The case, then, really resolves itself into the question whether the authority to lay a succession tax arises solely from the power to regulate the descent of property, or, as well from the independent general power to tax, or, as expressed in the Constitution, art. I, § 8, "to lay and collect taxes, duties, imposts, and excises." The difficulty with this proposition of the plaintiff is that it proves too much. If it be true that the right to impose such taxes arises solely from the right to regulate successions, then a denial of such right goes to the whole power of the government to impose a succession tax, irrespective of the question whether the legacy is made to a private individual or to an agent of the state, and the cases in this court upholding the power of the Federal government to lay such tax were wrongly decided.

That question was exhaustively considered by this court in *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, in which the constitutionality of this law was attacked upon four grounds: (1) That the taxes imposed were direct taxes, and not apportioned according to the population; (2) if not direct, they were levied on rights created solely by a state law, depending for their continued existence on the consent of the several states; (3) because they were not uniform throughout the United States; (4) that the rate of tax was determined by the aggregate amount of the personal estate of the deceased, and not by the sum of the legacies or distributive shares. It was held, following the cases of *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, and *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594, that an inheritance tax was not one upon property, but upon the succession. The question involved here, as to the power of Congress to levy a succession tax, was considered, and it was said by Mr. Justice White (p. 56, L. ed. p. 975, Sup. Ct. Rep. p. 753): "The proposition that it cannot rests upon the assumption that, since the transmission of property by death is exclusively subject to the regulating authority of the several states, therefore the levy by Congress of a tax on inheritances or legacies in any form is beyond the power of Congress, and is an interference by the national government *with a matter [252] which falls alone within the reach of state legislation." This proposition was pronounced a fallacy (p. 59, L. ed. p. 977, Sup. Ct. Rep. p. 755): "In legal effect, then, the proposition upon which the argument rests is that wherever a right is subject to exclusive regulation, by either the government of the United States on the one hand or the several states on the other, the exercise of such rights as regulated can alone be taxed by the government having the mission to regulate." In this connection was cited the power of the states to tax imported goods after they had been commingled with the general property of the state, as well as vehicles engaged in interstate commerce.

Continuing, it was further said (page 60, L. ed. p. 977, Sup. Ct. Rep. p. 755): "It cannot be doubted that the argument, when reduced to its essence, demonstrates its own unsoundness, since it leads to the necessary conclusion that both the national and state governments are devested of those powers of

taxation which, from the foundation of the government, admittedly have belonged to them. . . . Under our constitutional system, both the national and the state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

This case must be regarded as definitely establishing the doctrine that the power to tax inheritances does not arise solely from the power to regulate the descent of property, but from the general authority to impose taxes upon all property within the jurisdiction of the taxing power. It has usually happened that the power has been exercised by the same government which regulates the succession to the property taxed; but this power is not destroyed by the dual character of our government, or by the fact that, under our Constitution, the devolution of property is determined by the laws of the several states.

The principles laid down in *Knowlton* v. *Moore* were reiterated in *Murdock* v. *Ward*, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep. 775, although the case was decided upon the authority of *Plummer* v. *Coler*.

If it be true that it is beyond the power [253] of Congress to impose *an inheritance tax because the descent of property is regulated by state statutes, it would be difficult to support its power to impose stamp taxes upon commercial and legal instruments, since the conveyance, regulation, and transmission of all property is governed by the laws of the several states. Particularly would this be so with reference to stamp duties imposed upon documents connected with the devolution of the property of a deceased person. And yet, as stated in *Knowlton* v. *Moore* (page 50, L. ed. p. 973, Sup. Ct. Rep. p. 751) Congress, as early as 1797, imposed a stamp duty [1 Stat. at L. 527, chap. 11], not only upon receipts or other discharges for or on account of any legacy, or for a share of personal estate divided under the statute of distributions, proportioned to the amount of the legacy or such distributive share, but, in the internal revenue act of 1862 (12 Stat. at L. 432, 483, chap. 119, U. S. Comp. Stat. 1901, p. 186), a tax was imposed upon the probate of wills and letters of administration, proportioned to the value of the estate. Not only this, but the same statute imposed a tax upon writs, or other original process, by which suits are commenced in any court of record, exempting only processes issued by justices of the peace, or in suits begun by the United States or any state. This act was treated as applicable to the state courts, although its constitutionality may well be doubted.

Referable to the same principle is the power of Congress to tax occupations which can only be carried on by permission of the state authorities and under conditions prescribed by its laws,—such, for instance, as the profession of a lawyer or physician, or the business of dealing in spirituous liquors, for which licenses are required under the laws of nearly all the states. While the power of Congress to impose such taxes may never have been expressly affirmed by this court, it does not seem to have been seriously questioned, and is a legitimate inference from *McGuire* v. *Massachusetts*, 3 Wall. 387, 18 L. ed. 226; *License Tax Cases*, 5 Wall. 462, 18 L. ed. 497; *Pervear* v. *Massachusetts*, 5 Wall. 475, 18 L. ed. 608; and *Royall* v. *Virginia*, 116 U. S. 572, 580, 29 L. ed. 735, 737, 6 Sup. Ct. Rep. 510. See also *Ould* v. *Richmond*, 23 Gratt. 464, 14 Am. Rep. 139; *Humphreys* v. *Norfolk*, 25 Gratt. 97.

Conceding fully that Congress has no power to impose a burden upon a state or its municipal corporations, the question *in [254] each case is whether the tax is direct or incidental; since we have had frequent occasion to hold that the imposition of a tax may indirectly affect the value of property to the amount of the tax without being legally objectionable as a direct burden upon such property. Thus, in *Van Allen* v. *The Assessors*, 3 Wall. 573, *sub nom. Churchill* v. *Utica*, 18 L. ed. 229, we held it to be within the power of the states to tax the shares of national banks, though a part or the whole of the capital of such bank were invested in national securities exempt from taxation, upon the ground that the taxation of the shares was not a taxation of the capital. So a tax upon deposits was upheld, though such deposits were invested in United States securities. *Society for Savings* v. *Coite*, 6 Wall. 594, 18 L. ed. 897; *Provident Inst. for Savings* v. *Massachusetts*, 6 Wall. 611, 18 L. ed. 907; *Hamilton Mfg. Co.* v. *Massachusetts*, 6 Wall. 632, 18 L. ed. 904. The same principle was extended to a statute of New York, imposing a tax upon corporations measured by its dividends, though such dividends were derived from interest upon government bonds. *Home Ins. Co.* v. *New York*, 134 U. S. 594, 33 L. ed. 1025, 10 Sup. Ct. Rep. 593. As the tax in the case under consideration is collected from the property while in the hands of the executor (§ 30), who is required to liquidate it "before payment and distribution to the legatees," we do not regard it as a tax upon the municipality, though it may operate incidentally to reduce the bequest by the amount of the tax. Such incidental effects are common to many, if not all, forms of taxation,—indeed, it may be said generally that few taxes are wholly paid by the person upon whom they are directly and primarily imposed.

Having determined, then, that Congress has the power to tax successions; that the states have the same power, and that such power extends to bequests to the United States, it would seem to follow logically that Congress has the same power to tax the transmission of property by legacy to states or their municipalities, and that the exercise of that power in neither case conflicts with the proposition that neither the Fed-

eral nor the state government can tax the property or agencies of the other, since, as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property.

If the position of the plaintiff be sound, it [255] will come to pass *that, with the same power to tax the subject-matter, *i. e.*, the transmission of the property, the states are competent to limit the amount of bequests to the Federal government by requiring the prepayment of a succession tax as a condition precedent to the transmission of the property, while Congress is impotent to accomplish the same result with respect to legacies to states or their agents. We are reluctant to admit the inferiority of Congress in that particular.

*The judgment of the Circuit Court is therefore affirmed.*

Mr. Justice **White**, with whom concur Mr. Chief Justice **Fuller**, and Mr. Justice **Peckham**, dissenting:

It is conceded in the opinion of the court that the bequest upon which it is sought to levy the United States inheritance tax was made to a municipal corporation for a public, that is, a governmental, purpose. This being the admitted premise, I cannot give my assent to the proposition that the tax can be imposed. Nothing is better settled than that the United States has no power to tax the governmental attributes of the states, and that municipal corporations are agencies of the states, and not subject, as to their public rights and duties, to direct or indirect taxation by the United States. The doctrine has nowhere been more clearly stated than in *Pollock* v. *Farmers' Loan & T. Co.* 157 U. S. 429, 583, 584, 39 L. ed. 759, 820, 15 Sup. Ct. Rep. 673, 690. In that case, despite the division of opinion on other questions, the court was unanimous in holding that, in any event, income subject to taxation by the United States could not include interest derived from municipal bonds, because to include such interest in income subject to taxation would amount at least to an indirect charge upon a state governmental agency. Speaking through Mr. Chief Justice Fuller, the court said:

"The Constitution contemplates the independent exercise by the nation and the state, severally, of their constitutional powers.

"As the states cannot tax the powers, the operations, or the property of the United [256] States, nor the means which they employ *to carry their powers into execution, so it has been held that the United States have no power under the Constitution to tax either the instrumentalities or the property of a state.

"A municipal corporation is the representative of the state, and one of the instrumentalities of the state government. It was long ago determined that the property and revenues of municipal corporations are not subjects of Federal taxation. *The Collector* v. *Day*, 11 Wall. 113, 124, *sub nom. Buffington* v. *Day*, 20 L. ed. 122, 126; *United States* v. *Baltimore & O. R. Co.* 17 Wall. 322, 332, 21 L. ed. 597, 601."

It is true that in *United States* v. *Perkins*, 163 U. S. 625, 41 L. ed. 287, 16 Sup. Ct. Rep. 1073, and *Plummer* v. *Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 774, it was held in the one case that an inheritance tax of the state of New York could be taken out of a bequest to the United States, and in the other that a bequest of bonds of the United States was subject to a state inheritance tax. It is also true that in *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, it was decided that the United States had the power to impose an inheritance tax. But the ruling in none of these cases, in my opinion, sustains the decision now made. The power of the state of New York, which was upheld in both the Perkins and Coler cases, rested not simply on the authority of that state to impose an inheritance tax, but upon its admitted right to regulate the transmission or receipt of property by death. On the other hand, the right of the United States to levy an inheritance tax, which was upheld in *Knowlton* v. *Moore*, was based solely upon the power of the United States to tax, and that case, therefore, conveys no intimation that there is authority in the United States to levy an inheritance tax upon an object which it has no power under the Constitution to tax at all, either directly or indirectly. The distinction between the two, that is, between the broader power of a state, resulting from its authority not only to tax but also to regulate the transmission or receipt of property by death, and the narrower power, that is, of taxation alone, vested in the government of the United States, was explicitly pointed out in *Knowlton* v. *Moore*, 178 U. S. at page 57, 44 L. ed. at p. 976, and 20 Sup. Ct. Rep. at p. 754. Moreover, attention was specially directed to the obvious distinction between the two on page 58, L. ed. p. 977, Sup. Ct. Rep. p. 754, where it was said:

"Of course, in considering the power of Congress to impose *death duties, we elimi- [257] nate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the states, and not in Congress."

So also, the difference between the two had been previously accentuated in *Magoun* v. *Illinois Trust & Sav. Bank*, 170 U. S. 287, 288, 42 L. ed. 1040, 18 Sup. Ct. Rep. 594. There is no confusion between the two classes of cases, and no room in reason seems to me to exist for the assumption that things which are different are nevertheless one and the same. On the contrary, to my mind it appears that misconception will necessarily be caused by confounding wholly different powers and from supposing that, because a particular result is justified where a specified power exists, the same consequence must obtain where the power upon which it depends is wanting. Certainly, I assume, it cannot be said because a state has the right to regulate successions and, therefore, to prevent property from passing by death to

the United States, hence, also, the United States must have power, by regulating successions, to prevent property from passing by death to a state or its governmental agencies. And yet, in my opinion, this is the logical consequence of the doctrine that because the states may, in virtue of an authority belonging to them, accomplish a particular result as regards the United States, therefore the United States must have the right to bring about the same thing as to the states. The United States not possessing, as the states do, the right to regulate successions, when the United States calls into play its taxing power over the subject of the passage or receipt of property by death, the extent of its authority is to be measured solely by the scope of the taxing power conferred by the Constitution. When, on the contrary, the state imposes a burden upon the passage or receipt of property by death, its right to do so, if not sustainable by the exercise of the taxing power, finds adequate support in the authority vested in it to regulate the transmission or receipt of property on the occasion of death. This was clearly pointed out in *United States* v. *Perkins*, 163 U. S. 630, 41 L. ed. 289, 16 Sup. Ct. Rep. 1075, where it was said: "The legacy becomes the property of the United States only after it has suffered a diminution to [258] the amount of the tax, and it is *only upon this condition that the legislature assents to a bequest of it." Nor do I see the force of the suggestion that, as the tax in question is imposed upon the property in the hands of the executor before payment and distribution to the legatees, it, therefore, cannot be regarded as tax upon the right of the municipality to receive the legacy. It was held, after great deliberation, in *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747, that the inheritance taxes levied by the act of Congress were not imposed on the estate of the decedent, but were laid on the passing of the legacies, and on nothing else. It cannot be the intention now to bring about the confusion which must arise from overthrowing this settled doctrine, since it is conceded that the only question for decision is the right of Congress to impose a succession tax *upon the bequest to a municipal corporation, for a public purpose.* It being admitted that such is the question for decision, I do not perceive how that question can be solved by saying that the tax is not on the passing of the bequest to the municipality, but is imposed on the estate in the hands of the executor before the municipality receives its legacy. It was not only directly held in *Knowlton* v. *Moore* that the tax was on the transmission or the receipt of the legacy occasioned by death, and was therefore not on the property, not on the estate, not on the executor, but that it was also held to be a burden imposed on the recipient. The court said (p. 60, L. ed. p. 977. Sup. Ct. Rep. p. 755):

"Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but *this is a burden cast upon the recipient*, and not upon the power of the state to regulate."

This conclusion was absolutely essential to the construction of the statute which was sustained in *Knowlton* v. *Moore*. I do not perceive how it can be now held that the tax is valid because it is on the estate in the hands of the executor and not a burden on the recipient, when the case of *Knowlton* v. *Moore*, which explicitly holds to the contrary, is expressly approved. It is, however, suggested that the tax is only incidentally on the right of the corporation to receive, and therefore is valid. If "incidentally" is intended to refer to the subject upon which the tax is levied, then the proposition, in my *opinion, only reiterates the misconcep- [259] tion to which attention has been previously called, and it, besides, conflicts with the conceded premise that the question for decision is whether a tax can be validly imposed on the right of a municipal corporation to take a legacy. Such cannot be the question if there is no such question in the case. If the term "incidentally" conveys the thought that the tax is only indirectly on the corporation's right to take the bequest, and therefore it may be lawfully imposed, the doctrine overthrows the rule announced by Chief Justice Marshall in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 4 L. ed. 579, and reiterated in numberless cases since that decision, to the effect that where there is a want of constitutional power to tax a particular object, neither a direct nor an indirect tax can be imposed since the power to tax is the power to destroy. It to me seems that the tax here in question bears more directly upon the right of the corporation to take the bequest than did the tax which was condemned in *M'Culloch* v. *Maryland*. Assuredly, the inclusion, in income subject to taxation, of an amount derived from interest on municipal bonds, is less directly on the bonds than is the tax in this case on the right of the municipality to take; and yet, as I have said, in *Pollock* v. *Farmers' Loan & T. Co.* the tax on an income made up in part of interest on a municipal bond was declared to be void, because, even if indirect, it could not be levied where there was no power to tax at all. The distinction was pointed out in *Knowlton* v. *Moore*, where, in referring to the statement of Mr. Chief Justice Marshall in *M'Culloch* v. *Maryland*, that the power to tax involves the power to destroy, it was said (p. 60, L. ed. p. 977, Sup. Ct. Rep. p. 755):

"This principle is pertinent only when there is no power to tax a particular subject. . . . In other words, the power to destroy, which may be the consequence of taxation, is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that, in some particular instance, no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope."

To my mind, no doctrine more dangerous and more subversive of a long line of settled authority in this court could be an-

[260] nounced *than the statement that, although there is no power whatever to tax a particular object, the courts will nevertheless maintain a tax if it only indirectly puts a burden on the forbidden object, or that the tax may be sustained because, in the judgment of a court, the degree in which the Constitution has been violated is not great. Constitutional restrictions are, in my opinion, imperative, and ought not to be disregarded because, in a particular case, it may be the judgment of a court that the violation is not a very grievous one.

Testing the validity of the tax in this case solely by the extent of the power to tax conferred on the government of the United States by the Constitution, it follows, as the United States has no right to directly or indirectly burden a state governmental agency, that the tax here in question, in my opinion, cannot be sustained.

I am authorized to say that the CHIEF JUSTICE and Mr. Justice **Peckham** concur in this dissent.

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GEORGE H. MIFFLIN *et al., Appts.,*
*v.*
R. H. WHITE COMPANY.

(See S. C. Reporter's ed. 260-264.)

*Copyright—sufficiency of notice—entry in author's name of prior publication in copyrighted magazine.*

Any copyright protection for a work secured, under the act of February 3, 1831 (4 Stat. at L. 436, chap. 16), by entering for copyright in the name of the publishers the issues of a magazine which contain instalments thereof, is lost by the subsequent publication of the work in book form with no other notice of copyright than that of an entry in the author's name.

[No. 268.]

*Argued April 30, May 1, 1903. Decided June 1, 1903.*

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Massachusetts dismissing a bill in equity for violation of a copyright. *Affirmed.*

See same case below, 50 C. C. A. 661, 112 Fed. 1004.

Statement by Mr. Justice **Brown:**

This was a bill in equity by the firm of Houghton, Mifflin, & Co., as assignees of the [261] late Oliver Wendell Holmes, against *the R. H. White Company, for a violation of the copyright upon "The Professor at the Breakfast Table." The work was published serially during the year 1859, in the Atlantic Monthly Magazine, at first by Phillips, Sampson, & Co., and later by the firm of Ticknor & Fields. The first ten parts were published from January to October, 1859, by Phillips, Sampson, & Co. without copyright protection. The remaining two numbers for the months of November and December, 1859, were entered for copyright by Ticknor & Fields, whose copyright purported to cover the entire magazine. After its publication serially had been completed, Dr. Holmes published the entire work in one volume, containing a proper notice of copyright.

Upon this state of facts the circuit court dismissed the bill (107 Fed. 708), and, upon appeal to the circuit court of appeals, that court affirmed the decree. 50 C. C. A. 661, 112 Fed. 1004.

*Messrs.* **Samuel J. Elder** and **Edmund A. Whitman** argued the cause and filed a brief for appellants:

The decisions in the United States on the requirement of notice have never held a copyright bad unless some essential element has been wholly omitted, or such notice is misleading.

*Bleistein* v. *Donaldson Lithographing Co.* 188 U. S. 239, *ante*, 460, 23 Sup. Ct. Rep. 298; *Scribner* v. *Henry G. Allen Co.* 49 Fed. 854; *Scribner* v. *Clark*, 50 Fed. 473, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734; *Werckmeister* v. *Springer Lithographing Co.* 63 Fed. 808; *Sarony* v. *Burrow-Giles Lithographic Co.* 17 Fed. 591.

Many informalities in such notices have been sustained so long as they contained all the elements, and did not mislead, and the statute had been substantially complied with.

*Snow* v. *Mast*, 65 Fed. 995; *Falk* v. *Schumacher*, 48 Fed. 222; *Hefel* v. *Whitely Land Co.* 54 Fed. 179; *Bolles* v. *Outing Co.* 46 L. R. A. 712, 23 C. C. A. 594, 77 Fed. 966.

The true test of the sufficiency of a copyright notice is its likelihood to mislead.

*Callaghan* v. *Myers*, 128 U. S. 617, 32 L. ed. 547, 9 Sup. Ct. Rep. 177.

Another test is whether the statute has been substantially complied with.

*Myers* v. *Callaghan*, 10 Biss. 139, 5 Fed. 726; *Dwight* v. *Appleton*, 1 N. Y. Legal Obs. 195, Fed. Cas. No. 4,215.

The magazine notice is distributive and carries entire protection for each contributor, although not specially named in the notice.

The relation between author and publisher is so close as to constitute such an identity of interest that notice in the name of the publisher is equivalent to notice in the name of the author.

*Hole* v. *Bradbury*, L. R. 12 Ch. Div. 886; *Stevens* v. *Benning*, 1 Kay & J. 168; *Gibson* v. *Carruthers*, 8 Mees. & W. 343.

The law secures copyright to the author alone, and it belongs to him, although registered in the name of his publisher.

1 Curtis, Hist. of U. S. Const. p. 532; Curtis, Copyright, pp. 77-79; *Black* v. *Henry G. Allen Co.* 56 Fed. 764; *Pulte* v. *Derby*, 5 McLean, 328, Fed. Cas. No. 11,465; *Lawrence* v. *Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136; Drone, Copyright, pp. 260, 368.

Where copyright is registered in the pub-

lisher's name, the courts treat the author as the real owner and allow suits by him for protection of his copyright.

*Pulte* v. *Derby*, 5 McLean, 328, Fed. Cas. No. 11,465; *Scribner* v. *Clark*, 50 Fed. 473; *Belford C. & Co.* v. *Scribner*, 144 U. S. 488, 36 L. ed. 514, 12 Sup. Ct. Rep. 734; *Lawrence* v. *Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136.

It has been held in England that the court would enjoin a pirate from setting up in an action at law that the plaintiff did not have the legal title to the copyright when there was a real interest to be protected and the legal holder refused to allow suit in his name.

*Sweet* v. *Cater*, 11 Sim. 572.

This court always takes notice of the equitable interest, and if the equitable title to the copyright is complete this court will take care that the real question shall be tried, notwithstanding there may be a defect in respect of the legal property.

*Bohn* v. *Bogue*, 10 Jur. 420. See also *Chappell* v. *Purday*, 4 Younge & C. Exch. 485.

The statutory protection of literary property is a compensation given by the public to the author for dedicating his work to the public, and the public faith is pledged to secure him in his rights.

*Bleistein* v. *Donaldson Lithographing Co.* 188 U. S. 239, *ante*, 460, 23 Sup. Ct. Rep. 298; *Walter* v. *Lane* [1900] A. C. 539; *Henderson* v. *Tompkins*, 60 Fed. 758; *Brightley* v. *Littleton*, 37 Fed. 103; *Carlisle* v. *Colusa County*, 57 Fed. 979; *Drury* v. *Ewing*, 1 Bond, 540, Fed. Cas. No. 4,095; *Grant* v. *Raymond*, 6 Pet. 218, 8 L. ed. 376. See also *Wheaton* v. *Peters*, 8 Pet. 591, 8 L. ed. 1055; *Kendall* v. *Winsor*, 21 How. 322, 16 L. ed. 165; *Gyles* v. *Wilcox*, 2 Atk. 141; *Maxwell* v. *Hogg*, L. R. 2 Ch. 307; *Beckford* v. *Hood*, 7 T. R. 620.

The history of the notice clause shows that its purpose is merely to prevent the ignorant from being misled to their harm.

*Beckford* v. *Hood*, 7 T. R. 620.

The English decisions on their notice clause show that the name in a notice may be changed as the proprietorship of the copyright changes, so long as the change is not misleading.

*Sayer* v. *Dicey*, 3 Wils. 60; *Thompson* v. *Symonds*, 5 T. R. 41; *Weldon* v. *Dicks*, L. R. 10 Ch. Div. 247; *Newton* v. *Cowie*, 4 Bing. 234; *Rock* v. *Lazarus*, L. R. 15 Eq. 104.

Copyright can be secured for part of a work.

*Low* v. *Ward*, L. R. 6 Eq. 415; *Cary* v. *Longman*, 1 East, 358; *Kipling* v. *G. P. Putnam's Sons*, 120 Fed. 631; *Reid* v. *Maxwell*, 2 Times L. R. 790; *Black* v. *Henry G. Allen Co.* 9 L. R. A. 433, 42 Fed. 618; *Harper* v. *Shoppell*, 23 Blatchf. 431, 26 Fed. 519; *White* v. *Geroch*, 2 Barn. & Ald. 298; Drone, Copyright, 144–149; *Lawrence* v. *Dana*, 4 Cliff. 1, Fed. Cas. No. 8,136.

Every magazine is an illustration of the rule that the title has nothing necessarily to do with the contents, as the magazine title never changes, while its contents are always changing. There can be no copyright in a magazine title.

*Osgood* v. *Allen*, Holmes, 185, Fed. Cas. No. 10,603. See also *Jollie* v. *Jaques*, 1 Blatchf. 618, Fed. Cas. No. 7,437.

There is nothing in the language of the statute which prevents an author from changing the title between the time that he records it and the time that he deposits copies of the book.

*Black* v. *Henry G. Allen Co.* 56 Fed. 764.

President Walker's copyright on his work on the United States was not lost because he allowed it to be published as part of the contents of Vol. XXIII. of the Encyclopædia Britannica and under that title.

*Ibid.*

In *Johnson* v. *Newnes* [1894] 3 Ch. 663, the plaintiff was the author of a series of stories which he published serially and copyrighted under the general title of "Birds of the Night." One of the series with the subtitle "The Cabman's Story" was published separately under the latter title, and the objection was made that the title as registered was not used. The court, however, held the variance immaterial.

*Mr.* **Andrew Gilhooly** argued the cause and filed a brief for appellee:

The serial publication of "The Professor at the Breakfast Table," in the Atlantic Monthly, prior to any step being taken by Dr. Holmes towards securing a copyright of that work, invalidated the copyright thereof subsequently entered by Dr. Holmes.

*Holmes* v. *Hurst*, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606, Affirming 76 Fed. 757, 25 C. C. A. 610, 51 U. S. App. 271, 80 Fed. 514.

Where a copyright is originally invalid, no valid renewal can be secured.

*Wheaton* v. *Peters*, 8 Pet. 591, 8 L. ed. 1055; Drone, Copyright, 261.

The same exclusive right is continued the second term that existed the first.

*Wheaton* v. *Peters*, 8 Pet. 663, 8 L. ed. 1081.

The literary compositions, including the part of "The Professor at the Breakfast Table," which were published in the magazine number, received copyright protection—not under separate copyrights—but through the single copyright of the magazine number as an entire work, and a suit for reproduction of any part of that number must proceed for an infringement of a copyright of that number.

*Bennett* v. *Boston Traveler Co.* 41 C. C. A. 445, 101 Fed. 445; *Harper* v. *Shoppell*, 23 Blatchf. 431, 26 Fed. 519.

See also counsel's brief as reported in *Mifflin* v. *Dutton*, *post*, 1043.

Mr. Justice **Brown** delivered the opinion of the court:

That the copyright taken out by the author after the serial publication of his work in the Atlantic Monthly did not prevent the republication of so much of such serial as had appeared in the magazine prior to December, 1859, and before any steps taken to obtain a copyright, was settled by this court

in *Holmes* v. *Hurst*, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606, wherein we held that the appearance of a work in a magazine, by consent of the author, was such a publication as vitiated the copyright, under § 4 of the copyright act of 1831. 4 Stat. at L. 436, chap. 16.

The question presented by this case is whether entering for copyright the last two parts of "The Professor at the Breakfast Table" in the December number of 1859 of the Atlantic Monthly by Ticknor & Fields, proprietors of the magazine, was sufficient to save the rights of the author, the plaintiff [262] *having purchased such rights from the executor of the late Dr. Holmes.

By § 1 of the act of February 3, 1831, "the author or authors of any book or books . . . not printed and published, . . . and the executors, administrators, or *legal assigns* of such person or persons, shall have the sole right and liberty of printing," etc. By § 4, "no person shall be entitled to the benefit of this act, unless he shall, *before publication*, deposit a printed copy of the title of such book . . . in the clerk's office of the district court of the district wherein the author or *proprietor* shall reside," when the clerk is directed to make a record of the same, in a form prescribed, wherein is stated the date, the name of the author or proprietor, etc.; and, by § 5, the person entitled to the benefit of the act shall give information of his copyright, by giving notice on the title page, or page immediately following, in a prescribed form. Construing these statutes together, it would seem that the word "proprietor," in the 4th section, must practically have the same meaning as "legal assigns," in the 1st section, and was designed to give to the legal assignee of any author or authors the right to take out the copyright in his own name.

There is no evidence in this case, however, that Dr. Holmes, the author of "The Professor at the Breakfast Table," ever assigned to either of the proprietors of the magazine the authority to copyright his work. While there is an allegation in the bill, upon information and belief, that the work—the first ten parts of which were published by Phillips, Sampson, & Co.—was printed, published, and sold by said Phillips, Sampson, & Co. "by and with the consent and authority of the said Oliver Wendell Holmes, and in accordance with an agreement" made with him by the said firm, whereby he granted to them the right to print, publish, and sell his work in the said magazine, there is no allegation that either Phillips, Sampson, & Co. or their successors, Ticknor & Fields, were authorized to enter "The Professor at the Breakfast Table" for copyright, either in their own names, or in the name of the author; nor does there appear to be any connection whatever between the copyright taken out by Ticknor & Fields and that subsequently taken out by Dr. [263] Holmes. *The entry of the Atlantic Monthly by Ticknor & Fields was evidently not intended for the protection of the author of each article therein appearing, but for their own protection, and to prevent the republication of the December number of the Atlantic Monthly. While, without further explanation, it might, perhaps, be inferred that the author of a book who places it in the hands of publishers for publication, might be presumed to intend to authorize them to obtain a copyright in their own names (*Pulte* v. *Derby*, 5 McLean, 328, Fed. Cas. No. 11,465; *Belford, C. & Co.* v. *Scribner*, 144 U. S. 488, 504, 36 L. ed. 514, 519, 12 Sup. Ct. Rep. 734), it is apparent that there was no such intention in this case, inasmuch as, almost immediately after the publication of the December number of the magazine, Dr. Holmes himself entered the book, under its correct title, for copyright. That right was never assigned until 1895, when it was turned over to the plaintiffs by the executor of the author. Had the copyright been entered by Ticknor & Fields, as agents of Dr. Holmes, it is possible it might have been sustained, but there is nothing to indicate that Ticknor & Fields were acting for anyone else than themselves; and there is nothing to show that Dr. Holmes ever assented to their copyrighting his work. It is impossible to see how the copyright subsequently obtained by Dr. Holmes can derive any additional support from the fact that Ticknor & Fields chose to copyright the final chapters of the work in the Atlantic Monthly, since there is nothing to indicate that he even knew that any such proceedings were contemplated, much less that he authorized it.

But, even assuming that it was done by his authority, there is an additional question whether the entry of a book called the "Atlantic Monthly Magazine," in the name of Ticknor & Fields, is equivalent to entering a book called "The Professor at the Breakfast Table," by Oliver Wendell Holmes. The two entries were in the following form:

1. Entry of the Atlantic Monthly for the month of December, 1859: "Entered according to act of Congress in the year 1859, by Ticknor & Fields in the clerk's office of the district court of the district of Massachusetts."

2. Entry of "The Professor at the Breakfast Table:" "Entered according to act of Congress in the year 1859, by Oliver *Wen- [264] dell Holmes, in the clerk's office of the district court of the district of Massachusetts."

The object of the notice being to warn the public against the republication of a certain book by a certain author or proprietor, it is difficult to see how a person reading either of these notices would understand that they were intended for the protection of the same work. On their face they would seem to be designed for an entirely different purpose. While, owing to the great reputation of the work and the fame of its author, we might infer in this particular case that no publisher was actually led to believe that the book copyrighted by Dr. Holmes was not the same work which had appeared in the Atlantic Monthly, that would be an unsafe cri-

terion to apply to a work of less celebrity. It might well be that a book not copyrighted, or insufficiently copyrighted, by the author might be republished by another in total ignorance of the fact that it had previously appeared serially in a copyrighted magazine. It is incorrect to say that any form of notice is good which calls attention to the person of whom inquiry can be made and information obtained, since, the right being purely statutory, the public may justly demand that the person claiming a monopoly of publication shall pursue, in substance, at least, the statutory method of securing it. *Thompson* v. *Hubbard*, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710. In determining whether a notice of copyright is misleading, we are not bound to look beyond the face of the notice, and inquire whether, under the facts of the particular case, it is reasonable to suppose an intelligent person could actually have been misled.

With the utmost desire to give a construction to the statute most liberal to the author, we find it impossible to say that the entry of a book under one title by the publishers can validate the entry of another book of a different title by another person.

*The decree of the Court of Appeals was correct, and it is therefore affirmed.*

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265] *GEORGE H. MIFFLIN *et al., Appts.,*
*v.*
BENJAMIN F. DUTTON *et al.*

(See S. C. Reporter's ed. 265, 266.)

*Copyright—sufficiency of notice—magazine copyright of copyrighted book.*

A copyright of a book, obtained by an author in her own name, is vitiated for failure to comply with the requirement of the act of February 3, 1831, § 5 (4 Stat. at L. 436, chap. 16), that notice of copyright be inserted in each copy of the work, by its subsequent publication, with her consent, in a magazine with no other notice of copyright than that of the entry of the magazine in the name of its publishers.

[No. 267.]

*Argued April 30, May 1, 1903. Decided June 1, 1903.*

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the Circuit Court for the District of Massachusetts dismissing a bill in equity for the violation of a copyright. *Affirmed.*

See same case below, 50 C. C. A. 661, 112 Fed. 1004.

Statement by Mr. Justice **Brown:**

This was a bill in equity by the firm of Houghton, Mifflin, & Co., assignees of the late Harriet Beecher Stowe, against the firm of Houghton & Dutton, for a violation of the copyright of "The Minister's Wooing," by Mrs. Stowe.

"The Minister's Wooing" appeared serially in the Atlantic Monthly during the year 1859. The contract between Mrs. Stowe and her publishers, Phillips, Sampson, & Co., after reciting that Mrs. Stowe was the author and owned the copyright of, and right to publish, the book, gave to Phillips, Sampson, & Co. "the sole and exclusive right to publish the same in this country." After the first twenty-nine chapters had appeared in the first ten numbers of the Atlantic Monthly for the year 1859, the author published the whole work in book form on October 15, 1859, and took proper steps to secure the copyright, notice of which was given in the name of Harriet Beecher Stowe. At the date of this publication the last thirteen chapters had not been elsewhere published, but subsequently appeared in the November and December numbers, which were copyrighted by Ticknor & Fields, to whom the Atlantic Monthly had been sold, and in accordance with an arrangement with Mrs. Stowe, by which the contract between her and Phillips, Sampson, & Co. was assigned to Ticknor & Fields.

Upon this state of facts the circuit court dismissed the bill, *and, upon appeal to the [266] circuit court of appeals, that court affirmed the decree. Both this and the preceding case were covered by the same opinion.

*Messrs.* **Samuel J. Elder** and **Edmund A. Whitman** argued the cause and filed a brief for appellants.

For their contentions see their brief as reported in *Mifflin* v. *R. H. White Co., ante.* 1040.

*Mr.* **Andrew Gilhooly** argued the cause and filed a brief for appellees:

It is the settled law of this country that the right of an author to a monopoly of his publications is measured and determined by the copyright act.

*Holmes* v. *Hurst*, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606.

The right of action, as well as the copyright itself, is wholly statutory, and the means of securing any right of action are only those prescribed by Congress.

*Thompson* v. *Hubbard*, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710.

One of the conditions precedent to the perfection of a copyright was the insertion of notice of copyright in the prescribed form in all published copies.

*Ibid.*

The two copyrights which were entered by Ticknor & Fields on the November and December, 1859, numbers of the Atlantic Monthly, were clearly invalid so far as they related to the part of "The Minister's Wooing" therein published, because both of those copyrights were entered after publication of the whole of "The Minister's Wooing," by Harriet Beecher Stowe, in book form.

*Holmes* v. *Hurst*, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606.

As the first twenty-nine chapters of "The Minister's Wooing" were published in the Atlantic Monthly before Mrs. Stowe entered "The Minister's Wooing" for copyright, she could not obtain copyright for those twenty-nine chapters, and to that extent her attempted copyright of "The Minister's Wooing" was invalid.

*Holmes* v. *Hurst*, 174 U. S. 82, 43 L. ed. 904, 19 Sup. Ct. Rep. 606, Affirming 25 C. C. A. 610, 51 U. S. App. 271, 76 Fed. 757, 80 Fed. 514.

This requirement of giving the prescribed notice has always been held under all the statutes to be one of the conditions precedent to the perfection of a copyright, the other two being the deposit before publication of the printed copy of the title, and depositing in the proper office, within the prescribed time, of a copy or copies of the book.

*Thompson* v. *Hubbard*, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710; Drone, Copyright, p. 264.

While the courts have been liberal in holding any form of notice sufficient which contains the essentials of "name," "claim of exclusive right," and "date when obtained," they have not yet sustained the sufficiency of a notice which wholly omits some one of these essentials.

*Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; *Bolles* v. *Outing Co.* 46 L. R. A. 712, 23 C. C. A. 594, 45 U. S. App. 449, 77 Fed. 966; *Hoertel* v. *Raphael Tuck Sons & Co.* 94 Fed. 844.

There can be no valid copyright if the name of the person taking out the copyright is wholly omitted from the notice.

*Thompson* v. *Hubbard*, 131 U. S. 123, 33 L. ed. 76, 9 Sup. Ct. Rep. 710; *Osgood* v. *A. S. Aloe Instrument Co.* 83 Fed. 470, 69 Fed. 291; *Higgins* v. *Keuffel*, 30 Fed. 627, Affirmed in 140 U. S. 428, 35 L. ed. 470, 11 Sup. Ct. Rep. 731; 7 Am. & Eng. Enc. Law, 2d ed. p. 557; *Jackson* v. *Walkie*, 29 Fed. 15; *Baker* v. *Taylor*, 2 Blatchf. 82, Fed. Cas. No. 782.

The exact form of the notice is prescribed by law, and no equivalent is provided for, nor is any room for an equivalent left.

*Higgins* v. *Keuffel*, 30 Fed. 628; *Thompson* v. *Hubbard*, 131 U. S. 148, 33 L. ed. 85, 9 Sup. Ct. Rep. 710.

For other contentions of counsel see his brief as reported in *Mifflin* v. *R. H. White Co. ante*, 1040.

Mr. Justice **Brown** delivered the opinion of the court:

As the first twenty-nine chapters of "The Minister's Wooing" appeared in the Atlantic Monthly before any steps whatever were taken, either by the publishers or by Mrs. Stowe, to obtain a copyright, it follows that they, at least, became public property.

Mrs. Stowe's copyright of the last thirteen chapters would doubtless have been valid but for the fact that they subsequently appeared in the November and December numbers of the Atlantic Monthly without notice of such copyright. As we have already held that the copyright of the Atlantic Monthly by Ticknor & Fields did not operate as notice of the rights of the author to any article therein appearing, it follows from the case just decided that the appearance of the last thirteen chapters in the Atlantic Monthly vitiated the copyright under § 5, which provides that no person shall be entitled to the benefit of the act unless he shall give information of his copyright by causing to be inserted in the several copies of each and every edition published during the term secured a notice of such copyright.

It is exceedingly unfortunate that, with the pains taken by the authors of these works to protect themselves against republication, they should have failed in accomplishing their object; but the right being purely statutory, we see no escape from the conclusion that, unless the substance as well as the form of the statute be disregarded, the right has been lost in both of these cases.

*The decree in this case is also affirmed.*

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*NORTHERN PACIFIC RAILWAY COMPANY, *Plff. in Err.*, [267]

*v.*

ABNER TOWNSEND *et al.*

(See S. C. Reporter's ed. 267-273.)

*Adverse possession — of railroad right of way.*

Adverse ownership for private use under a state statute of limitations can confer no title on an individual to a portion of the right of way granted by the act of Congress of July 2, 1864, § 2 (13 Stat. at L. 365, chap. 217), to the Northern Pacific Railroad Company for the construction of its road.

[No. 160.]

*Submitted January 30, 1903. Decided May 4, 1903.*

IN ERROR to the Supreme Court of the State of Minnesota to review a judgment which reversed a judgment of the trial court in favor of the Northern Pacific Railroad Company in an action of ejectment brought by it to recover possession of a portion of its right of way. *Reversed.*

See same case below, 84 Minn. 152, 86 N. W. 1007.

Statement by Mr. Justice **White**:

This controversy concerns the validity of an asserted title, by adverse possession, to a portion of the right of way in Wadena county, Minnesota, granted to the Northern Pacific Railroad Company, its successors and assigns, by the 2d section of the act of Congress approved July 2, 1864. 13 Stat. at L. 365, chap. 217. The plaintiff in error, the Northern Pacific Railway Company, a corporation of the state of Wisconsin, acquired the railroad and property of the former named company on or about August 31, 1896, by purchase at a sale under foreclosure of certain mortgages.

By the 1st section of the act of 1864 the Northern Pacific Railroad Company was created a corporation, and was empowered to construct and maintain a continuous railroad and telegraph line from a point on

NOTE.—*On railroad rights of way*—see note to Illinois C. R. Co. v. Houghton (Ill.) 1 L. R. A. 214.

Lake Superior to some point on Puget sound. In the 2d section of the act it was provided, among other things, as follows:

[268] *"*And be it further enacted*, That the right of way through the public lands be and the same is hereby granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph, as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of 200 feet in width on each side of said railroad, where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; and the right of way shall be exempt from taxation within the territories of the United States. . . ."

Section 3 created a large land grant to secure the construction and continuous maintenance of the road. Construction was to be supervised by commissioners appointed by the President. Sec. 4. Section 5 provided how the road must be built, and that the company should not charge the government higher rates than individuals. The right of eminent domain was conferred by § 7. In § 8 conditions of the grant in respect to the commencement and completion of the construction of the road were enumerated. Section 9 reserved the right to Congress to complete the road. Section 10 secured to all the people of the United States the right to subscribe for its stock. Section 11 made it a post road subject to the use of the United States for government service, and subject to such regulations as Congress might impose respecting charges for government transportation. The remaining provisions of the act dealt with the mode of acceptance of the grant, the powers and duties of the board of directors and other officers of the company, the payments of cash assessments, and other subjects. We need only further particularly refer, however, to § 18, wherein it was provided that the railroad company, previous to commencing the construction of its road, should obtain the consent of the legislature of any state through which any portion of its line might pass. Such consent was duly given by the state of Minnesota.

[269] *The company signified its acceptance in writing, as provided in the act. In November, 1871, the line of road was definitely located, and a duly approved map was filed showing said definite location. This line crossed the northwest quarter of section 24, township 134 north, of range 35 west, of the fifth principal meridian, Minnesota. At that time, as well as prior thereto, said quarter section was public land, to which the United States had full title, and the same was not reserved or otherwise appropriated, nor had any entries or filings or applications to make entry or filing thereon been made. During the years 1870 and 1871 the railroad was duly constructed through the section referred to, and the portion of the road thus constructed was thereafter duly accepted by the President.

In December, 1878, and February, 1882, homestead entries were initiated on said northwest quarter of section 24, and on November 30, 1885, and July 24, 1889, patents, which purported to convey the whole of each 40-acre subdivision, were issued to Abner Townsend and George H. Brown, respectively. Subsequently, in 1886 and 1888, the title to said northwest quarter was conveyed to the defendant in error Minerva Townsend. During the occupancy of the homesteaders, they cultivated up to the line of the ordinary and snow fences of the railroad, situated respectively 50 and 100 feet from the center of the track, and such occupancy continued a sufficient length of time to constitute a title by adverse possession under the limitation statutes of Minnesota. Demand was made by the railroad company for possession of that portion of the quarter section which was within the granted right of way, and, upon noncompliance, an action of ejectment was brought in a court of the state of Minnesota to recover possession of the disputed ground. The case was tried by the court without a jury. Lengthy findings of fact were made, and, as a conclusion of law, the court found that the railroad company was entitled to the possession of the premises described, and entered judgment accordingly.

On appeal the supreme court of Minnesota reversed the judgment of the trial court. 84 Minn. 152, 86 N. W. 1007. The cause was then brought to this court.

*Messrs.* **C. W. Bunn** and **James B. Kerr** submitted the cause for plaintiff in error:

This right of way is not a mere easement, or right of passage, but a fee title, conferring on the company the sole and exclusive right of occupation.

*New Mexico* v. *United States Trust Co.* 172 U. S. 171, 43 L. ed. 407, 19 Sup. Ct. Rep. 128.

The company was entitled to the full width of 200 feet on each side of the road, and this width could not be diminished by any court or tribunal upon the ground that a less width was sufficient for railroad purposes.

*Northern P. R. Co.* v. *Smith*, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794.

Under the decisions of this court the corporation is incapable of alienating any part of the right of way granted by Congress.

*York & M. L. R. Co.* v. *Winans*, 17 How. 30, 15 L. ed. 27; *Gue* v. *Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635; *East Alabama R. Co.* v. *Doe ex dem. Visscher*, 114 U. S. 340, 29 L. ed. 136, 5 Sup. Ct. Rep. 869; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Hartford F. Ins. Co.* v. *Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33; *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 23 L. ed. 356; *Slocumb* v. *Chicago, B. & Q.*

*R. Co.* 57 Iowa, 675, 11 N. W. 641; *Union P. R. Co.* v. *Kindred*, 43 Kan. 134, 23 Pac. 112; *Southern P. Co.* v. *Hyatt*, 132 Cal. 240, 54 L. R. A. 522, 64 Pac. 272; *East Tennessee, V. & G. R. Co.* v. *Telford*, 89 Tenn. 293, *sub nom. East Tennessee, V. & G. R. Co.* v. *West*, 10 L. R. A. 855, 14 S. W. 776.

*Mr.* **Harold Preston** submitted the cause for defendants in error. *Messrs. A. G. Broker* and *F. T. Post* were with him on the brief:

The nature of the right of way through the public lands, which the railroad obtained by the grant, was no different from that which it had acquired from private lands by purchase or by condemnation proceedings under the laws of the several states through which it passed.

*Northern P. R. Co.* v. *Spokane*, 12 C. C. A. 246, 29 U. S. App. 81, 64 Fed. 508.

Not only did the predecessor of plaintiff, more than twenty years ago, dedicate streets across its right of way in the heart of the city of Spokane, but it also sold and conveyed lots and blocks carved out of this right of way to many different parties, who have erected thereon hotels, warehouses, and other permanent structures.

*Northern P. R. Co.* v. *Ely*, 25 Wash. 386, 54 L. R. A. 526, 65 Pac. 555.

A railroad company may lose part of its right of way by adverse possession.

*St. Paul* v. *Chicago, M. & St. P. R. Co.* 45 Minn. 387, 48 N. W. 17, 22; *Wayzata* v. *Great Northern R. Co.* 50 Minn. 438, 52 N. W. 913; *Pittsburg, C. C. & St. L. R. Co.* v. *Stickley*, 155 Ind. 312, 58 N. E. 192; *Illinois C. R. Co.* v. *Houghton*, 126 Ill. 233, 1 L. R. A. 213, 18 N. E. 301; *Illinois C. R. C.* v. *O'Connor*, 154 Ill. 550, 39 N. E. 563; *Illinois C. R. Co.* v. *Moore*, 160 Ill. 9, 43 N. E. 364; *Donahue* v. *Illinois C. R. Co.* 165 Ill. 640, 46 N. E. 714; *Illinois C. R. Co.* v. *Wakefield*, 173 Ill. 564, 50 N. E. 1002; *Matthews* v. *Lake Shore & M. S. R. Co.* 110 Mich. 170, 67 N. W. 1111; *Turner* v. *Fitchburg R. Co.* 145 Mass. 433, 14 N. E. 627; *Gay* v. *Boston & A. R. Co.* 141 Mass. 407, 6 N. E. 236; *Paxton* v. *Yazoo & M. Valley R. Co.* 76 Miss. 536, 24 So. 536; *Spottiswoode* v. *Morris & E. R. Co.* 61 N. J. L. 322, 40 Atl. 505; *Northern P. R. Co.* v. *Ely*, 25 Wash. 384, 54 L. R. A. 526, 65 Pac. 555; *Bobbett* v. *South Eastern R. Co.* L. R. 9 Q. B. Div. 424; *Norton* v. *London & N. W. R. Co.* L. R. 13 Ch. Div. 268; *Erie & N. R. Co.* v. *Rousseau*, 17 Ont. App. Rep. 483.

Abandonment of part of a right of way, the remainder being still used, will not extinguish the entire right of way, but only so much of it as has been abandoned.

*Lattimer* v. *Livermore*, 72 N. Y. 174; *Louisville & N. R. Co.* v. *Covington*, 2 Bush, 526.

If a grant is to be presumed by adverse possession, the plaintiff would be in the same position as if it had given a deed of the property to defendants and was seeking to set it aside and for possession, upon the ground that the deed was *ultra vires*. This it could not do.

*St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 145 U. S. 393, 36 L. ed. 748, 12 Sup. Ct. Rep. 953.

If it would be in violation of its powers for the plaintiff to alienate or abandon any part of its right of way, no matter how small or useless, the validity of its acts can be questioned only by the government.

*Union Nat. Bank* v. *Matthews*, 98 U. S. 621, 25 L. ed. 188; *American Emigrant Co.* v. *Adams County*, 100 U. S. 61, 25 L. ed. 563; *Fritts* v. *Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

At the outset, we premise that, as the grant of the right of way, the filing of the map of definite location, and the construction of the railroad within the quarter section in question preceded the filing of the homestead entries on such section, the land forming the right of way therein was taken out of the category of public lands subject to pre-emption and sale, and the Land Department was therefore without authority to convey rights therein. It follows that the homesteaders acquired no interest in the land within the right of way because of the fact that the grant to them was of the full legal subdivisions.

Conceding the adverse possession and its efficacy under the state law as against the railroad right of way to be as found by the state court, the sole question which arises, then, for decision is whether, in view of the provisions of the act of Congress to which we have referred, an asserted title by adverse possession can be made efficacious as respects the property in controversy. And depending, as this question does, upon the nature and effect of the acts of Congress, its solution necessarily involves a Federal question.

In determining whether an individual, for private purposes, may, by adverse possession, under a state statute of limitations, acquire title to a portion of the right of way granted by the United States for the use of this railroad, we must be guided by the doctrine enunciated in *Packer* v. *Bird*, 137 U. S. 661, 669, 34 L. ed. 819, 821, 11 Sup. Ct. Rep. 210, and approvingly referred to in *Shively* v. *Bowlby*, 152 U. S. 1, 44, 38 L. ed. 331, 347, 14 Sup. Ct. Rep. 548, 564, *viz.*: "The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership *of property conveyed by the [271] government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee." Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (*New Mexico* v. *United States Trust Co.* 172 U. S. 171, 181, 43 L. ed. 407, 410, 19 Sup. Ct. Rep. 128; *St. Joseph &*

*Denver C. R. Co.* v. *Baldwin*, 103 U. S. 426, 26 L. ed. 578), it must be held that the fee passed by the grant made in § 2 of the act of July 2, 1864. But, although there was a present grant, it was yet subject to conditions expressly stated in the act, and also (to quote the language of the *Baldwin Case*) "to those necessarily implied, such as that the road shall be . . . used for the purposes designed." Manifestly, the land forming the right of way was not granted with the intent that it might be absolutely disposed of at the volition of the company. On the contrary, the grant was explicitly stated to be for a designated purpose,—one which negated the existence of the power to voluntarily alienate the right of way or any portion thereof. The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. This being the nature of the title to the land granted for the special purpose named, it is evident that, to give such efficacy to a statute of limitations of a state as would operate to confer a permanent right of possession to any portion thereof upon an individual for his private use, would be to allow that to be done by indirection which could not be done directly; for, as said in *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 468, 23 L. ed. 356, 361, "a railroad company . . . is not at liberty to alienate any part of it so as to interfere with the full exercise of the franchises granted." Nor can it be rightfully contended that the portion of the right of way appropriated was not necessary for the execution of the [272] powers conferred *by Congress, for, as said in *Northern P. R. Co.* v. *Smith*, 171 U. S. 261, 275, 43 L. ed. 158, 163, 18 Sup. Ct. Rep. 794, 799, speaking of the very grant under consideration: "By granting a right of way 400 feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance." Neither courts nor juries, therefore, nor the general public, may be permitted to conjecture that a portion of such right of way is no longer needed for the use of the railroad, and title to it has vested in whomsoever chooses to occupy the same. The whole of the granted right of way must be presumed to be necessary for the purposes of the railroad, as against a claim by an individual of an exclusive right of possession for private purposes.

To repeat, the right of way was given in order that the obligations to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company.

Of course, nothing that has been said in anywise imports that a right of way granted through the public domain within a state is not amenable to the police power of the state. Congress must have assumed when making this grant, for instance, that in the natural order of events, as settlements were made along the line of the railroad, crossings of the right of way would become necessary, and that other limitations in favor of the general public upon an exclusive right of occupancy by the railroad of its right of way might be justly imposed. But such limitations are in no sense analogous to claim of adverse ownership for private use.

As our construction of the act of Congress determines the question presented for decision, it becomes unnecessary to review the cases which have been called to our attention supporting, on the one hand, or denying, on the other, the broad contention *that ti- [273] tle by adverse possession, under state statutes of limitation, may be acquired by individuals to land within the right of way of a railroad. None of the cases adverted to as holding the affirmative of the proposition even suggest that the rule would be applicable where its enforcement would conflict with the powers and duties imposed by law on a railroad corporation in a given case. As here we find that the nature of the duties imposed by Congress upon the railroad company and the character of the title conferred by Congress in giving the right of way through the public domain are inconsistent with the power in an individual to acquire, for private purposes, by limitation, a portion of the right of way granted by Congress, the cases in question are inapposite.

*The judgment of the Supreme Court of Minnesota must be reversed*, and the case remanded to that court for further proceedings not inconsistent with this opinion. And it is so ordered.

Mr. Justice **Harlan** and Mr. Justice **Brown** dissent.

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INTERSTATE COMMERCE COMMISSION, *Appt.*,

*v.*

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Western Railway of Alabama, and Atlanta & West Point Railroad Company.

(See S. C. Reporter's ed. 273-287.)

*Carriers — freight rates—discrimination—long and short hauls—possible competition.*

1. Freight rates from New Orleans, Louisiana,

NOTE.—*On discrimination in freight rates*—see notes to United States v. Tozer (D. C. E. D. Mo.) 2 L. R. A. 444; Burlington, C. R. & N. R. Co. v. Dey (Iowa) 12 L. R. A. 436.

to LaGrange, Georgia, arrived at by charging the through rate to Atlanta, Georgia, fixed as the result of competition at that point, and adding thereto the local rate back over the same line from Atlanta to LaGrange, are not obnoxious to the prohibition of the Interstate Commerce Act against undue discrimination and a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions, because stations between LaGrange and Atlanta to which the same rule is applied receive lower rates from New Orleans than LaGrange, where the LaGrange rates, if based on the nearest competitive point south, with the local rate from such point added, would be still higher.

2 The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those for a longer haul to a point where competition prevails, obnoxious to the prohibition of the Interstate Commerce Act against a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions.

[No. 214.]

*Argued April 13, 1903. Decided May 18, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which reversed a decree of the Circuit Court for the Southern District of Alabama sustaining an order of the Interstate Commerce Commission and remanded the cause for further proceedings. *Affirmed.*

See same case below, 46 C. C. A. 685, 108 Fed. 988.

Statement by Mr. Justice **White:**

The connecting roads of the appellees form the short line — 496 miles in length — between New Orleans and Atlanta. The through line consists of the Louisville & Nashville Railroad from New Orleans to Montgomery, the Western Railway of Alabama between Montgomery and West Point, and the Atlanta & West Point Railroad from West Point to Atlanta.

LaGrange is on the Western Railway of Alabama, 104 miles from Montgomery. Opelika lies between Montgomery and LaGrange, and is 38 miles distant from the latter place. LaGrange and the following stations between it and Atlanta are distant from Atlanta, as follows: LaGrange, 71 miles; Hogansville, 58 miles; Newnan, 30 miles; Palmetto, 25 miles; and Fairburn, 18 miles.

Pursuant to § 13 of the Act to Regulate Commerce [24 Stat. at L. 383, chap. 104, U. S. Comp. Stat. 1901, p. 3164], Fuller E. Calloway, a merchant of LaGrange, filed a complaint against the appellees herein with the Interstate Commerce Commission. We take from the opinion rendered by the Commission in that proceeding the following synopsis of the averments of the complaint and answer:

"The complaint alleges, in substance, that defendants are subject to the provisions of the Act to Regulate Commerce; that rates charged by them for the transportation by continuous carriage or shipment of freights, wholly by railroad, from New Orleans, Louisiana, to LaGrange, Georgia, are unjust and unreasonable *in themselves, and rela- [275] tively unjust and unreasonable as compared with lower rates charged by defendants for carrying the same commodities over longer distances from New Orleans through LaGrange to Hogansville, Newnan, Palmetto, and Fairburn, Georgia, and other localities; that defendants' said rates from New Orleans to LaGrange and said longer-distance points and other localities unjustly discriminate against complainant and others, the city of LaGrange and vicinity and traffic carried thereto, and subject merchants and dealers therein to undue and unreasonable prejudice and disadvantage, and give undue and unreasonable preference and advantage to merchants and dealers at Hogansville, Newnan, Palmetto, Fairburn, and other localities and traffic consigned thereto; that defendants' said rates from New Orleans to LaGrange, Hogansville, Newnan, Palmetto, and Fairburn give them greater aggregate compensation for the transportation of like kind of property, under substantially similar circumstances and conditions, for the shorter distance from New Orleans to LaGrange than for the longer distance over the same line, in the same direction, from New Orleans to Hogansville, Newnan, Palmetto, or Fairburn; that the rates charged by defendants as aforesaid are in violation of §§ 1, 2, 3, and 4 of the Act to Regulate Commerce. The rates and distances involved are set forth in the complaint, and it is further alleged therein that the lowest rate charged by defendants from New Orleans to LaGrange yields them over 1½ cents per ton for each mile of haul, and that their highest rate between said points affords them nearly 6¾ cents revenue per ton per mile.

"The defendants filed a joint answer, in which they admit that the rates charged are substantially as alleged in the complaint; that their rates to LaGrange amount for each mile to 1.36 cents per ton on the lowest class of freight (D), and to 6.71 cents per ton on the highest class (1), and that the rates for the shorter distance from New Orleans to LaGrange are more than they charge for the longer distances in the same direction from New Orleans to Hogansville, Newnan, Palmetto, and Fairburn; but they deny that the transportation to LaGrange Hogansville, and other points mentioned is conducted under substantially *similar cir- [276] cumstances and conditions, and thereupon further deny that their said rates are in violation of § 4 of the statute. The defendants also deny the unreasonableness, injustice, wrongful discrimination, and undue and unreasonable prejudice and preference, advantage, and disadvantage, alleged by complainant under the 1st, 2d and 3d sections of the act. The answer contains statements of rates from New Orleans to the points in question, and to and from Montgomery, Alabama, and Atlanta, Georgia, showing, also, that the through rates to LaGrange, Hogansville, and the other points mentioned

are made by combination of rates to Atlanta with local rates back over the same line to Fairburn, Palmetto, Newnan, Hogansville, and LaGrange; and it is further averred that the disparities in rates complained of are caused by a competitive situation at Atlanta which compels low rates to that point from New Orleans. The competitive circumstances and conditions at Atlanta are stated in the answer to be the competition of such supply markets as New Orleans, Baltimore, and other northeastern cities, Cincinnati, Louisville, and other Ohio river cities, and the competition of carriers from such markets to Atlanta, and to have resulted, after frequent and disastrous rate wars, in the establishment of certain relative rates from these various market cities to Atlanta, a disturbance of which would immediately lead to a repetition of such wars. Similar competitive conditions are claimed by the defendants to exist at Montgomery, Alabama, through which freight passes over defendants' through line to LaGrange and the other points mentioned or referred to in the complaint, and they further assert that the present relation of rates to Montgomery and Atlanta must also, under existing circumstances, be maintained. The following extract from the answer seems to succinctly set out the defendants' position in this case:

"The rates from Atlanta to those stations, respectively, LaGrange, Hogansville, Newnan, Palmetto, and Fairburn, are fixed by the Georgia Railroad Commission, and are just and reasonable. The rates from New Orleans to Atlanta are fixed by the competition between markets, and the competition between carriers, as explained above, and are just and reasonable. The rates charged by respondents are the sum [277] of those rates, *and, therefore, respondents' rates themselves are just and reasonable. The reason that Fairburn, Palmetto, Newnan, and Hogansville have lower rates than LaGrange is due alone to the fact that they are nearer to Atlanta, and not to any favoritism or discrimination on the part of the respondents."

The evidence introduced at the hearing before the Commission, in support of the complaint, consisted solely of the testimony of the complainant, which dealt merely with the discrimination alleged to exist against LaGrange in the lesser rates accorded to greater distance points from New Orleans beyond LaGrange towards Atlanta, *viz.*, Hogansville, Newnan, Palmetto, and Fairburn. Much evidence — both oral and documentary — was introduced on behalf of the railroads in support of the averments of the answer.

The various contentions contained in the complaint were sustained by the Commission, which made voluminous findings, and issued an order requiring the railroads in general terms to "wholly cease and desist from each and every of the violations of law" found and set forth in its report and opinion. The remaining clauses of the order are set out in the margin†

†Portion of Order of Commission.

It is further ordered and adjudged that said defendants, the Louisville & Nashville Railroad Company, the Western Railway of Alabama, and the Atlanta & West Point Railroad Company, do more particularly cease and desist from violations of the law, so found and set forth in said report and opinion as follows, to wit:

1. That said defendants and each of them cease and desist from charging, demanding, collecting, or receiving rates for the transportation of the several kinds or classes of freight from New Orleans, Louisiana, to LaGrange, Georgia, which, as a whole or upon any article of merchandise, are in any respect unreasonable or unjust.

2. That said defendants and each of them cease and desist from charging, demanding, collecting, or receiving the following unreasonable, unjust, and unlawful rates for the transportation from New Orleans, Louisiana, to La Grange, Georgia, of articles embraced in the various classes of their freight classification, that is to say:

*Classes; rates in cents per 100 pounds.*

| 1. | 2. | 3. | 4. | 5. | 6. |
|---|---|---|---|---|---|
| 143 | 124 | 109 | 93 | 74 | 59 *Per barrel.* |

| A. | B. | C. | D. | E. | H. | F. |
|---|---|---|---|---|---|---|
| 41 | 48 | 33 | 1-229 | 66 | 74 | 59 |

3. That said defendants and each of them cease and desist from charging, demanding, collecting, or receiving rates or charges for the transportation of freight articles from New Orleans, Louisiana, to LaGrange, Georgia, which are equal to rates or charges contemporaneously in force over their railroads on like traffic carried from New Orleans through La Grange to Atlanta, Georgia: added to local rates in force on such traffic for local service over the Atlanta & West Point Railroad back from Atlanta to La Grange, such combined rates having been found and held in and by said report and opinion of the Commission herein to be unreasonable, unjust, unduly prejudicial, and unlawful, and so unreasonable, unjust, unduly prejudicial, and unlawful to the extent of such added local charges of the defendant the Atlanta & West Point Railroad Company.

4. That said defendants, and each of them, cease and desist from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transporting of freight articles from New Orleans, Louisiana, for the shorter distance to LaGrange, Georgia, than they contemporaneously charge, demand, collect, or receive for transporting the like kind of freight traffic from New Orleans for the longer distance over the same line in the same direction to Hogansville, or Newnan, or Palmetto, or Fairburn, Georgia, the shorter being included within the longer distance.

5. That said defendants, and each of them, cease and desist from charging, demanding, collecting, or receiving unreasonable, unjust, unduly prejudicial, and unlawful rates for the transportation of freight articles from New Orleans to LaGrange, which are higher than aggregate rates contemporaneously charged, demanded, collected, or received by them, or either of them, for the transportation of like kind of freight from New Orleans to Hogansville, or from New Orleans to Newnan, or from New Orleans to Palmetto, or from New Orleans to Fairburn.

6. That said defendants, and each of them, in

[278] *The railroads not having obeyed the order, the Commission instituted the present proceeding in equity, in the circuit court of the United States for the southern district of Alabama. That court sustained the order [279] of the Commission. *The circuit court of appeals reversed the decree of the circuit court and remanded the cause, but "without prejudice to the right of the Commission to proceed, upon the evidence already introduced before it, or upon such further pleadings and evidence as it may allow to be made or introduced, to hear and determine the controversy according to law."

The cause was thereupon appealed to this court.

*Mr.* **L. A. Shaver** argued the cause and filed a brief for appellant:

Competition cannot justify rates excessive in themselves.

*Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 674, 44 L. ed. 319, 20 Sup. Ct. Rep. 209.

Through rates are lower than the sum of the separate rates of the different carriers composing the through line.

*Chicago & N. W. R. Co.* v. *Osborne*, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 912; *Minneapolis & St. L. R. Co.* v. *Minnesota*, 186 U. S. 262, 46 L. ed. 1155, 22 Sup. Ct. Rep. 900.

Where goods are shipped under a through bill of lading the several roads constituting the through line have thereby subjected themselves to "a common control, management, or arrangement for a continuous carriage" within the meaning of the Act to Regulate Commerce.

*Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 193, 40 L. ed. 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *United States ex rel. Interstate Commerce Commission* v. *Seaboard R. Co.* 82 Fed. 563.

The charge of a local rate as a part of a through rate, where the hauls are through hauls, and not local, and the extra expense of local hauls is not incurred, is prima facie excessive.

*Augusta Southern R. Co.* v. *Wrightsville & T. R. Co.* 74 Fed. 527; *Minneapolis & St. L. R. Co.* v. *Minnesota*, 186 U. S. 262, 46 L. ed. 1155, 22 Sup. Ct. Rep. 900; *Chicago & N. W. R. Co.* v. *Osborne*, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 912.

There is no excuse whatever for charging local rates as parts of through rates to points surrounding trade centers or basing points.

*Re Louisville & N. R. Co.* 1 Inters Com. Rep. 278; *Martin* v. *Chicago, B. & Q. R. Co.* 2 Inters. Com. Rep. 32; *Re Atlanta & W. P. R. Co.* 2 Inters. Com. Rep. 461; *Union P. R. Co.* v. *Goodridge*, 149 U. S. 690, 37 L. ed. 902, 13 Sup. Ct. Rep. 970.

The Commission does not require equal mileage rates.

*McMorran* v. *Grand Trunk R. Co.* 2 Inters. Com. Rep. 604.

The Atlanta rates are presumed to be reasonably high.

*Interstate Commerce Commission* v. *East Tennessee, V. & G. R. Co.* 85 Fed. 114.

The presumption that the Atlanta rates are reasonably remunerative is strengthened by the fact that they were originally established by agreement between the carriers.

*United States* v. *Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540.

Competition cannot justify unremunerative rates to competitive points.

*Smyth* v. *Ames*, 169 U. S. 541, 42 L. ed. 847, 18 Sup. Ct. Rep. 418; *Interstate Commerce Commission* v. *East Tennessee, V. & G. R. Co.* 85 Fed. 115; *Behlmer* v. *Louisville & N. R. Co.* 28 C. C. A. 229, 42 U. S. App. 581, 83 Fed. 898; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 20, 45 L. ed. 726, 21 Sup. Ct. Rep. 516.

Whether discrimination to the extent practised is justifiable, is a question to be determined by the courts or the Commission.

*Interstate Commerce Commission* v. *East Tennessee, V. & G. R. Co.* 85 Fed. 118; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 173, 42 L. ed. 425, 18 Sup. Ct. Rep. 45.

The situation of La Grange is just such a

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the transportation of freight articles from New Orleans, cease and desist from charging and collecting rates or compensation which subject complainant and other dealers and consignees at LaGrange, Georgia, their traffic, or the city of LaGrange itself, to undue and unreasonable prejudice or disadvantage in any respect whatsoever, and also cease and desist from giving any undue or unreasonable preference or advantage to merchants, dealers, and consignees at Atlanta, Fairburn, Palmetto, Newnan, or Hogansville, or to their traffic, or to either of such cities or localities, namely, Atlanta, Fairburn, Palmetto, Newnan, or Hogansville, as against complainant and said other dealers and consignees at LaGrange, or the city of LaGrange itself.

And it is further ordered and adjudged that said defendants be, and they severally are hereby, recommended to so revise their schedules of rates and charges that the aggregate compensation charged and collected by them for the transportation from New Orleans to LaGrange of freight articles embraced in the several freight classes shall not exceed reasonable, just, and lawful class rates in cents per hundred pounds and per barrel on Class F as follows, to wit:

| | | | | | | |
|---|---|---|---|---|---|---|
| Class..... | 1. | 2. | 3. | 4. | 5. | 6. |
| Rates..... | 103 | 88 | 77 | 64 | 52 | 42 |
| Class.... | A. | B. | C. | D. | E. | H. | F. |
| Rates.... | 24 | 31 | 24 | 20 | 44 | 49 | 40 |

—and that they make corresponding reductions or relatively reasonable and just charges in commodity rates, otherwise known as exceptions to class rates, from New Orleans to LaGrange, aforesaid.

And it is further ordered, that a notice embodying this order be forthwith sent to each of the defendant corporations, together with a copy of the report and opinion of the Commission herein, in conformity with the 15th section of the Act to Regulate Commerce.

situation as the Act to Regulate Commerce was designed to remedy, and this case falls clearly within the evil which that act was enacted to suppress.

*Union P. R. Co.* v. *Goodridge*, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970.

Statutes must be given operation.

Endlich, Interpretation of Statutes, pp. 351, 352; Potter's Dwarr. Stat. p. 189.

The right to discriminate on the ground of competition is to be exercised with due regard to the interest of the locality to which the goods are shipped.

*Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 674, 44 L. ed. 319, 20 Sup. Ct. Rep. 209; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 167, 42 L. ed. 423, 18 Sup. Ct. Rep. 45; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 19, 45 L. ed. 726, 21 Sup. Ct. Rep. 516; *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 220, 40 L. ed. 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

This court has taken pains in all its decisions upon this subject to safeguard the interests of the locality to which the goods are shipped.

*Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 220, 40 L. ed. 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 674, 44 L. ed. 319, 20 Sup. Ct. Rep. 209.

*Mr.* **Ed. Baxter** argued the cause and filed a brief for appellees:

Though the lesser charge to the competitive point, Atlanta, may "seemingly" give a preference to that point, and the greater rate to the noncompetitive point, La Grange, may "apparently" engender a discrimination against it, such preference in favor of Atlanta is not "undue," and such discrimination against La Grange is not "unjust."

*East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 18, 19, 45 L. ed. 725, 726, 21 Sup. Ct. Rep. 516.

The order of the Commission concedes in effect that La Grange's rates are reasonable in and of themselves.

*East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 23, 45 L. ed. 727, 21 Sup. Ct. Rep. 516.

The first section of the Act to Regulate Commerce relates to the reasonableness of rates "in and of themselves," as contradistinguished from rates which constitute unjust discrimination or undue preference.

*Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 277, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Kinnavey* v. *Terminal R. Asso.* 81 Fed. 804.

The burden of proof under the first section rests upon the appellant.

*Harding* v. *Chicago, St. P. M. & O. R. Co.* 1 Inters. Com. Rep. 375; *Brewer* v. *Louisville & N. R. Co.* 7 Inters. Com. Rep. 234.

The evidence is wholly insufficient to enable either the Commission. or this court, to intelligently decide that the rates to La Grange are unreasonably high in and of themselves.

*Ames* v. *Union P. R. Co.* 4 Inters. Com. Rep. 835, 64 Fed. 173; *Smyth* v. *Ames*, 169 U. S. 546, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 172, 44 L. ed. 419, 20 Sup. Ct. Rep. 336; *United States* v. *Trans-Missouri Freight Asso.* 166 U. S. 331, 41 L. ed. 1024, 17 Sup. Ct. Rep. 540; *Van Patten* v. *Chicago, M. & St. P. R. Co.* 81 Fed. 551; *Southern P. Co.* v. *California Railroad Comrs.* 78 Fed. 263; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 402–413, 38 L. ed. 1025–1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The appellees are entitled to a fair return upon the value of that which they employ for the public convenience.

*Ames* v. *Union P. R. Co.* 4 Inters. Com. Rep. 835, 64 Fed. 176; *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Reagan* v. *Farmers' Loan & T. Co.* 154 U. S. 412, 38 L. ed. 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth* v. *Ames*, 169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418.

The schedule of rates, as a whole, must control.

*Chicago & N. W. R. Co.* v. *Dey*, 1 L. R. A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 881; *Chicago, M. & St. P. R. Co.* v. *Minnesota*, 134 U. S. 460, 33 L. ed. 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

Freight rates are controlled by practical commercial considerations; and they cannot be adjusted by mathematical calculation.

*Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 225, 40 L. ed. 949, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission* v. *Louisville & N. R. Co.* 73 Fed. 421; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 5 Inters. Com. Rep. 685, 21 C. C. A. 51, 41 U. S. App. 453, 74 Fed. 721.

In ascertaining the value of a road, upon which value "the company is entitled to ask a fair return," it is proper to consider, not only the original cost of construction, but also "the amount expended in permanent improvements."

*Smyth* v. *Ames*, 169 U. S. 546, 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418.

Combination rates are made upon a basis or method by which rates to noncompetitive points are arrived at by adding to competitive rates prevailing at the nearest competitive point, reasonable local rates from such competitive point to the noncompetitive points in its vicinity. Such rates are just and reasonable.

*Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 684, 28 L. ed. 297, 4 Sup. Ct. Rep. 185; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763, 41 Fed. 563; *Oregon Short Line & U. N. R. Co.* v. *Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 474; *Chicago & N. W. R. Co.* v. *Osborne*, 4 Inters. Com. Rep. 257, 3 C. C. A. 347, 10 U. S. App. 430, 52 Fed. 915; *Little Rock & M. R. Co.* v. *St.*

*Louis, I. M. & S. R. Co.* 4 Inters. Com. Rep. 537, 59 Fed. 402; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 26 L. R. A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 280, 63 Fed. 778; *St. Louis Drayage Co.* v. *Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 41; *Gulf, C. & S. F. R. Co.* v. *Miami S. S. Co.* 30 C. C. A. 142, 52 U. S. App. 732, 86 Fed. 419; *Southern Indiana Exp. Co.* v. *United States Exp. Co.* 88 Fed. 662; *Interstate Commerce Commission* v. *Western & A. R. Co.* 35 C. C. A. 217, 93 Fed. 92.

When freight is shipped from New Orleans, consigned to La Grange, the carrier is bound to receive it at Montgomery, carry it to La Grange, and there deliver it to the consignee; but it has the right to charge on such freight a reasonable local rate from Montgomery to La Grange.

*Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 684, 28 L. ed. 297, 4 Sup. Ct. Rep. 185.

A through rate which is less than the sum of two or more reasonable local rates cannot be unreasonable,—especially where it does not exceed a low competitive rate by more than a reasonable local rate.

*Minneapolis & St. L. R. Co.* v. *Minnesota*, 186 U. S. 259, 46 L. ed. 1152, 22 Sup. Ct. Rep. 900.

Similar combination rates have been approved by the courts.

*Troy Bd. of Trade* v. *Alabama Midland R. Co.* 4 Inters. Com. Rep. 348; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 5 Inters. Com. Rep. 308, 69 Fed. 227, 5 Inters. Com. Rep. 685, 21 C. C. A. 51, 41 U. S. App. 453, 74 Fed. 715, 168 U. S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Interstate Commerce Commission* v. *Western & A. R. Co.* 88 Fed. 186, 35 C. C. A. 217, 93 Fed. 83; *Interstate Commerce Commission* v. *Clyde S. S. Co.* 181 U. S. 29, 45 L. ed. 729, 21 Sup. Ct. Rep. 512.

The second section of the Interstate Commerce Act is the equivalent of what is known as the English "equality clause."

*Wight* v. *United States*, 167 U. S. 516, 518, 42 L. ed. 259, 260, 17 Sup. Ct. Rep. 822.

The English "equality clause" requires equality of charge in no case except where goods pass "only over the same portion of the line of railway under the same circumstances."

2d Annual Report of Interstate Commerce Commission (1888) p. 89.

The English "equality clause" has no application where freight of one shipper, though carried over the same line, is carried a greater distance from a common point of departure than the freight of another shipper.

*Lancashire & Y. R. Co.* v. *Greenwood*, L. R. 21 Q. B. Div. 217.

The English "equality clause" did not apply either where the points of departure were different, or where the points of arrival were different, or where the distances over which the goods were carried were different.

*Ibid.*

The third section of the Act to Regulate Commerce prohibits only such preferences as are unjust or unreasonable.

*Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 276, 277, 36 L. ed. 703, 704, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 5 Inters. Com. Rep. 308, 69 Fed. 231; *Commercial Club* v. *Chicago & N. R. Co.* 7 Inters. Com. Rep. 404.

The competition which exists at Atlanta is entitled to the same consideration under § 3, as it is under § 4, of the Act to Regulate Commerce.

*Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 232, 40 L. ed. 952, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192, 43 Fed. 53; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 665, 44 L. ed. 315, 20 Sup. Ct. Rep. 209; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 18, 19, 45 L. ed. 725, 21 Sup. Ct. Rep. 516.

While "mere" competition does not authorize a less charge for a longer than a shorter distance, the reverse is true where the competition, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates.

*Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 233, 40 L. ed. 952, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 166, 42 L. ed. 423, 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 674, 675, 44 L. ed. 319, 20 Sup. Ct. Rep. 209; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

Atlanta is as much entitled to the advantage of the fact that it can avail itself of the competition which exists between the various competing lines, which extend from New Orleans to Atlanta, and of the competition which exists between those lines and other lines reaching Atlanta from other markets, as La Grange is entitled to avail itself of the advantage of the fact that it is (by appellees' line) nearer to New Orleans than Atlanta is.

*Phipps* v. *London & N. W. R. Co.* [1892] 2 Q. B. 229; *Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 224, 40 L. ed. 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 164, 42 L. ed. 422, 18 Sup. Ct. Rep. 45.

It is only "where the carrier cannot meet the competitive rate to a given point without transporting the merchandise at less than the cost of transportation, and therefore without bringing about a deficiency, which would have to be met by increased charges upon other business," that competition becomes illegitimate.

*East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 20, 45 L. ed. 726, 21 Sup. Ct. Rep. 516.

The mere fact that there is a material dis-

parity between the rates to La Grange, and the rates to the longer distance points, does not, of itself, constitute an undue preference, or an unjust discrimination.

*Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 219, 220, 40 L. ed. 947, 948, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Savannah Bureau of Freight & Transp.* v. *Charleston & S. R. Co.* 7 Inters. Com. Rep. 480.

The present differences between La Grange's rates and the rates to the longer distance points are justifiable.

*East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 21, 45 L. ed. 726, 21 Sup. Ct. Rep. 516.

The complaint made on behalf of persons at La Grange may be likened to that of the laborer, who, having worked all day, complained that others, who had worked much less, received a penny like himself.

*Hozier* v. *Caledonian R. Co.* 1 Nev. & Macn. 32, note 4; *Jones* v. *E. C. R. Co.* 1 Nev. & Macn. 45; *Foreman* v. *Great Eastern R. Co.* 2 Nev. & Macn. 202; *Harris* v. *Cockermouth R. Co.* 1 Nev. & Macn. 97; *Ransome* v. *E. C. R. Co.* 1 Nev. & Macn. 120.

The theory of equal mileage rates is entirely correct in all cases where competition does not interfere with it. But in cases where competition does interfere, the theory of equal mileage rates cannot be adopted in actual practice.

*Interstate Commerce Commission* v. *Alabama Midland R. Co.* 5 Inters. Com. Rep. 308, 69 Fed. 231; *Imperial Coal Co.* v. *Pittsburgh & L. E. R. Co.* 2 Inters. Com. Rep. 436; *Savannah Bureau of Freight & Transp.* v. *Charleston & S. R. Co.* 7 Inters. Com. Rep. 474.

Neither the common law nor the Act to Regulate Commerce requires equality of charge, except where the services are similar.

*Interstate Commerce Commission* v. *Baltimore & O. R. Co.* 145 U. S. 275, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Ex parte Koehler*, 1 Inters. Com. Rep. 317, 31 Fed. 321; *Brewer* v. *Central R. Co.* 84 Fed. 268.

The service rendered by a carrier in the transportation of traffic to a competitive point, is not "similar" to the service rendered in the transportation of traffic to a noncompetitive point.

*Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 219, 239, 40 L. ed. 947, 954, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 144–175, 42 L. ed. 414–426, 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648–675, 44 L. ed. 309–319, 20 Sup. Ct. Rep. 209; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516.

Competition is necessarily a dominating factor in fixing rates.

*Ex parte Koehler*, 1 Inters. Com. Rep. 317, 31 Fed. 321.

The discrimination which exists in this case against La Grange is not caused by any fault or contrivance of the appellees.

*Ex parte Koehler*, 23 Fed. 533; *Ex parte Koehler*, 1 Inters. Com. Rep. 317, 31 Fed. 319; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 18, 19, 20, 45 L. ed. 725, 726, 21 Sup. Ct. Rep. 516.

It is not a proper function of government to attempt to equalize the social relations or business facilities of communities.

*Ex parte Koehler*, 1 Inters. Com. Rep. 317, 31 Fed. 321; *Brewer* v. *Central of Georgia R. Co.* 84 Fed. 268.

Appellees' rates from New Orleans to La Grange do not violate § 4 of the Act to Regulate Commerce.

*Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 169, 42 L. ed. 423, 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 669, 44 L. ed. 317, 20 Sup. Ct. Rep. 209; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 19, 45 L. ed. 726, 21 Sup. Ct. Rep. 516; *Interstate Commerce Commission* v. *Western & A. R. Co.* 35 C. C. A. 217, 93 Fed. 87.

It is not necessary that there should be anything "rare," "unusual," or "peculiar" in the competition.

*Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 144–175, 42 L. ed. 414–426, 18 Sup. Ct. Rep. 45; *Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 648–675, 44 L. ed. 309–319, 20 Sup. Ct. Rep. 209; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18, 19, 45 L. ed. 719, 725, 726, 21 Sup. Ct. Rep. 516.

Where "the interests of the public as well as of the carrier" demand it, Congress intended that competition should be an excuse.

*Louisville & N. R. Co.* v. *Behlmer*, 175 U. S. 674, 675, 44 L. ed. 319, 20 Sup. Ct. Rep. 209; *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 18, 19, 45 L. ed. 719, 725, 726, 21 Sup. Ct. Rep. 516.

It is not fair to compare competitive rates with noncompetitive rates.

*Atchison, T. & S. F. R. Co.* v. *Denver & N. O. R. Co.* 110 U. S. 684, 28 L. ed. 297, 4 Sup. Ct. Rep. 185.

Where severe competition exists at the longer distance point, whether the competition be between market and market, or between product and product, or between carrier and carrier, the presumption, instead of being that the rates to that point are reasonably high, is that they are reasonably, or perhaps unreasonably, low.

*Smyth* v. *Ames*, 169 U. S. 542, 42 L. ed. 847, 18 Sup. Ct. Rep. 418.

If competitive rates will pay anything over and above "the additional cost of movement" of the competitive traffic, it is right and reasonable that they be accepted by the carrier, rather than abandon the competitive traffic.

*East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 18, 19, 45 L. ed. 725, 726, 21 Sup. Ct. Rep. 516;

*Interstate Commerce Commission* v. *Western & A. R. Co.* 35 C. C. A. 217, 93 Fed. 90.

It is impossible to increase the Atlanta rates without stifling the competition that has existed there for many years.

*Ex parte Koehler*, 1 Inters. Com. Rep. 317, 31 Fed. 321.

The law does not prohibit the acceptance of rates that are "unreasonably low in themselves."

*Re Chicago, St. P. & K. C. R. Co.* 2 Inters. Com. Rep. 146.

In passing upon the question of undue or unreasonable preference or disadvantage, it is not only legitimate, but proper, to take into consideration various elements, and among others "the relative quantities or volume of the traffic involved."

*Texas & P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 232, 40 L. ed. 952, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The Commission has no power to make specific rates.

*Thacher* v. *Delaware & H. Canal Co.* 1 Inters. Com. Rep. 317; *Cincinnati, N. O. & T. P. R. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Interstate Commerce Commission* v. *Alabama Midland R. Co.* 168 U. S. 161, 162, 42 L. ed. 421, 18 Sup. Ct. Rep. 45.

The Commission has no power to make relative rates.

*Southern P. Co.* v. *Colorado Fuel & Iron Co.* 42 C. C. A. 12, 101 Fed. 784.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The circuit court concurred in the finding of the Commission. that by the exaction of the rates to LaGrange complained of the 3d and 4th sections of the Act to Regulate Commerce were violated, and, being unable to say that error clearly appeared in the finding that the 1st section of the act was also violated, refused to overrule the action of the Commission in any particular.

Whilst the circuit court of appeals an-
[280] nounced its conclusions *in a *per curiam* opinion, it is fairly inferable from the authorities which are cited in that opinion that the court concluded that the rates charged to LaGrange did not constitute a violation of the 3d and 4th sections of the act, prohibiting undue discrimination and a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions. It is also inferable from the argument at bar that the appellate court. so far as the reasonableness *per se* of the rates was concerned, ordered the case to be dismissed, without prejudice to further proceedings, because it was of opinion that, in the consideration of this question, the Commission had been in effect controlled by its finding, held to have been erroneous, that there had been violations of the 3d and 4th sections of the act. It was, therefore, deemed that the controversy, in so far as the intrinsic reasonableness of the rates was concerned, should not be foreclosed, but should be left for further consideration and decision upon the evidence already introduced and such additional evidence as might be taken on a further hearing before the Commission if such new hearing was desired.

Whether or not the circuit court of appeals was correct in the conclusions reached by it as above stated, is the question now for decision.

The record convinces us that the appellate court correctly decided that there was no legal foundation for the contention that the 3d and 4th sections of the Act to Regulate Commerce had been violated. It was and is conceded that the rates on through freight from New Orleans to Atlanta were the result of competition at Atlanta, and that there was, hence, such a dissimilarity of circumstances and conditions as justified the lesser charge for the carriage of freight from New Orleans to Atlanta, the longer distance point, than was exacted for the haul from New Orleans to LaGrange, the shorter distance point.

The sum of the rate to LaGrange was arrived at by charging the low rate produced by competition at Atlanta, and adding thereto the sum of the local rate back from Atlanta to LaGrange. The same rule was applied to the stations between *LaGrange[281] and Atlanta, each of those stations receiving, therefore, a somewhat lower rate than LaGrange, although they were located a greater distance from New Orleans and nearer Atlanta. The sum by which the rates from New Orleans to these respective stations between LaGrange and Atlanta were lower than the LaGrange rate, was dependent upon the distance these respective stations were from Atlanta. It was shown, however, and is unquestioned, that, except in a particular to which we shall have occasion hereafter to refer, if the charge had been based on the nearest competitive point south of LaGrange,— that is, Montgomery, — and there had been added to the competitive rate to Montgomery the local rate from Montgomery to LaGrange and the other stations beyond, the freight rates on shipments from New Orleans to LaGrange would have been much greater than the rates now complained of as excessive. In other words, the railroads. instead of putting out of view the competition prevailing at Atlanta, when they fixed the rates to the noncompetitive points, took the low rates prevailing at Atlanta as a basis, and added thereto the local rate from Atlanta, the result being that the places in question were given the advantage resulting from their proximity to Atlanta, the competitive point, in proportion to the degree of such proximity.

When the situation just stated is comprehended, it results that the complaint in effect was that a method of rate making had been resorted to which gave the places re-

ferred to a lower rate than they otherwise would have enjoyed. In this situation of affairs, we fail to see how there was any just cause of complaint. Clearly, if, disregarding the competition at Atlanta, the higher rate had been established from New Orleans to the noncompetitive points within the designated radius from Atlanta, the inevitable result would have been to cause the traffic to move from New Orleans to the competitive point (Atlanta), and thence to the places in question, thus bringing about the same rates now complained of. It having been established that competition affecting rates existing at a particular point (Atlanta) produced the dissimilarity of circumstances and conditions contemplated by [282] the 4th section of the act, we *think it inevitably followed that the railway companies had a right to take the lower rate prevailing at Atlanta as a basis for the charge made to places in territory contiguous to Atlanta, and to ask, in addition to the low competitive rate, the local rate from Atlanta to such places, provided thereby no increased charges resulted over those which would have been occasioned if the low rate to Atlanta had been left out of view. That is to say, it seems incontrovertible that in making the rate, as the railroads had a right to meet the competition, they were authorized to give the shippers the benefit of it by according to them a lower rate than would otherwise have been afforded. True it is, that by this method a lower rate from New Orleans than was exacted at LaGrange obtained at the longer distance places lying between LaGrange and Atlanta, but this was only the result of their proximity to the competitive point, and they hence obtained only the advantage resulting from their situation. It could be no legal disadvantage to LaGrange, since, if the low competitive rate prevailing at Atlanta had been disregarded, and the rate had been fixed with reference to Montgomery, and the local rate from thence on, the sole result would have been, as we have previously said, to cause the traffic to move along the line of least resistance to Atlanta, and thence to the places named, leaving LaGrange in the exact position in which it was placed by the rates now complained of.

It is to be observed that it is shown that the local charges on freight moved between Atlanta and LaGrange and the stations intermediate — all of the points being in the state of Georgia — conformed to the requirements of the Georgia State Railroad Commission.

In the report of the Commission a suggestion is found that LaGrange should be entitled to the same rate as Atlanta, because, if the carriers concerned in this case in connection with other carriers reaching LaGrange chose to do so, they might bring about competition by the way of a line between Macon and LaGrange which would be equivalent to the competitive conditions existing at Atlanta. We are unable, however, to follow the suggestion. To adopt it would amount to this: That the substantial dissimilarity of circumstances and conditions *provided by the Act to Regulate Commerce [283] would depend, not as has been repeatedly held, upon a real and substantial competition at a particular point affecting rates, but upon the mere possibility of the arising of such competition. This would destroy the whole effect of the act, and cause every case where competition was involved to depend, not upon the fact of its existence as affecting rates, but upon the possibility of its arising. What the 4th section of the Act to Regulate Commerce has reference to is an actual dissimilarity of circumstances and conditions, not a conjectural one. Of course, if, by agreements or combinations among carriers, it were found that at a particular point rates were unduly influenced by a suppression of competition, that fact would be proper to consider in determining the question of undue discrimination and the reasonableness *per se* of the rates at such possible competitive points. As, however, the finding of the Commission concerning unjust discrimination was predicated solely upon the conclusion that the 4th section of the act had been violated, we may put that subject out of view. So far as the reasonableness *per se* of the rate is concerned, we come now to its consideration.

Whilst there was nothing in the evidence taken before the Commission to lend support to the finding that the rates to LaGrange were intrinsically unreasonable, in the report of the Commission considerable reference was made to facts and circumstances which it is to be presumed were upon the files of the Commission, and which were deemed to conduce to the conclusion that the rates to LaGrange were unreasonable *per se*. But when the statements on this subject made in the report are considered in connection with the report as a whole, and the subjects to which no reference is made in the report are recalled, we think it clearly results that every conclusion reached by the Commission concerning the unreasonableness *per se* of the rates to LaGrange rested wholly upon the error of law committed by the Commission when it decided that the railroad companies were powerless to consider the competitive rates prevailing at Atlanta, and to use those rates as a basis for the charges to points within the competitive area in order thereby to give a lower rate to such points than they otherwise would *have enjoyed. Thus, it was held in [284] effect that, because the competitive rate to Atlanta was not unduly low, therefore any higher charge to LaGrange, the shorter distance, was unreasonable. And the same misconception was manifested by the reasoning adopted concerning the rates to Hogansville and the other stations between LaGrange and Atlanta, since it was held that, because the charges to these points were lower than to LaGrange, therefore the rates to the last-named point were unreasonable *per se*. Both of these conclusions, however, but held that if the carriers elected to meet the competitive rate at Atlanta they must at once correspondingly reduce their rates to all shorter distance and noncompetitive points.

But such a ruling was equivalent to overthrowing the settled construction of the Interstate Commerce Act allowing carriers to charge the lesser rate for the longer than for the shorter distance, if at the further point the lesser rate was justified by a substantial dissimilarity of circumstances and conditions there prevailing, consequent upon real competition. A clause in the order of the Commission makes it clear that no independent finding as to the unreasonableness of the rates was made, since it allows the carriers to continue to charge the rates complained of to LaGrange, provided no higher rates were charged to the more distant points between there and Atlanta. The inconsistency between such an order and the conclusion that the rates to the shorter distance point were unreasonable *per se* was pointed out in *East Tennessee, V. & G. R. Co.* v. *Interstate Commerce Commission*, 181 U. S. 1, 45 L. ed. 719, 21 Sup. Ct. Rep. 516, where it was said (p. 23, L. ed. p. 727, Sup. Ct. Rep. p. 524):

"A decree which ordered the carriers to desist from charging a greater compensation for the lesser than for the longer haul would be in no way responsive to the conclusion that the rate for the lesser distance was unreasonable in and of itself. Such a decree would in effect authorize the carrier to continue to charge at its election a rate which was in itself unreasonable to the shorter point."

And when, in connection with the matters just stated, it is observed that the report of the Commission makes no reference whatever to any intrinsic disparity between the [285] LaGrange *rates and those prevailing at other noncompetitive points between New Orleans and LaGrange, no room in reason is left to sustain the view that the Commission could have held that the rates to LaGrange were in and of themselves unreasonable, irrespective of the competitive condition prevailing at Atlanta, and the arrangement of rates which arose from it which formed the main subject of the complaint.

We conclude that, under the circumstances disclosed by the record, the circuit court of appeals committed no error in refusing to enforce the order of the Commission and in remanding the case to that body for such independent consideration of the question of the reasonableness *per se* of the rates as the ends of justice might require.

It remains only to consider a special question concerning the 3d and 4th sections of the act, which was passed over in an earlier part of this opinion. As has been said, the complaint made before the Commission alleged a disparity and discrimination alone, because of the difference of rates between LaGrange and the points beyond to Atlanta, and the report of the Commission in effect dealt only with such alleged grievances. However, in the course of its report, it was remarked by the Commission that Opelika, which was 38 miles south of LaGrange, was a competitive point, and that if Opelika was used as the basis for calculating the rate to LaGrange, a slightly lesser rate on some articles would be enjoyed by LaGrange than was the case by basing the rate on Atlanta as the nearest competitive point. The Commission, however, would seem to have attached no great importance to the matter which it thus noticed, since nothing in the order entered by it was responsive to the suggestion. It was stated, however, at bar that in the argument of the case in the circuit court of appeals that court directed the attention of the counsel of the railroads to the fact that, even if their theories of the case were sound and were approved, there was a suggestion in the report of the Commission which indicated that Opelika, and not Atlanta, was the proper basing point for fixing the rates to LaGrange, as thereby LaGrange would enjoy on some classes of freight a slightly lower rate than resulted from using Atlanta as the *basic [286] point. It was also conceded at bar by counsel for all parties that when this suggestion was made the counsel for the railroad companies immediately declared that such fact had escaped attention, that it would at once be brought to the notice of the railroad companies, and a change of rates would be immediately put into effect upon that basis. And the brief of counsel for the Commission states that a modified tariff, based on Opelika, was put into operation by the railroad companies in May, 1900, immediately after the argument of the case in the circuit court of appeals, and has been continued in force from that time to this, the decree below having been entered more than one year after the submission of the cause. It is, however, now insisted that the change made by the railway companies to conform to the development as to Opelika is a confession that there was error in the action of the circuit court of appeals, and therefore requires that the decree of that court should be at least in part reversed. It would be, it is said, indeed, dangerous to allow a railway company to exact illegal rates, and persist in doing so even after the order of the Commission had been issued, and then escape the consequences of its wrongdoing by at the last hour changing its rates in order to prevent the entry of a decree against it. The reasoning has abstract force, but its application to the case in hand is devoid of merit, since neither in the complaint made before the Commission nor in the evidence introduced for the complainant was any claim made that wrong had been done because of a combination of rates based on Atlanta instead of Opelika. Indeed, the relief sought by the complaint and that accorded by the Commission was inconsistent with the theory that the rates should be based on either Opelika or Atlanta. As the altered tariff based on Opelika had been in force more than one year prior to the entry of the decree below, the court doubtless considered it unnecessary to provide for its continuance. The record does not disclose, nor was it suggested, that any application was made to the circuit court of appeals to modify its decree so as to direct the continuance of such new tariff, both parties evidently act-

ing on the reasonable assumption that it was an accomplished fact. Under these circum-
[287] stances, *we do not think a formal modification of the decree of the circuit court of appeals is required; and *that decree is therefore affirmed.*

**Mr. Justice Harlan dissents.**

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TEXAS & PACIFIC RAILWAY COMPANY,
*Plff. in Err.,*
*v.*
SAMUEL E. WATSON.

(See S. C. Reporter's ed. 287-293.)

*Railroads — fires set by passing locomotive — evidence — of other fires — opinions of nonexperts — reading deposition of witness in attendance — harmless error — expert testimony — instructions — stipulations in lease — effect on third party.*

1. Evidence that, at or about the time of a fire and of the passing of a locomotive which is claimed to have caused it, other fires were observed at various nearby points along the railroad track, is admissible on the issue of the liability of the railroad company for the value of the property destroyed by such fire, as tending to establish that such fire was caused by the locomotive in question, and as tending to show negligence in its construction or operation.
2. The testimony of witnesses to the effect that they did not know of or see any opportunity for certain cotton to have caught fire except from a passing locomotive is not inadmissible on the question of the liability of the railroad company for the value of such cotton, if objected to, not because of any omission to state the facts which induced the witnesses' belief, but because negative in character, irrelevant, and in the nature of a conclusion.
3. A competent expert witness may, on the trial of an action to recover the value of cotton claimed to have been destroyed by a fire set by a passing locomotive, give his opinion on a hypothetical state of facts based on the evidence as to whether a locomotive which in moving 4¼ miles should set from five to eight fires and should emit live cinders was properly operated or constructed, where there is evidence that it is impossible, even with the most effective spark arresters, to prevent the escape of sparks.
4. Permitting the deposition of a witness to be read when the witness is actually in court and his presence is known is not prejudicial error, where he is subsequently called by the objecting party, and gives fully his explanation of the deposition and his testimony as to the subject to which it related.
5. An instruction that a railroad company was not liable for a loss from a fire set by a passing locomotive, if it used "the most approved spark arrester, at the time in good condition," and the engine was then and there operated with ordinary care and prudence; but that it was so liable if it failed "to use the most approved spark arrester and apparatus connected with the engine as in ordinary use by properly conducted railways to prevent the escape of fire," so far as it could consistently be done in its business,—is not open to the objection that it left the jury to consider the original construction of the spark arrester irrespective of its condition at the time of the fire.
6. A requested instruction that a person storing his cotton near a railroad assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks when properly operated need not be given in an action to recover the value of such cotton claimed to have been destroyed by a fire set by a passing locomotive, where the jury are told that no recovery could be had if the railroad company was not negligent in respect to the equipment and operation of the engine, and were fully instructed as to contributory negligence and its effect.
7. Stipulations and exemptions from liability for loss caused by fire, contained in a lease under which the lessee holds possession and occupancy of a storage platform near a railroad, are not binding on one not in privity with such lessee, who, without knowledge of such stipulations, stores his cotton on such platform.

[No. 223.]

*Argued and submitted March 20, 1903. Decided May 4, 1903.*

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Texas establishing the liability of a railroad company for the value of cotton claimed to have been destroyed by a fire set by a passing locomotive. *Affirmed.*

See same case below, 50 C. C. A. 230, 112 Fed. 402.

Statement by Mr. Justice **White:**

*This action was originally commenced in [288] a Texas state court by the appellee Watson, to recover the value of 64 bales of cotton, less insurance thereon. The cotton was alleged to have been destroyed by fire on January 3, 1896, while stored upon what was known as the O'Neil cotton platform near the depot of the railway company at Clarksville, Red River county, Texas. The fire was averred to have been occasioned by the negligence of the railway company in the use of a defectively constructed locomotive

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NOTE.—*On expert testimony generally*—see notes to Davis v. United States, 41 L. ed. U. S. 750; Scheuer v. Muller, 20 C. C. A. 180; Missouri, K. & T. R. Co. v. Hall, 32 C. C. A. 150; Graham v. Pennsylvania Co. (Pa.) 12 L. R. A. 293, and Moore v. Kenockee Twp. (Mich.) 4 L. R. A. 555.

*As to the liability of railroad companies for fires caused by their negligence*—see notes to Marvin v. Chicago, M. & St. P. R. Co. (Wis.) 11 L. R. A. 506; Knowlton v. New York & N. E. R. Co. (Mass.) 1 L. R. A. 625; Missouri P. R. Co. v. Platzer (Tex.) 3 L. R. A. 639; Louisville, N. A. & C. R. Co. v. Nitsche (Ind.) 9 L. R. A. 750; White v. Chicago, M. & St. P. R. Co. (S. D.) 9 L. R. A. 824, and Grand Trunk R. Co. v. Richardson, 23 L. ed. U. S. 357.

*As to presumption of negligence in case of railway fires*—see note to Barnowski v. Helson (Mich.) 15 L. R. A. 40.

and in the careless operation thereof while passing said platform. Subsequently the insurance company was joined as plaintiff, and recovery was asked of the full value of the cotton. Upon application of the defendant, based upon the fact that it was incorporated under the laws of the United States, the cause was removed to the United States circuit court for the eastern district of Texas. In the latter court an amended answer was filed. This pleading contained general and special demurrers, a general denial, and a special answer setting up various defenses. The general and special demurrers were subsequently overruled, and defendant excepted. A trial was had, and it was shown by the evidence that at the point where the fire in question occurred the track of the railway company ran east and west, and the train which it was asserted caused the fire in question was moving eastward, and a strong wind was blowing from the north. A verdict was rendered in favor of the plaintiff Watson and against the railroad and against the plaintiff insurance company in favor of the railroad. Judgment was entered on the verdict; the judgment was affirmed by the circuit court of appeals for the fifth circuit (50 C. C. A. 230, 112 Fed. 402), and the cause was then brought to this court by writ of error.

*Mr.* **David D. Duncan** argued the cause, and, with *Messrs. John F. Dillon* and *Winslow S. Pierce*, filed a brief for plaintiff in error:

There was error in admitting evidence of fires in other places without proof that they were caused by defendant's engines.

*St. Louis & S. F. R. Co.* v. *Jones*, 59 Ark. 105, 26 S. W. 595; *Musselwhite* v. *Atlantic, M. & O. R. Co.* 4 Hughes, 166, Fed. Cas. No. 9,972.

It is not permissible to allow an expert to give the ultimate conclusion to be drawn from a given state of facts; that is, the final conclusion at which the jury is to arrive from all the evidence.

*Hunt* v. *Kile*, 38 C. C. A. 641, 98 Fed. 49; *Crane Co.* v. *Columbus Constr. Co.* 20 C. C. A. 233, 46 U. S. App. 52, 73 Fed. 984; *New York Electric Equipment Co.* v. *Blair*, 25 C. C. A. 216, 51 U. S. App. 81, 79 Fed. 896.

The object of all questions to experts should be to obtain their opinion as to the matter of skill or science which is in controversy and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts.

*Hunt* v. *Lowell Gaslight Co.* 8 Allen, 169, 85 Am. Dec. 697.

The court erred in submitting to the jury the issue that if defendant failed to use the most approved spark arresters, and plaintiff was free from contributory negligence, he could recover.

*Texas & P. R. Co.* v. *Minnick*, 10 C. C. A. 1, 23 U. S. App. 310, 61 Fed. 635.

The court erred in refusing to charge the jury that plaintiff, in placing his cotton upon the platform, assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated, and in saying to them that contributory negligence and assumed risk amount to the same thing.

*Briant* v. *Detroit, L. & N. R. Co.* 104 Mich. 307, 62 N. W. 365; *Chicago & A. R. Co.* v. *Pennell*, 94 Ill. 448; *Hartford F. Ins. Co.* v. *Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33.

The court erred in refusing to admit in evidence the stipulations and exemptions contained in the lease under which O'Neill held possession and occupancy of the platform.

*Hartford F. Ins. Co.* v. *Chicago, M. & St. P. R. Co.* 175 U. S. 91, 44 L. ed. 84, 20 Sup. Ct. Rep. 33.

*Mr.* **J. W. Bailey** submitted the cause for defendant in error. *Messrs. E. S. Chambers* and *Amos L. Beaty* were with him on the brief:

There was no error in allowing witnesses to testify to fires other than the cotton fire, although they did not see them start, when such other fires were shown to have commenced burning almost immediately after the passing of the locomotive that is claimed to have set out the cotton fire.

*Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 23 L. ed. 356; *Butcher* v. *Vaca Valley & C. L. R. Co.* 67 Cal. 518, 8 Pac. 176; *Missouri P. R. Co.* v. *Donaldson*, 73 Tex. 124, 11 S. W. 164; *Chicago & E. R. Co.* v. *Kreig*, 22 Ind. App. 393, 53 N. E. 1035; *Evansville & T. H. R. Co.* v. *Keith*, 8 Ind. App. 57, 35 N. E. 298; *Louisville, N. A. & C. R. Co.* v. *McCorkle*, 12 Ind. App. 691, 40 N. E. 27; *Lake Erie & W. R. Co.* v. *Middlecoff*, 150 Ill. 27, 37 N. E. 660; *Wiley* v. *West Jersey R. Co.* 44 N. J. L. 247.

The objection made to the testimony of witnesses, to the effect that they saw no opportunity and knew of none for the cotton to have caught fire except from the locomotive, was properly overruled.

*Pullman Palace Car Co.* v. *Smith*, 79 Tex. 470, 13 L. R. A. 215, 14 S. W. 993.

It was proper to allow the hypothetical question put to the company's expert witness, Wells, on cross-examination.

*Eastern Transp. Line* v. *Hope*, 95 U. S. 297, 24 L. ed. 477; *Chicago G. W. R. Co.* v. *Price*, 38 C. C. A. 239, 97 Fed. 425; *Union P. R. Co.* v. *Novak*, 9 C. C. A. 629, 15 U. S. App. 400, 61 Fed. 579; 12 Am. & Eng. Enc. Law, 2d ed. p. 472; 1 Greenl. Ev. §§ 440, 440a; 2 Taylor, Ev. § 1275; *Taylor* v. *Star Coal Co.* 110 Iowa, 40, 81 N. W. 251; *Williams* v. *Great Northern R. Co.* 68 Minn. 55, 37 L. R. A. 204, 70 N. W. 860.

The expert witness may give his opinion on the very issue to be decided by the jury provided it involves a matter on which expert evidence is admissible, and not merely a question the ordinary mind is capable of determining.

*Eastern Transp. Line* v. *Hope*, 95 U. S. 297, 24 L. ed. 477.

The trial court properly admitted the deposition of the witness Caperton, although the witness was personally present and

could have been called. Or, if there was error it was harmless.

*Whitford* v. *Clark County*, 119 U. S. 522, 30 L. ed. 500, 7 Sup. Ct. Rep. 306; *Hinds* v. *Keith*, 6 C. C. A. 231, 13 U. S. App. 222, 57 Fed. 12; *Schmick* v. *Noel*, 64 Tex. 406; *O'Connor* v. *Andrews*, 81 Tex. 28, 16 S. W. 628; *San Antonio Street R. Co.* v. *Renken*, 15 Tex. Civ. App. 229, 38 S. W. 830; 6 Enc. Pl. & Pr. 570.

The issue of whether the engine was equipped with the most approved spark arresters was properly submitted to the jury. *McCullen* v. *Chicago & N. W. R. Co.* 49 L. R. A. 642, 41 C. C. A. 365, 101 Fed. 66; *Texas & P. R. Co.* v. *Rice Bros.* 24 Tex. Civ. App. 374, 59 S. W. 833; *Smith* v. *Chicago, M. & St. P. R. Co.* 4 S. D. 71, 55 N. W. 717; *Babcock* v. *Chicago & N. W. R. Co.* 62 Iowa, 593, 13 N. W. 740, 17 N. W. 909.

The trial court was right in excluding the stipulations exempting the railway company from liability, as contained in the lease contracts under which O'Neil held the platform on which the cotton was stored.

*McAdams* v. *Missouri, K. & T. R. Co.* 19 Tex. Civ. App. 82, 45 S. W. 936; *King* v. *Southern P. Co.* 109 Cal. 96, 29 L. R. A. 755, 41 Pac. 786; *Ordelheide* v. *Wabash R. Co.* 80 Mo. App. 507.

[289] *Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The various assignments of error relied upon in the brief of counsel for plaintiff in error will be disposed of in the order therein discussed.

First. In several assignments it is claimed that the circuit court of appeals erred in holding that the trial court properly admitted the evidence of witnesses to the effect that at or about the time of the fire complained of, and about the time of the passing of the locomotive which it was charged occasioned the fire, the witnesses observed other fires at various points not far removed from the place where the cotton was burned and south of and near to the railway track. In the light of the decision of this court in *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 454, 470, 23 L. ed. 356, 362, we think this evidence was competent as having a tendency to establish that the destruction of the property of the plaintiff was caused by the locomotive in question, and as tending to show negligence in its construction or operation.

Second. In an assignment of error it was contended that the appellate court erred in holding that the trial court properly admitted testimony to the effect that certain witnesses did not know of and saw no opportunity for the cotton to have caught fire except from the locomotive in question. The evidence in the record is in narrative form, and that portion relating to the criticized testimony merely recites that at the time said evidence was offered from each witness "defendant then and there objected, because the evidence was of a negative character and would not be relevant, and further, because it was in the nature of a conclusion of the witness to the effect that the fire had originated from the engine." Whether the question which elicited the testimony complained of was objectionable cannot be determined from the record, nor does the objection seem to have been addressed to an omission to state the facts which induced the belief that no other opportunity existed for the cotton to have caught fire than was afforded by the operation of the locomotive. Evidence of the surrounding circumstances *and condi-[290] tions which by a process of exclusion would have tended to establish that the burning of the cotton could not have been caused other than by the locomotive in question would, we think, have been clearly relevant. As the record stands, we think the assignment in question was without merit.

Third. A further contention is that the appellate court erred in permitting a question to be answered despite the objection that "the evidence sought to be elicited was not such as was the subject of expert testimony, but the endeavor was to substitute a conclusion of the witness for that of the jury, and it was not allowable by a hypothetical question, such as this and the answer thereto, to prove the bad equipment of the engine in the face of the actual testimony that the equipment was all in good order." The following is the question referred to:

"Suppose an engine should come along, and in the course of 4 miles and ¼ should set out, say, eight fires, should set fire to the grass in some of these places, set fire to shavings 60 feet from the right of way, set cotton on fire, and that live cinders could be seen falling and did fall and smoked after falling on the ground, over the work benches and things and over platforms, would you say there was anything wrong about the operation or construction of that engine, or would you say it was all right? And suppose, instead of being eight fires, there were five under the conditions named to you, what would you say?"

The question was proper. The witness was foreman of the boiler department at the main shops of the defendant, having to do with the building of boilers, and was in special control of the part of the shops which had to do with spark arresters. The hypothetical question was based upon evidence, and if the witness was competent — as the evidence showed he was — to testify whether or not an engine so conducting itself was or was not in good working order or properly operated, we think the jury should have had the benefit of his opinion. Inasmuch as there was evidence to the effect that it is impossible, even with the use of the most effective spark arresters, to prevent the escape of sparks, a case was presented justifying the introduction of expert testimony to aid the jury in determining the ultimate *fact whether an engine was in good[291] repair and properly operated which conducted itself as the evidence tended to show this locomotive did. *Eastern Transp. Line* v. *Hope*, 95 U. S. 297, 298, 24 L. ed. 477.

Fourth. It is asserted that the appellate court erred in holding that prejudicial error was not committed in permitting the deposition of a witness to be read when the witness was actually in court and his presence was known to the plaintiff. We adopt as our own the language of the circuit court of appeals on this point:

"In view of the fact that the witness was called by the defendant after the deposition had been admitted over the defendant's objection, and gave fully his explanation of the deposition and his testimony as to the subject to which it related, we conclude that the error committed is not sufficiently grave in its results to require us to reverse the case."

Fifth. It is claimed that the appellate court erred in holding that the trial court rightly left it to the jury to determine that, if the railway company failed to use the most approved spark arrester, and plaintiff was free from contributory negligence, he could recover. This contention is based upon the assumption that there was no evidence tending to show that the most approved spark arrester was not used. We do not pause to analyze the evidence on the subject, because we think it not necessary to do so. The proposition, considering it in the light most favorable for the plaintiff in error, is but an abstraction, and assumes that, because it may be that at one time the spark arrester was of the most approved pattern, it continued to be such, even although it was not in good repair at the time of the fire and such defective condition occasioned the loss complained of. The court instructed that the jury must give a verdict for the railroad if it was found that it "did use the most approved spark arrester, at the time in good condition, and that the engine was then and there operated with ordinary care and prudence;" and, in stating the converse of the proposition, said: "But if the railroad failed to use the most approved spark arrester and apparatus connected with the engine as in ordinary use by properly conducted railways to prevent the escape of [292]*fire, in so far as it could consistently be done with the business" which the railroad was carrying on, a verdict should be returned against the railroad, provided it was found that the plaintiff Watson had not contributed to the injury. This charge as a whole we think is not amenable to the objection that it left to the jury to consider the original construction of the spark arrester, irrespective of its condition at the time of the fire. The expression, "as ordinarily used by properly conducted railways," of necessity implied that the apparatus must have been kept in proper condition for use. To construe to the contrary would presuppose that conflicting measures of liability were given to the jury by the court when it pointed out the opposing views which the jury were authorized to deduce from the proof. Thus rightly construing the charge, there was beyond peradventure evidence to be weighed by the jury in determining whether the spark arrester was or was not in satisfactory working order at the time the cotton was set on fire. Several witnesses testified that the engine emitted considerable fire and cinders, and the evidence upon which the hypothetical question quoted in subdivision third of this opinion was based clearly rebuts the assumption that there was not evidence of circumstances to be considered by the jury in connection with the evidence introduced by the defendant of the condition of the engine, spark arrester, etc., as disclosed by an inspection thereof. So, also, the answer to the hypothetical question clearly contained matter pertinent for the consideration of the jury in determining whether the engine was properly equipped and operated. The witness said:

"An engine that will do as you have stated is doing something unusual, very unusual. If there was dry and combustible material close to the track a spark from the ash pan might drop among it and set fire. What you said might have occurred, but it would be very unusual. I could not say that there would be anything wrong in the operation of the engine, but there might have been something deranged about the ash pan is the only way I could account for it. If the engine did set out sparks in the manner stated by you, I cannot believe that the engine was in quite perfect condition."

*Sixth. A further assignment of error is [293] to the effect that the appellate court erred in holding that error was not committed in refusing to charge the jury that plaintiff, in placing his cotton upon the platform, assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks and properly operated, and in saying to them that contributory negligence and assumed risk amount to the same thing. But the court charged the jury that, even though the cotton was set on fire by sparks communicated from the engine, yet, if the defendant used the most approved spark arrester, and the engine was operated with ordinary care and prudence, the plaintiff could not recover. As the court also fully instructed the jury as to what would have constituted contributory negligence on the part of Watson as respected the storing of his cotton on the platform, and informed the jury that recovery could not be had if there was such contributory negligence, it is quite clear that the jury could not have been misled by the failure of the trial court to point out the distinction between assumed risk and contributory negligence. It is not perceived, for instance, how the jury could have been aided in reaching a conclusion if, in addition to being informed that the plaintiff could not recover if the railway company was not negligent in respect to the equipment and operation of the engine, they were told that the plaintiff "assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks, and properly operated."

Seventh. The remaining assignment of error is to the effect that error was com-

mitted by the appellate court in affirming the judgment despite the fact that the trial court refused to admit in evidence the stipulations and exemptions from liability for loss caused by fire contained in the lease under which the lessee held possession and occupancy of the storage platform on which the cotton in question was when destroyed by fire. As Watson was not in privity with the lessee,—and it is conceded he had no knowledge of such stipulations when he stored his property on the platform,—there was no tenable ground on which to contend that he was in anywise bound by the stipulations in question.

*Judgment affirmed.*

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294] *JOEL W. LOCKWOOD, *Petitioner*,
*v.*
EXCHANGE BANK OF FORT VALLEY and F. P. Rape, Trustee.

(See S. C. Reporter's ed. 294-301.)

*Jurisdiction of bankruptcy court—administration of exempt property.*

A court of bankruptcy has no jurisdiction to enforce, against the bankrupt's exemption, the rights of unsecured creditors whose evidences of indebtedness contain the waiver of homestead and exemption authorized by the state Constitution and laws, by reason of the authority conferred upon such court by the bankruptcy act of 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), to control exempt property, in order to set it aside, and thus exclude it from the assets of the bankrupt's estate to be administered.

[No. 226.]

*Argued April 7, 1903. Decided June 1, 1903.*

ON A WRIT of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, which brings up for consideration the record in a cause in the District Court for the Southern District of Georgia in which was denied the exemption claimed by a bankrupt because of his written waiver of homestead and exemption. Judgment of the District Court reversed and proceedings remanded, with directions to sustain the exemption and to withhold discharge to permit proceedings to be taken in the state court to subject the exempt property to the claims of creditors.

Statement by Mr. Justice **White**:

In this proceeding, upon certain questions being certified by the United States circuit court of appeals for the fifth circuit for decision by this court, a writ of certiorari was allowed, and the entire record has been brought up for consideration.

The controversy is fully set forth in the following "statement of case," embodied in the certificate of the circuit court of appeals:

"On the 23d day of November, 1900, said Joel W. Lockwood was, on his application, duly adjudged a bankrupt by the district court of the United States for the southern district of Georgia. On December 6, 1900, F. T. Rape was duly appointed trustee for said bankrupt; on the 16th day of December, 1900, the said F. T. Rape, trustee, set aside and designated as an exemption all of the property returned by the said bankrupt in his schedule of assets. On the 1st day of January, 1901, the Exchange Bank of Fort Valley, a creditor who had duly proven its debt as an unsecured claim, filed exceptions to the trustee's *assignment of [295] homestead and exemption, upon the following grounds:

"'(*a*) That said creditor held a contract against the bankrupt in which said bankrupt specially waived and renounced all right to the homestead exemption allowed by the laws of Georgia or the United States. Said waiver is contained in a note constituting contract of indebtedness, and was made in accordance with the provisions of the Constitution and laws of said state, authorizing and empowering the debtor to waive and renounce in writing his right to the benefit of the exemption provided for by the Constitution and laws of said state.

"'(*b*) That creditor's debt was unsecured, save and except so far as a waiver of homestead and exemption may be construed as a security.

"'(*c*) That the trustee has set apart all the property of said bankrupt returned by him in bankruptcy.

"'(*d*) Under the laws of Georgia, the debtor's exemption cannot be subjected to the payment of a debt containing a waiver of homestead except by putting said debt in judgment, and afterwards causing execution to issue thereon to be levied on the exempt property, in accordance with the provisions of §§ 2850 *et seq.* of the Code of Georgia. If bankrupt court should approve trustee's assignment in this case, without reserving to petitioner the right to sue his claim and put same in judgment, and without itself giving judgment for said debt, creditor would be left without means of enforcing his rights created and arising out of the aforesaid waiver, and would be without remedy.

"'(*e*) Creditor therefore prays equitable relief and such decree as will protect his rights; that the homestead be set aside and trustee be required to take charge of and administer the property of said bankrupt so set apart, except so much as cannot be waived, for the benefit of creditors holding waiver contracts.'

"To these exceptions of the creditor the bankrupt duly filed a demurrer on the following grounds:

"'(*a*) That said exceptions are wholly insufficient in law to defeat the report of the trustee.

*"'(*b*) That the exceptions made are not [296] such as, under the laws of Georgia, will defeat the setting apart of the exemption, and furnish no reason why the trustee should not assign the exemption.

"'(c) That the bankrupt court has no jurisdiction over exempted property, and no authority to administer the same.

"'(d) That there is no authority of law for the exceptions made, nor for the relief sought.'

"The referee, Honorable Shelby Myrick, overruled the aforesaid demurrer, and directed the trustee to carve out of the said exemption of property a portion of the same, amounting to $300.00, which was to be free from the claims of all creditors. The residue of the exempted property was to be sold, and the proceeds held by the trustee for the benefit of creditors holding waiver notes. The bankrupt was ordered to yield possession to the trustee for the purpose of carrying out this order. The referee, at the request of bankrupt, certified the record in said case, together with his decision thereon, to the Honorable Emory Speer, judge of the district court of said district, for final determination. On the 30th March, 1901, said case came on regularly to be tried before said district judge, and, after hearing argument of counsel, his honor Judge Emory Speer held and decided and adjudged the aforesaid exceptions to the determinations and report of the trustee be sustained, and that the exemptions set apart by the trustee in his said report be denied and refused to the said bankrupt, save and except the item of household furniture and wearing apparel, and that the said bankrupt was not entitled to an exemption as claimed by him, by reason of having waived and renounced in writing his rights thereto, in accordance with the Constitution and laws of the state of Georgia."

This judgment of the district court is the one complained of, and which was sought to be revised in the circuit court of appeals.

*Mr.* **Stephen W. Parker** argued the cause, and, with *Messrs. J. M. Terrell* and *John W. Haygood*, and *Messrs. Allen Fort & Son*, filed a brief for petitioner:

The title to the exempted property never vests in the trustee of the bankrupt for any purpose, and therefore such property cannot be administered by the bankrupt court.

*Woodruff* v. *Cheeves*, 44 C. C. A. 631, 105 Fed. 601; *Re Bass*, 3 Woods, 382, Fed. Cas. No. 1,091; *Rix* v. *Capitol Bank*, 2 Dill. 367, Fed. Cas. No. 11,869; *Re Poleman*, 5 Biss. 526, Fed. Cas. No. 11,247; *Byrd* v. *Harrold*, 18 Nat. Bankr. Reg. 437, Fed. Cas. No. 2,269; *Re Stevens*, 2 Biss. 373, Fed. Cas. No. 13.392; *Re Preston*, 6 Nat. Bankr. Reg. 545, Fed. Cas. No. 11,394; *Re Camp*, 91 Fed. 745; *Re Wells*, 105 Fed. 762.

The allowance to bankrupts of their exemption under the state law is not to be "affected" by the bankruptcy. As to exemptions the act of Congress adopts the state laws of the bankrupt's domicil, and his right to an exemption must depend on those laws, and must be determined by them.

*Re Duerson*, 13 Nat. Bankr. Reg. 183, Fed. Cas. No. 4,117; *Re Feely*, 3 Nat. Bankr. Reg. 66, Fed. Cas. No. 4,714; *Re Wyllie*, 2 Hughes, 449, Fed. Cas. No. 18,112.

The bankrupt court has no jurisdiction of exempt property.

*Re Moore*, 112 Fed. 289; *Powers Dry Goods Co.* v. *Nelson*, 10 N. D. 580, 58 L. R. A. 770, 88 N. W. 703.

*Mr.* **Olin J. Wimberly** argued the cause, and, with *Mr. John I. Hall*, filed a brief for respondents:

Under the laws of Georgia a debtor cannot claim any property as exempt until it is set apart to him on proceedings instituted for that purpose.

*McDowell* v. *McMurria*, 107 Ga. 812, 33 S. E. 709; *Dunagan* v. *Stadler*, 101 Ga. 474, 29 S. E. 440; *Re Solomon*, 2 Hughes, 164, Fed. Cas. No. 13,166.

When the debtor makes a general waiver of the homestead and exemption right in a note, or other paper, he parts with all right to take and hold the homestead or exemption as against such creditor.

*Flemister* v. *Phillips*, 65 Ga. 676; *Boroughs* v. *White*, 69 Ga. 842; *Tribble* v. *Anderson*, 63 Ga. 31; *Cleghorn* v. *Greeson*, 77 Ga. 343; *Prather* v. *Smith*, 101 Ga. 283, 28 S. E. 857.

The question as to what property the bankrupt is entitled to as an exemption must be decided by the bankrupt court, and if it is decided that the bankrupt is not entitled to his homestead and exemption out of any property, or out of any particular property, then that property is necessarily to be administered in the bankrupt court, and is not turned over to the bankrupt, although he may assert a claim of exemption against such property.

*Re Solomon*, 2 Hughes, 164, Fed. Cas. No. 13,166.

The bankrupt court will follow the practice of the state courts to the extent of permitting any objection to be filed to the bankrupt's exemption if filed within the time required by the act of Congress, which can be made and urged in the state courts as a reason for defeating the exemption.

*Ibid.; Re Wyllie*, 2 Hughes, 449, Fed. Cas. No. 18,112; *Re Judkins*, 2 Hughes, 401, Fed. Cas. No. 7,560; *Re Whitehead*, 2 Nat. Bankr. Reg. 599, Fed. Cas. No. 17,562; *Re Perdue*, 2 Nat. Bankr. Reg. 183, Fed. Cas. No. 10,975; *Re Stevenson*, 93 Fed. 789; *Re Garden*, 93 Fed. 423, *Re Coffman*, 93 Fed. 422; *Re Sisler*, 96 Fed. 402; *Re Woodruff*, 96 Fed. 317; *Re Waxelbaum*, 101 Fed. 228.

The property which the bankrupt may claim as his exemption shall be set apart to him by the bankrupt court, and it can be set apart to him only after the bankrupt court decides that, under the laws of the domicil of the bankrupt, he is entitled to the exemption.

*Re Waxelbaum*, 101 Fed. 228; *Re Mayer*, 47 C. C. A. 512, 108 Fed. 599; *Re Beauchamp*, 101 Fed. 106; *Re Turnbull*, 106 Fed. 668; *Re Anderson*, 103 Fed. 854.

Mr. Justice **White**, after making the foregoing statement, delivered the opinion of the court:

The general exemption of property from levy or sale, authorized by article 9, § 1,

¶ 1, of the present Constitution of the state of Georgia (that of 1877), is "realty or personalty, or both, to the value in the aggregate of $1,600." By article 9, § 3, ¶ 1, of the same Constitution, a debtor is vested with power to waive or renounce in writing this right of exemption, "except as to wearing apparel, and not exceeding $300 worth of household and kitchen furniture and provisions." The mode of enforcement of a waiver of exemption is provided for in § 2850 of the Code of 1895, reading as follows:

"In all cases when any defendant in execution has applied for and had set apart a homestead of realty and personalty, or either, or where the same has been applied for and set apart out of his property, as provided for by the Constitution and laws of this state, and the plaintiff in execution is seeking to proceed with the same, and there is no property except the homestead on which to levy upon the ground that his debt falls within some one of the classes for which the homestead is bound under the Constitution, it shall and may be lawful for such plaintiff, his agent, or attorney, to make affidavit before any officer authorized to administer oaths that, to the best of his knowledge and belief, the debt upon which such execution is founded is one from which the homestead is not exempt, and it shall be the duty of the officer in whose hands the execution and affidavit are placed to proceed at once to levy and sell, as though the property had never been set apart. The defendant in such execution may, if he desires to do so, deny the truth of the plaintiff's affidavit by filing with the levying officer a counter affidavit."

The question presented on the record before us may be stated in similar language to that which was used by the district judge 298]*—the correctness of whose decision in the case at bar is now for review — in the course of his opinion in *Re Woodruff*, 96 Fed. 317, as follows (p. 318):

"Has the bankruptcy court jurisdiction to protect or enforce against the bankrupt's exemption the rights of creditors not having a judgment or other lien, whose promissory notes or other like obligations to pay contain a written waiver of the homestead and exemption authorized and prescribed by the Constitution of the state, or are such creditors to be remitted to the state courts for such relief as may be there obtained?"

The provisions of the bankruptcy act of 1898 [30 Stat. at L. 544, chap. 541 (U. S. Comp. Stat. 1901, p. 3418).] which control the consideration of the question just propounded are as follows: By clause 11 of § 2 courts of bankruptcy are vested with jurisdiction to "determine all claims of bankrupts to their exemptions." Section 6 provides as follows:

"Sec. 6. This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicil for the six months or the greater portion thereof immediately preceding the filing of the petition."

By clause 8 of § 7 the bankrupt is required to schedule all his property, and to make "a claim for such exemptions as he may be entitled to. By clause 11 of § 47 it is made the duty of the trustees to "set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment." By § 67 it is provided, among other things, that the property of the debtor fraudulently conveyed, etc., "shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicil, be and remain a part of the assets and estate of the bankrupt," etc. In § 70 is enumerated the property of the bankrupt which is to vest in the trustee as of the date of the adjudication in bankruptcy, "except in so far as it is to property which is exempt."

Under the bankruptcy act of 1867 [14 Stat. at L. 522, chap. 176] it was held that property generally exempted by the state law from the claims of creditors *was not [299] part of the assets of the bankrupt, and did not pass to the assignee, but that such property must be pursued by those having special claims against it, in the proper state tribunals. Thus, speaking of the act of 1867, Mr. Justice Bradley (*Re Bass*, 3 Woods, 382, 384, Fed. Cas. No. 1,091) said:

"Not only is all property exempted by state laws, as those laws stood in 1871, expressly excepted from the operation of the conveyance to the assignee, but is added in the section referred to, as if *ex industria*, that 'these exceptions shall operate as a limitation upon the conveyance of the property of the bankrupt to his assignee, and in no case shall the property hereby excepted pass to the assignee, or the title of the bankrupt thereto be impaired or affected by any of the provisions of this title.'

"In other words, it is made as clear as anything can be that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not, it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he must prosecute that claim in a court which has jurisdiction over the property, which the bankrupt court has not."

We think that the terms of the bankruptcy act of 1898, above set out, as clearly evidence the intention of Congress that the title to the property of a bankrupt, generally exempted by state laws, should remain in the bankrupt, and not pass to his representative in bankruptcy, as did the provisions of the act of 1867, considered in *Re Bass*. The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to

set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act, in unambiguous language, declares [300] shall not pass from the bankrupt, or become part of the bankruptcy assets. The two provisions of the statute must be construed together, and both be given effect. Moreover, the want of power in the court of bankruptcy to administer exempt property is, besides, shown by the context of the act; since, throughout its text, exempt property is contrasted with property not exempt, the latter alone constituting assets of the bankrupt estate subject to administration. The act of 1898, instead of manifesting the purpose of Congress to adopt a different rule from that which was applied, as we have seen, with reference to the act of 1867, on the contrary, exhibits the intention to perpetuate the rule, since the provision of the statute to which we have referred in reason is consonant only with that hypothesis.

Though it be conceded that some inconvenience may arise from the construction which the text of the statute requires, the fact of such inconvenience would not justify us in disregarding both its letter and spirit. Besides, if mere arguments of inconvenience were to have weight, the fact cannot be overlooked that the contrary construction would produce a greater inconvenience. The difference, however, between the two is this: That in the latter case — that is, causing the exempt property to form a part of the bankruptcy assets — the inconvenience would be irremediable, since it would compel the administration of the exempt property as part of the estate in bankruptcy; whilst in the other, the rights of creditors having no lien, as in the case at bar, but having a remedy under the state law against the exempt property, may be protected by the court of bankruptcy, since, certainly, there would exist in favor of a creditor holding a waiver note, like that possessed by the petitioning creditor in the case at bar, an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor.

As, in the case at bar, the entire property which the bankrupt owned is within the exemption of the state law, it becomes unnecessary to consider what, if any, remedy might be available in the court of bankruptcy for the benefit of general creditors, [301] in order to prevent the creditor holding the waiver as to exempt property from taking a dividend on his whole claim from the general assets, and thereafter availing himself of the right resulting from the waiver to proceed against exempt property.

*The judgment of the District Court is reversed*, and the proceeding is remanded to that court with directions to overrule the exceptions to the trustee's assignment of homestead and exemption, and to withhold the discharge of the bankrupt, if he be otherwise entitled thereto, until a reasonable time has elapsed for the excepting creditor to assert, in a state tribunal, his alleged right to subject the exempt property to the satisfaction of his claim. And it is so ordered.

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## COSMOS EXPLORATION COMPANY, *Appt.*, *v.* GRAY EAGLE OIL COMPANY *et al.*

(See S. C. Reporter's ed. 301-315.)

*Federal courts—interference with Land Department—forest reserve act—power of Land Department with reference to selection of lieu lands—acts of local officers insufficient to vest equitable title.*

1. The Federal courts cannot finally determine the respective interests of claimants to public lands of the United States while the question of issuing a patent therefor is properly before the Land Department and not yet decided.
2. The Land Department has full jurisdiction over matters involving the right of parties to a patent for public lands selected under the act of Congress of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), in lieu of lands relinquished in a forest reservation.
3. Local land officers were given no power to decide upon the sufficiency of an application, under the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), for vacant public lands in lieu of lands relinquished in the forest reservation, by the act of 1883 (22 Stat. at L. 484, chap. 101, U. S. Comp. Stat. 1901, p. 1369) imposing upon them the duty of furnishing plats of townships showing what lands were vacant and what lands taken.
4. No equitable title to lands selected, under the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), in lieu of land relinquished in a forest reservation, vests in the selector because the local land officers received, accepted, and filed his deed of relinquishment, abstract of title, and non-mineral affidavit, entered his selection upon the official records, and certified that it was free from conflict, as such action could not amount to a decision that the statute had been complied with, since authority so to decide was not conferred on such officials by that statute, and the regulations of the Land Department required all applications for change of entry or settlement to be forwarded to the Commissioner of the General Land Office "for consideration," together with a report "as to the status of the tract applied for."

[No. 217.]

*Argued March 16, 17, 1903. Decided May 18, 1903.*

NOTE.—*On injunction to restrain acts of public officers*—see note to Mississippi v. Johnson, 18 L. ed. U. S. 437.

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of California sustaining a demurrer to and dismissing a bill to enjoin interference with the possession of public land selected in lieu of land relinquished in a forest reservation. *Affirmed*, without prejudice to future proceedings.

See same case below, 50 C. C. A. 79, 112 Fed. 4.

Statement by Mr. Justice **Peckham:**

This is an appeal from the decree of the circuit court of appeals for the ninth circuit, affirming the decree of the circuit court for the southern district of California, sustaining the defendants' demurrer to the bill of complainant, and dismissing the same. The questions arise under the act of June 4, 1897, making appropriations for the sundry civil expenses of the government, etc. 30 Stat. at L. 11, 36, chap. 2, U. S. Comp. Stat. 1901, pp. 3768, 1541. The particular portion of the statute under which this litigation comes is set forth in the margin.†

The material facts averred in the bill are as follows: The assignor of the complainant, one C. W. Clarke, was on November 16, 1899, the owner in fee simple absolute of certain land in a forest reservation, nonmineral, and covered by a patent from the United States. On December 8, 1899, there were lands in the particular township described in the bill which for more than a year continuously theretofore had been surveyed, unappropriated, and vacant public land of the United States, open to settlement, returned and characterized upon the official records of the United States as agricultural land, free and open to settlement and entry under the laws thereof. This land did not then contain any known minerals, salines, petroleum, or mineral oils, nor had any minerals or petroleum or other mineral oils or mineral substances of any kind ever been discovered within the limits of such land, which was situated in the county of Kern, within the southern district of California, and within *the district of lands subject to sale and disposition by the United States land office at Visalia, California. On November 16, 1899, Clarke relinquished the land in the forest reservation to the United States by deed recorded in the office of the county in which the land was situated, and on December 8, 1899, he duly delivered to the register and receiver of the United States land office at Visalia, California, and filed in that land office his deed to the United States indorsed as recorded in the office where the land was situated, together with his selection of the land in lieu of the land relinquished; and at the same time he filed with the register and receiver a nonmineral affidavit showing the selected tract contained no known minerals, and he also delivered to and filed with the register and receiver an abstract of his title to the relinquished tract, duly certified as such by the recorder of the county in which the tract was situated, which abstract showed him to be the owner of the land by title in fee simple absolute, free of any lien or encumbrance at the time of such relinquishment and at the time the deed to the United States was made, and showed that his conveyance to the United States vested in the government the full, complete, and perfect title thereto. On the same day (December 8, 1899) the register and receiver of the United States land office at Visalia, California, duly accepted, received, and filed the deed, abstract of title, non-mineral affidavit and the selection of the land made by Clarke, and duly entered the selection upon the official records of the land office, and the register of the land office then certified that the land so selected by Clarke was free from conflict, and that there was no adverse filing, entry, or claim thereto; and Clarke thereupon and thereby became vested, as complainant averred, with the complete equitable title to the land so selected, and was thereupon and thereby entitled to receive a patent for the land from the United States in pursuance of that selection, under the terms and in pursuance of the provisions of the act of Congress above referred to. Clarke thereafter assigned and transferred to the complainant an undivided three-quarters interest in the land taken in lieu of the relinquished land, and by virtue of the above selection the full, complete, and equitable title to the so *selected land became immediately vested in the complainant's assignor without further act upon his part, and complainant, by virtue of those acts and the assignment to it, is now the complete and equitable owner of a three-quarters interest in the land, and entitled to a patent therefor.

Clarke did not file any affidavit of nonoccupancy of the land selected, so far as the record shows.

It is then averred that this claim of the complainant is denied by the defendants, who assert that the land remained subject to entry, exploration, selection, and purchase as mineral land, until a patent shall be issued to the complainant's assignor, and the complainant avers that the defendants since the selection have entered upon the land, bored for and obtained petroleum oil, and are engaged in taking it therefrom.

It is also averred that the right and title of the defendants are based upon some one or more of four certain pretended placer

†(Page 36.) That in cases in which a tract covered by an unperfected bona fide claim, or by a patent, is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims, the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

mining locations which the bill describes, and which cover the land claimed by complainant, and that the defendants assert title to and the right to the possession of the land described in those placer locations from some or all of the locators thereof; but complainant alleges that these placer locations are illegal and void, because they were not based upon any discovery of mineral within the boundaries thereof, or of petroleum oil within such boundaries, until after the land had been selected by complainant's assignor Clarke.

That after the land had been selected by complainant's assignor, the defendants filed in the United States land office at Visalia, California, a written verified protest against such selection, in which protest it was alleged that the land selected by Clarke was not subject to selection by him under the act of June 4, 1897, above referred to, because the same was mineral land and was included within the boundaries of a valid placer mining location. The protest ask that the Commissioner of the General Land Office should order a hearing to determine the mineral character of the land, and that the selection by Clarke be rejected and disapproved; and the bill specifically avers that such protest is now pending before the Commissioner of the General Land Office.

[305] *That the protest does not show there was any known mine, or that there were any known salines, or any known or existing petroleum wells, or known petroleum deposits, on any of the land selected by Clarke at the time the land was selected, and it is averred that the protest, failing to show such facts, is insufficient to warrant or justify a hearing being ordered by the Land Department to re-establish or redetermine the character of the land, or to change the present classification thereof as fixed by the former report of the Surveyor General and the confirmation thereof by the Land Department, and that such protest is insufficient to impair or affect the validity of Clarke's selection of the land; that notice of such selection by Clarke had been given and published on the — day of January, 1900, and that by law only sixty days are allowed to any person or persons to file protests in the local land offices of the United States against any selections under the law of June 4, 1897, and that the only protest or adverse claim filed against the selection was the protest of defendants above referred to, and that such protest does not state any facts which impair or affect the right of said Clarke or of the complainant in said selected land, nor does it show any grounds why a United States patent therefor should not issue to Clarke, and that defendants are bound and estopped by their protest and the contents thereof and the facts therein stated, and that if such facts be admitted they do not show that defendants, or any of them, have any interest in the lands as against Clarke or complainant: and it is averred that, upon the facts as pleaded by the protest, the Land Department of the United States cannot lawfully refuse or deny the issuance of a patent to Clarke, and that upon such facts he is entitled to the approval of his selection by the Land Department of the United States and to the issuance of a patent therefor.

Notwithstanding complainant was the complete and equitable owner of the land and entitled to the quiet and uninterrupted possession of the same, so far as regarded the three-quarters interest therein, yet the defendants herein, except Clarke, did, on or about February 1, 1890, and frequently since then, by themselves and their employees, without right, title, or claim, wrongfully and unlawfully, and in disregard of the right of Clarke, *enter upon the land, erect der- [306] ricks and other machinery thereon, and proceed to excavate the soil thereof and bore wells and drive iron pipes therein, seeking for petroleum oil and other mineral products in the land, for the purpose of taking the same, if found, to their own use, and removing the same; that thereafter, and on or about the last day of February, 1900, the defendants discovered in the wells petroleum oil in profitable quantities, and that the defendants are now wrongfully and unlawfully in possession of the premises, and unlawfully and continuously from day to day pumping large quantities of petroleum oil from the wells, and are about to and will, unless restrained by the court, remove the same from the land and sell and dispose of and market the same, and appropriate the proceeds thereof to their own use, to complainant's great loss and damage, and will continue so to do to the great waste and irreparable injury and damage of said property and the complainant, unless restrained therefrom by the court.

It was also alleged that the defendant Clarke is the owner of an undivided one-quarter interest in the selected land described, and that complainant requested him to join with it in instituting and prosecuting this suit, but he refused to join herein, and therefore complainant made him a defendant in order that all the parties interested in the premises might be before this court and their rights finally adjudicated by a decree to be entered herein.

Upon these allegations complainant prayed for a writ of injunction restraining defendants from interfering with complainant's entry upon the land, and enjoining defendants, other than Clarke, from excavating or digging upon the land for the purpose of taking petroleum oil from the wells thereon or from marketing or disposing of the oil, until the further order and decree of the court in the premises, and that upon final hearing the injunction should be made perpetual by an order and decree of the court.

It was also prayed that complainant might have the judgment of the court that the full and complete equitable title to an undivided three-quarters interest in the property is vested in the complainant, and an undivided one-quarter interest in Clarke, and that the adverse claims of defendants thereto should be decreed to be wholly without right and unfounded, and that *complain- [307]

ant have judgment for the possession of the land, and that a receiver should be appointed to take possession of the land and to preserve the same and the product thereof on the premises until the further order of the court, but not to operate the wells thereon except to the extent necessary, if at all, to preserve the same from deterioration in value, nor to market or remove any oil therefrom.

Upon the filing of this bill the court granted an order to show cause why the complainant should not have a preliminary injunction as asked for in the bill. The defendants appeared and interposed a demurrer to the bill, and upon the hearing of the order to show cause they presented a large number of affidavits, which in substance averred that the complainant was guilty of fraud and bad faith in locating the claim, and that such location was a fraud upon the statute under which it was assumed to be made. Affidavits in reply were filed by the complainant.

The demurrer was argued at the same time as the argument was had upon the return of the order to show cause, and thereafter on September 24, 1900, an order was made by the circuit court denying the application for a receiver and for an injunction, and a decree was also made sustaining the defendants' demurrer and dismissing the bill with costs, and on September 26, 1900, such decree was entered dismissing the bill. 104 Fed. 20.

An appeal was taken from the decree sustaining the demurrer and dismissing the bill, but none from the order denying the application for a receiver and for an injunction. As the appeal to the circuit court of appeals was only from the decree overruling the demurrer and dismissing the complainant's bill, that court confined its discussion to the facts alleged in the bill.

After a hearing it affirmed the decree of the circuit court (50 C. C. A. 79, 112 Fed. 4), and the complainant has by appeal brought the case here.

*Messrs.* **T. C. Van Ness** and **Jefferson Chandler** argued the cause, and, with *Messrs. John M. Thurston, Shirley C. Ward, M. A. Ballinger, Horace F. Clark,* and *William C. Prentiss,* filed a brief for appellant:

The relinquishment of forest reserve lands, and the selection of vacant land open to settlement, constitutes a "contract fully executed" upon the part of the selector at the instant of the selection.

*Olive Land & Development Co.* v. *Olmstead,* 103 Fed. 568; *Re McDonald,* 30 Land Dec. 124; *Clarke* v. *Northern P. R. Co.* 30 Land Dec. 145; *Kern Oil Co.* v. *Clarke,* 30 Land Dec. 550.

When the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities, and burdens of ownership, and no third party can acquire from the government interests as against him.

*Benson Min. & Smelting Co.* v. *Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877; *Simmons* v. *Wagner,* 101 U. S. 261, 25 L. ed. 911; *United States* v. *Hughes,* 11 How. 568, 13 L. ed. 816; *Stark* v. *Starr,* 6 Wall. 414, 18 L. ed. 928; *Wirth* v. *Branson,* 98 U. S. 118, 25 L. ed. 86; *Carroll* v. *Safford,* 3 How. 441, 11 L. ed. 671; *Witherspoon* v. *Duncan,* 4 Wall. 210, 18 L. ed. 339; *Deffeback* v. *Hawke,* 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Colorado Coal & Iron Co.* v. *United States,* 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *Davis* v. *Weibbold,* 139 U. S. 524, 35 L. ed. 244, 11 Sup. Ct. Rep. 628.

When the purchase price has been fully paid, or the provisions of the statute for the acquiring of title otherwise complied with, the full equitable title thereby vests, and no subsequent event can impair such title.

*Larriviere* v. *Madegan,* 1 Dill. 457, Fed. Cas. No. 8,096; *Culver* v. *Uthe,* 133 U. S. 655, 33 L. ed. 776, 10 Sup. Ct. Rep. 415; *Michigan Land & Lumber Co.* v. *Rust,* 168 U. S. 594, 42 L. ed. 593, 18 Sup. Ct. Rep. 208; *Cornelius* v. *Kessel,* 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Wright* v. *Roseberry,* 121 U. S. 488, 30 L. ed. 1038, 7 Sup. Ct. Rep. 985; *United States* v. *Iron Silver Min. Co.* 128 U. S. 673, 32 L. ed. 571, 9 Sup. Ct. Rep. 195.

Equity will not suffer a wrong to be without a remedy.

Bispham, Eq. 6th ed. § 37.

The conserving power of a court of chancery is not limited to cases in which action is actually pending, but extends to cases wherein adverse rights are asserted whether action be actually pending or not.

*Nantahala Marble & Talc Co.* v. *Thomas,* 76 Fed. 59; *Thomas* v. *Nantahala Marble & Talc Co.* 7 C. C. A. 330, 8 U. S. App. 429, 58 Fed. 485; *Northern P. R. Co.* v. *Hussey,* 9 C. C. A. 463, 15 U. S. App. 391, 61 Fed. 231; *Lanier* v. *Alison,* 31 Fed. 100; *Northern P. R. Co.* v. *Soderberg,* 86 Fed. 49; *Johnson* v. *Hughes,* 58 N. J. Eq. 406, 43 Atl. 901; *Wood* v. *Murray,* 85 Iowa, 505, 52 N. W. 356; *Olive Land & Development Co.* v. *Olmstead,* 103 Fed. 568; *West Coast Improv. Co.* v. *Winsor,* 8 Wash. 490, 36 Pac. 441; *Cox* v. *Garrett,* 7 Okla. 375, 54 Pac. 546; *Calhoun* v. *McCornack,* 7 Okla. 347, 54 Pac. 493; *Boyd* v. *Desrozier,* 20 Mont. 444, 52 Pac. 53; *Erhardt* v. *Boaro,* 113 U. S. 538, 28 L. ed. 1117, 5 Sup. Ct. Rep. 565; *Buskirk* v. *King,* 18 C. C. A. 418, 25 U. S. App. 607, 72 Fed. 22; *Wood* v. *Braxton,* 54 Fed. 1005; *Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.* 19 L. R. A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 746; *Union Mill & Min. Co.* v. *Warren,* 82 Fed. 522; *Walker* v. *Emerson,* 89 Cal. 456, 26 Pac. 968; *Richards* v. *Dower,* 64 Cal. 62, 28 Pac. 113; *More* v. *Massini,* 32 Cal. 590; *Kittle* v. *Pfeiffer,* 22 Cal. 485; *Poirier* v. *Fetter,* 20 Kan. 47; *Hall* v. *Equator Min. & Smelting Co.* Fed. Cas. No. 5,931.

No remedy exists at law for the wrongs complained of.

*Carter* v. *Ruddy,* 166 U. S. 493, 41 L. ed. 1090, 17 Sup. Ct. Rep. 640.

The necessity for equitable interference is therefore clear.

*Toledo, A. A. & N. M. R. Co.* v. *Pennsylvania Co.* 19 L. R. A. 395, 5 Inters. Com. Rep. 545, 54 Fed. 746; *Waterloo Min. Co.* v. *Doe*, 27 C. C. A. 50, 48 U. S. App. 411, 82 Fed. 45.

In the exercise of its jurisdiction to conserve property until legal title can be ascertained a court of equity must examine the facts and law of complainant's case and interpret the law upon which the rights asserted depend.

*Gormley* v. *Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Hunt* v. *Steese*, 75 Cal. 620, 17 Pac. 920; *Hess* v. *Winder*, 34 Cal. 270; *Porter* v. *Jennings*, 89 Cal. 440, 26 Pac. 965; *Bullard* v. *Kempff*, 119 Cal. 9, 50 Pac. 780.

The complainant must make a prima facie case, not a clear and conclusive one.

*Buskirk* v. *King*, 18 C. C. A. 418, 25 U. S. App. 607, 72 Fed. 22; *Hall* v. *Equator Min. & Smelting Co.* Fed. Cas. No. 5,931.

It is the act of the party in full compliance with the act of Congress, and not the act of the land officers, that passes the equitable title.

*Benson Min. & Smelting Co.* v. *Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877; *Simmons* v. *Wagner*, 101 U. S. 261, 25 L. ed. 910; *United States* v. *Hughes*, 11 How. 568, 13 L. ed. 816; *Stark* v. *Starr*, 6 Wall. 414, 18 L. ed. 928; *Wirth* v. *Branson*, 98 U. S. 118, 25 L. ed. 86; *Carroll* v. *Safford*, 3 How. 441, 11 L. ed. 671; *Witherspoon* v. *Duncan*, 4 Wall. 210, 18 L. ed. 339; *Deffeback* v. *Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Colorado Coal & Iron Co.* v. *United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *Davis* v. *Weibbold*, 139 U. S. 524, 35 L. ed. 244, 11 Sup. Ct. Rep. 628; *Re McDonald*, 30 Land Dec. 124; *Clarke* v. *Northern P. R. Co.* 30 Land Dec. 145; *Hussman* v. *Durham*, 165 U. S. 144, 41 L. ed. 664, 17 Sup. Ct. Rep. 253; *Carter* v. *Ruddy*, 166 U. S. 495, 41 L. ed. 1091, 17 Sup. Ct. Rep. 640.

Departmental approval is not only not a prerequisite to the vesting of equitable title, but equitable title frequently vests in the very face of departmental disapproval.

*Ard* v. *Brandon*, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; *Cunningham* v. *Ashley*, 14 How. 377, 14 L. ed. 462; *Samson* v. *Smiley*, 13 Wall. 91, 20 L. ed. 489; *Duluth & Iron Range R. Co.* v. *Roy*, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549; *Morrison* v. *Stalmaker*, 104 U. S. 213, 26 L. ed. 741; *Nelson* v. *Northern P. R. Co.* 188 U. S. 108, *ante*, 406, 23 Sup. Ct. Rep. 302.

Continuing jurisdiction in the department, to inquire as to whether or not equitable title has vested, is not incompatible with such title having in fact vested.

*Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 594, 42 L. ed. 593, 18 Sup. Ct. Rep. 208; *Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Wright* v. *Roseberry*, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; *Guaranty Sav. Bank* v. *Bladow*, 176 U. S. 448, 44 L. ed. 540, 20 Sup. Ct. Rep. 425.

Equitable title vests at the date of selection, under the act of June 4, 1897, whether the selector's relinquishment of his forest reserve land be contemporaneous with his selection,—as the act of Congress contemplates,—or prior thereto, as made necessary by Land Office regulations.

*Olive Land & Development Co.* v. *Olmstead*, 103 Fed. 568.

The term "final entry," as distinguished from "original entry," is only applicable where title is acquired by progressive steps; and has no application where the original entry operates as an immediate consummated purchase.

*Larriviere* v. *Madegan*, 1 Dill. 457, Fed. Cas. No. 8,096; *French* v. *Spencer*, 62 U. S. 228, 16 L. ed. 97; *Culver* v. *Uthe*, 133 U. S. 655, 33 L. ed. 776, 10 Sup. Ct. Rep. 415.

A third person, who is a mere trespasser, cannot upon demurrer invoke the weakness of an entry or selection of public land made by another, nor can a third person call upon that other to establish or defend his selection.

*Northern P. R. Co.* v. *Sanders*, 166 U. S. 631, 41 L. ed. 1143, 17 Sup. Ct. Rep. 671; *Sioux City & I. F. Town Lot & Land Co.* v. *Griffey*, 143 U. S. 32, 36 L. ed. 64, 12 Sup. Ct. Rep. 362; *Re Bergen*, 30 Land Dec. 266.

The defendants, as mere protestants, have no standing in court to argue against the strength of complainant's title.

*Wight* v. *Dubois*, 21 Fed. 694.

The government may waive as against itself any irregularity in the proceedings of complainant's grantor, and, if there was any, did so by accepting his selections and certifying to the same.

*Barnard* v. *Ashley*, 18 How. 43, 15 L. ed. 285.

The belief of a nonmineral claimant as to the mineral character of land does not affect the right of such claimant to make entry of the land.

*Iron Silver Min. Co.* v. *Reynolds*, 124 U. S. 374, 31 L. ed. 466, 8 Sup. Ct. Rep. 598; *Sullivan* v. *Iron Silver Min. Co.* 143 U. S. 431, 36 L. ed. 214, 12 Sup. Ct. Rep. 555; *Colorado Coal & I. Co.* v. *United States*, 123 U. S. 307, 31 L. ed. 182, 8 Sup. Ct. Rep. 131; *Deffeback* v. *Hawke*, 115 U. S. 399, 29 L. ed. 425, 6 Sup. Ct. Rep. 95; *Davis* v. *Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628; *Olive Land & Development Co.* v. *Olmstead*, 103 Fed. 578.

*Mr.* **John S. Chapman** argued the cause, and, with *Mr. Frank H. Short*, filed a brief for appellees:

A bill in equity to quiet a title cannot be maintained in the Federal courts sitting as courts of equity, by a party out of possession and against the parties in possession.

*Northern P. R. Co.* v. *Amacker*, 1 C. C. A. 345, 7 U. S. App. 33, 49 Fed. 529; *Wehrman* v. *Conklin*, 155 U. S. 314, 39 L. ed. 167, 15 Sup. Ct. Rep. 129; *Whitehead* v. *Shattuck*, 138 U. S. 146, 34 L. ed. 873, 11 Sup. Ct. Rep. 276; *Frost* v. *Spitley*, 121 U. S. 556, 30 L. ed. 1012, 7 Sup. Ct. Rep.

1129; *Savage* v. *Worsham*, 104 Fed. 18; *Southern P. R. Co.* v. *Goodrich*, 57 Fed. 879.

To such a suit as is here brought, it is necessary that the complainant should have a legal title, as well as be in possession.

*Harland* v. *Bankers' & M. Teleg. Co.* 32 Fed. 305; *Kennedy* v. *Elliott*, 85 Fed. 832; *Morrison* v. *Marker*, 93 Fed. 692.

A bill to quiet the title to a portion of the public lands of the United States cannot be maintained where it appears upon the face of the bill that a controversy is pending as to the rights of the parties in such lands before the Land Department of the United States.

*Sioux City & St. P. R. Co.* v. *United States*, 34 Fed. 835; *Gaines* v. *Thompson*, 7 Wall. 347, 19 L. ed. 62; *Sloan* v. *United States*, 95 Fed. 193; *Ferry* v. *Street*, 4 Utah, 521, 7 Pac. 712, 11 Pac. 571; *Brandt* v. *Wheaton*, 52 Cal. 430; *Forbes* v. *Driscoll*, 4 Dak. 336, 31 N. W. 633; *Marquez* v. *Frisbie*, 101 U. S. 473, 25 L. ed. 800.

The administration of these laws is under the jurisdiction of the Land Department: it has the power to prescribe reasonable regulations not inconsistent with law for the purpose of discharging the duties imposed upon it, and exercising the powers with which it is clothed.

*Knight* v. *United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *United States* v. *Winona & St. P. R. Co.* 15 C. C. A. 96, 32 U. S. App. 272, 67 Fed. 948; *Chapman* v. *Quinn*, 56 Cal. 266; *Poppe* v. *Athearn*, 42 Cal. 607; *Germania Iron Co.* v. *James*, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811; *Hoover* v. *Salling*, 102 Fed. 716; *James* v. *Germania Iron Co.* 46 C. C. A. 476, 107 Fed. 597; *King* v. *McAndrews*, 50 C. C. A. 20, 111 Fed. 860; *Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030; *Northern P. R. Co.* v. *Cannon*, 4 C. C. A. 303, 7 U. S. App. 507, 54 Fed. 252; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389.

And not only has the Land Department jurisdiction over these matters, but that jurisdiction continues until the patent is issued, or until that stage is reached which, in law, is the legal equivalent of a patent.

*Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208; *Knight* v. *United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; *Diller* v. *Hawley*, 26 C. C. A. 514, 48 U. S. App. 462, 81 Fed. 651; *Hawley* v. *Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

Where an act for the disposition of the public lands is passed, unless the administration of it is committed to some other specially enumerated tribunal, it comes within the scope of the jurisdiction of the Land Department.

*Catholic Bishop* v. *Gibbon*, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779.

The selection is not made until it is approved.

*Chicago, M. & St. P. R. Co.* v. *Sioux City & St. P. R. Co.* 117 U. S. 406, 29 L. ed. 928, 6 Sup. Ct. Rep. 790; *Wisconsin C. R. Co.* v. *Price County*, 133 U. S. 496, 33 L. ed. 687, 10 Sup. Ct. Rep. 341.

Subsequent to the commencement of these suits, the controversies which were at the time of the commencement pending in the Land Department were decided by the Department, and the selections were rejected.

*Kern Oil Co.* v. *Clarke*, 30 Land Dec. 550; *Gray Eagle Oil Co.* v. *Clarke*, 30 Land Dec. 570.

No right vests by the mere presentation of the application or selection, or by any other act of the applicant.

*Frisbie* v. *Whitney*, 76 U. S. 187, 19 L. ed. 668; *The Yosemite Valley Case*, 82 U. S. 77, *sub nom. Hutchings* v. *Low*, 21 L. ed. 82; *Wirth* v. *Branson*, 98 U. S. 118, 25 L. ed. 86; *Campbell* v. *Wade*, 132 U. S. 34, 33 L. ed. 240, 10 Sup. Ct. Rep. 9.

No construction can be placed upon the forest lien law which will take cases arising under it out of the ordinary jurisdiction of the Land Department.

*Orchard* v. *Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208; *Diller* v. *Hawley*, 26 C. C. A. 514, 48 U. S. App. 462, 81 Fed. 651; *Hawley* v. *Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

Until there is the judgment of the Land Department that the lands are of the character sought to be purchased or selected, no title vests.

*Re Abercrombie*, 6 Land Dec. 393; *Spratt* v. *Edwards*, 15 Land Dec. 290; *Stinchfield* v. *Pierce*, 19 Land Dec. 12; *Zadig* v. *Central P. R. Co.* 20 Land Dec. 26; *Barnstetter* v. *Central P. R. Co.* 21 Land Dec. 464; *Walker* v. *Southern P. R. Co.* 24 Land Dec. 172; *Swank* v. *California*, 27 Land Dec. 411; *McQuiddy* v. *California*, 29 Land Dec. 181; *Re Harrell*, 29 Land Dec. 553; *Harnish* v. *Wallace*, 13 Land Dec. 108; *Re Placer*, 13 Land Dec. 86; *Jones* v. *Driver*, 15 Land Dec. 514; *Rea* v. *Stephenson*, 15 Land Dec. 37; *Re Laney*, 9 Land Dec. 83; *Re Plymouth Lode*, 12 Land Dec. 513; *Deffeback* v. *Hawke*, 115 U. S. 392, 29 L. ed. 423, 6 Sup. Ct. Rep. 95; *Sparks* v. *Pierce*, 115 U. S. 411, 29 L. ed. 429, 6 Sup. Ct. Rep. 102; *Davis* v. *Weibbold*, 139 U. S. 515, 35 L. ed. 241, 11 Sup. Ct. Rep. 628; *New Dunderberg Min. Co.* v. *Old*, 25 C. C. A. 116, 49 U. S. App. 201, 79 Fed. 598; *Northern P. R. Co.* v. *Cannon*, 4 C. C. A. 303, 7 U. S. App. 507, 54 Fed. 252.

Lands already occupied by others are not "vacant."

*Shaw* v. *Kellogg*, 170 U. S. 312, 42 L. ed. 1050, 18 Sup. Ct. Rep. 632.

Lands in the occupancy of one person are not open to be taken under any of the various laws of the United States.

*Atherton* v. *Fowler*, 96 U. S. 513, 24 L. ed. 732; *Cosmos Explor. Co.* v. *Gray Eagle Oil Co.* 50 C. C. A. 79, 112 Fed. 4; *Basey* v. *Gallagher*, 20 Wall. 670, 22 L. ed. 452.

When a mining location has been made,

the party acquires right of exclusive possession, and the interest which thus vests removes the land from the public domain, and the United States has no authority to dispose of it.

*Forbes* v. *Gracey*, 94 U. S. 762, 24 L. ed. 313; *Belk* v. *Meagher*, 104 U. S. 279, 26 L. ed. 735; *Noyes* v. *Mantle*, 127 U. S. 348, 32 L. ed. 168, 8 Sup. Ct. Rep. 1132.

To issue a patent to one person for lands to which another has, or may have, rights under the laws of the United States, without any notice or any opportunity to be heard in defense of those rights, is in violation of the Constitution, and this has been applied as well to the action of the Land Department as to the courts.

*Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Orchard* v. *Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635.

One who has acquired any rights under the homestead law is as against all persons except the United States government at least, entitled to protection of that right.

*Sturr* v. *Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; *Diller* v. *Hawley*, 26 C. C. A. 514, 48 U. S. App. 462, 81 Fed. 653; *Hawley* v. *Diller*, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

There is no delivery of the deeds until they are accepted, and the mere passing of the instruments to the hands of the grantee does not amount to a delivery. The grantee has the right to examine it, and to reject it if it is not proper. And, moreover, he has a reasonable time in which to determine whether it is acceptable or not.

*Harris* v. *Harris*, 59 Cal. 620; Tiedeman, Real Prop. § 812; 3 Washb. Real Prop. p. 354, § 28; *Los Angeles Immigration & Land Co-op. Asso.* v. *Phillips*, 56 Cal. 539; *Ryan* v. *United States*, 136 U. S. 68, 34 L. ed. 447, 10 Sup. Ct. Rep. 913.

If the lands are mineral, they are not subject to selection. And until there has been an official determination that they come within the class of lands subject to selection, the question of mineral or nonmineral is not precluded.

*Barden* v. *Northern P. R. Co.* 154 U. S. 288, 38 L. ed. 992, 14 Sup. Ct. Rep. 1030.

This court takes judicial notice of the regulations of the Land Department.

*Caha* v. *United States*, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513.

The power to make regulations binding upon courts, if they are reasonable and consistent with law, has been affirmed by the courts in many different cases.

*Chapman* v. *Quinn*, 56 Cal. 266; *Poppe* v. *Athearn*, 42 Cal. 607; *Germania Iron Co.* v. *James*, 32 C. C. A. 348, 61 U. S. App. 1, 89 Fed. 811; *Hoover* v. *Salling*, 102 Fed. 716; *Catholic Bishop* v. *Gibbon*, 158 U. S. 155, 39 L. ed. 931, 15 Sup. Ct. Rep. 779.

In pleading a right given by a statute and dependent upon the existence of particular facts, the pleader must state the facts upon which that right or privilege depends.

*Dye* v. *Dye*, 11 Cal. 163; *Himmelman* v. *Danos*, 35 Cal. 441; *Rhoda* v. *Alameda Co.* 52 Cal. 350; *San Luis Obispo County* v. *Hendricks*, 71 Cal. 242, 11 Pac. 682; *Perine* v. *Forbush*, 97 Cal. 309, 32 Pac. 226; *Little York Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199, 24 L. ed. 656.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

An examination of the complainant's bill shows that it does not ask for an injunction until the decision of the Land Department upon the matters pending therein. The complainant ignores those proceedings so far as to claim now the final adjudication by the court, based upon its alleged equitable title to a three-quarters interest in the land selected, and it avers that the Land Department cannot lawfully refuse or deny the issuance of a patent to Clarke. It avers that the protest filed by defendants is insufficient to impair or affect the validity of the selection of land made by complainant's assignor. The court is, therefore, called upon in advance of and without reference to the action of the Land Department, to determine complainant's right and title to the three-quarters interest in the selected land, and a final decree is asked determining the interest of the parties in this land, while the question in relation to the title is still properly before the Land Department, and not yet decided. This we cannot do. *Marquez* v. *Frisbie*, 101 U. S. 473, 25 L. ed. 800; *United States* v. *Schurz*, 102 U. S. 378, 395, 26 L. ed. 167, 171. If the Land Department has any jurisdiction over the subject-matter, the question as to the sufficiency of the protest is one for the decision of that department, and its right to decide thereon is not taken from it by the averment of a legal conclusion contained in the complainant's bill that the department has no legal right to decide otherwise than in favor of the complainant upon the facts before it. But, assuming that the question of issuing a patent is still and properly before the Land Department, the complainant avers that it has an equitable title to the land which will be protected by the court. Whether complainant has a full, complete, and equitable title to the land is a question depending upon considerations hereinafter stated.

There can be, as we think, no doubt that the general administration of the forest reserve act, and also the determination of the [309] various questions which may arise thereunder before the issuing of any patent for the selected lands, are vested in the Land Department. The statute of 1897 does not in terms refer any question that might arise under it to that department, but the subject-matter of that act relates to the relinquishment of land in the various forest reservations, to the United States, and to the selection of lands in lieu thereof, from the public lands of the United States, and the administration of the act is to be governed by the general system adopted by the United States for the administration of the laws regarding its public lands. Unless taken away by some affirmative provision of law,

the Land Department has jurisdiction over the subject. *Catholic Bishop* v. *Gibbon*, 158 U. S. 155, 166, 167, 39 L. ed. 931, 936, 15 Sup. Ct. Rep. 779. There is no such law, and we must hold that the Land Department has full jurisdiction over matters involving the right of parties to a patent for lands selected under that act in lieu of lands relinquished in a forest reservation. By virtue of that jurisdiction the General Land Department has power to review and set aside (though not arbitrarily) the decisions of local officers relating to those questions, where such officers have power to make those decisions in the first instance. *Orchard* v. *Alexander*, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635; *Guaranty Sav. Bank* v. *Bladow*, 176 U. S. 448, 451, 44 L. ed. 540, 542, 20 Sup. Ct. Rep. 425; *Hawley* v. *Diller*, 178 U. S. 476, 490, 44 L. ed. 1157, 1162, 20 Sup. Ct. Rep. 986.

The Land Department also has power to adopt, and did adopt, rules and regulations for the administration of the forest reserve act. The power existed by virtue of the provisions of the Revised Statutes, §§ 441, 453, and 2478 (U. S. Comp. Stat. 1901, pp. 252, 257, 1586). Courts will take judicial notice of rules and regulations made by the Land Department regarding the sale or exchange of public land. *Caha* v. *United States*, 152 U. S. 211, 221, 38 L. ed. 415, 14 Sup. Ct. Rep. 513. The rules and regulations promulgated by that department for the purpose of carrying out the provisions of the act of June 4, 1897, are found in 24 Land Dec. 589, 592, and we think the rules set forth below are reasonable and entitled to respect and obedience as valid rules and regulations.

Among the rules it is provided:

"16. Where final certificate or patent has issued, it will be necessary for the entryman [310] or owner thereunder to execute a *quitclaim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for.

"18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for."

The "consideration," mentioned in rule 18, is clearly not of the character of a review of a decision already made by the local land officers, but is in the nature of an original consideration of the subject by the General Land Office, to which office the final decision belongs. The *applications* are to be forwarded, not a decision by the local land office, together with a report (not a decision) as to the status of the land. This rule makes it the duty of the local land officers merely to forward the various applications to the General Land Office, and an original decision is to be made by the latter office upon the papers transmitted to it.

It will be noticed that the bill in this case alleges the proceeding before the local land officers, and also that defendants filed a protest, and that the questions raised thereby are still before the Land Department and not yet decided. The complete equitable title of the complainant is not, therefore, made out, and cannot exist until a favorable decision by that department has been made regarding the sufficiency of complainant's proof of his right to the selected land. That question the department is competent, and it is its duty, to decide. It may be that when the decision of the Land Department is made, if it be favorable to the applicant, the complete equitable title claimed will accrue from the time the selection of the lands was made in the local land office, and when the patent subsequently issues the legal title will vest from the time of selection. But before any decision is made how can there be an equitable title?

We do not think that by the act of 1883 (22 Stat. at L. 484, chap. 101, U. S. Comp. Stat. 1901, p. 1369), the *local land officers [311] were given any power to decide upon the sufficiency of the application in such a case as this. That act simply imposed upon them the duty of furnishing plats of townships showing what lands were vacant and what lands taken. It obviously referred to the lands that appeared vacant or appeared to have been taken on the records of their office. It did not assume to provide that no other lands could be taken than such as appeared so to be on those records.

The ground upon which complainant insists that it is the equitable owner of the land selected is that it has relinquished a title in fee in a forest reservation, and has selected in lieu thereof vacant land open to settlement, and that the local land officers duly accepted, received, and filed the deed of the land relinquished, and the affidavit that the land selected was nonmineral, and that the officers duly entered such selection upon the official records of the land office, and then and there certified that the land selected was free from conflict, and that there was no adverse filing, entry, or claim thereto. Complainant asserts that was all that it could reasonably do; that nothing remained on its part to do, and that when such is the case the equitable title vests, and it is entitled to the protection of a court of equity to preserve and defend the title so acquired.

Counsel insists that the act of June 4, 1897, constitutes a standing offer on the part of the government to exchange any of its "vacant land, open to settlement" for a similar area of patented land in a forest reservation, and that whenever a person relinquishes to the government a tract in a forest reservation, and places his deed to the government of record as required by the Land Department rules, and selects in lieu thereof a similar area of vacant land, open to settlement, that such offer of the government has thereupon been both accepted

and fully complied with, and that a complete equitable title to the selected land is thereby vested in the selector.

But even the complete equitable title asserted by complainant must, as it would seem, be based upon the alleged right of the local land officers to accept the deed and approve the selection, even though such approval may be thereafter the subject of a review in the nature of an appeal from the action [312] *of the local officers. There must be a decision made somewhere regarding the rights asserted by the selector of land under the act, before a complete equitable title to the land can exist. The mere filing of papers cannot create such title. The application must comply with and conform to the statute, and the selector cannot decide the question for himself.

We do not see how it can be successfully maintained that, without any decision by any official representing the government, and by merely filing the deed relinquishing to the government a tract of forest reserve land and assuming to select a similar area of vacant land open to settlement, the selector has thereby acquired a complete equitable title to the selected land. The selector has not acquired title simply because he has selected land which he claims was at the time of selection vacant land open to settlement, nor does the filing of his deed conveying the land relinquished and the abstract of title with it show necessarily that he was the owner of the land as provided for by the statute. So far as his action goes, it is an assertion on his part that he was the owner in fee simple of the land he proposed to relinquish, and that the deed conveys a fee simple title to the government, and also that he has selected vacant land which is open to settlement, and that therefore he is entitled to a patent for such land. These assertions may or may not be true. Who is to decide? Complainant asserts that if a decision be necessary before the vesting of a complete equitable title, that in that case the local officers are to decide that question, and by accepting the deed and making the certificate already mentioned, they have decided it, and thereupon, at all events, the complete, equitable title accrued, even though such decision were subject to a review by the Commissioner of the General Land Office and thereafter by the Secretary.

But, as has already been stated, there is nothing in the statute of 1897 which gives the local land officers the right to decide whether the selector has complied with the provisions of the act, and unless those officers had that power they did not acquire it by assuming to exercise it. We do not say they did so assume. They received, accepted, and filed the deed, the abstract of title, the non-mineral affidavit, and the selec- [313] tion as *made by Clarke. They entered that selection upon the official records of the land office, and they certified that it was free from conflict, and that there was no adverse filing, entry, or claim thereto; but it cannot be said that they decided that the selector had complied with the provisions of the statute, or that he had done all that he ought to have done in order to acquire his alleged complete, equitable title.

Their certificate that the land was free from conflict was simply a certificate as to what appeared on the books of the local office, and the same may be said of the statement that there was no adverse filing, entry, or claim thereto upon such books. No affidavit of non-occupancy was filed, and they did not certify that the land so selected was in fact vacant or unoccupied, nor did they assume to certify that the selected land contained no minerals, although an affidavit to that effect was presented to them. In truth, all that these local officers did was to certify that the selector had done certain things, and that the land selected was vacant and open to settlement so far as it appeared from the books of the local land office.

Taking into consideration, however, the fact that the statute did not vest the local officers with the right to decide upon the question of a compliance with its terms, and the further fact that the Land Department had adopted rule 18, above referred to, which provides for the forwarding of all applications for change of entry or settlement to the Commissioner of the General Land Office for his consideration, together with a report as to the status of the tract applied for, we must conclude that the action of the local officers did not, as it could not, amount to a decision upon the application of the selector, so that he became vested with the equitable title to the land he assumed to select. It is certain, as we have already remarked, there must be some decision upon that question before any equitable title can be claimed,— some decision by an officer authorized to make it. Under the rule above cited, that decision has not been made. The General Land Office has (so far as this record shows) come to no conclusion in regard to it.

The protest by the defendants was duly filed within the time permitted by the regulations of the office, and the questions *aris- [314] ing thereunder are, as stated, in the bill still pending before the General Land Office. Whether it was necessary, at the time of making the selection, for the selector to file, in addition to his non-mineral affidavit, an affidavit that the land was not occupied in fact, is a question of law for the Land Department to determine among the other questions to be decided by it. Its decision of any legal question would not, of course, be binding on the courts whenever such a question might properly arise in any future litigation. It is also for the Land Department to determine whether, if the land were not known to be mineral land at the time of the selection, the fact that mineral in paying quantities has been found since that time, will vitiate that selection.

In *Kern Oil Co.* v. *Clarke*, 30 Land Dec. 550, 567, referring to the necessity of the filing of a nonoccupancy affidavit, it was said:

"That a non-mineral affidavit should ac-

company the selection is not seriously questioned by appellant. It is just as essential that it should be accompanied by a vacancy or nonoccupancy affidavit. Appellant's contention, that the word 'vacant,' as used in the statute, means public lands which are not shown by the records of the local office or General Land Office to be claimed, appropriated, or reserved, cannot be accepted. Portions of the public lands may be occupied, and for that reason be not subject to selection, and yet there be no mention of their occupancy in the records of the Land Department."

Again, in *Gray Eagle Oil Co.* v. *Clarke*, 30 Land Dec. 570, it was also held that under the act of June 4, 1897, it must be shown that at the date of selection the selected lands were unoccupied as well as non-mineral in character, and that, until that proof was submitted, a selector had not done that which converts the offer of exchange into a contract fully executed on his part whereby he secures a vested right in the selected land. It is unnecessary for the court to express an opinion as to the correctness of these views of the Land Department as stated in its opinion in the above cases.

What may be the decision of the Land Department upon these questions in this case cannot be known, but, until the various 315]*questions of law and fact have been determined by that department in favor of complainant, it cannot be said that it has a complete equitable title to the land selected.

Concluding, as we do, that the question whether the complainant has ever made a proper selection of land in lieu of the land relinquished, has never been decided by the Land Department, but is still properly before that department, the courts cannot take jurisdiction and proceed to decide such question themselves. The government has provided a special tribunal for the decision of such a question arising out of the administration of its public land laws, and that jurisdiction cannot be taken away from it by the courts. *United States* v. *Schurz*, 102 U. S. 378, 395, 26 L. ed. 167, 171.

The bill is not based upon any alleged power of the court to prevent the taking out of mineral from the land, pending the decision of the Land Department upon the rights of the complainant, and the court has not been asked by any averments in the bill or in the prayer for relief to consider that question.

For the reasons stated, we think the bill does not state sufficient facts upon which to base the relief asked for, and that the defendants' demurrer to the same was properly sustained. *The decree of the Circuit Court of Appeals must therefore be affirmed.*

On a petition for a modification of the above decree of affirmance, Mr. Justice **Peckham** announced on June 1, 1903, the order of the court that the decree dismissing the bill be modified by providing that the dismissal is without prejudice to such future proceedings as complainant may be advised, and that as so modified the decree be affirmed.

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## *PACIFIC LAND AND IMPROVEMENT COMPANY, *Appt.*, [316]
## *v.*
## ELWOOD OIL COMPANY *et al.*

(See S. C. Reporter's ed. 316.)

*Federal courts—interference with Land Department—forest reserve act—power of Land Department with reference to selection of lieu lands—acts of local officers insufficient to vest equitable title.*

This case is governed by the decision in *Cosmos Exploration Co.* v. *Gray Eagle Oil Co. ante*, 1064.

[No. 218.]

*Argued March 16, 17, 1903. Decided May 18, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of California sustaining a demurrer to and dismissing a bill to enjoin interference with the possession of public land selected in lieu of land relinquished in a forest reservation. *Affirmed* without prejudice to future proceedings.

See same case below, 50 C. C. A. 79, 112 Fed. 4.

*Messrs.* **T. C. Van Ness** and **Jefferson Chandler** argued the cause, and, with *Messrs. John M. Thurston, Shirley C. Ward, M. A. Ballinger, Horace F. Clark*, and *William C. Prentiss*, filed a brief for appellant:

For their contentions see their brief as reported in *Cosmos Explor. Co.* v. *Gray Eagle Oil Co. ante*, 1064.

*Mr.* **John S. Chapman** argued the cause, and, with *Mr. Frank H. Short*, filed a brief for appellees:

That Congress might, at any time prior to the discovery of the mine, withdraw the lands or grant them to another, does not make it necessary to construe the forest lieu act as an exercise of that power.

*Washington & I. R. Co.* v. *Osborn*, 160 U. S. 103, 109, 110, 40 L. ed. 356, 358, 16 Sup. Ct. Rep. 219.

When one enters upon the public land for a lawful purpose and with the intention to acquire the title to it by a lawful means, and goes under the sanction of the acts of Congress, he is entitled to perform the acts which are necessary to perfect that title free from the interference of other persons.

*United States* v. *Waddell*, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35.

For other contentions of counsel see their brief as reported in *Cosmos Explor. Co.* v. *Gray Eagle Oil Co. ante*, 1064.

Mr. Justice **Peckham**: This case is cov-

ered by the foregoing decision, and the *decree of the circuit court of appeals herein is therefore, affirmed.*

On a petition for a modification of the above decree of affirmance, Mr. Justice **Peckham** announced on June 1, 1903, the order of the court that the decree dismissing the bill be modified by providing that the dismissal is without prejudice to such future proceedings as complainant may be advised, and that as so modified the decree be affirmed.

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UNITED STATES OF AMERICA on the Relation of THE RIVERSIDE OIL COMPANY, *Plff. in Err.*,

*v.*

ETHAN A. HITCHCOCK, Secretary of the Interior.

(See S. C. Reporter's ed. 316-326.)

*Mandamus—against Secretary of Interior—does not lie to control judicial action.*

Mandamus will not lie against the Secretary of the Interior to compel him to vacate his decision that a selection of public land, under the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), in lieu of land relinquished in a forest reservation, must be rejected because of the failure of the selector to show in due and proper form that the land was, at the date of selection, subject to selection as "vacant land open to settlement," which the Secretary construed as meaning to exclude land in the actual possession of any person under the local customs or rules of miners which are by statute incorporated into and have become part of the laws of the United States.

[No. 632.]

*Argued March 17, 18, 1903. Decided May 18, 1903.*

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of that District denying a petition for a writ of mandamus to compel the Secretary of the Interior to vacate an order rejecting a selection of public land. *Affirmed.*

Statement by Mr. Justice **Peckham:**

The relator, plaintiff in error, filed its petition in the supreme court of the District of Columbia, asking for a writ of mandamus to compel the defendant, the Secretary of the Interior, to vacate a certain order made by him rejecting selections of land by one Clarke, and to compel the defendant to order such selections passed to patent and to cause to be prepared and presented for signature to the proper officers of the United States of America a patent for the selected land, or for such other relief as might be proper. The court denied the petition, and from that judgment the relator appealed to the court of appeals of the District, which, after a hearing, affirmed the judgment of the court below. The relator has brought the case here by writ of error.

The petition for the writ filed in the court below, in addition to various conclusions of law, made the following averments of fact:

On October 28, 1898, one C. W. Clarke was the owner in fee of certain land in the state of Oregon covered by a patent from the United States to his grantors, which is described in the petition, and the land was situated in a forest reservation in that state, designated as the Cascade Range Forest Reservation. On the day above mentioned Clarke executed a deed, which conveyed in fee and relinquished to the United States the land above described, and the deed was surrendered to the register and receiver of the proper land office and received and accepted by them. Certain land was thereupon selected by Clarke, which land had been duly surveyed and classified as agricultural land prior to the selection, and appeared on the records of the Land Department as agricultural land, subject to disposition under the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), relating to forest reserve lands. A copy of the material portion of that act is set *forth in [*18] the margin in the case immediately preceding, *Cosmos Exploration Co.* v. *Gray Eagle Oil Co.* 190 U. S. 301, *ante*, 1064, 23 Sup. Ct. Rep. 692.

After the selection of the land the register certified that the land thus selected in lieu of the land relinquished to the United States was free from conflict, and that there was no adverse filing, entry, or claim thereto, and he thereupon entered the selected land upon the records and tract books of the land office. The Land Department thereafter required Clarke (without authority of law as averred) to publish a notice of his selection for a period of sixty days, and the register forwarded all the papers to the Commissioner of the General Land Office, together with his above-mentioned certifi-

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NOTE.—*As to when mandamus will issue to public officers*—see notes to United States *ex rel.* Pollok v. Hall (D. C.) 1 L. R. A. 738; People *ex rel.* Brokaw v. Bloomington Twp. Highway Comrs. (Ill.) 6 L. R. A. 161, and Territory *ex rel.* Choteau County v. Cascade County (Mont.) 7 L. R. A. 105.

*That mandamus will not lie to control official judgment and discretion*—see note to Bates v. Taylor (Tenn.) 3 L. R. A. 316, and State *ex rel.* Charleston, C. C. & C. R. Co. v. Whitesides (S. C.) 3 L. R. A. 777.

*As to independence of departments of government*—see note to Fleming v. Guthrie (W. Va.) 3 L. R. A. 53, and Bates v. Taylor (Tenn.) 3 L. R. A. 316.

*As to when mandamus is the proper remedy*—see notes to United States *ex rel.* International Contracting Co. v. Lamont, 39 L. ed. U. S. 160; M'Cluny v. Silliman, 4 L. ed. U. S. 263; Fleming v. Guthrie (W. Va.) 3 L. R. A. 54; Burnsville Turnp. Co. v. State (Ind.) 3 L. R. A. 265; State *ex rel.* Charleston, C. C. & C. R. Co. v. Whitesides (S. C.) 3 L. R. A. 777, and *Ex parte* Hurn (Ala.) 13 L. R. A. 120.

cate, and reported to that office that publication had been ordered pursuant to the circular of the General Land Office of December 18, 1899. Clarke complied with the requirements of the department and published the notice, and on February 6, 1900, before the sixty days had expired, the Kern Oil Company filed in the local office a protest against the selection, with accompanying affidavits, which protest and affidavits were also thereupon forwarded to the General Land Office. The petitioner avers that the protest was insufficient to constitute an issue as to whether or not the land selected by Clarke was vacant land open to settlement at the time of such selection, and it was averred that the protestant, by reason of the non-discovery of mineral in the land, was wholly without standing as an adverse claimant under the law and practice of the Land Department.

On January 2, 1900, Clarke duly conveyed by deed the selected land to the petitioner, and it thereby became vested with all of Clarke's rights in and to the land, and it is still the owner thereof and entitled to demand and receive from the United States a patent therefor. The petitioner then filed in the General Land Office a motion to dismiss the protest.

It was then averred that at the time of the selection by Clarke no other person had any right, title, or interest, vested or inchoate, in or to the land so selected, and that the persons mentioned in the protest and affidavits, and alleged to have been upon the land as locators at or before the time of the selection by Clarke, and under whom [319] the protestant asserted rights, *were pretended explorers for minerals who had made no discovery of minerals upon the land or any part thereof, but had merely staked off pretended mining claims for the purpose of deceiving others and discouraging and defeating them from acquiring title to such land under the land laws, and that such staking off initiated no lawful right, inchoate or vested, under such land laws.

The hearing was had before the Commissioner of the General Land Office, and a decision in the matter was given by him, by which he held that the title of the selector did not vest until approval by the Commissioner, and that the land in the selection was yet open to exploration under the mining laws, and if at the date of the decision the land is shown to be mineral it defeats the selection.

From this decision the petitioner appealed to the Secretary of the Interior, and assigned, among other things, that the Commissioner erred in not sustaining the motion to dismiss the protest and in not passing the land selected to patent, and that he also erred in ordering a hearing, and in not holding that the showing of the tract books and land records at the date of the selection governed the character of the land for the purpose of the selection, and also in holding that a discovery of mineral upon the land selected subsequent to the selection and before approval by the Commissioner would defeat such selection; that the Commissioner also erred in calling upon the selector to demand a hearing and assume the burden of proof upon the question of the character of the land, and in directing that at such hearing, if demanded, the character of the land subsequent to the selection should be embraced in the issue.

On April 25, 1901, the defendant rendered a decision in the matter, wherein, as averred, he held that questions respecting the class and character of the selected land were to be determined by the conditions existing at the time when all requirements necessary to obtain title have been complied with by the selector; that the mere recital in one of the forms approved by the respondent, of an accompanying non-mineral and non-occupancy affidavit, constituted a regulation of the department requiring the filing of such affidavit as a condition precedent to *the [320] vesting of selector's title; that such alleged regulation was binding upon selector's forest reserve lieu land; that the affidavits filed by the selector Clarke failed to allege non-occupancy, and therefore he had not complied with the requirements necessary to obtain title; that since the said selection by Clarke valuable deposits of mineral petroleum oil had been discovered, and that, in view of the alleged admitted occupancy subsequent to the said selection and the subsequently discovered value of the land for mining purposes, it was apparent that the required proofs of the then non-mineral character and non-occupancy of the land could not then be supplied; that, therefore, the selections must be rejected.

The petition averred that the defendant vacated the order of the Commissioner directing a hearing, and arbitrarily, wrongfully, and unlawfully attempted to reject the selections and destroy the vested rights of Clarke and his grantees.

The protest mentioned in nowise questioned the sufficiency in substance and form of the selection made by Clarke, nor was the point of the alleged insufficiency of the affidavit raised by the Commissioner of the General Land Office in his decision of December 18, 1900, and the United States has in nowise notified the selector of any defect in the exchange, and there is no issue in the record charging a failure to comply with the law.

The affidavits, though not essential to the validity of the contract of exchange tendered by Congress, and accepted and completed by the relinquishment and selection aforesaid, did in law and in fact allege the non-occupancy of the land as understood in the law and the practice of the Land Department, as they expressly negative all the elements of legal occupancy.

A motion for a review of the hearing was made and granted, and was thereafter had before the Assistant Attorney General of the United States for the Interior Department.

On April 12, 1902, the defendant rendered a decision, adhering to the ruling already given, ignoring the curative effect of sup-

plemental affidavits of nonoccupancy, and denied the motion for a review.

By this decision the Secretary of the Interior erroneously held and decided that the land selected was not "vacant land," [321] *though in truth and in fact unoccupied, and such vacancy and lack of occupancy was not shown by an affidavit of selector, made and filed at the time and as a part of the selection: that the defendant erroneously held and decided that, in order to be vacant land within the meaning of the act of 1897, the selected land must not only be free from the presence of anyone on the land as a matter of fact, but must be shown to be free from such presence of anyone on the land at the date of selection by an affidavit of selector. It was then alleged that in fact there was no person present on the selected land at the time of the selection; that the decision of the Secretary of the Interior on review turned solely on a question of law, and not on any question of fact or on any question of mixed law and fact, and that the only question of law involved is the meaning of the act of June 4, 1897, and the particular words therein, "vacant land open to settlement."

The defendant arbitrarily refused to pass the selection to patent, and has arbitrarily ordered the case of the selector dismissed from his docket solely because of the alleged absence from the record of selection of a non-occupancy affidavit, and not because of any ground or cause of objection to the selection set up in said protest.

In conclusion, the petitioner prays for a writ of mandamus to command the defendant "to forthwith recall and vacate his said order rejecting said selections of said Clarke, and if said selections have already been canceled to vacate and recall said cancelation and reinstate the proceedings relating to the said selections, and thereupon to proceed therein as required by law, and to order said selections passed to patent, and cause to be prepared and presented for signature to and by the proper officer of the United States of America a patent or patents for the said selected lands, and that the petitioner may have such other or further relief as the premises warrant and to the court may seem meet."

To this petition the defendant made answer, admitting many averments in the petition, and setting up the facts as understood by the defendant, as follows: The defendant averred that Clarke did file his deed [322] with the local land officers and assumed *to select other land under the act of June 4, 1897; that a form of application to select land under the act had been prescribed by the Commissioner of the General Land Office in April, 1898, and approved by the Secretary of the Interior, and was in force when the selection was made, and which form contained, among other things, the following clause:

"There are also submitted certificates from the proper officers showing that the land relinquished or surrendered is free from encumbrance of any kind, also that all taxes thereon to the present time have been paid, and an affidavit showing the lands selected to be non-mineral in character and unoccupied."

It is then averred that the allegations showing the land selected to be non-mineral in character and unoccupied was an essential averment, for the reason that, unless the lands were non-mineral in character and unoccupied, the same were not vacant lands open to settlement within the intent and meaning of the act of 1897.

The regulation was not complied with and no evidence of non-occupancy was given, and the allegation contained in the proposed form as to the non-mineral character of the land was not complied with, as it was stated by the selector in this case that his affidavit as to the character of the lands was made "upon the evidence found upon the surface of the ground, and that the affiant does not undertake to express any opinion as to what may be under the ground."

The answer then set up the facts as to the protest of the Kern Oil Company and the various hearings and decisions of the Commissioner and the Secretary, in substance as set forth in the petition.

The defendant then averred that by the laws of the United States the duty was imposed upon him to construe the acts governing the disposition of the public lands of the United States, and, in pursuance of the duties so imposed upon him, he was required to construe and apply the terms of the act of Congress of June 4, 1897, and that, in the exercise of his judgment and discretion in that behalf, he did construe the term, "vacant land open to settlement," as meaning to exclude land in the actual occupation of any person or persons under the local customs *or rules of miners which are [323] by the statute incorporated into and have become part of the laws of the United States; that, in the exercise of his proper duty and function as Secretary of the Interior, the defendant decided that, by reason of the failure of Clarke to show in due and proper form that the lands were at the date of selection subject to selection as "vacant land open to settlement," the attempted selection thereof must be rejected, and it thereupon became and was unlawful for this respondent as such Secretary to order any patent or patents to the said lands to issue to the said Clarke as in the said petition prayed to be commanded.

To this answer the petitioner demurred on the ground that the same was insufficient and bad in form and substance. After the demurrer was overruled the petitioner elected to stand by it, and the court thereupon adjudged that the rule to show cause should be discharged, the prayer of petitioner denied, and the petition itself dismissed.

*Messrs.* **Jefferson Chandler** and **Shirley C. Ward** argued the cause, and, with *Messrs. John M. Thurston, William C. Prentiss, M. A. Ballinger,* and *Horace F. Clark,* filed a brief for plaintiff in error:

The supervisory power of the Commission-

er of the General Land Office and the Secretary of the Interior over the action of the local officers is limited to vacating such action for causes which in law make the patent void or, in equity, would sustain suit to cancel it.

*Cornelius* v. *Kessel*, 128 U. S. 456, 32 L. ed. 482, 9 Sup. Ct. Rep. 122; *Brown* v. *Hitchcock*, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485.

When in cash sales the price has been paid, or in other cases all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom is vested all the rights and obligations of ownership.

*Benson Min. & Smelting Co.* v. *Alta Min. & Smelting Co.* 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877.

The execution and delivery of a patent after the right to it has become complete are mere ministerial acts of the officers charged with that duty.

*Barney* v. *Dolph*, 97 U. S. 652, 656, 24 L. ed. 1063, 1064; *Simmons* v. *Wagner*, 101 U. S. 260, 261, 25 L. ed. 910, 911; *Dibble* v. *Bellingham Bay Land Co.* 163 U. S. 63, 74, 41 L. ed. 72, 76, 16 Sup. Ct. Rep. 939.

The determination of questions of law by the Land Department is not binding on the courts.

*Northern P. R. Co.* v. *Colburn*, 164 U. S. 383, 41 L. ed. 479, 17 Sup. Ct. Rep. 98.

The supervisory power of the defendant is purely ministerial.

*Mullan* v. *United States*, 118 U. S. 271, 30 L. ed. 170, 6 Sup. Ct. Rep. 1041; *Orchard* v. *Alexander*, 157 U. S. 373, 39 L. ed. 737, 15 Sup. Ct. Rep. 635; Lewis, Government of Dependencies, pp. 6–8; *Maese* v. *Herman*, 183 U. S. 572, 581, 46 L. ed. 335, 339, 22 Sup. Ct. Rep. 91.

Rights under our system of law and procedure do not rest in the discretionary authority of any officer, judicial or otherwise.

*Re Parker*, 131 U. S. 221, 225, 33 L. ed. 123, 124, 9 Sup. Ct. Rep. 708.

Mandamus will lie wherever a right is denied through mistake of law on the part of a ministerial officer.

*American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, *ante*, 90, 23 Sup. Ct. Rep. 33; *Payne* v. *United States*, 20 App. D. C. 581.

*Messrs. Jefferson Chandler, John M. Thurston, T. C. Van Ness, Shirley C. Ward, William C. Prentiss, M. A. Ballinger*, and *Horace F. Clark* also filed a brief for plaintiff in error:

The fact that the act which mandamus seeks to compel is the culmination of a series of proceedings, or is of a judicial or quasi-judicial nature, or is an act in the course of such proceedings, does not exempt it from judicial control by the courts through the writ of mandamus when the officer or person charged to perform it arbitrarily and without just legal cause refuses such performance.

*United States ex rel. West* v. *Hitchcock*, 19 App. D. C. 333.

*Mr.* **John S. Chapman** argued the cause, and, with *Messrs. Morgan H. Beach, Henry H. Glassie, Solicitor General Hoyt*, and *Assistant Attorney General Van Devanter*, filed a brief for defendant in error:

The Department was necessarily called upon to construe the act. It had jurisdiction over the subject-matter and of the parties, and it did construe it; and whether that construction was right or wrong, its discretion cannot be controlled by the writ of mandamus.

*Litchfield* v. *Richards*, 9 Wall. 575, 577, 19 L. ed. 681, 682; *Gaines* v. *Thompson*, 7 Wall. 347, 19 L. ed. 62; *Noble* v. *Union River Logging R. Co.* 147 U. S. 165, 176, 177, 37 L. ed. 127, 13 Sup. Ct. Rep. 271; *New Orleans* v. *Paine*, 147 U. S. 261, 263, 264, 37 L. ed. 162, 163, 13 Sup. Ct. Rep. 303; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 45, 32 L. ed. 354, 355, 9 Sup. Ct. Rep. 12; *Decatur* v. *Paulding*, 14 Pet. 497, 499, 10 L. ed. 559, 560.

If any doubt may rightfully exist in the mind of the court on the subject, an answer is furnished to the application for mandamus.

*Carrick* v. *Lamar*, 116 U. S. 423, 426, 29 L. ed. 677, 678, 6 Sup. Ct. Rep. 424.

If the act be one requiring the exercise of judgment or discretion, whether in the ascertainment of fact or the interpretation of law, it makes no difference how gross an error may be committed or however ill advised the action of an executive officer may be.

*Seymour* v. *United States*, 2 App. D. C. 240; *Lochren* v. *United States*, 6 App. D. C. 486.

Nor will the writ be issued merely because the law has not provided any other remedy.

*Re Rice*, 155 U. S. 396, 39 L. ed. 198, 15 Sup. Ct. Rep. 149; *American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 379, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758.

*Messrs. John S. Chapman* and *Henry H. Glassie* filed a supplemental brief for defendant in error:

Courts cannot by mandamus act directly upon a public officer, and guide and control his judgment or discretion in the matters committed to his care in the ordinary discharge of his official duties.

*Decatur* v. *Paulding*, 14 Pet. 497, 515, 10 L. ed. 559, 568; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 41, 48, 49, 32 L. ed. 355, 357, 358, 9 Sup. Ct. Rep. 12.

*A fortiori*, the courts have no such power in respect of a department to which Congress has expressly confided judicial functions.

*Gaines* v. *Thompson*, 7 Wall. 347, 353, 19 L. ed. 62, 65.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

We have set out in the foregoing statement of facts, at very great length, a large portion of the contents of the petition and

answer in this case. It has been done for the purpose of showing by the record itself the questions of law arising therefrom. Upon a perusal of the record it appears that those questions are not merely formal ones, nor are they so plain as not to require the careful judgment of any tribunal to which they may be referred for decision. [324] Their solution was properly submitted *to the Land Department, which had full and complete jurisdiction over the matters arising under the act of June 4, 1897, and it thereby became the duty of the officers of that department to decide them. As is said in *Knight* v. *United Land Asso.* 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258:

"The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands."

Congress has constituted the Land Department, under the supervision and control of the Secretary of the Interior, a special tribunal with judicial functions, to which is confided the execution of the laws which regulate the purchase, selling, and care and disposition of the public lands.

Neither an injunction nor mandamus will lie against an officer of the Land Department to control him in discharging an official duty which requires the exercise of his judgment and discretion. *Marquez* v. *Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Gaines* v. *Thompson*, 7 Wall. 347, 19 L. ed. 62; *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 32 L. ed. 354, 9 Sup. Ct. Rep. 12; *United States ex rel. Redfield* v. *Windom* 137 U. S. 636, 34 L. ed. 811, 11 Sup. Ct. Rep. 197.

In *Decatur* v. *Paulding*, 14 Pet. 497, 10 L. ed. 559, it was held that, in general, the official duties of the head of one of the executive departments, whether imposed by act of Congress or by resolution, are not mere ministerial duties. The head of an executive department of the government in the administration of the various and important concerns of his office is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of Congress under which he is from time to time required to act.

That the decision of the questions presented to the Secretary of the Interior was no merely formal or ministerial act is shown beyond the necessity of argument by a perusal of the foregoing statement of the issues presented by this record for the decision of the Secretary. Whether he decided right or wrong, is not the question. Having jurisdic- [325] tion to decide at all, he had *necessarily jurisdiction, and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded. The responsibility as well as the power rests with the Secretary, uncontrolled by the courts.

Neither the case of *Roberts* v. *United States*, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 396, nor that of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, *ante*, 90, 23 Sup. Ct. Rep. 33, decides anything opposing these views.

In the *Roberts Case* it was simply decided that the duty of the Treasurer to pay the money in question in that case was ministerial in its nature, and should have been performed by him on demand, and that, therefore, mandamus was the proper remedy for his failure to do it.

In the *McAnnulty Case* it was held that the order of the Postmaster General to the postmaster in the city of Nevada, not to deliver the mail to the relator, was not a justification for such refusal, because the order was given without authority of law, and the postmaster could, notwithstanding such order, be compelled by mandamus to do his duty and deliver the mail. The case has no relevancy to the one in hand.

*We are so clearly of opinion that the de- [326] cision of the defendant in this case was judicial in its nature that further argument upon the subject is needless.

*The judgment of the Court of Appeals of the District of Columbia is affirmed.*

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SOUTHERN RAILWAY COMPANY, *Plff. in Err.*,

*v.*

JOHN H. ALLISON.

(See S. C. Reporter's ed. 326-339.)

*Jurisdiction of Federal courts—diverse citi-*

NOTE.—*As to diverse citizenship as ground of Federal jurisdiction*—see Shipp v. Williams, 10 C. C. A. 247, and note; Mason v. Dullagham, 27 C. C. A. 206, and note; Seddon v. Virginia, T.

*zenship—suit against foreign corporation —effect of "domestication" statute—removal to Federal courts.*

1. A foreign railroad corporation does not become a citizen of North Carolina, so far as to affect the jurisdiction of the Federal courts upon the question of diverse citizenship, by complying with N. C. Pub. Acts 1899, chap. 62, which declares that such a corporation becomes a domestic corporation by filing with the secretary of state duly authenticated copies of its charter and by-laws.

2. The right of a foreign railroad corporation under the act of Congress of August 13, 1888, chap. 866, § 2 (25 Stat. at L. 433), to remove to a Federal court, for prejudice or local influence, a suit brought in a court of North Carolina by a citizen of that state, is not defeated because such corporation has complied with the provisions of N. C. Pub. Acts 1899, chap. 62, which declares that foreign railroad corporations shall become domestic by filing with the secretary of state duly authenticated copies of their charters and by-laws.

[No. 232.]

*Argued April 8, 1903. Decided May 18, 1903.*

IN ERROR to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of McDowell County entered on a verdict of a jury in favor of plaintiff in an action to recover from a railroad company the damages suffered by reason of its negligence. *Reversed.*

See same case below, 129 N. C. 336, 40 S. E. 91.

Statement by Mr. Justice **Peckham:**

The supreme court of the state of North Carolina affirmed a judgment against the railway company, which was entered on a verdict of a jury upon a trial in the state court, and the railway company has brought the case here by writ of error.

The plaintiff below brought his action in the state court against the railway company to recover damages suffered by reason of the alleged negligence of the defendant. The defendant answered, and averred that it was a corporation created and organized under the laws of the state of Virginia; it denied the various allegations of the complaint as to its negligence and as to the damages suffered by the plaintiff, and also set up as a defense plaintiff's contributory negligence. [327] After answer *and under the provisions of the 2d section of the act of Congress, chapter 866, approved August 13, 1888 (25 Stat. at L. 433), the defendant, alleging that it was a corporation created under the laws of Virginia, submitted a petition to the United States circuit court in North Carolina, for the removal of the case from the state to the United States court, and the ground for removal, as stated in the petition, was because of "prejudice or local influence" to such an extent that it would "not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause." The petition was supported by an affidavit that set up facts from which the court might find that defendant could not obtain justice in the state court.

The circuit court decided that the proof submitted to it was sufficient; that defendant was a citizen of Virginia, and that it could not, on account of local prejudice and influence, obtain a fair trial in the state court, and it, therefore, ordered the removal of the cause to the United States circuit court for the western district of North Carolina. The court also ordered that its clerk should certify to the state court the order of removal, "together with copies of the petition, bond, and affidavit, to the end that the state court may be advised of the action of this court and of its order of removal, and to the further end that the said state court may proceed no further with the said suit or action, and to the end also that the said state court may direct the clerk of the superior court of the county of McDowell to make a full and complete transcript of the record of said action and to certify the same to this court for trial."

Upon the filing of this order in the state court that court declined to grant the motion to surrender jurisdiction, holding that the case could not be legally removed to the circuit court of the United States, and it made the following order:

"In this case it appears to the court that the circuit court of the United States has caused an order for the removal of the case to the circuit court of the United States, upon petition setting forth that the defendant is a nonresident of the state of North Carolina; and it further appearing to the court, by *the admission of defendant, through its [328] counsel, that the defendant has complied with the terms of the act of the legislature of the state of North Carolina, being chapter 62 of the acts of the general assembly of North Carolina at its session of 1899: It is thereupon considered by the court that the defendant is a corporation of this state by virtue of said act, and that it is not entitled

& C. Steel & Iron Co. (C. C. W. D. Va.) 1 L. R. A. 108, and note; Myers v. Murray, N. & Co. (C. C. S. D. Iowa) 11 L. R. A. 216, and note. And see note to Roberts v. Lewis, 36 L. ed. U. S. 579.

*On removal of causes generally*—see notes to Whelan v. New York, L. E. & W. R. Co. (C. C. N. D. Ohio) 1 L. R. A. 65; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346, and Torrence v. Shedd, 36 L. ed. U. S. 528.

*On removal from state to Federal court for prejudice or local influence*—see notes to Whelan v. New York, L. E. & W. R. Co. (C. C. N. D. Ohio) 1 L. R. A. 65; Huskins v. Cincinnati, N. O. & T. P. R. Co. (C. C. N. D. Tenn.) 3 L. R. A. 545; Bierbower v. Miller (Neb.) 9 L. R. A. 228; Brodhead v. Shoemaker (C. C. N. D. Ga.) 11 L. R. A. 567; P. Schwenk & Co. v. Strang, 8 C. C. A. 95; Gaines v. Fuentes, 23 L. ed. U. S. 524, and Jefferson v. Driver, 29 L. ed. U. S. 897.

to remove this cause to the Federal court. It is further considered by the court that the courts of the state of North Carolina have jurisdiction of this cause, and this court declines to surrender jurisdiction thereof. It is ordered by the court that a copy of this order be sent to the clerk of said circuit court of the United States by the clerk of this court."

The act of the legislature of North Carolina, referred to in the foregoing order, is set forth in full in the margin.†

[329] *It was admitted that defendant had complied with the terms of the act before the cause of action set out in the complaint of plaintiff had accrued.

When the case was thereafter called for [330] trial in the state court, *a motion was again made to dismiss the same from that court because of the removal to the United States circuit court. The motion was again denied, and an exception taken by the defendant. The case was then tried in the state court, and resulted in a verdict for the plaintiff, upon which judgment was entered, and exception taken to the verdict and to the entry of judgment. Defendant appealed from the judgment to the supreme court of the state of North Carolina, and assigned as error, among other things, the refusal of the trial court to recognize the removal, and its trial of the cause after it had been legally removed to the Federal court. The supreme court of North Carolina affirmed the judgment (129 N. C. 336, 40 S. E. 91), and decided against the right claimed by defendant to a removal of the cause under the statute of the United States above referred to.

*Mr.* **F. H. Busbee** argued the cause, and, with *Mr. Charles Price*, filed a brief for plaintiff in error:

The order of removal was valid.

*St. Louis & S. F. R. Co.* v. *James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Louisville, N. A. & C. R. Co.* v. *Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817; *Wilson* v. *Southern P. R. Co.* 64 S. C. 162, 36 S. E. 701, 41 S. E. 971; *Walters* v. *Chicago, B. & Q. R. Co.* 104 Fed. 377.

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†(Chapter 62, Public Acts of 1899.)

*The General Assembly of North Carolina do enact:*

Sec. 1. That every telegraph, telephone, express, insurance, steamboat, and railroad company incorporated, created, and organized under and by virtue of the laws of any state or government other than that of North Carolina, desiring to own property or to carry on business, or to exercise any corporate franchise whatsoever in this state, shall become a domestic corporation of the state of North Carolina by filing in the office of the secretary of state a copy of its charter, duly authenticated in the manner directed by law for the authentication of statutes of the state or country under the laws of which such company or corporation is chartered and organized, and a copy of its by-laws duly authenticated by the oath of its secretary. Such corporation shall pay therefor to the secretary of state, to be turned over by him into the state treasury, such fees as are or may be required by law.

Sec. 2. That if any such charter or by-laws, or any part thereof, filed in the office of the Secretary of State, shall be in contravention or violation of the laws of this state, such charter or by-laws, or such part thereof as are in conflict with the laws of this state, shall be null and void in this state.

Sec. 3. That when any such corporation shall have complied with the provisions of this act above set out it shall thereupon immediately become a corporation of this state, and shall enjoy the rights and privileges and be subject to the liability of corporations of this state the same as if such corporation had been originally created by the laws of this state. It may sue and be sued in all the courts in this state as fully as if such corporation were originally created under the laws of the state of North Carolina.

Sec. 4. That on and after the 1st day of June, 1899, it shall be unlawful for any such corporation to do business, or attempt to do business, in this state without having fully complied with the requirements of this act.

Sec. 5. Any such corporation violating any of the provisions of this act shall forfeit to the state of North Carolina a penalty of $200 for each and every day after the 1st day of June, 1899, on which such corporation shall have continued to operate and do business without having complied with the requirements of this act. Such penalty shall be recovered by the treasurer of the state for the benefit of the state of North Carolina, and it shall be his duty to sue for such forfeitures in the superior court of Wake county as the same accrue.

Sec. 6. No telegraph, telephone, express, insurance, steamboat, or railroad company, which is a foreign corporation of another state doing business in North Carolina, shall be allowed to sue in the courts of North Carolina on or after June 1st, 1899, until such foreign corporation has become a domestic corporation, either by a special act of the legislature, or under the provisions of this act.

Sec. 7. No such foreign corporation, mentioned in the preceding section of this act, shall be allowed to enter into a contract in the state of North Carolina on or after the 1st day of June, 1899, nor shall any such contract heretofore or hereafter made, or attempted to be made and entered into by such corporation in the state of North Carolina, be enforceable by such corporation unless such corporation shall, on or before the 1st day of June, 1899, become a domestic corporation under and by virtue of the laws of North Carolina.

Sec. 8. Any such corporation violating the provisions of this act by doing any business in this state without first becoming a domestic corporation in the manner prescribed by law shall, in addition to the penalty prescribed in § 5 of this act, forfeit a penalty of $500 for each day any such business shall be done by it in the state of North Carolina on or after the 1st day of June, 1899. The amount so forfeited under the provisions of this section shall be recovered by the treasurer of North Carolina, and it shall be the duty of said state treasurer to institute suit for same in the superior court of Wake county: *Provided*, The business contemplated in this section of this act does not embrace such business as is strictly the business of interstate commerce.

Sec. 9. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

Sec. 10. That this act shall be in force from and after its ratification.

Ratified the 10th day of February, A. D. 1899.

*Mr.* **W. A. Henderson** also argued the cause for plaintiff in error.

*Mr.* **E. J. Justice** argued the cause, and, with *Mr. J. C. Pritchard*, filed a brief for defendant in error:

Whether the Southern Railway Company had the right to remove, into the circuit court of the United States, this action brought against it by a citizen of North Carolina in a court of that state, depends upon the question whether this company was a corporation created by the laws of Virginia only, or by the laws of North Carolina also.

*Gerling* v. *Baltimore & O. R. Co.* 151 U. S. 677, 38 L. ed. 311, 14 Sup. Ct. Rep. 533; *Memphis & C. R. Co.* v. *Alabama*, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432.

The decisions of the supreme court of North Carolina are uniform to the effect that a compliance with the act of 1899, chap. 62, by a corporation, charters it in North Carolina, as distinguished from licensing a foreign corporation to do business therein.

*Debnam* v. *Southern Bell Teleph. & Teleg. Co.* 126 N. C. 831, 36 S. E. 269; *Layden* v. *Endowment Bank, K. of P.* 128 N. C. 546, 39 S. E. 47.

In *St. Louis & S. F. R. Co.* v. *James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621; *Louisville, N. A. & C. R. Co.* v. *Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817, and that line of cases, the question was: If a corporation is chartered in one state, and afterwards is chartered in another state, which state is it a citizen of for purposes of jurisdiction when it sues or is sued in the United States courts?

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The state court refused to recognize the validity of the order of removal of this case to the Federal court solely because of the state statute, and because of the admitted compliance of defendant with its provisions. It held that by complying with the statute the defendant became a citizen of North Carolina, so far, at least, as to prevent it from applying for removal as a citizen of another state. We, therefore, assume the sufficiency of the facts to warrant the decision of the circuit court of the United States removing the case to that court, provided the defendant company was a citizen of Virginia and did not become a citizen of North Carolina by virtue of its compliance with the state statute.

The ruling of the state court, by which it [331] proceeded to judgment *in the case notwithstanding the order of removal to the Federal court, is reviewable here under § 709, Revised Statutes (U. S. Comp. Stat. 1901, p. 575). *Stone* v. *South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Missouri P. R. Co.* v. *Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

Two propositions were argued at the bar: (1) Whether the state court had the right to pass upon the question of the validity of the order of the circuit court of the United States removing the case to that court. (2) Did the defendant company, which was originally incorporated in the state of Virginia, have the right, as a citizen of Virginia, to remove the case into the Federal court, notwithstanding the defendant company had complied with the statute of North Carolina, which declared that upon doing the things therein mentioned the defendant became a domestic corporation of North Carolina?

In the view we take of this case, it is unnecessary to dwell upon the first of these questions. We therefore address ourselves to the second.

The statute of North Carolina provides, in substance, that a railroad company incorporated under the laws of any state or government, other than North Carolina, which desires to own property or carry on business, or to exercise any corporate franchises within that state, shall become a domestic corporation of the state of North Carolina "by filing in the office of the secretary of state a copy of its charter, duly authenticated in the manner directed by law for the authentication of statutes of the state or country under the laws of which such company or corporation is chartered or organized, and a copy of its by-laws duly authenticated by the oath of its secretary." Section 3 of the act provides:

"That when any such corporation shall have complied with the provisions of this act (above set out) it shall thereupon immediately become a corporation of this state and shall enjoy the rights and privileges, and be subject to the liability, of corporations of this state the same as if such corporation had been originally created by the laws of this state. It may sue and be sued in all courts of this state, and shall be subject to the jurisdiction of the courts of this state as fully as if such corporation were originally created under the laws of the state of North Carolina."

*It is further provided by § 4 that it shall [332] be unlawful for such foreign corporation to do business, or attempt to do business, in North Carolina after the 1st day of June, 1899, without having fully complied with the requirements of the act. It is admitted that the company did comply with the provisions of the act in relation to filing its charter, by-laws, etc., with the secretary of state.

It early became material to inquire into the nature of the status of corporations with regard to the jurisdiction of the Federal courts under the Constitution and laws of the United States. A recent statement of the law on that subject is contained in the case of *St. Louis & S. F. R. Co.* v. *James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621. It was said by Mr. Justice Shiras, in delivering the opinion of the court in that case, that, after considerable contention in the courts, it was finally determined by this court that the citizenship of a corporation was that of the state originally creating it, and that it was a presumption of law that

the members of the corporation were citizens of the same state.

The facts upon which the decision of the court in that case was based, so far as important to be here observed, were these: The St. Louis & San Francisco Railway Company was a corporation originally created under the laws of the state of Missouri, and it operated a railroad from Monett in the state of Missouri to the southern border of that state. Subsequently, and under provisions of the laws of Arkansas, it entered that state for the purpose of operating its road therein from the southern boundary of the state of Missouri to Fort Smith in the state of Arkansas; the portion of the railroad in Arkansas was operated by the leasing of a railroad already or partly built in that state. The state of Arkansas had provided by its legislation that before any railroad corporation of any other state or territory should be permitted to avail itself of the benefits of the act allowing the purchasing or leasing of any road within that state, the foreign corporation should "file with the secretary of state of this state a certified copy of its articles of incorporation, if incorporated under a general law of such state or territory, or a certified copy of the statute [333] *laws of such state or territory incorporating such company, where the charter of such railroad corporation was granted by special statute of such state; and upon the filing of such articles of incorporation or such charter, with a map and profile of the proposed line, and paying the fees prescribed by law for railroad charters, such railroad company shall, to all intents and purposes, become a railroad corporation of this state, subject to all of the laws of the state now in force or hereafter enacted, the same as if formally incorporated in this state, anything in its articles of incorporation or charter to the contrary notwithstanding, and such acts on the part of such corporation shall be conclusive evidence of the intent of such corporation to create and become a domestic corporation: *And provided further*, That every railroad corporation of any other state, which has heretofore leased or purchased any railroad in this state, shall, within sixty days from the passage of this act, file a duly certified copy of its articles of incorporation or charter with the secretary of state of this state, and shall, thereupon, become a corporation of this state, anything in its articles of incorporation or charter to the contrary notwithstanding; and in all suits or proceedings instituted against any such corporation process may be served upon the agent or agents of such corporation or corporations in this state, in the same manner that process is authorized by law to be served upon the agents of railroad corporations in this state organized and existing under the laws of this state."

The railroad company, pursuant to that act, filed with the secretary of state of the state of Arkansas a duly certified copy of its articles of incorporation under the laws of Missouri. After this had been done and while the company was operating its railroad from Monett, Missouri, to Fort Smith, Arkansas, one Etta James brought an action in the circuit court of the United States for the western district of Arkansas against the company for negligence in maintaining a switch track at Monett, in Barry county, Missouri, so near its tracks that the husband of plaintiff was struck and killed by it on July 3, 1889, while employed as a fireman on one of the company's engines. The plaintiff was the widow and sole heir at law of her husband, * and resided at Monett, and [334] was a citizen of the state of Missouri. She recovered a verdict in the United States circuit court in Arkansas, and the cause was taken to the circuit court of appeals for the eighth circuit by the railroad company, which claimed that the circuit court of Arkansas had no jurisdiction, because the railroad company was a citizen of Missouri and the plaintiff was a citizen of the same state. That court, desiring instructions from the Supreme Court of the United States before deciding the case, propounded the following questions:

"1. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that state, become a corporation and citizen of the state of Arkansas?

"2d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that state, become a citizen of the state of Arkansas, so as to give the circuit court of the United States for the western district of Arkansas jurisdiction of this action, in which the defendant in error was and is a citizen of the state of Missouri?

"3d. In view of the provisions of the act of the general assembly of Arkansas, approved March 13, 1889, did the St. Louis & San Francisco Railway Company, by filing a certified copy of its articles of incorporation under the laws of Missouri with the secretary of state of Arkansas, and continuing to operate its railroad through that state, become a citizen of the state of Arkansas, so as to give the circuit court of the United States for the western district of Arkansas jurisdiction of this action, in which defendant in error was and is a resident and citizen of the state of Missouri, and the cause of action accrued in the state of Missouri, and arose from an accident that resulted *from [335] the operation of the railroad of the company in that state?

"4th. In view of the facts hereinbefore set forth, did the circuit court of the United States for the western district of Arkansas have jurisdiction of this action?"

After a full examination of the prior cases

Mr. Justice Shiras, speaking for the court, answered the second question in the negative, observing that such answer rendered it unnecessary to answer the other questions.

Here was a corporation originally incorporated in the state of Missouri going into the state of Arkansas and operating a railroad in that state by leasing a portion of it therein and complying with a statute which provided that, upon filing a certified copy of its articles of incorporation with the secretary of state of Arkansas, it should be regarded as formally incorporated in that state, and it should thereby become a domestic corporation, and yet it was held that defendant could not be sued by a citizen of Missouri in the Federal court in the state of Arkansas; that, although to some extent and for some purposes it might be regarded as a corporation of Arkansas, it was for purposes of jurisdiction in the Federal courts to be regarded as a corporation of the state of Missouri.

The case, it will be seen, was not decided upon the ground that the cause of action had arisen in the state of Missouri. It was admitted that the cause of action was transitory, but the broad question was decided that the company was a corporation of Missouri and a citizen of that state, and could not be sued by another citizen of that state in the Federal courts of Arkansas.

It is stated in the opinion:

"The presumption that a corporation is composed of citizens of the state which created it accompanies such corporation when it does business in another state, and it may sue or be sued in the Federal courts in such other state as a citizen of the state of its original creation.

"We are now asked to extend the doctrine of indisputable citizenship, so that if a corporation of one state, indisputably taken, for the purpose of Federal jurisdiction, to be [336] composed *of citizens of such state, is authorized by the law of another state to do business therein, and to be endowed, for local purposes, with all the powers and privileges of a domestic corporation, such adopted corporation shall be deemed to be composed of citizens of the second state, in such a sense as to confer jurisdiction on the Federal courts at the suit of a citizen of the state of its original creation.

"We are unwilling to sanction such an extension of a doctrine which, as heretofore established, went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the Federal courts might be defeated. Then, after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary. There we are content to leave it."

In *Louisville, N. A. & C. R. Co.* v. *Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817, a question arose as to whether the railway company was a corporation of Kentucky as well as of the state where it was originally created. The exigencies of the case did not require a solution of that question, but the *James Case*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 821, was referred to with approval in the opinion of the court, which was delivered by Mr. Justice Gray. In the course of that opinion, he said (p. 563, L. ed. p. 1087, Sup. Ct. Rep. p. 821):

"But a decision of the question whether the plaintiff was or was not a corporation of Kentucky does not appear to this court to be required for the disposition of this case, either as to the jurisdiction, or as to the merits. As to the jurisdiction, it being clear that the plaintiff was first created a corporation of the state of Indiana, even if it was afterwards created a corporation of the state of Kentucky also, it was and remained, for the purposes of the jurisdiction of the courts of the United States, a citizen of Indiana, the state by which it was originally created. It could neither have brought suit as a corporation of both states against a corporation or other citizen of either *state, nor could it have sued or been [337] sued as a corporation of Kentucky, in any court of the United States."

So it seems that a corporation may be made what is termed a domestic corporation, or in form a domestic corporation, of a state in compliance with the legislation thereof, by filing a copy of its charter and by-laws with the secretary of state; yet such fact does not affect the character of the original corporation. It does not thereby become a citizen of the state in which a copy of its charter is filed, so far as to affect the jurisdiction of the Federal courts upon a question of diverse citizenship.

Considerable stress has been laid, by those holding opposite views, upon the case of *Memphis & C. R. Co.* v. *Alabama*, 107 U. S. 581, 27 L. ed. 518, 2 Sup. Ct. Rep. 432. It was there held that a railroad company, having been made by the statutes of Alabama an Alabama corporation, although having previously been incorporated in Tennessee, could not remove into the circuit court of the United States a suit brought against it in Alabama by a citizen of that state. But in that case the company was required by the legislation of Alabama to open books in that state for the subscription of stock in the capital of the corporation, so as to afford the citizens thereof an opportunity to take stock to the amount of a million and a half of dollars of the capital of the company. The Alabama act also provided that the company should, at the first meeting of the stockholders, designate a time when and a place or places in northern Alabama where, for the convenience of the citizens of the state who may be stockholders, an election for directors should be held, notice whereof was to be given in the newspapers, and elections for directors should be held at the same time both in Alabama and in Tennessee.

This court held that, by reason of the particular language used in the act, there was a

separate original Alabama corporation formed; that the sections, taken altogether, made it a corporation created as well as controlled by the state of Alabama. It is stated in the opinion, page 584, L. ed. p. 519, Sup. Ct. Rep. p. 435:

"The whole act, taken together, manifests the understanding and intention of the legislature of Alabama that the corporation, [338]*which was thereby granted a right of way to construct through this state a railroad, with which any railroad company, chartered or to be chartered in this state, should have the right to connect its road, and which was required to construct a branch railroad in this state, to open books for subscriptions of stock to a certain amount in this state, to apply the moneys here subscribed to the construction of the road within this state, and to hold elections in this state, was and should be in law a corporation of the state of Alabama, although having one and the same organization with the corporation of the same name previously established by the legislature of Tennessee."

The difference between the above case and the cases we have already referred to is plain and fundamental, but in any event we regard the *James Case*, reaffirmed and approved as it is by that of *Louisville, N. A. & C. R. Co.* v. *Louisville Trust Co.* 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817, as decisive of the case before us.

We do not subscribe to the doctrine that, if a corporation files its charter in one state, after having been first chartered in another state, and is sued by a citizen of the state in which it filed its charter, in the state courts of that state, the right of removal to the Federal courts will be denied, while, at the same time, if such a corporation is sued by a citizen of the state in which it filed its charter, in the United States courts, the jurisdiction of the United States courts will be sustained upon the ground that in the Federal courts the corporation is domestic in the state where it was originally created and where its original incorporators are citizens, and it will be conclusively presumed, as a matter of law, that they are citizens of the state originally chartering it. If there be jurisdiction in the United States courts in the latter case, on the ground that it is a corporation and citizen of the state in which it was created, that fact gives jurisdiction to the Federal court to remove the case from the state court when the corporation is sued by a citizen of the state in which it filed its charter, because such corporation is a citizen of another state, namely, the state in which it was originally created. The citizenship of the corporation is not changed because of the particular court in which the action is commenced. If it be a citizen of [339]another state *in the one case, it is such citizen also in the other, and, if the other party to the action be a citizen of a state other than the one which created the corporation, the jurisdiction of the Federal courts exists, and the right of the corporation (upon complying with the statute) to remove the case from the state court when it is sued by a citizen of the state where its charter may have been subsequently filed, is granted by the laws of the United States.

We have read with respectful consideration the cases of *Debnam* v. *Southern Bell Teleph. & Teleg. Co.* 126 N. C. 831, 36 S. E. 269, and *Layden* v. *Endowment Rank, K. of P.* 128 N. C. 546, 39 S. E. 47, in which the supreme court of North Carolina comes to a different conclusion from that which we have reached in regard to the jurisdiction of the Federal courts in such a case as this; but we cannot concur in the doctrine of the supreme court of the state as announced in those cases. We feel bound by the decisions of this court upon that subject.

The supreme court of South Carolina has come to the same conclusion that we reach in this case, having altered its holding in *Mathis* v. *Southern R. Co.* 53 S. C. 257, 31 S. E. 240, after the decision of the *James Case*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 821. See, to that effect, *Wilson* v. *Southern R. Co.* 64 S. C. 162, 36 S. E. 701, 41 S. E. 971.

In *Walters* v. *Chicago, B. & Q. R. Co.* 104 Fed. 377, the United States circuit court in Nebraska held, in accordance with the principles maintained in the *James Case*, that the defendant, although made a domestic corporation of Nebraska, yet, having in fact been originally created by the state of Illinois, was a citizen of that state. The motion to remand to the state court was therefore denied.

We are of opinion that the plaintiff in error was not a citizen of the state of North Carolina at the time it was sued by the defendant in error, so far as regards the jurisdiction of the Federal courts, and that the order of removal made by the circuit court of the United States operated to withdraw from the state court the right to hear and determine the case. *The judgment of the Supreme Court of North Carolina is therefore reversed*, and the case remanded to that court for further proceedings not inconsistent with the opinion of this court.

So ordered.

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*HORACE B. DUNBAR, *Plff. in Err.*, [340]
*v.*
LOTTIE E. DUNBAR.

(See S. C. Reporter's ed. 340-353.)

*Bankruptcy—discharge—effect on contingent liability—agreement to support divorced wife until remarriage—contract to support minor children.*

1. A discharge in bankruptcy is no bar to a claim under an agreement by a bankrupt to pay an annuity to his divorced wife "during her life or until she remarries," since, by reason of the substantial impossibility of estimating the value of the contingency of a remarriage, such a contract is not provable under the provisions of the bankruptcy act of 1898, § 63*a* (30 Stat. at L. 562, chap. 541 U. S. Comp. Stat. 1901, p. 3447), for the

proving, *inter alia*, of a fixed liability owing at the time of the filing of the petition in bankruptcy, whether then payable or not, and of debts which are "founded upon an open account or upon a contract express or implied."

2. A father is not relieved by his discharge in bankruptcy from his liability under an agreement to pay his divorced wife a certain sum yearly for the support of his children during their minority.

[No. 244.]

*Argued April 16, 1903. Decided June 1, 1903.*

IN ERROR to the Superior Court of the State of Massachusetts to review a judgment entered in accordance with the direction of the Supreme Court of that State in favor of plaintiff in an action on a contract to which a discharge in bankruptcy was pleaded as a bar. *Affirmed.*

See same case below, 180 Mass. 170, 62 N. E. 248.

Statement by Mr. Justice **Peckham:**

The defendant in error, being the plaintiff below, brought her action in October, 1899, against the plaintiff in error, in the municipal court of Boston, to recover moneys alleged to be due upon a contract, which was set forth in the complaint. Issue was joined and the case tried before a single justice, and judgment ordered for the defendant, with costs. An appeal was taken to the superior court of the county of Suffolk, and that court ordered judgment for the plaintiff for one branch only of her claim. The case was reported to the supreme judicial court for the commonwealth, and that court ordered the court below to enter judgment for the plaintiff for both branches of her claim (180 Mass. 170, 62 N. E. 248), and the case was remanded to the superior court for the purpose of entering such judgment. Pursuant to the directions of the supreme court, the superior court did enter judgment against the defendant for both [341] branches of her*claim, for the sum of $851.60 and costs. The defendant then obtained a writ of error from this court, directed to the superior court of Massachusetts, where the record remained.

The case shows these facts: The parties were husband and wife, who, in 1889, were living apart, the husband in Ohio and the wife in Massachusetts. In May, 1889, the attorney for her husband came to Massachusetts and saw Mrs. Dunbar, and told her that her husband was about to seek a divorce from her. The wife at this time had no means, and the two sons of the marriage, then respectively nine and twelve years old, were living with her. The purpose of the visit of the attorney was to obtain some assurance from her that she would not contest the case, and, if she did not, that the husband would make provision for aiding in the support of herself and her sons until they arrived of age. The wife denied any intended desertion of her husband, but the result of the negotiations after the wife had taken counsel of friends was to give assurance to the attorney that no defense would be interposed if he made some suitable provision for herself and her children.

Upon the return of the attorney to Ohio, a suit for divorce was commenced by the husband, and the summons served by publication. No appearance was made and there was no opposition to the decree of divorce, which was obtained in July, 1889. It adjudged that the marriage contract theretofore existing between the parties was thereby dissolved, and both parties released from the obligation of the same, and "that the custody of the children of such marriage, one boy, Harry H. Dunbar, aged twelve years, and Willie W. Dunbar, aged nine years, be, and the same are, to remain in charge and under the control of the said Lottie E. Dunbar, the said Horace B. Dunbar to have the privilege of seeing said children at all reasonable times."

The ground of divorce was stated, and the court found "upon the evidence adduced that the defendant has been guilty of wilful absence for more than three years last past from plaintiff, and that, by reason thereof, the plaintiff is entitled to a divorce as prayed for."

After the divorce the husband sent to a friend of his wife, to be delivered to her in performance of his agreement, a written *contract, in which he bound himself to pay [342] to Lottie E. Dunbar, of Ashburnham, Mass., $500 yearly, so long as she remained unmarried, in monthly instalments. In that contract he also agreed to pay "to our children, Harry H. Dunbar and Willie W. Dunbar, the sum of $250 each, yearly, until they each attain the age of fourteen years; after that age they are to be paid by me such extra allowance as will give them a good and sufficient education befitting their station in life, and a suitable maintenance until each attains the age of twenty-one years." This writing was signed by the husband and acknowledged before a notary public of Hamilton, Ohio.

Payments upon this contract were made by the husband, but in 1896 they had become somewhat in arrears, and disputes arose as to the validity of the agreement. Thereafter another contract was entered into and payments were made as called for in that contract until some months prior to December 2, 1898. On such last-named date the defendant was adjudged a bankrupt, on his voluntary petition in bankruptcy, in the United States district court in bankruptcy, southern district of Ohio, western division, and on April 24, 1899, was discharged from all debts and claims provable, under the act of Congress relating to bankruptcy, against his estate, existing on the 2d day of December, 1898.

In the schedule of the defendant it appeared that he named the plaintiff as a creditor, as follows:

| | |
|---|---|
| Lottie E. Dunbar, Charlestown, Mass. Alimony due up to present time. | $540 |
| Lottie E. Dunbar, Charlestown, Mass. Alimony payable yearly. | 1,300 |

The plaintiff, at the first meeting of the

creditors in bankruptcy proceedings, which was held before a referee appointed therein, appeared by an attorney, who produced and filed his power of attorney, and filed her claim for $691.63, for instalments on the contract due to December 2, 1898. The hueband had paid nothing on the contract since some time before December 2, 1898, and finally the wife commenced an action to recover the amounts due thereon.

[343] *The following is a copy of the contract sued on:

"Controversies having arisen concerning the agreement heretofore made between Horace B. Dunbar and Lottie E. Dunbar in September, 1889, in consideration of said Lottie E. Dunbar's forbearance of suit on such controversies, and in settlement of all such controversies, and in substitution of said agreement of September, 1889, and in further consideration of the release by Lottie E. Dunbar and in satisfaction of all claims under said original agreement, Horace B. Dunbar agrees with the said Lottie E. Dunbar as follows:

"That said Horace B. Dunbar will pay to Lottie E. Dunbar during her life, or until she marries, for her maintenance and support, yearly, the sum of $500, and will pay to her yearly for the support and maintenance of her child, Harry H. Dunbar, the sum of $400 until he shall attain the age of twenty-one years; and shall pay to her yearly for the support and maintenance of her child, Willie W. Dunbar, the sum of $400 until he shall attain the age of twenty-one years, all said sums to be paid in equal monthly instalments between the 1st and 10th of each and every month,—the first instalment being for the month of May, 1896, shall be paid between the 1st and 10th of June, 1896.

"And, in addition to the foregoing, said Horace B. Dunbar agrees to pay the further sum of $100 between the 1st and 10th of July, 1896, over and above the instalment otherwise due for said month.

"And the said Lottie E. Dunbar hereby agrees that she has not, nor shall she have, any other claim or demand against Horace B. Dunbar for contribution to her support and maintenance, or for the support, maintenance, or education of said children, save and except as fixed and limited by this agreement."

Properly signed by both parties and witnessed.

The particulars of her claim were stated as follows:

Horace B. Dunbar to Lottie E. Dunbar, Dr.

1. To instalments due under covenant for alimony from December, 1898, to October 1, 1899, ten months, at $41.66 a month. $416 60

[344] *2. To monthly allowance due her for support and maintenance of Willie W. Dunbar, from December, 1898, to October 1, 1899, ten months, at $33.33 a month . . . . . 333 30

$749 90

The defendant pleaded his discharge in bankruptcy as a bar, and the supreme judicial court of the state held that it was not good.

*Messrs.* **James Hamilton Lewis and George Fred Williams** argued the cause, and, with *Mr. James A. Halloran*, filed a brief for plaintiff in error:

No recovery can be had in a state court, on a debt that was provable against an estate in bankruptcy, after the debtor had obtained a discharge under the national bankrupt law, whether proved or not, unless the debt in question belonged to one of the excepted classes.

*Talbott* v. *Suit*, 68 Md. 443, 13 Atl. 356; *Withers* v. *Stinson*, 79 N. C. 341; *Miller* v. *Chandler*, 29 La. Ann. 88; *Mace* v. *Wells*, 7 How. 272, 12 L. ed. 698.

The claim is not one for alimony, nor can it be treated as a covenant for alimony or in lieu of alimony with respect to the operation of a discharge in bankruptcy.

Alimony means decree for alimony, a judicial debt without the ordinary incidents of a contract.

*Audubon* v. *Shufeldt*, 181 U. S. 577, 45 L. ed. 1010, 21 Sup. Ct. Rep. 735; *Re Nowell*, 99 Fed. 931; *Parsons* v. *Parsons*, 9 N. H. 309, 32 Am. Dec. 362; *Taylor* v. *Taylor*, 93 N. C. 418, 53 Am. Rep. 460.

Alimony can only be obtained by decree on the granting of a divorce.

*Darrow* v. *Darrow*, 43 Iowa, 411; *Burrows* v. *Purple*, 107 Mass. 428; *Fischli* v. *Fischli*, 1 Blackf. 360, 12 Am. Dec. 251; *Heyob* v. *Her Husband*, 18 La. Ann. 41; *Moore* v. *Moore*, 18 La. Ann. 613; *Shotwell* v. *Shotwell*, Smedes & M. Ch. 51; *Bowman* v. *Worthington*, 24 Ark. 522; *Doyle* v. *Doyle*, 26 Mo. 545.

The allowance of alimony, its amount, and the time of its payment, are all within the discretion of the court.

*Bergen* v. *Bergen*, 22 Ill. 187; *McDonough* v. *McDonough*, 26 How. Pr. 193; *Jolliff* v. *Jolliff*, 32 Ill. 527; *Brown* v. *Brown* (Va.) 24 S. E. 238; *Call* v. *Call*, 65 Me. 407; *McCarthy* v. *McCarthy*, 143 N. Y. 235, 38 N. E. 288; *Downs* v. *Flanders*, 150 Mass. 92, 22 N. E. 585.

Where the husband, as in this case, obtains a divorce for his wife's misconduct or fault, there is a presumption that the wife is not entitled to alimony.

*Perry* v. *Perry*, 2 Barb. Ch. 311; *Spitler* v. *Spitler*, 108 Ill. 120; 2 Am. & Eng. Enc. of Law, p. 118.

The instrument upon which the present action is founded may be properly characterized as a covenant for annuities.

*Holbrook* v. *Comstock*, 16 Gray, 109.

An annuity is a yearly sum stipulated to be paid to another in fee for life, or years, and chargeable on the person of the grantor.

Black's Law Dict. p. 74; Bouvier's Law Dict. p. 144; Co. Litt. 144 B.; *Turrentine* v. *Perkins*, 46 Ala. 631; *Booth* v. *Ammerman*, 4 Bradf. 132; *Pearson* v. *Chace*, 10 R. I. 455; *Holbrook* v. *Comstock*, 16 Gray, 109;

*Shover* v. *Myrick*, 4 Ind. App. 7, 30 N. E. 207.

An annuity may be created by contract.

*Cox* v. *Maxwell*, 151 Mass. 336, 24 N. E. 50; *Turrentine* v. *Perkins*, 46 Ala. 631.

The contract in this case is an entire contract, although it is one the performance of which on the part of the plaintiff in error required him to make various payments at various times. The consideration moving from the defendant in error was an entirely executed one. The only acts to be done were those to be performed by the plaintiff in error.

*Schell* v. *Plumb*, 55 N. Y. 592; *Kirkland* v. *Oates*, 25 Ala. 465; *Lucesco Oil Co.* v. *Brewer*, 66 Pa. 351; *Shaffer* v. *Lee*, 8 Barb. 412; *Wiggins* v. *Keizer*, 6 Ind. 252.

A contract to be held severable must embrace several undertakings, each supported by a distinct consideration. It is one divisible in its nature and purposes, *i. e.*, susceptible of division and apportionment where the matters and things contemplated and embraced by it are not necessarily dependent upon each other, nor intended by the parties so to be.

*Wooten* v. *Walters*, 110 N. C. 251, 14 S. E 734, 736; *Keeler* v. *Clifford*, 165 Ill. 544, 46 N. E. 248; *Coos Bay Wagon Co.* v. *Crocker*, 6 Sawy. 574, 4 Fed. 577.

The word "debt" is not given a confined and limited meaning in the bankruptcy act, but "shall" include any debt, demand, or claim provable in bankruptcy; and this broad signification of the term "debt" is recognized in subd. b, § 63, by the provision that unliquidated claims may be liquidated as the court may direct, and thereafter proved and allowed against the bankrupt's estate.

*Re Hilton*, 104 Fed. 981.

The term "demand" is of much broader import than "debt."

Co. Litt. 291 b.; 3 Coke, Thomas ed. 427; *Vedder* v. *Vedder*, 1 Denio, 257; *Re Denny*, 2 Hill, 223; *Gray* v. *Bennett*, 3 Met. 522; *Jemison* v. *Blowers*, 5 Barb. 686.

If, therefore, the claim in this case might be in any event a provable claim, then the defendant in error is bound to regard it as such and apply to the court, pursuant to § 63, subd. b, to have it liquidated, or abide by the consequences of her failure to do so.

*Re Hilton*, 104 Fed. 981.

Liquidation of this claim would be no more difficult to accomplish than in many cases which are regularly presented to courts of law for adjustment.

*United States* v. *Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81; *Pierce* v. *Tennessee Coal, I. & R. Co.* 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335; *Roehm* v. *Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780; *Marks* v. *Van Eeghen*, 30 C. C. A. 208, 57 U. S. App. 149, 85 Fed. 853; *Re Stern*, 54 C. C. A. 60, 116 Fed. 604; *Parker* v. *Russell*, 133 Mass. 74; *James* v. *Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821, 6 N. E. 246; *East Tennessee, V. & G. R. Co.* v. *Staub*, 7 Lea, 397.

The bankruptcy act was intended to relieve insolvent debtors from their pecuniary liabilities as well as to secure ratable distribution of their assets among their creditors.

*Moch* v. *Market Street Nat. Bank*, 47 C. C. A. 49, 107 Fed. 897.

The bankruptcy act, to accomplish its purpose, compels the creditor to elect to treat the contract as broken, and to prove his claim for the entire damages suffered by breach of it.

*Ex parte Pollard*, 2 Low. Dec. 411, Fed. Cas. No. 11,252.

The contention here made finds strong support in the decisions made under the act of 1841, where the language of the act was that persons having uncertain and contingent demands against the bankrupt "shall be permitted to come in and prove such debts and claims." It has been held under that act that creditors holding such demands were compelled to prove their claims, and that the discharge was a bar to such claims.

*Mace* v. *Wells*, 7 How. 272, 12 L. ed. 698; *Jemison* v. *Blowers*, 5 Barb. 686.

A doctrine of law that promoted litigation by compelling a suit for each of a series of breaches of one contract is recognized by the later decisions as serviceable neither to the public, nor to the injured party. Hence, the rule of damages in actions of contract has gravitated toward the rule of damages in actions of tort.

*Pierce* v. *Tennessee Coal, I. & R. Co.* 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335; *Tarbox* v. *Hartenstein*, 4 Baxt. 78.

As a general rule every debt recoverable at law or in equity is provable.

*Re Jordan*, 2 Fed. 319.

It is certain that a bankruptcy act may be so framed as to avoid and annul all contracts existing at the time of the bankruptcy, whether the liability of the bankrupt at the time upon such contracts be certain or contingent.

*Shelton* v. *Pease*, 10 Mo. 478.

A debt is liquidated when it is certain what is due and how much is due.

2 Bouvier's Law Dict. p. 263.

It is significant in this connection that in § 19 of the act of 1867, the term "liquidation" is applied to contingent debts. By § 5 of the act of 1841, it was that class of persons who were annuitants and holders of debts payable in future, *i. e.*, having uncertain and contingent demands, who might have the value of such claims ascertained under the direction of the court.

Lowell, Bankruptcy, p. 485.

And the ground upon which uncertain or contingent debts under the early English bankrupt laws and the United States law of 1800 were excluded, was that no mode was provided for their liquidation.

*Jemison* v. *Blowers*, 5 Barb. 686.

In England successive statutes have continually enlarged the class of debts which may be proved in bankruptcy.

Lowell, Bankruptcy, § 164.

It is the purpose of bankruptcy laws to

terminate all the contractual relations of the bankrupt.

Lowell, Bankruptcy, p. 486.

Nor can it be fairly urged against this contention that clause 4 is dependent upon or to be governed by clause (1) of subdivision a, § 63. On the face of the act they are distinct and independent provisions, and reasonable effect can be given to both by treating them as separate and independent clauses.

*Moch* v. *Market Street Nat. Bank*, 47 C. C. A. 49, 107 Fed. 897.

It has been frequently determined that claims of a character similar to the one in suit can be liquidated, and that the discharge in bankruptcy is a bar to recovery upon them. The test laid down in this court with respect to the proof of this class of claims is the possibility of their estimation or valuation.

*Riggin* v. *Magwire*, 15 Wall. 549, 21 L. ed. 232.

A bankrupt is released by his discharge from further liability on a covenant for quiet enjoyment, although no breach occurred before bankruptcy.

*Jemison* v. *Blowers*, 5 Barb. 686.

A claim upon a bond conditioned on the payment of all the debts of a firm by the continuing partner, where no debts were paid by the obligee until after bankruptcy, was "capable of approximate proof," and barred by a discharge of the obligor in bankruptcy.

*Fisher* v. *Tifft*, 12 R. I. 56.

The obligation to pay an annuity for life by quarter-yearly instalments was discharged by bankruptcy of the obligor. With respect to payments which might become due after the petition in bankruptcy was filed, the present value of the liability was ascertainable and provable.

*Heywood* v. *Shreve*, 44 N. J. L. 94.

The liability of a subscriber to corporate stock for his unpaid subscription was a provable debt under the bankrupt act of 1867, although no assessment had been made at the time of bankruptcy.

*Glenn* v. *Abell*, 39 Fed. 10.

A claim based on a contract right, although for unliquidated damages for loss of future profits, is provable in bankruptcy.

*Re Manhattan Ice Co.* 114 Fed. 399; *Re Stern*, 54 C. C. A. 60, 116 Fed. 604.

Claim based on a bond to secure the payment of an annuity to a wife for life held to be provable in bankruptcy. The payment is clearly one the value of which can be ascertained.

*Cobb* v. *Overman*, 48 C. C. A. 223, 109 Fed. 65.

Liabilities involving payment or the ceasing to pay at the end of a life or lives in being can always be valued by the tables of actuaries.

Lowell, Bankruptcy, 131; *Lovell* v. *St. Louis Mut. L. Ins. Co.* 111 U. S. 264, 28 L. ed. 423, 4 Sup. Ct. Rep. 390; *Pierce* v. *Tennessee Coal, I. & R. Co.* 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335; *Parker* v. *Russell*, 133 Mass. 74; *Schell* v. *Plumb*, 55 N. Y. 592; *Heywood* v. *Shreve*, 44 N. J. L. 94; *Cobb* v. *Overman*, 48 C. C. A. 223, 109 Fed. 65; *Shover* v. *Myrick*, 4 Ind. App. 7, 30 N. E. 207; *Ex parte Granger*, 10 Ves. Jr. 348; *Ex parte Tindal*, 1 Dea. & Ch. 291; *Ex parte Broadley*, 2 Mont. D. & De G. 524; *Ex parte Naden*, L. R. 9 Ch. 670.

The liability to pay "until she marries," in England, has been held to be discharged in bankruptcy.

*Ex parte Blakemore*, L. R. 5 Ch. Div. 372; *Ex parte Neal*, L. R. 14 Ch. Div. 579.

The hardship to the other creditors is no greater than upon many claims the liquidation and proof of which are undoubted.

Lowell, Bankruptcy, § 171, p. 130; *Jemison* v. *Blowers*, 5 Barb. 686; *Moch* v. *Market Street Nat. Bank*, 47 C. C. A. 49, 107 Fed. 897; *Re Manhattan Ice Co.* 114 Fed. 399; *Fisher* v. *Tifft*, 12 R. I. 56.

Payment under this contract was not dependent upon the happening of an event which might never occur.

*Wolf* v. *Stix*, 99 U. S. 1, 25 L. ed. 309.

The word "contingent," when applied to a use, remainder, devise, etc., or other legal right or interest, implies that no present interest exists, and that whether such right or interest ever will exist depends upon a future uncertain event. The term "contingent demand" would, therefore, be inapplicable where a present claim exists or where it is certain to arise in future, and is only appropriate when there is no claim *in præsenti*, and when it is uncertain whether any in fact will arise.

*Jemison* v. *Blowers*, 5 Barb. 686.

In *Riggin* v. *Magwire*, 15 Wall. 549, 21 L. ed. 232, Mr. Justice Bradley said that the covenant sued on did not come within the category of annuities and debts payable in future, which are absolute existing claims. If it had come within that category, the value of the wife's probability of survivorship after the death of her husband might have been calculated on the principle of life annuities.

The agreement in suit, in so far as it provided for the payment of a certain yearly sum by monthly instalments for the support and maintenance of the son until he shall attain the age of twenty-one years, did not impose a contingent liability on the plaintiff in error. It cannot be doubted that the claim of the defendant in error in respect to this part of the contract could be liquidated and proved in bankruptcy. It is therefore barred by the discharge.

*Ex parte Pollard*, 2 Low. Dec. 411, Fed. Cas. No. 11,252; *Riggin* v. *Magwire*, 15 Wall. 549, 21 L. ed. 232; *Cobb* v. *Overman*, 48 C. C. A. 223, 109 Fed. 65.

If a fiduciary creditor prove his debt, he shall be bound by the discharge.

*Chapman* v. *Forsyth*, 2 How. 202, 11 L. ed. 236; *Re Tebbetts*, Fed. Cas. No. 13,817; *Morse* v. *Lowell*, 7 Met. 152; *Burpee* v. *Sparhawk*, 108 Mass. 111, 11 Am. Rep. 320; *Fisher* v. *Currier*, 7 Met. 424.

Furthermore, in such a contract as the one in this case, there can be but one recovery, as there is but one breach. The

plaintiff in error disabled himself by bankruptcy from performing his contract.

*Re Swift*, 50 C. C. A. 264, 112 Fed. 315.

In fact, long before his bankruptcy he had ceased to make the payments required by the contract. This repudiation of his obligations was communicated to the defendant in error, and she acted upon it by proving for her claim in part. She was entitled and compelled, because of this breach of the entire contract, to have her entire damages assessed at once, and having sought to recover on her demand she must be held to have waived all right to claim for a greater sum than that for which she proved in bankruptcy.

*James* v. *Allen County*, 44 Ohio St. 226, 58 Am. Rep. 821, 6 N. E. 246; *Wrubel* v. *Muth*, 11 Ohio C. C. 559; *Tarbox* v. *Hartenstein*, 4 Baxt. 78; *Fish* v. *Folley*, 6 Hill, 54.

*Mr.* **Frank H. Stewart** argued the cause, and, with *Mr. John Oscar Teele*, filed a brief for defendant in error:

Alimony has never been considered a debt provable in bankruptcy in this country, but simply a duty, and as such is not barred by the discharge.

*Audubon* v. *Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735; *Lynde* v. *Lynde*, 181 U. S. 183, 45 L. ed. 810, 21 Sup. Ct. Rep. 555; *Barber* v. *Barber*, 21 How. 582, 16 L. ed. 226; *Re Lachemeyer*, 18 Nat. Bankr. Reg. 270, Fed. Cas. No. 7,966; *Re Garrett*, 2 Hughes, 235, Fed. Cas. No. 5,252; *Re Baker*, 96 Fed. 955; *Re Shepard*, 97 Fed. 187; *Re Anderson*, 97 Fed. 321; *Re Hubbard*, 98 Fed. 710; *Re Nowell*, 99 Fed. 931.

It is not necessary in this case to consider whether the wife's claims are strictly alimony, or even in the nature of alimony, in order to determine whether the state court erred. The judgment complained of was rendered upon the ground that they were contingent claims, and so not provable under the bankrupt act of 1898.

*Dunbar* v. *Dunbar*, 180 Mass. 170, 62 N. E. 248.

The wife's claim in her own direct behalf was contingent (a) upon her death, and (b) upon her remarriage. The obligation is a continuing liability; and new breaches give new causes of action, which are not provable under the proceedings in bankruptcy.

*Austin* v. *Moore*, 7 Met. 116; *Shute* v. *Taylor*, 5 Met. 67; *Waldo* v. *Fobes*, 1 Mass. 10.

As the act makes no provision for the proof of claims depending upon a contingency which does not happen before the time of the adjudication of the bankruptcy, this claim could not be proved at all unless as an unliquidated one.

*Re Big Meadows Gas Co.* 113 Fed. 974.

But liquidation was impossible.

*Ex parte Pollard*, 2 Low. Dec. 411, Fed. Cas. No. 11,252; *Riggin* v. *Magwire*, 15 Wall. 549, 21 L. ed. 232.

Under the English statutes of bankruptcy down to 1869 such contingent claims were held not to be provable, and so not barred.

*Millen* v. *Whittenbury*, 1 Campb. 428: *St. Martin* v. *Warren*, 1 Barn. & Ald. 491; *Mills* v. *Auriol*, 1 H. Bl. 433; *Mudge* v. *Rowan*, L. R. 3 Ex. Ch. 85.

The English act of 1869, however, enlarged the language of claims provable, so as to make "every kind of a debt or liability provable in bankruptcy except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise," and that whether the liability is "capable of being ascertained by fixed rules, or assessed only by a jury, or as a matter of opinion."

*Ex parte Blakemore*, L. R. 5 Ch. Div. 372; *Ex parte Neal*, L. R. 14 Ch. Div. 579.

Under that statute claims of this nature were held to be provable, and so barred; but these cases are not of authority in this country, since the English bankrupt law permitted the proof of contingent debts to an extent outside the utmost possibility of the construction of the present bankrupt act of the United States.

*Re Nowell*, 99 Fed. 931. See also *Re Ells*, 98 Fed. 967; *Re Arnstein*, 101 Fed. 706; *Re Mahler*, 105 Fed. 428; *Re Jefferson*, 93 Fed. 948; *Re Garlington*, 115 Fed. 999; *Morgan* v. *Wordell*, 178 Mass. 350, 55 L. R. A. 33, 59 N. E. 1037; *Goding* v. *Roscenthal*, 180 Mass. 43, 61 N. E. 222; *Ex parte Lake*, 2 Low. Dec. 544, Fed. Cas. No. 7,991.

The only reference in the act of 1898 to contingent claims, even by construction, other than that of the surety of a bankrupt (§ 57i) is contained in § 63b. This paragraph, however, does not in any way enlarge the class of debts which may be proved, but provides that, if any claim coming within the scope of § 63 is unliquidated, it may be liquidated and proved.

Lowell, Bankruptcy, p. 487; *Re Hirschman*, 104 Fed. 69; *Re Yates*, 114 Fed. 365; *Re Marous*, 104 Fed. 331.

The contingency was of such a nature that it could not be valued for the purposes of proof under any bankrupt law existing or known to the history of the law, except perhaps the English act of 1869, and even under that act alimony was not provable.

*Kerr* v. *Kerr* [1897] 2 Q. B. 439; *Linton* v. *Linton*, L. R. 15 Q. B. Div. 239.

The relations between parent and child, and the parent's liabilities, must be worked out independently of all bankruptcy laws.

*Millen* v. *Whittenbury*, 1 Campb. 428; *Re Baker*, 96 Fed. 954; *Re Hubbard*, 98 Fed. 710; *Re Cotton*, Fed. Cas. No. 3,269; *Re Garrett*, 2 Hughes, 235, Fed. Cas. No. 5,252; *Re Lachemeyer*, 18 Nat. Bankr. Reg. 270, Fed. Cas. No. 7,966.

The bankruptcy act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness; but it was not intended to, nor does it, subvert the higher rule, which casts upon a parent the care and maintenance of his offspring. The welfare of the state, as also of every principle of law, statutory, natural, and divine, demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children. Creditors,

as well as all citizens, are interested in the enforcement of this rule.

*Re Hubbard*, 98 Fed. 710.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

Had the provisions of this contract, so far as contracting to pay money for the support of his wife is concerned, been embodied in the decree of divorce which the husband obtained from his wife in Ohio on the ground of desertion, the liability of the husband to pay the amount as alimony, notwithstanding his discharge in bankruptcy, cannot be doubted. *Audubon* v. *Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735. We are not by any means clear that the same principle ought not to govern a contract of this nature when, although the judgment of divorce is silent upon the subject, it is plain that the contract was made with reference to the obligations of the husband to aid in the support of his wife, notwithstanding the decree. The facts appearing in this record do not show a case of any moral delinquency on the part of the wife, and the contract, considering the circumstances, might possibly be held to take the place of an order or judgment of the court for the payment of the amount, as in the nature of a decree for alimony. We do not find it necessary, however, to decide that question in this case, because, in [345] any *event, we think the contract as to the support of the wife is not of such a nature as to be discharged by a discharge in bankruptcy.

Conceding that the bankruptcy act provides for discharging some classes of contingent demands or claims, this is not, in our opinion, such a demand. Even though it may be that an annuity dependent upon life is a contingent demand within the meaning of the bankruptcy act of 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), yet this contract, so far as regards the support of the wife, is not dependent upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which, in our opinion, is within the purview of the act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood. A simple annuity which is to terminate upon the death of a particular person may be valued by reference to the mortality tables. Mr. Justice Bradley, in *Riggin* v. *Magwire*, 15 Wall. 549, 21 L. ed. 232, speaking for the court, said that so long as it remained uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the bankruptcy act of 1841 [5 Stat. at L. 445, chap. 9]. The 5th section of that act gave the right to prove "uncertain and contingent demands," but it was held that a contract such as above described was not within that section.

It was remarked by the justice in that case that, if the contract had come within the category of annuities and debts payable in future, which are absolute and existing claims, that the value of the wife's probability of survivorship after death of her husband might have been calculated on the principle of life annuities.

But how can any calculation be made in regard to the continuance of widowhood when there are no tables and no statistics by which to calculate such contingency? How can a valuation of a probable continuance of widowhood be made? Who can say what the probability of remarrying is in regard to any particular widow? We know what some of the factors might be in the question: inclination, age, health, property, attractiveness, children. *These would, at least, enter into the question as to the probability of continuance of widowhood, and yet there are no statistics which can be gathered which would tend in the slightest degree to aid in the solving of the question. [346]

In many cases where actions are brought for the violation of contracts, such as *Pierce* v. *Tennessee Coal, I. & R. Co.* 173 U. S. 1, 43 L. ed. 591, 19 Sup. Ct. Rep. 335; *Roehm* v. *Horst*, 178 U. S. 1, 44 L. ed. 953, 20 Sup. Ct. Rep. 780, and *Schell* v. *Plumb*, 55 N. Y. 592, it is necessary to come to some conclusion in regard to the damages which the party has sustained by reason of the breach of the contract, and in such cases resort may be had to the tables of mortality, and to other means of ascertaining as near as possible what the present damages are for a failure to perform in the future; but we think the rules in those cases are not applicable to cases like this, under the bankruptcy act.

Taking the liability as presented by the contract, if the mortality tables were referred to for the purpose of ascertaining the value so far as it depended upon life, the answer would be no answer to the other contingency of the continuance of widowhood; and if, having found the value as depending upon the mortality tables, you desire to deduct from that the valuation of the other contingency, it is pure guesswork to do it.

It is true that this has been done in England under the English bankruptcy act of 1869 [32 & 33 Vict. chap. 71, § 31]. In *Ex parte Blakemore* (1877) L. R. 5 Ch. Div. 372, it was held by the court of appeal that the value of the contingency of a widow's marrying again was capable of being fairly estimated, and that proof must be admitted for the value of the future payments as ascertained by an actuary. That decision was made under the 31st section of the bankruptcy act of 1869. James, Lord Justice, said:

"No doubt it is uncertain whether the appellant will marry again, just as the duration of any particular life is uncertain. But, though the duration of any particular life is uncertain, the expectation of life at a given age is reduced to a certainty when we have regard to a million of lives. The value of the expectation of life is arrived at

by an average deduced from practical experience."

Although the English statute makes it necessary to arrive at a conclusion upon this point, yet there is no "practical expe-
[347] rience"*as to the chances of the continuance of widowhood, such as may be referred to where the probable continuance of life is involved. In the latter case we have the experience tables in regard to millions of lives, and, under such circumstances, there is, as Lord Justice James said, almost a certainty as to the valuation to be put on such a contingency. But under the English statute, the 31st section makes every kind of debt or liability provable in bankruptcy except demands in the nature of unliquidated damages arising otherwise than by reason of a contract or promise, so long as the value of the liability is "capable of being ascertained by fixed rules, or assessable only by a jury, or as matter of opinion." So, under that act, in *Ex parte Neal*, L. R. 14 Ch. Div. 579, there was a separation deed between husband and wife, and the husband was to pay an annuity to the wife, which was terminable "in case the wife should not lead a chaste life; in case the husband and wife should resume cohabitation; and in case the marriage should be dissolved in respect of anything done, committed, or suffered by" the other party, after the date of the deed. The annuity was also to be proportionately diminished in the event of the wife's becoming entitled to any income independent of the husband, exceeding a certain amount a year. After the execution of the deed the husband went through bankruptcy, and it was held that the value of the annuity was capable of being fairly estimated and was provable in the liquidation. In that case, speaking of the 31st section of the act of 1869, it was stated that "words more large and general it is impossible to conceive; they cover every species of contingency." It was also stated that it was "difficult to see how any case could arise which would not come within" the language of this act. Bramwell, Lord Justice, said: "But for the present bankruptcy act, our decision must have been the same as that in *Mudge v. Rowan*" (1868) L. R. 3 Exch. 85; but he said that the present bankruptcy act was very different in its terms from the act which was in force when that case was decided.

In the case of *Mudge* v. *Rowan*, L. R. 3 Exch. 85, there was a deed of separation between husband and wife, in which the husband covenanted to pay an annuity to his wife by quarterly instalments, the annuity to cease in the event of future cohabita-
[348] tion *by mutual consent. It was held that this was not an annuity provable under the bankruptcy act of 1849, 12th and 13th Vict. chap. 106, § 175; nor a liability to pay money under the 24th and 25th Vict. chap. 134, § 154.

The 175th section of the act of 1849 expressly provided that the creditor might prove for the value of any annuity, which value the court was to ascertain. Kelly, Chief Baron, said:

"The annuity seems to me to be so uncertain in its nature as to be impossible to be valued. In many cases the commissioner of bankruptcy may have to deal with contingencies the value of which depend on a variety of considerations, and where the valuation is very difficult. But here I am at a loss to see any single circumstance upon which a calculation of any kind could be based."

Martin, Baron, said:

"This contingency depends on an infinite variety of circumstances, into which it is idle to suppose a commissioner could inquire."

Channell, Baron, concurring, said:

"The tendency of recent legislation, and the course of recent decisions, has been to free a debtor who becomes a bankrupt, from all liability of every kind; but I do not think an order of discharge a bar to such a claim as the present. . . . I quite admit that, to bring an annuity within the act of 1849, it is not necessary to have any actual pecuniary consideration. I also feel that in many cases the difficulty of calculating the present value of contingencies may be very great, and yet they may be within the acts. But here it appears to me that the difficulty is insuperable."

In *Parker* v. *Ince* (1859) 4 Hurlst. & N. 52, there was a bond conditioned to pay an annuity during the life of the obligor's wife, provided that if the obligor and his wife should at any time thereafter cohabit as man and wife the annuity should cease, and it was held that the annual sum thus covenanted to be paid by the defendant was not an annuity within the 175th section of the bankruptcy law or consolidation act of 1849, nor a debt payable upon a contingency *within the 177th section, nor a liability to [349]
pay money upon a contingency within the 178th section, and consequently the discharge in bankruptcy was no bar to an action for a recovery of a quarterly payment due on the bond. Martin, Baron, said:

"That cannot be such an annuity as would fall within the 175th section, because a value cannot be put upon it. How is it possible to calculate the probability of a man and his wife, who are separated, living together again? Their doing so depends on their character, temper, and disposition, and, it may be, a variety of other circumstances. Then, is it money payable upon a contingency within the 178th section? I think it is not."

It is only, therefore, by reason of the extraordinarily broad language contained in the 31st section of the English bankruptcy act of 1869 that the English courts have endeavored to make a fair estimate of the value of a contract based on the continuance of widowhood, even though the value was not capable of being ascertained by fixed rules, nor assessable by a jury, but was simply to be estimated by the opinion of the court or of some one intrusted with the duty.

In the *Blakemore Case*, L. R. 5 Ch. Div.

372, after the announcement of the judgment, the report states that it was then arranged that it should be referred to an actuary to ascertain the annuity as a simple life annuity, and to deduct from that value such a sum as he should estimate to be the proper deduction for the contingency of widowhood. In other words, it was left to the actuary to guess the proper amount to be deducted.

No such broad language is found in our bankruptcy act of 1898. Section 63*a* provides for debts which may be proved, which, among others, are: (1) "A fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest." (4) "Founded upon an open account or upon a contract, express or implied."

[350] *In § 63*b*, provision is made for unliquidated claims against the bankrupt, which may be liquidated upon application to the court in such manner as it shall direct, and may thereafter be proved and allowed against his estate. This paragraph *b*, however, adds nothing to the class of debts which might be proved under paragraph *a* of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of § 63*a*, to be liquidated as the court should direct.

We do not think that by the use of the language in § 63*a* it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.

The language of § 63*a* of the act of 1898 differs from that contained in the bankruptcy act of 1867, and also from that of 1841. The act of 1867, § 19 (14 Stat. at L. 517, 525, chap. 176, carried into the Revised Statutes as § 5068), provided expressly for cases of contingent debts and contingent liabilities contracted by the bankrupt, and permitted applications to be made to the court to have the present value of the debt or liability ascertained and liquidated, which was to be done in such manner as the court should order; and the creditor was then to be allowed to prove for the amount so ascertained.

Section 5 of the act of 1841 (5 Stat. at L. 440, chap. 9) provides in terms for the holders of uncertain or contingent demands coming in and proving such debts under the act. But neither the act of 1841 nor that of 1867 would probably cover the case of such a contract as the one under consideration.

Cases have been cited showing some contingent debts which were held capable of being proved under the bankruptcy act of 1898, among which are *Moch* v. *Market Street Nat. Bank*, 47 C. C. A. 49, 107 Fed. 897, Circuit Court of Appeals, Third Circuit, 1901, and *Cobb* v. *Overman*, 54 L. R. A. 369, 48 C. C. A. 223, 109 Fed. 65. Circuit Court of Appeals, Fourth Circuit, 1901. And under former bankrupt acts, the cases of *Fisher* v. *Tifft* (1878) 12 R. I. 56; *Heywood* v. *Shreve* (1882) 44 N. J. L. 94, and *Shelton* v. *Pease* (1847) 10 Mo. 473.

The contingency in the case of *Moch* v. *Market Street Nat. Bank*, 47 C. C. A. 49, 107 Fed. 897, was that the bankrupt was the indorser of commercial paper *not due [351] at the time of filing the petition, and it was held that under § 63*a*, subdivision 4, the creditor might prove against the estate of the bankrupt after the liability had become fixed.

In *Cobb* v. *Overman*, 54 L. R. A. 369, 48 C. C. A. 223, 109 Fed. 65, the bond of the bankrupt to secure payment to the obligee of an annuity for life was held to be properly proved under § 63*a*, clause 1.

These cases, it will be seen, do not come within the principle of the case at bar. The other cases arising under the acts of 1867 and 1841 do not affect this case.

The Massachusetts court held the debt herein not provable, upon the authority of *Morgan* v. *Wordell*, 178 Mass. 350, 55 L. R. A. 33, 59 N. E. 1037, and *Goding* v. *Roscenthal*, 180 Mass. 43, 61 N. E. 222. Mr. Justice Barker, in delivering the opinion of the supreme judicial court of Massachusetts in the latter case, said:

"But in *Morgan* v. *Wordell*, 178 Mass. 350, 55 L. R. A. 33, 59 N. E. 1037, this court assumed that such claims were not provable under the act, and we follow that view in the present case."

We think the contract, so far as it related to the payment to the wife during her life or widowhood, was not a contingent liability provable under the act of 1898.

In relation to that part of the husband's contract to pay for the support of his minor children until they respectively became of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the states. In this case the decree of the court provided that the children should remain in the custody of the wife, and the contract to contribute a certain sum yearly for the support of each child during his minority was simply a contract to do that which the law obliged him to do; that is, to support his minor children. The contract was a recognition of such liability on his part. We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do *should be discharged [352] in that way. As his discharge would not, in any event, terminate his obligation to support his children during their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be pre-

sumed to have been a reasonable one) in fulfilment thereof should be so discharged. It is true his promise is to pay to the mother; but, on this branch of the contract, it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose.

In *Re Baker*, 96 Fed. 954, in the district court of Kansas, it was held that a judgment in a bastardy proceeding against the putative father, adjudging him to pay a certain sum to the mother of the child for its maintenance, was not such a debt as would be released by the discharge of the father in bankruptcy, and it was put upon the ground that, by virtue of the judgment and bond given thereon, the father became liable for the maintenance of the illegitimate son the same as if he were his legitimate offspring, and that the bankruptcy law was never intended to affect the liability of the father for the support of his children.

In the case of *Re Hubbard*, 98 Fed. 710, the district court of Illinois held that a discharge in bankruptcy did not release the bankrupt from the obligation to obey an order made by a state court requiring him to pay a certain sum for the support of his minor children. Kohlsaat, District Judge, said:

"The bankruptcy act was passed to relieve persons bringing themselves within its provisions from the incubus of hopeless indebtedness; but it was not intended to nor does it subvert the higher rule, which casts upon a parent the care and maintenance of his offspring. The welfare of the state, as also every principle of law,—statutory, natural, and divine,—demand that, so long as he has any substance at all, he shall apply it to the maintenance of his children. Creditors, as well as all citizens, are interested in the enforcement of this rule."

As the defendant would still remain liable for the support of his minor children, even if discharged from this contract under the act, and he would remain liable for past support, why should it be held that Congress intended that such a contract, to do [353] what *the law enjoins upon him as a duty, should be released? There is no language in the act which plainly so provides, and we ought not to infer it.

The amendments to the bankruptcy act passed in 1903 (32 Stat. at L. 797, chap. 487) contain an amendment of § 17 of the act of 1898, which relates to debts not affected by a discharge, and it provides, among those not released by a discharge in bankruptcy, a debt due or to become due for alimony or for the maintenance or support of wife or child. It is true that the provisions of the amendatory act are not to apply to cases pending before their enactment. They are only referred to here for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife or children.

*The judgment is affirmed.*

ESTHER S. BUCHANAN *et al.*, *Plffs. in Err.*,
*v.*
LAURA PATTERSON *et al.*

(See S. C. Reporter's ed. 353-367.)

*French spoliation claims—appropriation for payment—identification of distributees.*

Congress by making an appropriation in the act of March 3, 1899 (30 Stat. at L. 1161, chap. 426. U. S. Comp. Stat. 1901, p. 751), in accordance with the report of the court of claims on certain French spoliation claims, to an administratrix "representing" a designated firm, and a similar appropriation to the same person as administratrix of the estate of a person designated as "the surviving partner" of such firm, cannot be deemed thereby to have determined that the next of kin of such surviving partner should share in the distribution, where such administratrix represented in the court of claims all the interested parties, and that court mistakenly supposed such surviving partner to have been a member of the firm at the time of the illegal seizures of its property, but must be regarded as having intended such appropriation for the next of kin of those composing the firm at the time of the seizures, without attempting to identify the particular persons belonging to that class.

[No. 266.]

*Argued April 29, 30, 1903. Decided June 1, 1903.*

IN ERROR to the Court of Appeals of the State of Maryland to review a decree which affirmed a decree of the Circuit Court No. 2. of Baltimore City giving directions for the distribution of moneys received under the French spoliation acts. *Affirmed.*

See same case below, 94 Md. 534, 51 Atl. 169; on prior appeal, 92 Md. 334, 48 Atl. 158.

Statement by Mr. Justice **Peckham:**

The plaintiff in error, Esther S. Buchanan, filed her bill in circuit court No. 2, of Baltimore city, on August 17, 1899, against the parties defendant, for the purpose of obtaining the instructions of that court as to whom and in what proportions she should pay and distribute certain sums of money received by her from the United States under what is termed the French spoliations acts of Congress. Answers were made by the various parties, and a decree was subsequently entered giving directions for the distribution of the funds. An appeal from that decree was taken by some of the defendants to the court of appeals, and that court reversed a portion of the decree (as to the proper distribution of the money), and remanded the case for further proceedings. 92 Md. 334, 48 Atl. 158. The trial court then entered a decree in accordance with the directions of the court of appeals, and thereupon the original plaintiff, Esther S. Buchanan, appealed to the court of appeals, and that court then affirmed the decree of the court below. 94 Md. 534, 51

Atl. 169. Plaintiffs in error bring the case here by writ of error.

The first act of Congress relating to the French spoliations was passed January 20, 1885. 23 Stat. at L. 283, chap. 25 (U. S. Comp. Stat. 1901, p. 750).

[355] *Miss Buchanan was, in May, 1885, duly appointed administratrix upon the estate of her father, William B. Buchanan, deceased. She then, through her counsel and in common with other claimants for losses sustained by the seizures of the two vessels Patapsco and Jane, came into the court of claims and proved the facts upon which the rights of the several claimants were based as against the United States. In presenting the claims, she did in truth represent, with their consent, all the parties interested therein, including those now claiming against her.

The court reported (May 18, 1887) that the seizures of the two vessels complained of were illegal, and that the claimants were entitled to the following sums from the United States. A list was then given of those entitled to an appropriation on account of the ship Patapsco, in which was included the name of Esther S. Buchanan, as follows:

"Esther S. Buchanan, administratrix of the estate of William Buchanan, who was the surviving partner of the firm of S. Smith & Buchanan, deceased, to the sum of $25,056."

In relation to the ship Jane, in the list of those entitled to an appropriation was the following:

"Esther S. Buchanan, administratrix, representing Smith & Buchanan, $11,660.-21."

After this report had been made, and on March 23, 1891, Esther S. Buchanan was duly appointed administratrix *de bonis non* with the will annexed of the personal estate of James A. Buchanan, her grandfather.

No action of Congress in relation to these claims was had until 1899, when an act was passed, approved March 3, 1899 (30 Stat. at L. 1161, chap. 426, U. S. Comp. Stat. 1901, p. 751). The act provided for the payment of claims allowed under the Bowman and Tucker acts by the court of claims, and on page 1191 it provided as follows:

"French Spoliation Claims.

"To pay the findings of the court of claims on the following claims for indemnity for spoliations by the French prior to July thirtieth, eighteen hundred and one, under the act entitled 'An Act to Provide for the Ascertainment of Claims of Ameri-[356]can *Citizens for Spoliations Committed by the French Prior to the Thirty-first Day of July, Eighteen Hundred and One:' *Provided*, That in all cases where the original sufferers were adjudicated bankrupts the awards shall be made on behalf of the next of kin instead of to assignees in bankruptcy, and the awards in the cases of individual claimants shall not be paid until the court of claims shall certify to the Secretary of the Treasury that the personal representatives on whose behalf the award is made represent the next of kin, and the courts which granted the administrations, respectively, shall have certified that the legal representatives have given adequate security for the legal disbursements of the awards, namely."

Then follow appropriations to a number of claimants in satisfaction of the losses sustained by the illegal seizures of vessels and cargoes.

Among them, on page 1194, is included the following:

"On the ship Jane, John Wallace, master, namely:

"Esther S. Buchanan, administratrix, representing Smith & Buchanan, $11,660.-21."

On page 1195 is the following:

"On the ship Patapsco, William Hill, master, namely: . . . [names of various claimants for other interests in same ship].

"Esther S. Buchanan, administratrix of the estate of William B. Buchanan, who was the surviving partner of the firm of S. Smith & Buchanan, deceased, $25,056, the value of the cargo shipped by said firm."

Pursuant to the proviso in the act of 1899, the court of claims, upon the application of the attorney of record for Esther S. Buchanan, administratrix, representing Smith & Buchanan, deceased, ordered, in the case of the ship Jane, a certificate to be issued to the Secretary of the Treasury, as follows:

"The court of claims hereby certifies that it appears by evidence on file in the above-entitled case that said Esther S. Buchanan, on whose behalf an appropriation or award was made by the act of March 3, 1899, entitled 'An Act for the Allowance of Certain Claims for Stores and Supplies Reported by the Court of Claims under the Provisions of the Act Approved March Third, *Eighteen[357] Hundred and Eighty-three, and Commonly Known as the Bowman Act, and for Other Purposes.' for the sum of eleven thousand six hundred and sixty dollars and twenty-one cents ($11,660.21), represents the next of kin of William B. Buchanan, the surviving member of the firm of Samuel Smith & Buchanan, deceased, the original owner of the claim upon which said award was made.

"And the court further certifies that it appears on the record of the said case that at the time when the award of this court was made the said claim was not held by assignment or owned by an insurance company."

The same kind of a certificate was made in relation to the ship Patapsco.

These certificates were made on June 15, 1899, and were filed with the Secretary of the Treasury, and the moneys mentioned, being a total of $36,716.21, were thereafter paid to Miss Buchanan.

Having received the money from the government, the plaintiff in error then commenced this suit individually, and as administratrix of the estate of William B. Buchanan, deceased, and as administratrix *de*

*bonis non* with the will annexed of James A. Buchanan, deceased, in circuit court No. 2, of Baltimore city, in which she stated the various facts under which the money had been paid her, and that she had in her hands for distribution, among the persons particularly entitled to the same, the sum of $22,629.47, after the payment of all costs, etc. She also averred that she was advised that she held funds for the benefit of and distribution among, not only the next of kin of her own decedent, the said William B. Buchanan, but also the next of kin of the other partners of said firm of S. Smith & Buchanan, to wit, Samuel Smith and James A. Buchanan, in the proportions and according to the laws of distribution which the court might hold to be proper in the cause. She also gave the names of the next of kin of William B. Buchanan, namely, herself and her brother, Wilson C. Buchanan, and then stated who were the next of kin of James A. Buchanan, deceased, living at the date of the passage of the act of Congress directing the payment of the claims, to wit, March 3, 1899, [358] so *far as they were known to her, and she stated that she had given the names of all of the next of kin of Samuel Smith and James A. Buchanan living at the time of the passage of the act of Congress, March 3, 1899, although she said there might be others unknown to her who might lay claim to participate in the distribution of the fund, and she was in doubt as to the proportion in which the beneficiaries should participate in the shares of their ancestors in the fund. She then stated:

"Twelfth. That according to the information and belief of your oratrix, the said Samuel Smith, James A. Buchanan, and William B. Buchanan were equal copartners, but a claim has been made on your oratrix by Robert Carter Smith, one of the distributees of Samuel Smith, and a party defendant herein, wherein he asserts that his ancestor, the said Samuel Smith, had a one-half interest in the property of said copartnership, and that, therefore, the next of kin of the said Samuel Smith are entitled to have for distribution among them one half of the fund now in the hands of your oratrix for distribution; but your oratrix is informed and does verily believe that distribution of said fund should be made in three equal parts among the next of kin of the three partners in said firm of S. Smith & Buchanan."

Other facts were given in relation to the existence of parties who might possibly claim some interest in the fund, and in her complaint she finally said that, by reason of the facts above set forth, she was in doubt to whom and in what proportion she should pay and distribute the sum of money in her hands, and that she was advised, and therefore alleges, that a distribution of the same can only be had under the order of a court of equity, in a manner adequate to insure her own protection in the future. She thereupon asked that the court assume jurisdiction of the fund in her hands as administratrix, as already set forth, and that it direct and supervise the distribution of the same among the parties whom the court may find to be entitled to participate therein, according to the proportion and rule which this court may declare to govern the same.

Answers were made by some of the parties and the bill taken as confessed as against others. Upon the trial, evidence was *given under objection, and the state [359] court has found that at the time of the illegal seizures of the vessels in 1798, William B. Buchanan was about three years old, he having been born on September 9, 1795; that in 1798, the year the losses occurred, there was a firm of S. Smith & Buchanan, consisting only of S. Smith and James A. Buchanan, the father of William B. Buchanan, and they were the only original sufferers from the illegal seizures of the ships. William B. Buchanan did not become a member of the firm until about twenty years later, or until January 1, 1818, and he became the survivor of the firm formed in 1818, which was also known as S. Smith & Buchanan.

It thus appears that, although William B. Buchanan was the survivor of a firm of S. Smith & Buchanan as that firm was constituted in 1818, he was not the survivor of the firm of S. Smith & Buchanan as that firm was constituted in 1798, when these illegal seizures occurred.

The trial court held that the moneys should be divided into three portions, one of which should go to the next of kin of Samuel Smith, another to the next of kin of James A. Buchanan, and another to the next of kin of William B. Buchanan, being Esther S. and Wilson C. Buchanan.

The court of appeals, on appeal from the decree of the circuit court, held that this was an erroneous disposition of the money, and that it should be divided into two portions, one of which should go to the next of kin of Samuel Smith, and the other to the next of kin of James A. Buchanan; Samuel Smith and James A. Buchanan being the only members of the firm that sustained the losses, and being the original sufferers from the illegal seizures. The writ of error has been sued out for the purpose of reviewing this decree.

*Messrs.* **Archibald H. Taylor** and **Edward P. Keech, Jr.**, argued the cause, and, with *Mr. John Peirce Bruns*, filed a brief for plaintiffs in error.

*Messrs.* **Arthur W. Machen, Jr.**, **Frank P. Clark**, and **Arthur W. Machen**, argued the cause and filed a brief for defendants in error.

Contentions of counsel sufficiently appear in the opinion.

*Mr. Justice **Peckham**, after making the [360] foregoing statement of facts, delivered the opinion of the court:

The contention of the plaintiffs in error is that Congress, by the acts mentioned, and particularly that of March 3, 1899, ratified and adopted the findings and decisions

of the court of claims, made in pursuance of the act of 1885, in the cases of the two ships Patapsco and Jane, and that the act of 1899 recognized and designated William B. Buchanan as an original sufferer within the meaning of Congress, by virtue of his being a partner, and the surviving partner, of S. Smith & Buchanan, and that the act gave to the personal representative of William B. Buchanan the awards in question, for the benefit of his next of kin and the next of kin of his two partners. They also assert that the court of claims having made the additional final certificate required by the act of Congress, and the Secretary of the Treasury, in accordance with those certificates, having paid the money to the plaintiff in error, administratrix, for the benefit of the next of kin of William B. Buchanan, to the full extent of his partnership interest in the firm, there was no power in any court to in anywise alter the statute or make any other distribution than such as would give to the next of kin of William B. Buchanan one third of the total sum to be distributed.

It becomes necessary, in order to fully appreciate the action of the court of claims and of Congress subsequently to the passage of the act of 1885, to examine the latter act and determine its scope and purpose. The act provided for an investigation to be undertaken by the court as to the validity of the claims for indemnity upon the French government, for losses of citizens of the United States or their legal representatives, arising from illegal captures, seizures, etc., of vessels or cargoes prior to the treaty of 1800 between France and the United States. The act did not assume to provide for the identification of all the next of kin of the original sufferers from such illegal seizures. The court was to determine the validity and the amount of the claims included within the description contained in § 1 of the act [361] of 1885, and it was also to determine *the present ownership of such claims. The matter of chief importance between the claimants and the United States was for the court to ascertain and determine the validity and the extent of the claims.

The particular class of persons who were the owners of the claims, and to whom the moneys might be properly paid, was at this time of subsidiary importance, so far as the United States was concerned. Although the present ownership was to be determined, and, if by assignee, the date of the assignment and the consideration paid therefor, yet this was obviously for the mere purpose of informing Congress as to the present situation of a claim, whether owned by next of kin of those who suffered the loss or by assignees; but the particular individuals who composed the next of kin or the assignees were not then of importance, as gathered from the language and purpose of the act. All this action of the court was, by the terms of the act, made advisory only. Congress specifically withheld from the court any right to render a judgment which would in any manner conclude the United States, or commit it to the payment of any claims determined by the court under the 3d section of the act. All that Congress did was to give jurisdiction to the court of claims to inquire into the matter of each claim which might be presented to it, and to report to Congress its opinion of the validity and the amount of the claim, with a statement as to its ownership. The whole subject thereafter remained with Congress, subject to its future action.

Regarding its powers and duties under this act, the court of claims itself stated its opinion in the case of the ship Jane. 24 Ct. Cl. 74. It held that the court could not determine to whom the money should be distributed, which Congress might thereafter award as indemnity in the French spoliations cases, nor could it determine who were the next of kin of a deceased claimant, nor whether there were any. All that the court could determine in its report to Congress was the validity of a claim against France, its relinquishment by the United States, and the amount thereof. It also held that its decisions in these cases were not judgments which judicially affect the rights of anyone, and that, after the court had reported a French spoliation case, it remained [362] with Congress to determine, first, the measure of the indemnity which the United States should give; and, second, the persons who were equitably entitled to participate therein. The purpose of the court was, as it stated, to require a claimant to file his letters of administration and prove, to the satisfaction of the court, *that the decedent whose estate he administered was the same person who suffered loss through the capture of a vessel.*

Again, in *The Leghorn Seizures*, 27 Ct. Cl. 224, the court held that the French spoliations act of 1885 conferred jurisdiction, but did not impose liabilities; that Congress conceded that several classes of claimants seeking redress for French spoliations might come into the court of claims, and have the question of the liability of the United States determined, and conceded nothing more.

From these extracts it is plain that the court of claims did not regard it as its duty under the act of 1885 to investigate and determine the rights of each individual of a class, but only to determine the validity and amount of a claim, with a specification of ownership sufficient to identify the claim itself, for the payment of which an appropriation might be thereafter made. The particular individuals of the class would be matter for subsequent investigation by some other tribunal.

In *Blagge* v. *Balch*, 162 U. S. 439, 40 L. ed. 1032, 16 Sup. Ct. Rep. 853, the meaning and purpose of the act of 1885, together with the act of March 3, 1891 (26 Stat. at L. 908, chap. 540), came before this court for consideration, and it was held that the result of the action of Congress was to place the payments prescribed under the act of 1891 within the category of payments by way of gratuity and grace, and not as of

right as against the government; that, under the proviso contained in the act of 1891, Congress intended the next of kin to be beneficiaries in every case, and excluded creditors, legatees, assignees, and all strangers to the blood, and that the words "next of kin," as used in the proviso, meant next of kin living at the date of the act (1891), to be determined according to the statute of distribution of the respective states of the domicil of the original sufferers.

The court distinguished the case from *Comegys* v. *Vasse*, 1 Pet. 193, 7 L. ed. 108, [363] and *Williams v. *Heard*, 140 U. S. 529, 35 L. ed. 550, 11 Sup. Ct. Rep. 885. In these cases it was held that assignees in bankruptcy took title to the moneys.

The same proviso mentioned in *Blagge* v. *Balch*, 162 U. S. 439, 40 L. ed. 1032, 16 Sup. Ct. Rep. 853, and contained in the act of March 3, 1891, is found in the act of 1899 (30 Stat. at L. 1161, 1191, chap. 426, U. S. Comp. Stat. 1901, p. 751). So we know from the above case that the desire of Congress was to make payments to the next of kin of the original sufferers of the losses, and that assignees in bankruptcy should not take. The identification of the particular persons belonging to the class that Congress desired to aid was evidently not within the purpose of the act of 1891 or that of 1899.

Under the act of 1885, the plaintiff in error, Esther S. Buchanan, presented the claims arising out of the capture of the vessels Patapsco and Jane, together with their cargoes. It is not disputed—on the contrary, it is admitted—that she represented on the trial before the court of claims, with their consent, all the parties interested in the claim of S. Smith & Buchanan, including those who now claim in opposition to her so far as the proportion of the award to be paid to the different parties is concerned. That she represented these different persons, with their consent, in the examination before the court of claims, shows that there was between them at that time no diverse interest involved; that, so far as regarded the validity of the whole claim and its amount, the parties were situated alike, and had the same interest as against the United States in proving the validity of their claim and the amount thereof. That she was authorized to receive the amount that might be awarded, and that thereafter the question of proportion and distribution would arise, is a plain deduction from the facts stated. As the material point before the court of claims was the validity of the claim and its amount, in regard to which all claimants appeared in the same interest, it was not of much moment who should be named to receive the award (if any were to be made), and therefore the statement by the court that Esther S. Buchanan was the administratrix of William B. Buchanan, the survivor of the firm, was not calculated to call for any comment, for the reason, as stated, that the appropriation would be to [364] a *representative of the next of kin, the individual members of which might be thereafter identified. The history given by the court of claims was, upon the question of ownership, just enough to form a basis for an appropriation to some one, who would thereupon distribute to the proper persons among themselves. The reports of the court were not intended as an identification of such persons.

After the report of the court of claims to Congress, Miss Buchanan had, in 1891, taken out letters of administration upon the estate of James A. Buchanan. Soon after the passage of the act of 1899 she obtained the certificates already referred to from the court of claims, in one of which, in regard to the ship Jane, it was stated that she "represents the next of kin of William B. Buchanan, the surviving member of the firm of Samuel Smith & Buchanan, deceased, the original owners of the claim upon which said award was made," and in the other certificate, in regard to the ship Patapsco, it was stated that she "represents the next of kin of William B. Buchanan, surviving partner, etc., deceased, the original owner of the claim upon which said award was made." These certificates obviously proceeded upon the report which the court had theretofore made in these two cases, and in which it is plain that the court reported the fact that the members of the firm of S. Smith & Buchanan, as that firm was constituted in 1798, were the original sufferers of the loss in 1798. It is also plain that the court assumed that the William B. Buchanan named in the certificate was a member of the firm in 1798, which suffered the loss, and it was to the administratrix of the survivor of that firm (1798) that the certificate in truth applied. This simply carried out the purpose of the court, expressly stated in this case, to insist that the decedent whose estate was administered was the same person who suffered loss through the capture of a vessel. In the certificates, as well as in the report of the court of claims, it is evident that the court assumed that the persons entitled to the distributive share of the moneys were the next of kin of the original sufferers, whoever they might turn out to be, although the court supposed that William B. Buchanan was the survivor of the firm that suffered the loss in 1798.

*The case of *United States* v. *Gilliat*, 164 [365] U. S. 42, 41 L. ed. 344, 17 Sup. Ct. Rep. 16, simply holds that, under the special statute therein referred to, the certificate made by the court of claims and sent to the Secretary of the Treasury was conclusive, and the United States had no right of appeal from the conclusion stated in the certificate.

In this case, the court of claims thought there were three members of the firm of S. Smith & Buchanan at the time of these captures. In the 4th finding, in regard to the ship Patapsco, the court reported that "John Donnell and the firm of S. Smith & Buchanan owned jointly the cotton shipped on that vessel, and that Samuel Smith, James A. Buchanan, and William B. Buchanan, citizens of the United States, formed

the said firm of S. Smith & Buchanan;" that is, formed the firm at the time of the capture in 1798; and in the 10th finding the court found that on November 9, 1820, "said Samuel Smith, James A. Buchanan, and William B. Buchanan, copartners, and trading as hereinbefore set forth as copartners, under the firm name of S. Smith & Buchanan, assigned" to assignees for the benefit of their creditors. Thus the court assumed that the firm consisted of the same members in 1798 and in 1820, and that William B. Buchanan was the survivor. This is clearly a mistake. William B. Buchanan was born in 1795, and was then, at the time of these captures, but three years old, and was not a member of the firm at that time, as the state court finds. But clearly the court of claims had reference to the firm as it was composed when the losses occurred, whoever in fact were then the members of that firm.

There is nothing in its report which would show that it regarded William B. Buchanan as one of the original sufferers because of his being a member of the firm of 1818, of S. Smith & Buchanan. The whole history of the case as given by the court shows that William B. Buchanan was mistakenly supposed to have been a member of the firm in 1798, and it was on that account that he was regarded as the survivor of that firm. Whatever equity the parties might claim on account of William B. Buchanan becoming a member of the firm in 1818, it is plain that those equities were not regarded or known or supposed to exist by the court of claims.

[366] *Taking this report of the court of claims, it seems to us evident that the appropriations for the payment of the claims made by the act of 1899 (30 Stat. at L. 1194, 1195, chap. 426) proceeded upon the report made by that court to Congress in these cases, and that the language of that act, in the case of the ship Jane, to "Esther S. Buchanan, administratrix, representing Smith & Buchanan, $11,660.21," and in the case of the ship Patapsco, "Esther S. Buchanan, administratrix of the estate of William B. Buchanan, who was the surviving partner of S. Smith & Buchanan, deceased, $25,056, the value of the cargo shipped by said firm," when taken in connection with the other facts as to the firm of 1798, shows that the appropriation was intended for the administratrix of the survivor of the original firm existing in 1798, at the time the losses occurred, and that the next of kin of the members of that firm at that time were in reality the parties intended by Congress to receive its gratuity. It was not within the intention of Congress to determine by the appropriation who those persons were, but the appropriation was to Esther S. Buchanan as a representative of the class; in other words, the representative of the next of kin of the original sufferers, without therein determining who they were. The intent of Congress to make the payment in each case to the representative of those who were next of kin of the original sufferers, or, in other words, of the firm as it stood in 1798, we think is perfectly certain. Whoever they might be, Congress intended the payment to be for those who were the next of kin, and it did not conclude the fact as to who they were, by appropriating the money to Esther S. Buchanan. It was to be for her as the representative of the next of kin of the original sufferers.

Congress could, of course, have given this fund to anyone it chose, as it was a case of gratuity, in any event; but the question is, What did Congress, in fact, mean when it made the appropriation in the act of 1899? and that meaning, we feel convinced, was as we have already stated.

The cases of *United States* v. *Jordan*, 113 U. S. 418, 28 L. ed. 1013, 5 Sup. Ct. Rep. 585; *United States* v. *Price*, 116 U. S. 43, 29 L. ed. 541, 6 Sup. Ct. Rep. 235, and *United States* v. *Louisville Sinking Fund Comrs.* 169 U. S. 249, 42 L. ed. 735, 18 Sup. Ct. Rep. 358, are not in conflict with this result. In those cases the *appropriation [367] was to the party named in the act, and a specific sum was directed to be paid to such party. It was not a payment to him in trust for some other and unidentified members of a class to which he belonged, but it was a positive and absolute direction by Congress to pay to the individual named in the act the amount stated therein. In such cases there is no subject for identification of the members of any class and no occasion for the further action of anyone before payment is to be made.

In the case at bar, it is clear that the party named in the appropriation was not entitled to the money absolutely as her own. It was an appropriation to her for the benefit of others, herself included, and those others were identified only as a class, and that class was intended as the next of kin of the firm of S. Smith & Buchanan as it existed in 1798.

Having obtained payment of the sum appropriated by Congress, the plaintiff in error, Esther S. Buchanan, came into a court of equity and asked to have the fund distributed under its authority. She stated all the facts, and while claiming the right to share in the distribution of the money in her character as one of the next of kin of William B. Buchanan, yet she still submitted the whole question as to the proper distribution to the court. The court had jurisdiction to determine as to the real meaning and the proper construction of the act of Congress, and the highest court of that state, upon appeal from the trial court, has held in substance that it appears that there were but two members of the firm in 1798, and it accordingly decided that the intent of Congress was clearly to make the gift to the next of kin of the members of the firm in 1798, which would result in giving one half to the next of kin of S. Smith and the other one half to the next of kin of James A. Buchanan, among whom are found Esther S. Buchanan and her brother, Wilson C. Buchanan.

*We see no error in the decree of the Mary-*

*land Court of Appeals, and it is, for the reasons stated, affirmed.*

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[368] *JOHNSON BLACKFEATHER, the Principal Chief of the Shawnee Tribe of Indians, etc., *Appt.*,

*v.*

UNITED STATES.

(See S. C. Reporter's ed. 368-379.)

*Jurisdiction of court of claims—rights of individual Shawnee Indians.*

Jurisdiction over the claims of individual members of the Shawnee tribe of Indians was not included in the grant of jurisdiction to the court of claims by the act of October 1, 1890 (26 Stat. at L. 636, chap. 1249), to hear and determine the rights of the Shawnee Indians to moneys, lands, and rights which may be due to "the said Shawnees" under the treaty of July 19, 1866 (14 Stat. at L. 803), between the United States and the Cherokee Nation, and under articles of agreement between such nation and the Shawnees, Delawares, and Cherokee freedmen, and to moneys due from the United States "to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom;" nor was such jurisdiction conferred by the act of July 6, 1892 (27 Stat. at L. 86, chap. 151), enlarging the scope of the earlier act so as to include all claims of "the Shawnee tribe or band . . . arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties."

[No. 276.]

*Submitted April 28, 1903. Decided June 1, 1903.*

APPEAL from the Court of Claims to review a judgment sustaining a demurrer to a petition by a Shawnee Indian to recover a sum of money from the United States. *Affirmed.*

See same case below, 37 Ct. Cl. 233.

Statement by Mr. Justice **Peckham:**

The petitioner filed his amended petition in the court of claims in August, 1892, in which he asked to recover from the United States over five hundred and thirty thousand dollars on the grounds therein set forth. There was a demurrer to the amended petition, by the United States, on the ground that it did not allege facts sufficient to constitute a cause of action. The demurrer was sustained, and the plaintiff has appealed to this court.

In his petition the petitioner represents himself as a Shawnee Indian by blood and descent, a member and the principal chief of the Shawnee Tribe or Nation, and residing in the Indian territory. He states that he brings suit in the court of claims as such principal chief of such Shawnee Tribe or Nation under the provisions of two acts of Congress, the first of which is entitled "An Act to Refer to the Court of Claims Certain Claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation, and for Other Purposes," approved October 1, 1890 (26 Stat. at L. 636, chap. 1249), and the second entitled "An Act Supplementary *and Amendatory to an Act Enti- [369] tled 'An Act to Refer to the Court of Claims Certain Claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation, and for Other Purposes,' Approved October 1, 1890, Approved July 6, 1892" (27 Stat. at L. 86, chap. 151). These acts are set out in the margin.†

*The petitioner asks to recover and collect [370] from the United States the several amounts

NOTE.—*On suits by Indians*—see note to Missouri P. R. Co. v. Cullers (Tex.) 13 L. R. A. 542.

*On Indians and Indian tribes generally*—see note to Worcester v. Georgia, 8 L. ed. U. S. 483.

†Act of 1890 (26 Stat. at L. 636, chap. 1249).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That full jurisdiction is hereby conferred upon the court of claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation, and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians, June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians April eighth, eighteen hundred and sixty-seven; and also of the Cherokee freedmen, who are settled and located in the Cherokee Nation, under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six, in respect to the subject-matter herein provided for.

Sec. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States government to recover from the Cherokee Nation all moneys due, either in law or equity, and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, *per capita,* in the Cherokee Nation, and which was, or may be, refused or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation out of any moneys or funds which have or may be paid into the treasury of, or in any way have come, or may come, into the possession of, the Cherokee Nation, Indian territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degrees west longitude, and which have been, or may be, appropriated and directed to be paid out *per capita* by the acts passed by the Cherokee Council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of treaty and articles of agreement.

Sec. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the

of money thereafter set out at length in payment for the destruction, loss, forcible taking, carrying, and driving away of live stock, farm products, household goods, money, and other personal property of divers descriptions and kinds belonging to, owned, and possessed by, and the property of, the said Shawnee Indians, by white and United States citizens and soldiers, in the state of Kansas and the Indian territory, at divers times and places in the year 1861, and all the time up to and including the year 1866. Reference is then made to a schedule which is made part of the petition, and in which appear the names of between three and four hundred Indians, and the schedule gives their individual claims, varying in amounts from as high as $7,000 down to $75, and aggregating $530,945.14.

It is contended that the claims arise out of treaty relations with the United States (mentioned in the foregoing acts of Congress), [371] *particularly artcles 11 and 14 of the treaty of May 10, 1854 (10 Stat. at L. 1053, 1057), between the United States and the Indians, and also out of §§ 2154 and 2155 of the Revised Statutes of the United States. The articles of the treaty are as follows:

"Article 11. It being represented that many of the Shawnees have sustained damage in the loss and destruction of their crops, stock, and other property, and otherwise, by reason of the great emigration which has for several years passed through their country, and of other causes, in violation, as they allege, of guarantees made for their protection by the United States, it is agreed that there shall be paid in consideration thereof, to the Shawnees, the sum of twenty-seven thousand dollars, which shall be taken and considered in full satisfaction, not only of such claim, but of all others of what kind soever, and in release of all demands and stipulations arising under former treaties, with the exception of the perpetual annuities, amounting to three thousand dollars, hereinbefore named and which *are set apart and appropriated in [372] the third article hereof. All Shawnees who have sustained damage by the emigration of citizens of the United States, or by other acts of such citizens, shall, within six months after the ratification of this treaty, file their claims for such damages with the Shawnee agent, to be submitted by him to the Shawnee council, for their action and decision, and the amount in each case approved shall be paid by said agent: *Provided*, The whole amount of claims thus approved shall not exceed the said sum stipulated for in this article. *And provided*, That if such amount shall exceed that sum, then a reduction shall be made *pro rata* from each claim until the aggregate is lowered to that amount. If less than that amount be adjudged to be due, the residue, it is agreed, shall be appropriated as the council shall direct."

"Article 14. The Shawnees acknowledge their dependence on the government of the United States, and invoke its protection and care. They will abstain from the commission of depredations and comply, as far as they are able, with the laws in such cases

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freedmen, and in their behalf and for their use in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor shall the rights of such Indians be impaired by any acts passed and approved by the Cherokee National Council. Suits may be instituted within twelve months after the passage of this act, and the law and practice and rules of procedure in such courts shall be the practice and law in these cases; and copies of the petitions filed in the case at the commencement of the suit shall be served upon the Attorney General of the United States, and on the principal chief of the Cherokee Nation, by the marshal of the district court for the Indian territory; and that the costs of the said suits shall be apportioned between the United States and the other parties to such suits as to said court, law and equity shall require. The Attorney General shall designate and appoint from the Department of Justice a person who is competent to defend the said Cherokee Nation and the United States. And the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby authorized to decree the amount of compensation of such attorneys, and counsel fees, not to exceed ten per centum of the amount recovered, and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen; and all judgments for any sum or sums of moneys which may be ordered or decreed by such court in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation by execution, mandamus, or in any other way which the said court may see fit.

Sec. 4. That the said Shawnee Indians are hereby authorized and empowered to bring and begin a suit in law or equity against the United States government in the court of claims, to recover and collect from the United States government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom. The right to appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections one, two, and three of this act.

Act of 1802 (27 Stat. at L. 86, chap. 151).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States court of claims for adjudication under the act of Congress passed and approved October first, eighteen hundred and ninety, entitled "An Act to Refer to the Court of Claims Certain Claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation, and for Other Purposes," shall present to the said court all their claims against the United States and the Cherokee Nation, or against either or both of them, of every description whatsoever, arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties, made and entered into by and between the said Shawnees and Cherokees, and between them, or either of them, and the United States

made and provided, as they will expect to be protected and to have their rights vindicated."

Section 2154 of the Revised Statutes, which is part of the act of June 30, 1834 (4 Stat. at L. 731, chap. 161), reads as follows:

"Sec. 2154. Whenever, in the commission, by a white person, of any crime, offense, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed."

Section 2155 of the Revised Statutes, which is also part of the act of June 30, 1834 (4 Stat. at L. 731, chap. 161), reads as follows:

"Sec. 2155. If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But [373] no Indian shall be entitled to any *payment out of the Treasury of the United States for any such property if he, or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence."

It is also stated that, at the time the property was taken, the Indians were in amity with, and had always been loyal to, the United States. Judgment was asked in favor of the Indians mentioned for the respective sums set opposite their names, and that 10 per centum of the amount might be allowed the attorneys for their services.

*Messrs.* **John C. Chaney** and **Alphonso Hart** submitted the cause for appellant.

*Assistant Attorney General* **Pradt** and *Mr.* **William H. Button** submitted the cause for appellee.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

The duty of this court is simply to construe the acts of Congress of 1890 and 1892. The court of claims has no jurisdiction of the subject-matter of this petition, unless it is conferred by one or the other of the above acts. The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize, and the courts can exercise only such jurisdiction over the subject as Congress may confer upon them.

Upon examination of the act of 1890, it appears that jurisdiction is conferred upon the court of claims to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, under the provisions of article 15 of the treaty of 1866 (14 Stat. at L. 803) between the United States and the Cherokee Nation, and also under articles of agreement between the Cherokee Nation and the Shawnee Indians, made June 7, 1869, and articles of agreement made with the Delaware Indians, April 8, 1867, and also of the Cherokee freedmen settled, etc., under provisions of article 9 of the treaty of 1866.

*The language of the 1st section, in our [374] opinion, confers jurisdiction upon the court of claims to hear and determine the rights in law or equity of the tribes of the Shawnee or Delaware Indians, arising out of the subject-matter provided for in the subsequent parts of the act, and there is no grant of jurisdiction to hear or determine the rights of individual members of those tribes. It is true the statute speaks of the Shawnee and Delaware Indians, but the words "Shawnee and Delaware Indians" mean the tribes, and not individual members of those tribes of Indians. The rights must be those which arise out of the subject-matter which is referred to in §§ 2, 3, and 4 of the act. This is stated in terms in the 1st section. The subsequent sections of the act show, as we think, that Indian tribes, and not individual members thereof, are intended. And no jurisdiction is granted to hear claims such as are included in this case, whether they are made by tribes or by individual members of a tribe.

The 2d section permits a suit against the Cherokee Nation and the United States government to recover from the Cherokee Nation moneys due and unpaid to the Shawnees, etc., which the Cherokee Nation have before paid out, or may hereafter pay *per capita* in the Cherokee Nation, and which the Cherokee Nation had refused or neglected to pay to the other Indians. The suits are in reality against the Cherokee Nation, and the recovery is from that nation. The separate or joint suit mentioned in this section is a separate or joint suit of the tribes and of the freedmen, and not of the individual members thereof. In either event, it does not include such a case as this.

Section 3 permits the bringing of "the said suit or suits" in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen, in their behalf and for their use, in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior. The exercise of this jurisdiction is not to be barred by any lapse of time heretofore, nor are the rights of the Indians to be impaired by any acts passed and approved by the Cherokee National Council. The right given by the 3d section is to commence a suit or suits which had already *been spoken [375] of in the 2d section of the act. The 2d section gave no right to commence this suit, as we have seen. Neither section includes the rights of individual Indians.

A perusal of § 4 shows that the right to bring a suit against the United States, therein provided for, was limited to the purpose of collecting from the United States government any amount of money that in law or equity may be due from the United States

"to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom." We think that individual Indians had no right to commence such an action as this under the act of 1890, even though it be assumed that the tribe had such right under that act for the recovery of the value of property taken from the tribe. Such a suit as the one before us is plainly not included in the grant of jurisdiction in this section.

By the act of 1892, it is provided that "the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States court of claims for adjudication" (under the act of 1890), "shall present to the said court all their claims against the United States and the Cherokee Nation," etc.

The result is that this act does not grant jurisdiction to the court of claims to hear and decide the questions arising under this petition. The grant of jurisdiction is to hear and determine all the claims of the Shawnee tribe or band of Indians.

The claims are those of a tribe or band, and not those of the individual members of the Shawnee tribe or band. The reference in the act of 1892 shows that Congress assumed that, whatever their nature, it was the claims of the Shawnee tribe or band that had been referred to the court of claims for adjudication by the act of 1890, and not claims of the individual members thereof. The act of 1892 enlarges the scope of the act of 1890 so as to include all claims of the tribe or band, instead of claims of the nature provided for in §§ 2, 3, and 4 of the act of 1890, but the claims must be claims of a band, and not of an individual.

These acts have been before this court on a previous occasion.

[376] *In *United States* v. *Blackfeather*, 155 U. S. 180, 194, 39 L. ed. 114, 119, 15 Sup. Ct. Rep. 64, 70, Mr. Justice Brown, speaking for the court, said:

"While there may be a moral obligation on the part of the government to reimburse the money embezzled by the Indian superintendent, and, in fact, an appropriation appears to have been made for that purpose (Act of July 7, 1884, chap. 334, 23 Stat. at L. 236, 247), it is by no means clear that, under the acts of 1890 and 1892, the Shawnees were authorized to recover and collect from the government any other moneys than those which they claimed in their tribal relation or capacity. The money in question is not due the tribe as such, but to certain individual orphans, who claim to have been defrauded. But whether this be so or not, there is nothing in the record to indicate how much of this money was embezzled by the guardians created by the Indian council, and how much by the Indian superintendent, so that there is in reality no basis for a decree in their favor."

While the question in issue here was, as is seen, not decided in the above case, yet the expression contained in the opinion shows the court was not prepared to hold that the acts embraced claims of individual Indians.

As these statutes extend the jurisdiction of the court of claims and permit the government to be sued for causes of action therein referred to, the grant of jurisdiction must be shown clearly to cover the case before us, and if it do not, it will not be implied. Statutes of this nature extending the right to sue the government will generally be strictly construed. We concur with the following remarks of Judge Weldon, contained in the opinion delivered by him in this case in the court of claims:

"The act of 1892 seems to have been enacted for the purpose of enlarging the scope of the right given under the act of 1890. But is it sufficiently broad to embrace the individual right of each Indian who may have suffered a depredation at the hands of the persons alleged?

"The statute [1890] is entitled 'An Act to Refer to the Court of Claims Certain Claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation, and for Other Purposes,' and provides, in substance, that they shall present to the *said [377] court all their claims against the United States and the Cherokee Nation, or against either or both of them, of any description whatsoever, arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties, made and entered into by and between the said Shawnees and Cherokees, and between them, or either of them, and the United States.

"The right to sue, by the phraseology of this statute, is in the assertion of rights growing out of treaties, and for contracts, expressed or implied, under treaties made and entered into by and between the said Shawnees, Cherokees, and the United States. Can it be said that there has been a treaty, a contract, expressed or implied, between the United States and the individual Indians, who, through the medium of the principal chief, are now prosecuting these claims?

"The attention of the court is called to the 14th article [of the treaty of 1854], which provides that 'the Shawnees acknowledge their dependence on the government of the United States, and invoke its protection and care. They will abstain from the commission of depredations and comply, as far as they are able, with the laws in such cases made and provided, as they will expect to be protected and to have their rights vindicated.' Does this phraseology establish contractual or treaty relations, having the effect of contracts, with each individual Indian composing the Shawnee tribe? Or, rather, is it not a general clause, limited in its effect to the parties to the treaty, to wit, the United States on one side and the Shawnee tribe upon the other?

"The plaintiff, by the allegations of the petition, has asserted an individual obliga-

tion existing between the United States and each of the claimants, and, in order to recover, it must appear that such a relation exists.

"The United States, as the guardian of the Indians, deal with the nation, tribe, or band, and have never, so far as is known to the court, entered into contracts, either expressed or implied, compacts, or treaties with individual Indians so as to embrace within the purview of such contract or undertaking the personal rights of individual Indians.

[378] "The acts of Congress referred to by the allegations of the petition and the argument of counsel for the claimant are not applicable to the claim made by this petition. The condition upon which remuneration to the Indian is to be made under § 2154, Revised Statutes, is not shown to exist in this case. And so it may be said of § 2155 of Revised Statutes, that the condition upon which the Indian is entitled to remuneration out of the Treasury is not shown to exist in the claims made in this proceeding.

"The act of 1892 specifies that the Shawnee tribe or band of Indians, whose claims and demands against the Cherokee Nation and the United States were referred to the United States court of claims for adjudication under the act of Congress passed and approved October 1, 1890, shall present to said court all their claims against the United States. The claims referred to this court under the act of 1890 were the claims of the Shawnee tribe or band of Indians, and not the personal claims of the individual Indians belonging to said tribe or band of Shawnees.

"The evident object of the act of 1892 was to enlarge the jurisdiction of this court with reference to the same class of claims as were cognizable under the act of 1890, to wit, the claims of the Shawnee tribe or band of Indians."

We think it clear that no jurisdiction over this case is granted by the language of the sections of the Revised Statutes above referred to.

We see nothing in the act, approved May 9, 1860 (12 Stat. at L. 15, chap. 40), appropriating moneys for the payment of "claims of certain members of the Shawnee tribe of Indians," which affects the conclusion we have reached that the acts of 1890 and 1892 refer to tribes, and not individuals. The act of 1860 appropriates, in terms, money to pay claims of certain members of the tribe. It is apparent that when Congress intends to include individuals as distinct from tribes, it does not speak of them as Shawnee Indians, but as "certain members" of the Shawnee tribe.

Congress may, of course, at its pleasure, still confer jurisdiction upon the court of [379] claims in such terms as shall, without doubt, cover claims of the nature set forth in this record. In our judgment it has not done so as yet. *The judgment of the Court of Claims must be affirmed.*

UNITED STATES OF AMERICA, *Complainant,*

*v.*

STATE OF MICHIGAN, *Defendant.*

(See S. C. Reporter's ed. 379-406.)

*Ship canal surplus—state ownership of—charged with trust in favor of United States—laches.*

1. Surplus moneys over and above the cost of the ship canal at Saint Marys Falls, arising from sales of the public lands granted by the act of August 26, 1852 (10 Stat. at L. 35, chap. 92), to the state of Michigan in aid of its construction on a right of way therein granted to the state for that purpose, and any surplus tolls remaining after the formal transfer of such canal to the United States, and all the tools and machinery on hand at the time of such transfer, must be deemed to be held in trust by the state for the United States, in view of the provision of such act, which was accepted by the state subject to all its conditions, by Mich. act February 5, 1853, that the tolls which the state might charge were to be only such, after it was repaid for the cost, as should be sufficient to pay the necessary expenses for the care, charge, and repairs.
2. The ownership by the state of Michigan of surplus tolls and surplus moneys arising from sales of public lands granted by the act of August 26, 1852 (10 Stat. at L. 35, chap. 92), in aid of the construction of a ship canal at Saint Marys Falls, and of the tools and machinery belonging thereto, was not acknowledged to be free from the trust in favor of the United States created by the acceptance by the state, through Mich. act February 5, 1853, of the conditions of such grant, by the offer of the United States, under the act of June 14, 1880 (21 Stat. at L. 189, chap. 211), to accept a transfer of the canal without liability for debts or claims in regard thereto; nor was the liability of such state as trustee altered by its attempt, in accepting such offer through Mich. Pub. Acts 1881, act No. 17, to impose the condition upon its payment of such moneys and its transfer of materials belonging to the canal that the United States should build a dry dock to be operated in connection therewith.
3. Laches is no defense to a suit by the United States to compel the state of Michigan to account for surplus moneys over and above the cost of the ship canal at Saint Marys Falls, arising from sales of the public lands granted by the act of August 26, 1852 (10 Stat. at L. 35, chap. 92), to that state in aid of its construction on a right of way therein granted to the state for that purpose, and for any surplus tolls remaining after the formal transfer of such canal to the United States, and for all tools and machinery on hand at the time of such transfer.

[No. 11, Original.]

*Argued April 20, 21, 1903. Decided June 1, 1903.*

DEMURRER to an original bill in equity filed by the United States to compel the

NOTE.—*That the statute of limitations does not run against the state*—see note to Gibson v. Chouteau, 20 L. ed. U. S. 534.

state of Michigan to account for surplus moneys in the Saint Marys Falls ship canal fund, and for tools and machinery belonging to such canal. *Overruled* and leave to answer given.

Statement by Mr. Justice **Peckham:**

The United States, by leave of court, duly filed in this court its original bill in equity against the state of Michigan, to which bill the defendant has filed a demurrer substantially for want of equity, and also because it appears therefrom that the complainant has been guilty of gross laches in regard to the matters therein set forth. It will be most convenient to set forth the bill, with the exception of some portions thereof which do not seem to be material, and it is as follows:

"*To the Chief Justice and the Associate Justices of the Supreme Court of the United States, in Equity:*

"Philander C. Knox, Attorney General of the United States of America, for and in be-[380] half of said United States, brings this *bill of complaint against the state of Michigan, and thereupon your orator complains and says:

"*First.*

"That the said state of Michigan, for some years previous to the date first hereinafter mentioned, was desirous of procuring the construction of a canal and lock in the Saint Marys river, at or near Saint Marys falls, where Lake Superior empties into said river, and did at various times, by joint resolutions of the legislature thereof, importune the Congress of the United States to construct such a canal and lock on the Michigan side of said river, and was able, through the influence of its senators and representatives in Congress from said state, with the co-operation and influence of other states which might become directly affected in a desirable manner, to cause and procure said Congress to pass a law, which became operative on the 20th day of August, 1852, appropriating to the state of Michigan 750,000 acres of land, to be afterwards selected, to construct such ship canal and lock. Said act is in terms as follows:

"'*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there be, and is hereby, granted to said state the right of locating a canal through the public lands known as the military reservation at the falls at Saint Marys river in said state, and that four hundred feet of land in width, extending along the line of such canal, be, and the same is hereby, granted, to be used by said state, or under the authority thereof, for the construction and convenience of such canal, and the appurtenances thereto and the use thereof is hereby vested in said state forever for the purposes aforesaid and no other: *Provided,* That in locating the line of said canal through said military reservation the same shall be located on the line of the survey heretofore made for that purpose, or such other route between the waters above and below said falls as, under the approval of the Secretary of War, may be selected. *And provided further,* That said canal shall be at least one hundred feet wide, with a depth of water *twelve feet,[381] and the locks shall be at least two hundred and fifty feet long and sixty feet wide.

"'Sec. 2. *And be it further enacted,* That there be, and hereby is, granted to the said state of Michigan, for the purpose of aiding said state in constructing and completing said canal, seven hundred and fifty thousand acres of public lands, to be selected in subdivisions, agreeably to the United States surveys, by an agent or agents, to be appointed by the governor of said state, subject to the approval of the Secretary of the Interior, from any lands within said state subject to private entry.

"'Sec. 3. *And be it further enacted,* That the said lands hereby granted shall be subject to the disposal of the legislature of said state for the purposes aforesaid and no other; and the said canal shall be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the vessels of said government engaged in the public service, or upon vessels employed by said government in the transportation of any property or troops of the United States.

"'Sec. 4. *And be it further enacted,* That if the said canal shall not be commenced within three, and completed within ten, years, the said state of Michigan shall be bound to pay to the United States the amount which may be received upon the sale of any part of said lands by said state, not less than one dollar and twenty-five cents per acre, the title to the purchasers under said state remaining valid.

"'Sec. 5. *And be it further enacted,* That the legislature of said state shall cause to be kept an accurate account of the sales and net proceeds of the lands hereby granted, and of all expenditures in the construction, repairs, and operating of said canal, and of the earnings thereof, and shall return a statement of the same annually to the Secretary of the Interior; and whenever said state shall be fully reimbursed for all advances made for the construction, repairs, and operating of said canal, with legal interest on all advances until the reimbursement of the same, or upon payment by the United States of any balance of such advances over such receipts from said lands and canal, with such interest, the said state shall be allowed to tax for the use of said canal *only such tolls as shall be sufficient[382] to pay all necessary expenses for the care, charge, and repairs of the same.

"'Sec. 6. *And be it further enacted,* That before it shall be competent for said state to dispose of any of the lands to be selected as aforesaid, the route of said canal shall be established as aforesaid, and a plat or plats thereof shall be filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office.

"'Approved, August 26, 1852.' [10 Stat. at L. 35, chap. 92.]

"And your orator further shows that the legislature of the state of Michigan afterwards passed an act providing for the construction of a ship canal around the falls of Saint Mary, the same being number thirty-eight of the session laws of the state of Michigan for the year 1853. By this act the appropriation of land made by Congress as aforesaid was accepted, with all conditions therein expressed attached, and made obligatory upon the state of Michigan. By its said act, also, the governor was authorized to appoint a board of five commissioners and an engineer for the purpose of looking after the construction of said canal and lock; provisions were made relative to the contract proposed to be entered into for the construction of the canal; the expenses of surveying, locating, and constructing the same; the manner in which the expenses attendant upon such construction should be paid, which was substantially out of the lands so appropriated by Congress; the keeping of accounts connected with such construction; the turning out of lands to the contractor and subcontractor; and other matters connected with such work, such act being in terms as follows:

"'Section 1. *The People of the State of Michigan enact*, That the act of Congress entitled "An Act Granting to the State of Michigan the Right of Way and a Donation of Public Land for the Construction of a Ship Canal around the Falls of Saint Mary, in Said State," approved August 26, 1852, is hereby accepted, and all conditions expressed in said act are hereby agreed to and made obligatory upon the state of Michigan.

"'Sec. 2. For the purpose of carrying out the objects of said act the governor is hereby authorized, by and with the advice and consent of the senate, to appoint five com-[383]missioners and an engineer, *who shall prepare a plan for the construction of said canal in conformity with the provisions of said act of Congress and this act, to be approved by the governor, and who shall have the entire and absolute control and supervision of the construction of said canal.

. . . . . .

"'Sec. 3. The said commissioners shall receive proposals for the construction of said canal, agreeable to said plan, and, in deciding upon said proposals, are required to take into consideration the responsibility of the person or persons offering to contract for the same, and his or their ability to carry into effect the object and intention of said act of Congress, by constructing said canal in the best and most expeditious manner; and said commissioners, in making said contract, shall require good and ample security for the performance thereof.

. . . . . .

"'Sec. 5. . . . The cost of locating the said canal, and all expenses of every kind incidental to the supervision of the construction and completion of said canal, shall be reimbursed by the contractors as fast as ascertained, and shall be paid by them into the state treasury, and under the direction of said commissioners. When and as fast as the lands shall have been selected and located, an accurate description thereof, certified by the persons appointed to select the same, shall be filed in the office of the commissioner of the state land office, whose duty it shall be to transmit to the Commissioner of the General Land Office a true copy of said list, and to designate and mark upon the books and plats in his office the said lands as Saint Mary canal lands.

"'Sec. 6. The commissioners shall require said canal to be constructed and completed within two years from making the contract; and, on the completion of the same within said period to their satisfaction and acceptance, and the satisfaction of the governor and engineer, they shall have a certificate thereof, to be signed by the commissioners, governor, and engineer, and filed in the office of the commissioner of the state land office. Thereupon it shall be the duty of the said commissioner of the state land office forthwith to make certificates of purchase for so much of said lands as by the terms of the contract for *the construction[384] of said canal are to be conveyed for the purpose of defraying its costs and the expenses hereinbefore provided, which certificates shall run to such persons and for such portions of said lands so selected and to be conveyed as the contractor may designate, and shall forthwith be delivered to the Secretary of State, and patents shall immediately be issued thereon, as in other cases.

"'Sec. 7. That said commissioners shall keep an accurate account of the sales and net proceeds of the lands granted by said act of Congress, and of all expenditures in the construction of said canal, and the earnings thereof, and on or before the first Monday in October in each year return a statement thereof to the governor, whose duty it shall be to return the same, or a copy thereof, to the Secretary of the Interior, at Washington, as required by said act of Congress.

. . . . . .

"'Sec. 9. For the selection of the lands granted by Congress, as aforesaid, for the construction of said canal, the governor shall appoint agents, in pursuance of said act. He shall give notice to the person or persons contracting under this act to construct said canal, to recommend to him suitable persons to make such selections; and he shall appoint such agents from the persons so recommended, if, in his judgment, suitable and proper persons for that purpose.

. . . . . .

"'Approved, February 5, 1853.'

"*Second.*

"Your orator shows that the lands so appropriated were duly selected and certified to the state of Michigan, and that he is informed and verily believes, and so charges the fact to be, that the lands so appropriated were all sold and disposed of in some manner by the state of Michigan, and that

at some time subsequent to such selection and certification said state of Michigan constructed, or caused to be constructed, and put into operation, the canal and lock so appropriated for, but that the said state of Michigan did not report to the Secretary of the Interior, as required by the terms of § [385] 5 of said act of *Congress, an accurate account of the sales and net proceeds of the lands granted and of all expenditures in the construction, repairs, and operating of said canal, and of the earnings thereof; but, on the contrary, your orator shows that after diligent search and inquiry in the office of the Secretary of the Interior, to whom such annual reports should have been made, no such reports can be found on file, and no record or memoranda indicating that any report or reports, such as were provided for in said section, were ever made, so that your orator is unable to state in what manner said lands were sold or disposed of, or whether all the proceeds thereof were in fact devoted to the construction, control, and management of said canal, as in said act provided.

*"Third.*

"Your orator further shows that by an act of the legislature of the state of Michigan, approved February 12, 1855, a superintendent was authorized to be appointed by the governor of the state of Michigan, with the advice and consent of the senate thereof, his salary fixed, and the manner of keeping record of the vessels navigating said canal and passing through said lock, as well as the tolls to be collected and the keeping of accounts, were all provided for; that from the completion of said canal and lock the same were controlled, operated, and managed by the state of Michigan, and that during the entire management of the same by said state, as your orator is informed and verily believes and therefore charges the fact to be, no funds belonging to the state of Michigan were ever permanently invested or involved in such control, operation, and management, but, on the contrary, said canal was wholly constructed from the appropriation of such lands so made by the United States aforesaid, and was managed, controlled, repaired, and maintained from the amounts collected as tolls from the vessels passing through said canal and lock during the several years when said state of Michigan was in such control thereof.

*"Fourth.*

"And your orator further shows that he is informed and verily believes, and there- [386] fore charges the fact to be, that during *such management and control by the state of Michigan there were from time to time moneys collected in the form of tolls in excess of the amounts actually used at the period of such collection, and that this was done without intention on the part of the state of Michigan to make a profit from the management and control of said canal in violation of the act of Congress hereinbefore quoted, but for the purpose of having cash on hand to make repairs either during the season when the canal was closed to navigation or any time when so needed, and that said fund gradually increased in amount with the increasing volume of commerce through the canal until finally, at the time when the canal was turned over to the United States, there was in the treasury of the state of Michigan, belonging to the fund of said canal, not appropriated or the expenditure thereof in any way provided for, the acknowledged sum of $68,927.12, all of which had been paid for or collected in the manner hereinbefore stated for the purposes hereinbefore mentioned, and in direct compliance with the requirements of the act of Congress originally providing for the construction of said canal; and that said money had been collected in good faith and for the purposes of devoting the same ultimately to the repair, improvement, supervision, and expenses of the management thereof.

"And your orator further shows that there was purchased and collected from time to time a large quantity of tools, implements, and property of various kinds in connection with extensions, repairs, improvements, management, and control of said canal and lock by defendant, and at the time of the transfer to the United States, as aforesaid, the same were on hand and within the control and in the custody of the defendant, all of which properly belonged and appertained to the said canal and lock and to the defendant in its capacity as the manager and controller thereof; but whether any further and larger sum of money than is hereinbefore stated was, should, or might have been on hand and within the control of said defendant, in its treasury or otherwise, or might or should have been accredited to the account of the said canal and lock, your orator does not know and has no means of being informed, and is therefore *obliged to [387] depend upon an accounting by the defendant, hereinafter to be prayed for, for correct and authentic information.

*"Fifth.*

"And your orator further shows that the state of Michigan had no beneficial interest in said canal or lock, except as it affected the general public welfare, and had expended, or claimed to have expended, all the appropriation of Congress for the construction of the same, and that the increasing demands of commerce required great expenditures of money for the enlargement and betterment of said canal and lock, together with the probable construction of a new and enlarged lock, and that it was not convenient, if possible, to provide the funds therefor by the collection of tolls upon the vessels passing and repassing through said canal; that the state of Michigan not alone being interested in such enlargement and improvement, but rather the general public, and particularly the inhabitants of several rapidly growing states of the Union, it was proposed to transfer the canal to the United States to accomplish such end, and for that purpose an act was passed by the legislature of the state of Michigan and became operative on March 3, 1881."

(This act, although not set forth in the bill, is given in the margin.)†

388] *"By the terms of said act the board of control of said canal, constituted by defendant for its management, was authorized and empowered, at any time when they might deem it proper, to transfer all material belonging to said canal and to pay over to the United States all moneys remaining in the canal fund, excepting so much as might be necessary to put the canal in repair for its acceptance in accordance with the act transferring the same to the United States; and the Congress of the United States in turn passed an act authorizing the Secretary of War to accept, on behalf of the United States, from the state of Michigan, the said canal and the public works thereon, and appropriating $250,000 to improve and operate the same, the same being the act approved June 14, 1880, found in 21 Stat. at L. 189, chap. 211." (This act is correctly set forth in the preamble to the foregoing act of the state of Michigan.)

389] *"And thereupon said canal actually was transferred to the officers of the government of the United States connected with the War Department thereof, and your orator shows, avers, and charges that no tools, implements, personal property, chattels, goods, moneys, or effects of any name or nature that were in the treasury of the state of Michigan, or should or might have been therein at the time of such transfer, or within the custody of said state of Michigan, defendant herein, or might have been in such custody, connected with or belonging to said canal or lock, its funds, its management, and control, were so transferred and turned over.

"*Sixth.*

"Your orator further shows that, while certain of the terms of the act of Congress appropriating the land for the construction of said lock and canal indicated a donation to the state of Michigan for such purpose, it was really the intent and purpose of the Congress of the United States to appropriate such lands, not for the purposes of exclusively enriching the state of Michigan, increasing its commerce, or extending its authority alone, but for the purpose of accomplishing a public work for the general good of all classes of people engaged or interested in the commerce of the Great Lakes of the United States, and for that reason, while granting said lands to the state of Michigan in certain of its terms, it was provided that, in case of the failure to construct said canal, the proceeds of the sale of such lands should be returned to the United States; also that the state of Michigan should have no beneficial interest in the revenue from said canal, when constructed, while in its management and control, but that the said canal and lock should be actually free to the United States government, and for the use of all persons desiring the same, except as to the necessary tolls to pay for their supervision, repairs, and maintenance; and it was also provided that a strict account should be kept of the sales of said lands, and that they should be applied to the construction of said canal and lock and to no other purpose whatever; also that annual reports should be made by the state of Michigan, and forwarded by the governor thereof to the Secretary *of the Interior,[390] concerning the management, control, and sale of lands; and thus, instead of being an actual grant or donation of lands to the state of Michigan for its individual benefit, and to become a part of its domain and to be within its ownership, the terms of said act

†Act No. 17, Public Acts 1881.

An Act to Authorize the Board of Control to Transfer the Saint Marys Falls Ship Canal, with the Property Belonging to the Same, to the United States.

Whereas, Congress, at its last session, included in the river and harbor bill the following:

For improving and operating the Saint Marys River and Saint Marys Falls canal, two hundred and fifty thousand dollars. "And the Secretary of War is hereby authorized to accept, on behalf of the United States, from the state of Michigan, the Saint Marys canal and the public works thereon: *Provided,* Such transfer shall be so made as to leave the United States free from any and all debts, claims, or liability of any character whatsoever, and said canal, after such transfer, shall be free for public use: *And provided further,* That, after such transfer the Secretary of War be, and hereby is, authorized to draw, from time to time, his warrant on the Secretary of the Treasury to pay the actual expense of operating and keeping said canal in repair." Therefore,

Sec. 1. *The People of the State of Michigan enact,* That the board of control of the Saint Marys Falls ship canal be, and hereby is, authorized and directed to transfer the said canal and the public works thereon, with all its appurtenances and all the right and title of the state of Michigan in and to the same, to the United States in accordance with (the) provisions of the above-mentioned clause: *Provided,* That this cession is upon the express condition that the state of Michigan shall so far retain concurrent jurisdiction with the United States over the Saint Marys Falls ship canal, and in and over all lands acquired, or hereafter acquired, for its use, that any civil or criminal process issued by any court of competent jurisdiction, or officers having authority of law to issue such process, and all orders made by such court, or any judicial officer duly empowered to make such orders, and necessary to be served upon any such person, may be executed upon said Saint Marys Falls ship canal, its lands, and in the buildings that may be erected thereon, in the same way and manner as if jurisdiction had not been ceded as aforesaid.

Sec. 2. The board of control of the Saint Marys Falls ship canal are hereby authorized and empowered, at any time when they may deem it proper, to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund, excepting so much as may be necessary to put the said canal in repair for its acceptance in accordance with the act above recited: *Provided,* Such transfer of material and payment of moneys shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Marys Falls ship canal for the use of disabled vessels.

This act is ordered to take immediate effect.

Approved March 3, 1881.

merely operated to create a trust in the state of Michigan for the purpose of carrying out a public work in which it, the state of Michigan, had become interested for the general public good. Your orator further shows that by the act of the legislature of the state of Michigan, hereinbefore quoted, said donation or appropriation of lands was accepted subject to all limitations, restrictions, and conditions imposed by Congress, as aforesaid. Your orator further shows that the state of Michigan, at the time and continuously until a very recent period, hereinafter to be mentioned and set forth, not only regarded its sale of said lands, its construction of said works, and its management and control of the latter as a trust for the public good from the complainant, but also through its legislature, as well as various of its officers, so declared; and that in an act of the legislature of the state of Michigan, passed and approved February 14, 1859, the same being No. 175 of the Session Laws of the state of Michigan for said year, and particularly in the third paragraph of the preamble thereof, said legislature made use of the following language:

"'Whereas such canal, having been built and accepted by the authorities of this state, is found to need repairs in order to its preservation and usefulness, and the due performance of the trust created by said act of Congress, and the assent of this state thereto,' etc.

"And your orator further shows that the treasurer of the state of Michigan, who, by virtue of his office, was one of the members of the said board of control of the Saint Marys Falls ship canal, in his annual report for the year 1883, duly made to the governor and transmitted to the legislature of said state, made use of the following language:

"'Since my last report, the remainder of the personal property belonging to the Saint Marys Falls ship canal has been sold, making a final balance in that fund of $68.927.-[391]12. All *business pertaining to the management of the canal on the part of the state has ceased and the moneys in the fund remain in the state treasury under act No. 17, Laws 1881, the state acting simply as trustee.'

"But your orator shows that of late said defendant, through its officers and servants, and particularly its attorney general and the board of control of St. Marys Falls ship canal, denies such a trust, or its liability to the United States in the premises.

"*Seventh.*

"Your orator further shows and charges that it became and was the duty of the state of Michigan to transfer and pay over to the United States all funds appertaining to or connected with or collected for the repairs and management of said canal to the complainant, and to transfer to the complainant all property of every name and nature within its custody and control in connection with said canal and lock; and that, instead of so performing its equitable duty in the premises, the said state of Michigan, the defendant herein, converted said funds to its own use, by passing a joint resolution transferring the same from the canal fund to the general fund in the treasury of said state, said joint resolution being No. 20 of the Public Acts of 1897, which in terms is as follows:

"'Whereas there has remained to the credit of the St. Marys ship canal fund a credit balance which was on hand at the time of the transfer of the said canal from the state to the United States, and no claim has been made for any part of such moneys, either by any person who paid the same into the fund or by the general government;

"'And whereas there now remains on hand, under the board of control of the St. Marys ship canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery:

"'*Therefore, resolved by the Senate and House of Representatives of the State of Michigan,* That the auditor general be, and he is hereby, directed to transfer such balance as shown upon *the books of his office [392] to the same, and it shall hereafter become a part of the general fund of the state.

"'*And be it further resolved,* That the board of control of the St. Marys ship canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this state.'

"Your orator further shows that a due and proper request to account to the United States in the premises, and to pay over all funds and turn over all property in its hands to the United States, has been made by your orator of the governor of the state of Michigan and all of the officers of said state directly concerned in any manner with the custody, management, or control of said fund or property, and particularly of the board of control of the St. Marys ship canal, which consists of the governor, auditor general, and treasurer of the said state of Michigan; and also of the attorney general of the state of Michigan; and that said reasonable and just request has been refused by them and each of them."

The bill prayed for an accounting as to the sales of the lands, the prices obtained therefor, the application of the proceeds of the sales or exchange of such lands to the cost of the construction of the canal, the tolls received, their application, and also an accounting as to the tools on hand at the time of the transfer of the canal to the United States.

*Mr.* **Marsden C. Burch** argued the cause and filed a brief for complainant:

A mixed trust and power is where the settlor sketches the outlines of a trust and leaves the details to be settled and carried into effect, according to the best judgment of his trustee. The power joined to the trust

in such case is imperative and must be exercised; but the mode of its execution is a matter of judgment, and discretionary.

Perry, Tr. ¶ 20.

The word "grant" may be used in a restricted sense and be so limited that the grantee will take but a naked trust or power to dispose of the thing granted and to apply the proceeds arising out of it to the use and benefit of the grantor.

*Rice* v. *Minnesota & N. W. R. Co.* 1 Black, 378, 17 L. ed. 153.

Laches will not apply to a proceeding in equity instituted by the United States.

*United States* v. *Beebe*, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083; *United States* v. *Dalles Military Road Co.* 140 U. S. 599, 35 L. ed. 560, 11 Sup. Ct. Rep. 988; *San Pedro & C. d. A. Co.* v. *United States*, 146 U. S. 120, 36 L. ed. 911, 13 Sup. Ct. Rep. 94; *United States* v. *Insley*, 130 U. S. 263, 32 L. ed. 968, 9 Sup. Ct. Rep. 485.

*Mr.* **Horace M. Oren** argued the cause, and, with *Mr. Charles A. Blair*, filed a brief for defendant:

A settlement of accounts between parties is prima facie a settlement of all accounts.

*Bourke* v. *James*, 4 Mich. 336.

If no *cestui que trust* is named, or so designated that he can be identified, the court cannot carry a trust into effect, however clearly it may be created in other respects.

Perry, Tr. 4th ed. § 95.

A settlor or founder of a trust created by grant, by his own act becomes a stranger to the trust, in the sense that he no longer has an interest in property he has aliened. It is true, as to a certain class of corporations, the founder has a right of visitation which he may retain or may assign, but the court of chancery has nothing to do with his visitorial power. It is only as respects the administration of the corporate property that the court has any jurisdiction.

Perry, Tr. 4th ed. § 742.

A trustee may be relieved from his office by the consent of all parties interested, without the decree of a court, even if the instrument of trust is silent upon that subject. But the transaction operates rather as an estoppel of the *cestui que trust* than as an affirmative transfer of power.

Perry, Tr. 4th ed. § 285.

A conveyance by the trustee to the *cestui que trust* merges the title and determines the trust.

Perry, Tr. 4th ed. § 921.

Mr. Justice **Peckham**, after making the foregoing statement of facts, delivered the opinion of the court:

[396] *By its bill the United States invokes the original jurisdiction of this court for the purpose of determining a controversy existing between it and the state of Michigan. This court has jurisdiction of such a controversy, although it is not literally between two states, the United States being a party on the one side and a state on the other. This was decided in *United States* v. *Texas*, 143 U. S. 621, 642, 36 L. ed. 285, 292, 12 Sup. Ct. Rep. 488.

In the consideration of this case, the controlling thought must, of course, be to arrive at the meaning of the parties, as expressed in the various statutes set forth in the bill. While that meaning is to be sought from the language used, yet its construction need not be of a narrow or technical nature, but, in view of the character of the subject, the language should have its ordinary and usual meaning.

Whether, under these circumstances, technical words were used to express the thought that the state was to be a trustee, is not important if, upon a reading of the statutes and a survey of the condition of the country when the acts were passed, it is apparent that the intent was that the state should occupy the position of trustee in the construction and operation of the canal. *Winona & St. P. R. Co.* v. *Barney*, 113 U. S. 618, 625, 28 L. ed. 1109, 1111, 5 Sup. Ct. Rep. 606.

The general purpose of these statutes was to build a ship canal, by means of the funds procured from the sale or other disposition of the public lands of the United States, to be used by all those whose business or pleasure should call them to pass through it in order to reach their destination.

As is well known, the Saint Marys river connects the waters of the lakes Huron and Superior. The navigation of the river is interrupted by Saint Marys falls, and it early became necessary, in order to provide conveniences for a rapidly increasing commerce, that there should be built a ship canal around these falls, so that large vessels coming from, or going to, Lake Superior should be thereby enabled to pursue their voyage to the east or to the west without interruption by those falls. The state of Michigan did not feel at that time (1850–1852) able to undertake such work itself, although it was a matter of much importance to many of her citizens. Finally the United States passed the act of 1852, set out in full in the foregoing statement. *The state subsequently accepted the [397] same with all the conditions contained therein. We think it sufficiently appears from a perusal of these two acts that it was assumed that the grant of the right of way through the lands of the United States, and the grant of the 750,000 acres of its public lands in the state of Michigan, would pay the cost of construction of the canal, and the tolls to be collected by the state would repay it for all advances made by it in the repairs which would naturally and from time to time be required in such a work. There was no reason why the United States should provide that the state of Michigan should actually receive a profit over and above the payment to it of all its expenses for the construction of the canal and for keeping it in repair. If, through the action of the United States, a public work of national importance were constructed within the boundaries of that state, and the state itself reimbursed for

every item expended by it in the construction and in the keeping of such work in repair, it would certainly seem as if the state could properly ask no more. It was clearly not the intention that the state should realize a beneficial interest from the transaction between the United States and the state over and beyond that which would arise from the existence of this canal. The cost of its construction and the keeping of it in repair were not to be borne by the state, even to the extent of a single dollar. That the parties supposed the cost would be borne by the United States is proved by an examination of the statutes; and, if it be a fact, it goes far to show that the state was, in this matter, acting in effect and substance as an agent, or, in other words, as a trustee for the United States, and that the transaction was not to be a source of profit to the state, by reason of getting more from the United States than it would cost to build the canal.

The expectation that the means provided by the United States for the construction of the work would be adequate for that purpose was not a visionary one, and it is proved by the fact, alleged in the bill and admitted by the demurrer, that such means were in truth adequate, and the canal was wholly constructed from the appropriation of the lands granted by the United States, and managed, repaired, and maintained [398] from *the tolls exacted by the state from vessels passing through the canal.

An examination of the act of Congress of 1852, set forth in the foregoing statement of facts, will show, as we think, the trust character of the transaction between the United States and the state. There is granted to the state, by § 1, the right of locating a canal through the public lands of the United States 400 feet in width; but this right of way is, by the terms of the act, to be used by the state, or under its authority, for the construction or convenience of such canal and the appurtenances thereto; and the use thereof is thereby vested in the state forever, but "for the purposes aforesaid and no other." The canal must be at least 100 feet wide, with a depth of water of 12 feet, and with locks at least 250 feet long and 60 feet wide. The act does not grant an absolute estate in fee simple in the land covered by this right of way. It was in effect a grant upon condition for a special purpose; that is, in trust for use for the purposes of a canal, and for no other. The state had no power to alien it and none to put it to any other use or purpose. Such a grant creates a trust, at least by implication. We have just held in *Northern P. R. Co.* v. *Townsend*, 190 U. S. 267, *ante*, 1044, 23 Sup. Ct. Rep. 671, in reference to a grant of a right of way for the railroad, that it was in effect a grant of "a limited fee, made on an implied condition of reverter, in the event that the company ceased to use or retain the land for the purpose for which it was granted."

The 2d section granted to the state, "for the purpose of aiding said state in constructing and completing said canal, 750,000 acres of public lands," belonging to the United States and lying within the state, which were to be subject to the disposal of the legislature of the state for such purpose and no other, and the canal was to be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the vessels of said government engaged in public service, or upon vessels employed by said government in the transportation of any property or troops of the United States. It was also provided that if the canal should not be commenced within three years and completed within ten years, the state *was [399] bound to pay to the United States the amount it received upon the sale of any part of said lands by the state at not less than $1.25 per acre, although the title to the purchasers from the state should remain valid. The state was bound to cause to be kept accurate accounts of the sales and net proceeds of the lands granted, and of all expenditures in the construction, repair, and operating of the canal and of the earnings thereof, and was to render a statement of the same annually to the Secretary of the Interior, and whenever the state should be fully reimbursed for all advances made for the construction, repairs, and operating the canal, with legal interest on all advances until the reimbursement of the same, or upon payment by the United States of any balance of such advances from the receipts from the lands and canal with such interest, the state was then only to be allowed to tax for the use of the canal such tolls as should be sufficient to pay all necessary expenses for its care, charge, and repairs of the same; and, before the state could dispose of any of the lands, the route of the canal was to be established and a plat thereof filed in the office of the War Department, and a duplicate thereof in the office of the Commissioner of the General Land Office. The 6th paragraph of the bill calls special attention to these facts.

In this Federal statute we find the purpose of the United States in granting the land. It was not for the benefit of the state of Michigan, and the state did not thereby receive any beneficial interests in such lands. As soon as it was repaid its outlay for the cost of the construction and for the maintenance and repairs of the canal, the tolls were to be reduced to such a sum as should be sufficient only to pay the necessary expenses for the care, charge, and repair of the same. Evidently, it was not supposed that the state was to profit from this grant further than such profit as might arise indirectly from the completion and operation of the canal.

Defendant refers to certain grants of land made to Illinois, Indiana, and Ohio, and perhaps to some of the other states, where such grants were made to aid in the construction of canals in those states, and where possible profits from the construction

of such canals were within the contempla-
[400] tion of the various grants. *But in the acts referred to there are no restrictions upon the tolls which the states may charge for the use of their respective canals, the only limitation imposed being that the government should have their free use for the passing of its vessels; while, in this act, the tolls which the state may charge are to be only such after the payment for its construction, etc., as should be sufficient to pay the necessary expenses for the care, charge, and repairs thereof.

The state of Michigan, through an act of its legislature, duly accepted the terms of the act of Congress, and agreed to carry out all the conditions therein made obligatory upon that state. An attentive reading of that statute shows its purpose to conform to all of the provisions of the Federal statute. It provides (§ 7) for keeping accurate books of account of sales and net proceeds of the lands, and for making returns to the Secretary of the Interior containing such accounts; provides (§ 5) for designating the lands granted as "Saint Marys canal lands;" and also (§ 3) provides that, in letting contracts for construction of the canal, the responsibility of the proposed contractor and his ability to carry into effect the object of the act of Congress are to be considered. Reading both statutes, it seems to us the effect was to create a trust, and that the state was made the trustee to carry out the purposes of the act of Congress in the construction and maintenance of the canal. If there were funds arising from the sale of the lands over and above the cost of construction and other expenses of the canal, it could not within reason (after a perusal of these two statutes, with the provisions for accounting for sales and net proceeds of lands, and the other provisions of the statutes already mentioned) be supposed the parties understood that Michigan was to have for its own treasury the balance arising beyond such cost, maintenance, etc., of the canal. If a surplus arose in the course of the operation of the canal, the tolls were to be at once reduced; and it seems to us that that surplus would, upon a fair and reasonable construction of the acts, belong to the original owner of the lands, by means of which the state, as, in substance, the agent of the United States, was enabled to construct the canal, and secure the tolls arising from its operation, to be expended upon its main-
[401] tenance *and for necessary repairs. This would certainly be so after the formal transfer of the canal, and after the surplus was conclusively ascertained, and was subject to no further claims for repairs of the canal on the part of the state. The tolls were, in fact, the proceeds of the trust fund (the lands), which belonged to the United States, and should be transferred with the rest of the trust property.

Where Congress grants land to a state, to be used as provided in this statute, we think a trust, or power to dispose of the lands for the purpose of carrying out the improvement, is granted; and, in this case, no beneficial interest passes to the state by the language used, considering the whole statute. *Rice* v. *Minnesota & N. W. R. Co.* 1 Black, 358, 378, 17 L. ed. 147, 153.

If any particular part of the statute in this case were ambiguous or its meaning doubtful, of course the intention must be deduced from the whole statute and every part of it. Hence the importance of those provisions which, in effect, if carried out, prevent the state from making any direct profit by the construction of the canal, or from the tolls received from vessels passing through it. And, where words are ambiguous, legislative grants must be interpreted most strongly against the grantee and for the government, and are not to be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed. Any ambiguity must operate against the grantee and in favor of the public. *Rice* v. *Minnesota & N. W. R. Co.* 1 Black, 380, 17 L. ed. 154. This rule of construction obtains in grants from the United States to states or corporations in aid of the construction of public works. (Id. 10.)

Then, too, there is the almost contemporaneous construction placed upon the Federal statute by the legislature of Michigan in the act No. 175, approved February 14, 1859, in the preamble of which it is said that "whereas such canal, having been built and accepted by the authorities of this state, is found to need repairs in order to its preservation and use to the due performance of the trust created by said act of Congress and the assent of this state thereto," etc. Again, the treasurer of the state, who, by virtue of his office, was one of the members of the board of control of the Saint Marys Falls ship *canal, in the [402]
course of his annual report for the year 1883, made to the governor and transmitted to the legislature of the state, used the following language:

"Since my last report, the remainder of the personal property belonging to the Saint Marys Falls ship canal has been sold, making a final balance in that fund of $68,927.12. All business pertaining to the management of the canal on the part of the state has ceased, and the moneys in the fund remain in the state treasury under act No. 17, Laws of 1881, the state acting simply as trustee."

We do not, of course, assume that the state treasurer could bind the state of Michigan by any admission he might make in a report to the legislature of that state, but it shows simply the understanding of that official, who was so closely connected with the construction and operation of the canal, in relation to the surplus funds in the treasury of the state, arising out of the operation of the canal. That the state legislature in 1859 regarded the state as a trustee is evident from the above language in the portion of the preamble quoted.

Finally, by the joint resolution of the leg-

islature, being No. 20 of the Public Acts of 1897, it was stated as follows:

"Whereas there has remained to the credit of the Saint Marys ship canal fund a credit balance which was on hand at the time of the transfer of the said canal from the state to the United States, and no claim has been made for any part of such moneys, either by any persons who paid the same into the fund or by the general government;

"And whereas there now remains on hand, under the board of control of the Saint Marys ship canal, an invoice of tools and machinery, and no demand by any person or persons or by the United States having been made for a transfer of said tools and machinery:

"*Therefore, resolved by the Senate and House of Representatives of the State of Michigan,* That the auditor general be, and he is hereby, directed to transfer such balance as shown upon the books of his office to the same, and it shall hereafter become a part of the general fund of the state.

"*And be it further resolved,* That the [403] board of control of the *Saint Marys ship canal be, and they are hereby, authorized to dispose of, at the best possible advantage, the tools and machinery aforesaid and now under their control, and deposit the money received from the sale of said property in the general fund of this state."

From these statutes and resolutions we think it quite clearly appears that the state and its public officers thought that a trust had been created, and that the state had received the lands in trust for the purpose of carrying out the provisions of the Federal statute. A surplus arising from the sales of lands and from the tolls, over and above all cost of construction, repairs, etc., after the formal transfer of the canal itself, belongs to the United States, and it is the proper party to recover the same.

The counsel for defendant, however, urged that other action by the United States shows that no such trust existed. He referred to the joint resolution of the state, adopted in 1869, wherein the necessity for the immediate enlargement of the Saint Marys Falls canal, a work of urgent necessity and national importance, was advocated, and it was therein said that the state of Michigan had no funds properly applicable to such purpose, and it was, therefore, resolved that the board of control of the canal should be authorized and directed to transfer the canal, with all its appurtenances and all the right and title of the state of Michigan in and to the same, to the United States, provided the state should be first guaranteed and secured, to the satisfaction of the board, against loss, by reason of its liability, on certain bonds which had been issued by it under authority of an act to provide for the repairs upon the canal, "and to perform the trust respecting the same," approved February 14, 1859. Even in this act of 1859, the legislature, as has already been stated, acknowledges the trust, and passes an act for the purpose of performing its obligations respecting the same. But it is said that this resolution (of 1869) providing for the transfer of the canal was not noticed or accepted by the United States until 1880, when Congress, by an act approved June 14, 1880, authorized the Secretary of War to accept, on behalf of the United States, from the state of Michigan, the *canal, provided "such trans- [404] fer shall be so made as to leave the United States free from any and all debts, claims, or liability of any character whatsoever, and said canal, after such transfer, shall be free for public use."

This offer under the act of 1880 was accepted by the state by act No. 17, Public Acts of Michigan of 1881, *supra,* and the board of control was authorized and directed: First. "To transfer the said canal and the public works thereon, with all its appurtenances, and all the right and title of the state of Michigan in and to the same, to the United States," in accordance with the provisions of the act of Congress approved June 14, 1880; and, second, "at any time when they may deem it proper, *to transfer all material belonging to said canal, and to pay over to the United States all moneys remaining in the canal fund,* excepting so much as may be necessary to put the said canal in repair, for its acceptance in accordance with the act above recited: *Provided, Such transfer of material and payment of moneys* shall be in consideration of the construction, by the United States, of a suitable dry dock, to be operated in connection with the Saint Marys Falls ship canal for the use of disabled vessels."

It is argued from this legislation that Congress thereby recognized and acknowledged the ownership of the canal by the state, free from any trust connected therewith, and that the provisions by the state for transferring all material belonging to the canal and for paying over to the United States all moneys remaining in the canal fund, etc., were upon the condition just quoted; and it is stated that there was no proof that such dry dock had been constructed, and hence there was no liability on the part of the state to pay the moneys or deliver the tools. But, if the original transaction amounted to a trust, as we think it did, the attempt of the state to impose a condition upon its payment of the moneys and the transfer of the tools did not take away its liability as trustee, nor make it necessary that the United States should build the dry dock before it should be entitled to the money and the tools. The United States might have been satisfied to permit the state to retain its nominal title and to remain in possession, and to operate the canal under its original obligations; and when, in 1880, it authorized the Secretary *of War to accept the ca- [405] nal from the state without any liability on its part for debts or claims in regard to the canal, it did not thereby in any manner admit the nonexistence of any trust theretofore created. Assuming that the land grant and the tolls had been sufficient to construct the canal and operate and repair

it, there was no reason why the United States should assume or agree to pay any debts or claims which might exist in regard to the canal. The consideration for the transfer of the material and the payment of the moneys amounted, at most, to a provision in the nature somewhat of a condition subsequent, and the right to such transfer and payment did not rest upon the prior building of the dry dock by the United States. There was nothing in this legislation, in our opinion, which changed the character in which the state had acted as trustee up to the time of such transfer of the canal, and the liability of the state was not altered by reason of the act of 1880 or that of 1881.

We are of opinion that the bill shows a cause of action against the state of Michigan as trustee, and its liability to pay over the surplus moneys (if any), which upon an accounting it may appear have arisen from the sale of the granted lands, over and above all cost of the construction of the canal and the necessary work appertaining thereto, and the supervision thereof, together with the surplus money arising from the tolls collected, which latter sum by the demurrer is admitted to amount to $68,927.12. This sum the United States in substance (especially in the 4th paragraph of the bill) admits is all that is due from the state on account of such tolls. It is not entitled to go back of that amount and call for an accounting as to the tolls prior to the transfer of the canal to the United States. The latter is also entitled to recover the value of the tools, etc., mentioned in the bill, as of the time of the transfer of the canal.

We think there is no ground of defense arising from any alleged laches on the part of the United States in bringing this suit. Assuming the existence of what would be laches in a private person, the defense that might arise therefrom is not available ordinarily against the government. *United States* v. *Beebe*, 180 U. S. 343, 353, 45 L. ed. 563, 570, 21 Sup. Ct. Rep. 371.

[406] *There must be judgment overruling the demurrer, but as the defendant may desire to set up facts which it might claim would be a defense to the complainant's bill, we grant leave to the defendant to answer up to the first day of the next term of this court. In case it refuses to plead further, the judgment will be in favor of the United States for an accounting and for the payment of the sum found due thereon.

*Demurrer overruled and leave to answer given, etc.*

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JEFFERSON B. CONLEY, *Plff. in Err.*,
*v.*
MATHIESON ALKALI WORKS.

(See S. C. Reporter's ed. 406–412.)

*Service of process on foreign corporation.*

Service of summons within the state on resident directors of a foreign corporation is insufficient to give the court jurisdiction of such corporation, where, at the time of such service, it had ceased to do business within the state, and had designated no agent upon whom service could be made.

[No. 238.]

*Argued April 15, 16, 1903. Decided May 18, 1903.*

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review an order which set aside a service of summons on a foreign corporation. *Affirmed.*

See same case below, 110 Fed. 730.

The facts are stated in the opinion.

*Mr.* **W. W. MacFarland** argued the cause, and, with *Messrs. MacFarland, Taylor, & Costello*, filed a brief for plaintiff in error:

Cases in which service of process will not be regarded by this court as sufficient to give jurisdiction over the foreign corporation for the purpose of rendering a valid personal judgment are those where the cause of action against the foreign corporation did not arise within the state, and the corporation was not doing any business within the state, and the service was upon an officer or agent only casually within the state, and not charged with any business of the corporation there.

*Goldey* v. *Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Fidelity Trust & S. V. Co.* v. *Mobile Street R. Co.* 53 Fed. 850; *Reifsnider* v. *American Imp. Pub. Co.* 45 Fed. 433; *Carpenter* v. *Westinghouse Air-Brake Co.* 32 Fed. 434; *United States* v. *American Bell Teleph. Co.* 29 Fed. 17; *Elgin Canning Co.* v. *Atchison, T. & S. F. R. Co.* 24 Fed. 866; *American Wooden-Ware Co.* v. *Stem*, 63 Fed. 676; *Clews* v. *Woodstock Iron Co.* 44 Fed. 31; *Golden* v. *Morning News*, 42 Fed. 112.

Directors of a corporation are its principal officers and agents.

*Hiller* v. *Burlington & M. River R. Co.* 70 N. Y. 226.

State decisions sustain the validity of the service in the present case.

*Tuchband* v. *Chicago & A. R. Co.* 115 N. Y. 437, 22 N. E. 360; *Hiller* v. *Burlington & M. River R. Co.* 70 N. Y. 223; *Pope* v. *Terre Haute Car & Mfg. Co.* 87 N. Y. 139.

Everything is presumed against those who do not produce books that would show the fact.

Lindley, Partn. pp. 808, note, 993.

Every decision of the Federal courts upon any state of facts at all resembling the facts of the case at bar has affirmed the validity of such a service as was made in the present case.

*Simon* v. *Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Barrow S. S.*

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NOTE.—*As to service of process upon foreign corporations*—see notes to Foster v. Charles Betcher Lumber Co. (S. D.) 23 L. R. A. 490, and Eldred v. American Palace-Car Co. 45 C. C. A. 3.

*That a foreign corporation must be engaged in business within the state in order to validate service of process upon it*—see note to Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 591.

*Co.* v. *Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Connecticut Mut. L. Ins. Co.* v. *Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Henrietta Min. & Mill. Co.* v. *Johnson*, 173 U. S. 221, 43 L. ed. 675, 19 Sup. Ct. Rep. 402; *Société Foncière* v. *Milliken*, 135 U. S. 304, 34 L. ed. 208, 10 Sup. Ct. Rep. 823; *Cowley* v. *Northern P. R. Co.* 159 U. S. 583, 40 L. ed. 267, 16 Sup. Ct. Rep. 127; *Tootle* v. *Coleman*, 57 L. R. A. 120, 46 C. C. A. 132, 107 Fed. 41; *Purdy* v. *Wallace Müller & Co.* 81 Fed. 513; *Reilly* v. *Philadelphia & R. R. Co.* 109 Fed. 349; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221; *Meyer* v. *Pennsylvania Lumbermen's Mut. F. Ins. Co.* 108 Fed. 169; *Revans* v. *Southern M. & A. R. Co.* 114 Fed. 982.

*Mr.* **Alfred Ely** argued the cause, and, with *Messrs. Agar, Ely, & Fulton*, filed a brief for defendant in error:

The service was insufficient.

*Goldey* v. *Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559.

It is immaterial whether such service is recognized as sufficient by the statutes or the judicial decisions of the state where the service is made.

*Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *St. Clair* v. *Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354.

Mr. Justice **McKenna** delivered the opinion of the court:

The plaintiff is a citizen of the state of New York, and the defendant was incorporated in the state of Virginia. The plaintiff, [407] as *assignee of T. T. Mathieson, brought this action in the supreme court of New York county, state of New York, against the defendant for moneys alleged to be due on a contract made and entered into by Mathieson and defendant. The complaint alleged that the contract was made in the city of New York on the 15th of August, 1893. The articles of agreement show that Mathieson's employment was as general superintendent for the term of eight years, in the erection and general management of the works of the corporation, "and also of their operation, after the same shall have been erected." The defendant had designated no agent upon whom service could have been made, and summons was served on R. T. Wilson and John G. Agar, two members of the board of directors of the corporation, both residents of the city of New York. They were not officers of the company. Before the time for answer had expired, on defendant's motion the cause was transferred to the United States circuit court for the southern district of New York. A motion was made in that court to set aside the summons and service as null and void. Affidavits were presented by both parties, and ruling on them the court said that if the facts stated by the affidavits of the defendant were true, that, at the time of the service of the summons and for some months before, defendant corporation had ceased to do business in the state, the motion should be granted. But it was said that "the affidavits of complainant are mainly on information and belief, but annexed to them is a letter, the genuineness of which is not questioned, which bears date March 15, 1901 (two months and a half after the alleged cessation of business at Niagara Falls), and signed by the treasurer of the defendant corporation, in which he speaks of the plant at Niagara Falls as still being operated by the defendant. Under these circumstances the court would not be warranted in granting this motion, in view of the conflict of fact. If, however, the defendant feels assured that the apparent discrepancy can be explained, and is willing to pay the expenses of a reference, it may be sent to a master to take testimony and report to the court whether or not at the time of the service of the summons the defendant corporation was doing business within this state."

*A reference to the master was made. [408] After taking testimony (which occupies sixty-two pages of the record), the master reported that, beside its plant at Saltville, the defendant, prior to December 31, 1900, owned and operated a plant for the manufacture of caustic soda and bleaching powder by electricity, located at Niagara Falls, under a patented process, known as the Castner electrolytic process; that on the 31st of December, 1900, it conveyed this plant and all of the property of the defendant, of every kind and description, to the Castner Electrolytic Alkali Company, a corporation organized under the laws of Virginia; that the consideration expressed for the conveyance was $1 and other valuable considerations, but that the substantial consideration was the entire capital stock of the Castner Electrolytic Alkali Company; that the selling agent for the products manufactured at Niagara Falls, before and after the transfer, was Arnold Hoffman & Co., a corporation organized under the laws of Rhode Island, and [which] had and has its principal place of business in Providence, in that state; that said company was and is the selling agent for the Saltville products, with some exceptions, and that said corporation has a branch office in the city of New York, but the business dealings of the defendant corporation and of the Castner company with Arnold Hoffman & Co. are carried on through its Providence office; that the defendant, since a period prior to the 31st day of December, 1900, had, and still has, its principal place of business in the city of Providence, and that its books and records are kept there, and it has also an office force, consisting of several employees, that its bank account is also kept in said city, and that it has no office in the state of New York,—none of its books, records, or accounts are kept there, nor has it, since January 1, 1901, sold any of its products there; that a by-law of the company, adopted in 1896, provided that the directors should hold monthly meetings in the city of New York, on the second Wednesday of each and every month in each year, but that it did not appear, however, that

meetings had been held in compliance with the by-laws, the fact being that they were held sometimes in Saltville and sometimes in Providence, and, during the year 1901, at least, were held not more than two or *three times in New York city, and then at the branch office of Arnold Hoffman & Co., or at the office of R. T. Wilson & Co., bankers, in Wall street, a member of which firm was a director of the defendant company, and one of its principal stockholders; that the admissions in a letter of the treasurer of the company, March 15, 1901, "are fully explained by the fact that it followed earlier correspondence in which the plan of disposing of the plant at Niagara Falls for the stock of a new company was brought to the attention of Mr. Pell," the president, to whom the letter was addressed. The master's report concluded as follows:

"Upon the facts thus outlined, it does not appear that the defendant corporation was, at the time of the service of the summons herein, *viz.*, April 18, 1901, doing business within this state.

"The fact that it held the entire capital stock of the Castner Electrolytic Alkali Company, and that the operations of that company were carried on under the same management as before December 31, 1900, is not material. The new corporation was a separate legal entity, and, whatever may have been the motives leading to its creation, it can only be regarded as such for the purposes of legal proceedings.

"It was that corporation alone which transacted any business in this state, notwithstanding it may have been for all practical purposes merely the instrument of the defendant corporation. *People* v. *American Bell Teleph. Co.* 117 N. Y. 241, 22 N. E. 1057; *United States* v. *American Bell Teleph. Co.* 29 Fed. 17."

The plaintiff excepted to the report, the rulings of the master on the admission of testimony, and to his conclusions. The report was affirmed and the service of summons set aside and declared null and void. This ruling is assigned as error.

The fundamental proposition of plaintiff in error is that the state court had jurisdiction of the defendant in error, and that, therefore, the circuit court of the United States had jurisdiction. To sustain the jurisdiction of the state court subdivision 3 of § 432 and § 1780 of the Code of Civil Procedure of the state are cited. Subdivision 1 of § 432 provides for service upon certain enumerated officers of a foreign cor-[410]poration; *subdivision 2 provides for the designation of a person by the corporation upon whom process may be served. Subdivision 3 is as follows:

"If such a designation is not in force, or if neither the person designated nor an officer specified in subdivision 1st of this section can be found with due diligence, and the corporation has property within the state, or the cause of action arose therein, to the cashier, a director, or a managing agent of the corporation within the state."

Section 1780 is as follows:

"Sec. 1780. An action against a foreign corporation may be maintained by a resident of the state, or by a domestic corporation, for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident, in one of the following cases only:

"1. Where the action is brought to recover damages for the breach of a contract, made within the state or relating to property situated within the state, at the time of the making thereof.

"2. Where it is brought to recover real property situated within the state, or a chattel, which is replevied within the state.

"3. Where the cause of action arose within the state, except where the object of the action is to affect the title to real property situated without the state."

These sections, it is insisted, gave the state court jurisdiction, and it follows that the circuit court had jurisdiction. But, granting the existence of a cause of action, it is not every service upon an officer of a corporation which will give the state court jurisdiction of a foreign corporation. This was declared in *Goldey* v. *Morning News*, 156 U. S. 518, 39 L. ed. 517, 13 Sup. Ct. Rep. 559. The case arose in New York, and the question presented was "whether, in a personal action against a corporation which neither is incorporated nor does business within the state, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, is sufficient service upon the corporation."

As there was a difference between the rulings of the state court of New York and the circuit courts of the United States *on[411] the question, it was elaborately considered "upon principle and in the light of previous decisions of this court." The decisions were examined, and the question was answered in the negative, and it was announced, as "an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government." It was also held that the defendant, by filing a petition for removal, did not waive defects in the service of summons, and that objection could be made of such service in the circuit court of the United States in the same manner as if the action had been originally commenced there. *Goldey* v. *Morning News* was affirmed in *Wabash Western R. Co.* v. *Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126.

The principle announced in *Goldey* v. *Morning News* covers the case at bar. The residence of an officer of a corporation does

not necessarily give the corporation a domicil in the state. He must be there officially, — there representing the corporation in its business. *St. Clair* v. *Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354. In other words, a corporation must be doing business there, and, recognizing the necessity of this, the circuit court referred that issue to a master. The decision upon the issue was adverse to the contention of the plaintiff, and we cannot say that it was not sustained by the evidence and the presumptions which must be conceded to the report of a master and the judgment of the lower court. The defendant was competent to convey its property to the Castner Electrolytic Alkali Company, and afterwards make the locality of its own business Providence and Saltville. Whether the transfer to the latter company was fraudulent we certainly cannot decide from this record, and the by-law, which provided for a monthly meeting in New York, could not of itself keep the corporation in New York. The testimony is positive that [412] no business of the corporation was done in New York city after the transfer of the Niagara Falls plant; that all of the business of the corporation was conducted at Providence, except of a purely manufacturing character, which was conducted at Saltville.

The following is an extract from the testimony of the secretary and treasurer:

"The offices of the Mathieson Alkali Works at Providence conducted all the business of the company except that of a purely manufacturing character, which was conducted at Saltville. They keep there the general books of account, the books of record, the stock books. They had charge of the general course of the company's affairs and transacted its finances; collected the money and paid the bills. In fact, attended to all the business which generally comes under the conduct of a company's general office. This was done solely at Providence, and nowhere else."

And he further testified that all of the goods of the corporation were sold at Providence. The affidavits filed by the defendants were as positive as the oral testimony. *The order of the Circuit Court is therefore affirmed.*

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WESTERN UNION TELEGRAPH COMPANY, *Plff. in Err.*,

*v.*

STATE OF MISSOURI at the Relation and the Use of CHRIS. GOTTLIEB, Collector of the Revenue for Jackson County, Missouri.

(See S. C. Reporter's ed. 412-427.)

*State taxation — of foreign telegraph companies — valuation of property within state — discrimination or overvaluation no defense to suit for taxes.*

1. A state tax on the property within the state belonging to a foreign telegraph corporation, the value of which was determined by regarding it as a part of a system operated in other states, is not invalid because such corporation is engaged in interstate business, and has accepted the provisions of the act of July 24, 1866, giving it the privilege of operating a line over military and post roads, and was not created by such state or given any franchise by it.

2. Discrimination or overvaluation by a state board of equalization in assessing property for purposes of taxation is not a ground of defense to an action at law to collect the taxes.

[No. 256.]

*Argued April 21, 1903. Decided May 18, 1903.*

IN ERROR to the Supreme Court of Missouri to review a judgment which reversed a judgment of the Circuit Court of Jackson County for a portion of the taxes sought to be collected from a foreign telegraph company, and entered judgment for the full amount of the tax sued for. *Affirmed.*

See same case below, 165 Mo. 502, 65 S. W. 775.

Statement by Mr. Justice **McKenna:**

The defendant in error is the tax collector of Jackson county, Missouri, and brought this action against the plaintiff in error in the circuit court of that county for the sum of $1,027.22, the taxes assessed against plaintiff in error for the year 1899, apportioned to Jackson county. The answer of the plaintiff in error alleged illegality in the taxes upon two grounds: First, that the taxes were levied upon the franchise of the plaintiff in error, derived from the United States under certain acts of the Congress; second, that the state board of equalization, intending to injure the plaintiff by compelling it to pay an excessive and disproportionate share of state and local taxes, assessed its poles, wires, and instruments at far more than their actual value.

The plaintiff in error is a telegraph company, incorporated by the state of New York. It does business in the state of Missouri, having offices in a number of cities of that state, and its lines run between those cities and to and from them to other places in the Union; in other words, the plaintiff in error engages in intrastate and interstate business. It claims to have no franchises from the state of Missouri (except in an unimportant instance), but occupies the streets of its cities, and its public roads and highways, by authority of the act of Congress of July 24, 1866 (16 Stat. at L. 221, chap. 230, U. S. Comp. Stat. 1901, p. 3579), entitled "An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes." The material part of § 1 of the act is as follows:

"Section 1. That any telegraph company

NOTE.—*As to the power of states to control or impose burdens upon interstate telephone and telegraph companies*—see notes to Postal Teleg. Cable Co. v. Baltimore (Md.) 24 L. R. A. 161, and Orleans v. Pullman's Palace-Car Co. 8 C. C. A. 498.

now organized, or which may hereafter be organized, under the laws of any state in this Union, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along [414] any of the *military or post roads of the United States, which have been or may hereafter be declared such by an act of Congress, and over, under, or across the navigable streams or waters of the United States: *Provided*, That such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters or interfere with the ordinary travel of such military or post roads."

Section 2 provides that the messages between the officers and agents of the government shall have priority, and be sent at rates to be fixed by the Postmaster General.

Section 3 forbids the transfer of the rights conferred by the act.

Section 4 gives the United States the power to purchase the telegraph lines, property, and effects of any company availing itself of the benefits of the act.

Section 4 is as follows:

"*And be it further enacted*, That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster General of the restrictions and obligations required by this act."

Under the Constitution and laws of Missouri, the state board of equalization, composed of the governor, secretary of state, state auditor, state treasurer, and attorney general, assesses railroad and telegraph property, and it also equalizes the real and personal property assessed by the local assessors. Exercising its powers of original assessment, the board made the following order in regard to the property of plaintiff in error:

State of Missouri, office of state auditor.

Be it remembered that heretofore, to wit, on the 25th day of July, 1899, the following, among other proceedings, were had by the state board of equalization, *viz.:*

The state board of equalization having given to the Western Union Telegraph Company opportunity to be heard personally by the board, and having heard the said company, through its officers and agents, and having carefully considered the facts set out in the returns and the statements of said company, and all evidence of value, and all [415] matters bearing upon *the question of the value of the property of said company, and considering the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the market and par value of its stocks and bonds, and the gross receipts and net earnings and franchise owned by said company, and the value thereof, and having received evidence concerning the value of the cost of construction of said telegraph line, and the market value and par value of the stocks and bonds, and the gross receipts and net earning power, and the franchise and value thereof, and having heard evidence upon and considering all other matters ascertainable by said board bearing upon the question of the value of said company, which, in the opinion of the board, would assist in its findings, conclusions, and judgment in arriving at the actual cash value of the property of said telegraph company; on motion the state board of equalization assesses and values for taxes of 1899 the property of said Western Union Telegraph Company at $1,827,727.45; and it is further ordered by the state board of equalization that the assessed value thereof be distributed upon the classes of property as follows:

| | |
|---|---|
| 6,075.98 miles of poles at $71.50 per mile | $434,432 57 |
| 23,767.34 miles of wire at $22.02 per mile | 523,356 82 |
| 3,375 instruments at $5.70 each | 13,537 50 |
| All other property at | 856,400 56 |
| | $1,827,727 45 |

The apportionment of the tax to Jackson county was as follows:

| | |
|---|---|
| For state purposes | $202 43 |
| For county purposes | 283 40 |
| For road purposes | 35 41 |
| For general county school purposes | 370 61 |
| For school building purposes | 2 98 |
| For other school purposes | 19 03 |
| For Kansas City municipal purposes | 81 21 |
| For Independence municipal purposes | 25 38 |
| For Kaw township railroad purposes | 2 03 |
| For Blue township railroad purposes | 4 74 |
| Total | $1,027 22 |

*The case was tried without a jury and [416] the trial court found "the fact to be from the evidence and the pleadings that the defendant owned in the state of Missouri, at the time of said assessment, the poles, wires, and instruments of the value hereinbefore set forth. And the court finds the fact to be from the evidence that in valuing 'all other property' of defendant the state board took into consideration the franchise of defendant company, and the court finds under the law, and so declares, that the franchise of defendant company is not subject to valuation and taxation, and as to this item of the above-named valuation the court finds the issues for the defendant."

Judgment was entered against plaintiff in error in the sum of $605.82, being the tax on the poles, wires, and instruments of the company, with interest at 2 per cent for collector's fees, and also for attorneys' fees. The amount found due was made a first lien

against the property of defendant in error, and special execution ordered to be issued. Both parties moved for a new trial, which motions were denied. Both parties then appealed to the supreme court of the state, which court reversed the judgment of the circuit court. After an elaborate discussion of the case the supreme court said:

"It follows that the judgment of the circuit court holding the tax assessed against 'all other property at $856,400.56' to be unlawful, is erroneous, and that the plaintiff is entitled to a judgment for the whole amount of the tax sued for. Judgment is accordingly entered here for the plaintiff for $1,027.22, back taxes for the year 1899, with interest thereon from the 1st of January, 1900, at the rate of 1 per cent per month (Rev. Stat. 1899, § 9225), and costs."

This writ of error was then sued out. Other facts appear in the opinion.

*Messrs.* **Eleneious Smith** and **John F. Dillon** argued the cause, and, with *Messrs. Alexander New* and *Henry D. Estabrook*, filed a brief for plaintiff in error:

The Western Union Telegraph Company is an agent of the government and an instrument of interstate commerce; and its franchises exercised in Missouri having been derived solely from the Federal government are exempt from taxation by the taxing authorities of the state.

*Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1, 24 L. ed. 708; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067; *California* v. *Central P. R. Co.* 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *San Francisco* v. *Western U. Teleg. Co.* 96 Cal. 140, 17 L. R. A. 301, 31 Pac. 10; *Central P. R. Co.* v. *California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Wabash, St. L. & P. R. Co.* v. *Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Union P. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Robbins* v. *Shelby County Taxing Dist.* 120 U. S. 493, 30 L. ed. 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 344, 30 L. ed. 1204, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; *Western U. Teleg. Co.* v. *Pendleton*, 122 U. S. 358, 30 L. ed. 1189, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126.

The state board of equalization has discriminated against plaintiff in error and in favor of other persons generally. The board, in order to discriminate as aforesaid, fixed the value of the property of the Western Union Telegraph Company for taxation at far more than its full actual cash value, and intentionally so equalized and adjusted the values of other property throughout the state at 40 per cent of the actual cash value thereof. The necessary effect of all of which has been that the said company has been discriminated against in violation of the 14th Amendment to the Constitution of the United States.

*Pelton* v. *Commercial Nat. Bank*, 101 U.S. 143, 25 L. ed. 901; *Cummings* v. *Merchants' Nat. Bank*, 101 U. S. 153, 25 L. ed. 903; *German Nat. Bank* v. *Kimball*, 103 U. S. 732, 26 L. ed. 469; *State ex rel. Morris* v. *Cunningham*, 153 Mo. 642, 55 S. W. 249; *State ex rel. Wright* v. *St. Louis, I. M. & S. R. Co.* 82 Mo. 683; *State ex rel. Gibson* v. *Davis*, 131 Mo. 457, 33 S. W. 22; *Hannibal & St. J. R. Co.* v. *State Bd. of Equalization*, 64 Mo. 294; *State* v. *Hannibal & St. J. R. Co.* 75 Mo. 208; *Ward* v. *Gentry County Bd. of Equalization*, 135 Mo. 309, 36 S. W. 648; *House* v. *Clinton County Ct.* 67 Mo. 522; *State ex rel. Lemon* v. *Buchanan County Bd. of Equalization*, 108 Mo. 235, 18 S. W. 782; *State ex rel. Wyatt* v. *Vaile*, 122 Mo. 33, 26 S. W. 672; *State Bd. of Equalization* v. *People*, 191 Ill. 528, 58 L. R. A. 513, 61 N. E. 339; *Ex parte Ft. Smith & V. B. Bridge Co.* 62 Ark. 461, 36 S. W. 1060; *Los Angeles County* v. *Ballerino*, 99 Cal. 597, 32 Pac. 583, 34 Pac. 329; *Pacific Postal Teleg. Cable Co.* v. *Dalton*, 119 Cal. 604, 51 Pac. 1072; *Randell* v. *Bridgeport*, 63 Conn. 321, 28 Atl. 523; *Bureau County* v. *Chicago, B. & Q. R. Co.* 44 Ill. 229; *Iowa & D. Teleph. Co.* v. *Schamber*, 15 S. D. 588, 91 N. W. 78; *Chicago, B. & Q. R. Co.* v. *Atchison County*, 54 Kan. 786, 39 Pac. 1039; *Merrill* v. *Humphrey*, 24 Mich. 170; *Walsh* v. *King*, 74 Mich. 350, 41 N. W. 1080; *State ex rel. Wright* v. *Savage* (Neb.) 91 N. W. 557; *Cocheco Mfg. Co.* v. *Strafford*, 51 N. H. 455; *Manchester Mills* v. *Manchester*, 58 N. H. 38; *Mercantile Nat. Bank* v. *New York*, 172 N. Y. 35, 64 N. E. 756; *Chattanooga* v. *Nashville, C. & St. L. R. Co.* 7 Lea, 563; *Weeks* v. *Milwaukee*, 10 Wis. 243; *Hersey* v. *Milwaukee County*, 16 Wis. 186, 82 Am. Dec. 713; *Lefferts* v. *Calumet County*, 21 Wis. 688; *Milwaukee Iron Co.* v. *Hubbard*, 29 Wis. 52; *Hersey* v. *Barron County*, 37 Wis. 75; *Railroad Tax Case*, 8 Sawy. 238, 13 Fed. 722; *Second Nat. Bank* v. *Caldwell*, 13 Fed. 429; *Re Watson*, 15 Fed. 511; *Santa Clara County* v. *Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 385; *Indiana ex rel. Wolf* v. *Pullman Palace Car Co.* 11 Biss. 561, 16 Fed. 193; *Dundee Mortg. Trust Invest. Co.* v. *School Dist. No. 1*, 10 Sawy. 52, 21 Fed. 151, 11 Sawy. 92, 24 Fed. 197; *Taylor* v. *Louisville & N. R. Co.* 31 C. C. A. 537, 60 U. S. App. 166, 88 Fed. 350; *Railroad & Teleph. Cos.* v. *Tennessee*, 85 Fed. 302; *Chicago Union Traction Co.* v. *State Bd. of Equalization*, 114 Fed. 557; Cooley, Taxn. 2d ed. pp. 748–785; Judson, Taxn. § 478; Welty, Assessments, § 186.

Where discrimination of this character exists, it amounts to fraud in law, and a denial of equal protection of the law, and the courts will grant relief. Likewise where lack of jurisdiction to make the assessment is shown.

*State ex rel. Wyatt* v. *Vaile*, 122 Mo. 33, 26 S. W. 672; *State ex rel. Love* v. *Hannibal & St. J. R. Co.* 101 Mo. 120, 13 S. W. 406; *Black* v. *McGonigle*, 103 Mo. 192, 15 S. W. 615; *State ex rel. Morris* v. *Cunningham*, 153 Mo. 642, 55 S. W. 249.

In all cases where franchises such as those

possessed by the Western Union Telegraph Company have been considered in estimating the value of property assessed, and such assessments have been sustained, statutes providing for the assessment of corporations under a "unit" system have contained express and detailed provisions for correctly ascertaining the valuation of the property to be assessed. No such provisions are found in the laws of Missouri. The "ways and means" for any such assessment have not been prescribed. Furthermore, the statutes of Missouri exclude any such mode of assessment of telegraph companies.

*Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Atty. Gen.* v. *Western U. Teleg. Co.* 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; *State Railroad Tax Cases*, 92 U. S. 575, *sub nom. Taylor* v. *Sewor*, 23 L. ed. 669; *Pullman's Palace Car Co.* v *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Adams Exp. Co.* v. *Ohio State Auditor*, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305; on Rehearing 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *St. Louis* v. *Wenneker*, 145 Mo. 238, 47 S. W. 105.

The franchise of a corporation "to be" a corporation is not taxable in a foreign state in which it is licensed to do business.

*London & S. F. Bank* v. *Block*, 117 Fed. 900.

*Mr.* **Hunter M. Meriwether** argued the cause, and, with *Mr. Robert E. Ball*, filed a brief for defendant in error:

The franchises, in the sense of intangible property, as well as the poles and wires of the Western Union Telegraph Company, are taxable by the several states. Such franchise taxes have been sustained in all recent cases by the Supreme Court of the United States against this defendant, and others similarly situated.

*Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Atty. Gen.* v. *Western U. Teleg. Co.* 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; *Central P. R. Co.* v. *California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Western U. Teleg. Co.* v. *Norman*, 77 Fed. 13; *Western U. Teleg. Co.* v. *Taggart*, 163 U. S. 1, 41 L. ed. 49, 16 Sup. Ct. Rep. 1054; 25 Am. & Eng. Enc. Law, p. 873; *Adams Exp. Co.* v. *Ohio State Auditor*, 166 U. S. 220, 41 L. ed. 977, 17 Sup. Ct. Rep. 604; *Com.* v. *Western U. Teleg. Co.* 2 Dauph. Co. Rep. 40; *Michigan Teleph. Co.* v. *Charlotte*, 93 Fed. 11; *Keokuk & H. Bridge Co.* v. *Illinois*, 175 U. S. 626, 44 L. ed. 299, 20 Sup. Ct. Rep. 205; *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 154, 41 L. ed. 954, 17 Sup. Ct. Rep. 532; *Louisville Tobacco Warehouse Co.* v. *Com.* 106 Ky. 165, 57 L. R. A. 33, 49 S. W. 1069; *Com.* v. *Manor Gas Coal Co.* 188 Pa. 195, 41 Atl. 605; *Adams Exp. Co.* v. *Kentucky*, 166 U. S. 171, 41 L. ed. 960, 17 Sup. Ct. Rep. 527.

The assessment made by the state board was an assessment of the property of plaintiff in error, and did not include or in any way affect the right to exist and transact its business in Missouri or elsewhere. The tax is strictly a property tax, and having been fairly and legally assessed upon a reasonable valuation of the property, should be sustained.

*First Nat. Bank* v. *Kentucky*, 9 Wall. 353, 19 L. ed. 701; *Union P. R. Co.* v. *Peniston*, 18 Wall. 5, 21 L. ed. 787; *Commercial Electric Light & P. Co.* v. *Judson*, 21 Wash. 49, 57 L. R. A. 78, 56 Pac. 829; *Louisville R. Co.* v. *Com.* 105 Ky. 710, 49 S. W. 486; *Paducah Street R. Co.* v. *McCracken County*, 105 Ky. 472, 49 S. W. 178; *Owensboro Nat. Bank* v. *Owensboro*, 173 U. S. 664, 43 L. ed. 850, 19 Sup. Ct. Rep. 537; *Com.* v. *Manor Gas Coal Co.* 8 Pa. Dist. R. 258; *New York* v. *Roberts*, 171 U. S. 658, 43 L. ed. 323, 19 Sup. Ct. Rep. 58.

There is a clear distinction between a license tax and a property tax. The former involves a charge for permission or authority to transact certain business, while the latter is a contribution imposed upon, and measured by, the property of an individual or corporation. The state cannot impose a license, impost, or embargo on plaintiff in error, even though it be called a tax. But it can take from the property owned by plaintiff in error within the jurisdiction of the state, a sufficient amount to pay its just proportion of its governmental expenses. Nothing else having been attempted, the tax should be sustained.

Cooley, Taxn. 2d ed. pp. 383, 576; Burroughs, Taxn. § 77, p. 146, § 85, p. 169; Judson, Taxn. p. 130; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *State* v. *Emert*, 103 Mo. 241, 11 L. R. A. 219, 3 Inters. Com. Rep. 527, 15 S. W. 81; *Emert* v. *Missouri*, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367.

The action of the state board in valuing and assessing the property of the plaintiff in error is not subject to review or attack in this proceeding.

Cooley, Taxn. 2d ed. p. 748; Burroughs, Taxn. p. 238; *Hamilton* v. *Rosenblatt*, 8 Mo. App. 237; *Yazoo & M. Valley R. Co.* v. *Adams*, 77 Miss. 764, 25 So. 355; *Home F. Ins. Co.* v. *Lynch*, 19 Utah, 189, 56 Pac. 681; *Danforth* v. *Livingston*, 23 Mont. 558, 59 Pac. 916; *State, Elizabeth, Prosecutor*, v. *New Jersey Jockey Club*, 63 N. J. L. 515, 44 Atl. 207; *Dayton* v. *Multnomah*, 34 Or. 239, 55 Pac. 23; *Ledoux* v. *Le Bee*, 83 Fed. 761; *McLeod* v. *Receveur*, 18 C. C. A. 188, 34 U. S. App. 533, 71 Fed. 455; *Brooklyn Elev. R. Co.* v. *Brooklyn*, 16 Misc. 416, 38 N. Y. Supp. 154; *State ex rel. Harrison County Bank* v. *Springer*, 134 Mo. 212, 35 S. W. 589.

Mr. Justice **McKenna**, after stating the facts, delivered the opinion of the court:

On the question of fact, if it be such, as to what the item "of other property at $856,400.56," in the *assessment by the board [421]

of equalization, was constituted of, the trial court and the supreme court of the state are not in accord. The trial court found the "fact to be from the evidence that, in valuation 'of other property' of defendant, the state board took into consideration the franchise of defendant company." It is apparent from the court's opinion that by franchise the court meant the rights and privileges obtained by the plaintiff in error under the act of Congress of July 24, 1866. The supreme court of the state, however, expressed its conclusion from the evidence, as follows:

"So, that, when, in determining the value of the property of the defendant in this state, the board of equalization took into consideration 'the cost of construction and equipment of said Western Union Telegraph Company, and the location thereof, and its traffic and business, and the par value of its stock and bonds, and the gross receipts and net earnings and franchises owned by said company, and the value thereof,' it did not and could not have included therein any franchise derived by the defendant from the government of the United States, because that government had conferred no such franchise; nor was such a valuation placed upon 'all other property,' a tax upon the franchise of the defendant company. The franchise derived by the defendant from the state of New York was considered by the board in determining the value of the property of the defendant located in this state. That is, that property was valued, not as so many poles, so much wire, so many instruments, or so much 'other property,' in the abstract, but was valued in the concrete, in the relation that such property in the abstract bore to other property in the abstract, which being brought into relation towards each other — into a *system*, located partly in this state and partly in other states — gave each part a concrete value, which was much greater than its abstract value. The right to exist,—the franchise—of the defendant, was property, and was subject to taxation, either directly, in the proportion that the portion of the franchise exercised in this state bore to the proportion of the franchise exercised in all other states, or indirectly, as was done in Massachusetts and was done here, by being impressed upon the [422] *tangible property owned by it, thereby increasing its value, and by considering the franchise and its tangible property as a system, and then assessing the part of the property forming a part of the system and located in Missouri as of its proportionate value of the whole property constituting the system."

Plaintiff in error asserts the correctness of the finding of the trial court, and insists that it is the only finding that could have been made, and bases the argument against the taxes assessed on that insistence. But if the finding on the question is one of fact, necessarily we are bound by that made by the supreme court of the state. The trial court picked out the rights given to the defendant under the act of Congress, denominated them a franchise, contemplated the franchise as a distinct proprietary entity, and, because it was derived from the Federal government, decided that it was exempt from taxation. The necessary consequence was and is to destroy the relation between that franchise and the other properties of the plaintiff in error, regarding them, not as parts of the system, but abstractly,— regarding the poles not differently from other poles, the wire not different from other wire. The supreme court, on the contrary, regarded the properties as related and as constituting a system, and because of their relation having a value greater than the sum of the values of the individual things regarded merely as such. Viewing the order of the board of equalization as the supreme court viewed it, was it valid? In other words, Is the state in exercising its taxing power limited to assessing the mere material things used by the plaintiff in error, and must it regard them as of no greater value than they had when they reposed in lumber yards and factories, with cost added of putting them in place? Or the proposition may be stated another way, which better expresses the ultimate contention of the plaintiff in error. Conceding that the tangible property of the telegraph company derives value from its use in a system, does the company do business in the state in pursuance of the Constitution of the United States and the act of July, 1866, and become thereby an instrument of interstate commerce and a government agent, and as such exempt from the taxation contested in this case? We think the question has been answered by this court.

*In *Western U. Teleg. Co.* v. *Atty. Gen.* [423] 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961, the effect of the act of July, 1866, upon the power of the state to tax the property of telegraph companies was considered. The laws of Massachusetts imposed a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that state, the value of which was ascertained by comparing the length of its lines within the state with the length of its entire lines. The tax was sustained. The act of July, 1866, was urged against the tax as it is urged here.

The contentions of the company in that case was, as it is in this, that it did not derive its existence from the state of Missouri, but from the state of New York; that it did not do business in the state of Missouri by permission of that state, but by virtue of being an instrument of interstate commerce; that its rights and privileges and franchises were conferred by the United States and constituted it an agent of the United States, and as such agent it was exempt from the tax imposed. The contentions were rejected. The court did not test or measure the power of the state by the name which its laws gave the tax, and, speaking by Mr. Justice Miller, said:

"The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute

above recited, cannot be taxed by a state, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts it is essentially an excise upon the capital of the corporation. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein."

And that power of the state was explained in an elaborate opinion, and sustained. [424] These propositions were laid down: *The company owed its existence as a corporation and its right to exercise the business of telegraphy to the laws of the state under which it was organized; that the privilege of running the lines of its wires over and along the military and post roads of the United States was granted by the act of Congress, but that the statute was merely permissive, and conferred no exemption from the ordinary burdens of taxation; that the state could not, by any specific statute, prevent a corporation from placing its lines along the post roads or stop the use of them after they were so placed, but the corporation could be taxed, in exchange for the protection it received from the state, "upon its real or personal property as any other person would be." And, describing the particular tax imposed, it was said:

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the state of Massachusetts, and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by § 5263 of the Revised Statutes [U. S. Comp. Stat. 1901, p. 3579] or by the commerce clause of the Constitution."

In other words, the lines in Massachusetts were regarded as a part of a system, and assessed accordingly.

The statute of Massachusetts came up again for consideration in *Atty. Gen.* v. *Western U. Teleg. Co.* 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889, and the principles announced in *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961, were affirmed and followed. See also *Ratterman* v. *Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup* v. *Port of Mobile,* 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

These cases establish that, in estimating the value of the property of a telegraph company situate within a state, it may be regarded, not abstractly or strictly locally, but as a part of a system operated in other states, and that the state was not precluded from taxing the property because the state had not created the company or conferred franchise upon it, or because it derived rights or privileges under the act of July, 1866, or *was engaged in interstate com- [425] merce. Every one of the fundamental propositions, therefore, contended for by plaintiff in error, those decisions declare unsound.

But it is contended that the method of assessment followed in those cases was sustained because they were prescribed by the legislature, and that in the case at bar the method adopted was not prescribed or authorized by the laws of Missouri. The answer is obvious. What the laws of Missouri authorized was competent for the supreme court of Missouri to decide, and it decided that the order of the board of equalization was legal under the Constitution and statutes of the state. The decision, constituting, as it does, an interpretation of the Constitution and laws of the state, is not open to dispute here. If it were, it would seem incontestable that the state could either prescribe the method or confer upon its taxing officers the power to adopt a suitable one. And there is nothing in the *Adams Exp. Co. Cases,* 166 U. S. 171, 225, 41 L. ed. 960, 979, 17 Sup. Ct. Rep. 527, 608, to the contrary.

2. The plaintiff in error asserts that the board of equalization practised discrimination against it by assessing at a value disproportionate to the value assessed on real and personal property by local assessing officers. This defense was expressed as follows:

"Defendant avers that under the law it was the duty of said board of equalization to adjust and equalize as aforesaid the valuation of all real and personal property in the state of Missouri, among the several counties in the state, and that during the period aforesaid it did so proceed to adjust and equalize such valuations. That said state board of equalization, by common arrangement, understanding and purpose among themselves, in fact did during the period aforesaid, in violation of the Constitution and laws of said state of Missouri, with intent to compel defendant to pay a greater proportion of taxes than the owners of other real and personal property in said state of Missouri, assess all property, to wit, other than the property of the telegraph companies, to wit, from 35 to 40 per cent of its true value, whereby as to taxes levied upon real and personal property other than telegraph property in the state of Missouri, this defendant was unlawfully and wrongfully discriminated *against to the extent of [426] 60 per cent of the amount of taxes assessed by said state board of equalization and levied by the taxing officers of the state upon defendant in pursuance of such assessment."

Testimony was introduced to sustain the averments.

The supreme court of Missouri held, how-

ever, that plaintiff in error could not, even under the cases cited by it, avail itself of the defense. The court said:

"The defendant cannot avail itself of these cases, for the reasons (1) that it seeks to raise the question of discrimination by a defense to an action at law to collect the taxes, and thereby collaterally attacks the judgment of the board of equalization; (2) that such questions can only be raised by a direct attack, in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collection of the excess restrained. This the defendant has not done in this case. It simply alleges a discrimination or excessive tax, and then seeks to defeat the whole assessment without paying or tendering anything, notwithstanding it admits by its answer and its proofs that it has property in this state subject to taxation of the value of $541,472.40. Upon the authority of the cases relied on by it, this cannot be done."

We concur in this view. The proceedings before the board were quasi judicial, and the order made by it was within its jurisdiction. It was not void on its face, and cannot be resisted in an action at law. This is the principle announced in the case referred to. In *Stanley* v. *Albany County* [121 U. S. 535, 30 L. ed. 1001, 7 Sup. Ct. Rep. 1234] is cited, among other cases, *Balfour* v. *Portland*, 28 Fed. 738. The case is especially pertinent. The action was at law for the recovery of taxes paid under protest which had been levied upon property which, it was charged, had been deliberately overvalued. Recovery was denied. The circuit court said:

"The property was subject to taxation by the authority and for the purpose alleged. True, the result reached was erroneous, because of the wilful disregard in the proceeding of the law requiring uniformity in the [427] valuation of property for taxation *within the jurisdiction of the defendant. Still the proceeding being quasi judicial, and the subject-matter within the jurisdiction of the officers who conducted it, the result reached is so far conclusive that the legality of it cannot be questioned in an action at law to recover back the one half of the tax as illegal."

So this court said in *Stanley* v. *Albany County:*

"It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Over-valuation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board. *Newman* v. *Livingston County*, 45 N. Y. 676, 687; *National Bank* v. *Elmira*, 53 N. Y. 49, 52; *Bruecher* v. *Port Chester*, 101 N. Y. 240, 244, 4 N. E. 272; *Lincoln* v. *Worcester*, 8 Cush. 55, 63; *Hicks* v. *Westport*, 130 Mass. 478; *Balfour* v. *Portland*, 28 Fed. 738."

And we think overvaluation of property cannot be a ground of defense at law. In other words, the action of the tax officers, being in the nature of a judgment, must be yielded to until set aside. This can only be done in a direct proceeding. The property owner is in effect a plaintiff, and the condition of relief against the enforcement of the quasi judicial order, which he attacks, is a tender of payment of the taxes that he ought to pay. And this condition would still be upon him if he set up overvaluation as an equitable defense to an action brought against him. *Los Angeles County* v. *Ballerino*, 99 Cal. 594, 597, 32 Pac. 581, 34 Pac. 329. This certainly would be so in Missouri, under the doctrine expressed by the supreme court of the state in the case at bar.

*Judgment affirmed.*

Mr. Justice **Brewer** concurs in the result.

Mr. Justice **White** and Mr. Justice **Peckham** dissent.

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*DANFORTH GEER, Willard F. Gay, Arthur W. Smith, *et al.*, *Appts.*, [428]

*v.*

MATHIESON ALKALI WORKS, Castner Electrolytic Alkali Company, Edward E. Arnold, Richard T. Wilson, John G. Agar, Alfred Ely, John Russel Gladdings, *et al.*, as Directors of the Said Mathieson Alkali Works.

(See S. C. Reporter's ed. 428-437.)

*Service of summons on foreign corporation—removal of causes—separable controversy.*

1. Service of summons within the state on resident directors of a foreign corporation is insufficient to give the court jurisdiction of such corporation, where at the time of such service it had ceased to do business within the state, and had designated no agent on whom service could be made.
2. A separable controversy which justifies a removal to a Federal court, where there is diverse citizenship, exists between plaintiffs and two corporations named as defendants in a complaint which seeks to set aside for fraud a conveyance between such corporations, and to prevent the directors of the grantor from making any further disposition of its property, and prays for a reconveyance of such property and an accounting by the grantee for the damages sustained by the transfer.

NOTE.—*As to service of process on foreign corporations*—see notes to Foster v. Charles Betcher Lumber Co. (S. D.) 23 L. R. A. 490, and Eldred v. American Palace-Car Co. 45 C. C. A. 3.

*As to what service of process is sufficient to constitute due process of law*—see note to Pinney v. Providence Loan & Invest. Co. (Wis.) 50 L. R. A. 577.

*On removal of causes generally*—see notes to Whelan v. New York, L. E. & W. R. Co. (C. C. N. D. Ohio) 1 L. R. A. 65; Butler v. National Home for Disabled Volunteer Soldiers, 36 L. ed. U. S. 346, and Torrence v. Shedd, 36 L. ed. U. S. 528.

and also asks that such directors, who are joined as defendants and are not all residents of different states from plaintiffs, be compelled to account as agents and trustees for their actions in the premises, and be required to make good all loss and damage caused by their wrongful conduct.

[No. 261.]

*Submitted April 24, 1903. Decided June 1, 1903.*

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order dismissing a suit for want of due service of process. *Affirmed.*

Statement by Mr. Justice **McKenna:**

This is an appeal from an order dismissing appellants' bill for want of due service of process.

The suit is in equity, and was commenced in the supreme court of the state of New York to set aside the conveyance made by the Mathieson Alkali Company to the Castner Electrolytic Alkali Company, on the ground that the conveyance was fraudulent. The directors of the former company were made defendants. On the petition of the defendant companies the case was removed to the circuit court of the United States for the southern district of New York, on the ground that the controversy was wholly between citizens of different states, and separable as to them. The appellants made the motion in the circuit court to remand the case to the state court, but the motion was denied, the circuit court saying:

"Whatever relief the complainants may be entitled to against the directors upon the facts alleged, they would, as to the two corporations, be entitled to a decree for retransfer of the property, and an accounting for damages sustained by the transfer. This is a controversy separable from the one between complainants and the officers and di-[429]rectors who effected the transfer, *and citizenship of the parties to that separable controversy being such as the statute contemplates, the motion to remand is denied."

The Mathieson Alkali Works (which we shall designate hereafter as the Mathieson Company) then moved the court to set aside the summons and the service thereof, on the ground that it, the Mathieson Company, was, at the time of the service of the summons, a foreign corporation, and at that time, and for some time before, had no place of transacting business in the state of New York, and transacted no business therein. Affidavits were presented on the motion, and it was granted.

The appellants were plaintiffs in the court below, and we will so call them. They are stockholders in the Mathieson Company. Some of them are citizens of the state of New York, some citizens of states other than Virginia, and some citizens of Great Britain and Ireland. It is alleged that the defendant corporations are Virginia corporations, and that each has an office and place of business in the city of New York, and that all but two of the directors of the Castner Electrolytic Alkali Company, hereafter called the Castner Company, resided there, and that the property, to recover which the suit is brought, is situated in the state of New York.

The purpose of the Mathieson Company was to manufacture salt, soda, soda ash, bleaching powder, and other minerals, and to carry on a general merchandise business, and engage in agriculture and stock raising.

The bill is very voluminous, and it is enough to explain the contentions in the case to say that it recites the organization and history of the Mathieson Company; the erection and operation by it of a manufacturing plant at Saltville, Virginia; the leasing by it from the Niagara Falls Power Company of land and power at Niagara Falls, and the establishment of a plant there for the manufacture of the commodities mentioned in the charter of the company, and the carrying on of a profitable business. The bill alleges, on information and belief, that the defendants Arnold and Wilson are, respectively, the president and financial agent and manager of the company; the defendants Agar and Ely, their attorneys; Gladding, an employee of *some sort, and the directors[430] other than Arnold and Wilson are dummies, without substantial interest in the company. That Arnold and Wilson have conducted the affairs of the company with great secrecy, and for their own interests; that Arnold is a member of the firm of Arnold, Hoffman, & Co., dealers in chemicals, in the city of New York, and by arrangements nominally between the firm and the company, but really between Wilson and the firm, the latter has had the exclusive sale and disposition of the products of the company since the organization, of the details of which the plaintiffs are ignorant, because they have been kept secret from the stockholders. That, though dividends have been earned, none have been declared or paid, but have been appropriated by Arnold and Wilson. That they, with the other directors, have confederated and conspired to fraudulently dispose of, and do away with, substantially all of the property of the company, and have attempted to do so by means of the conveyance to the Castner Company, set out in the bill; and, to better conceal their acts, have obtained no certificate from the secretary of state, or designated any person upon whom process can be served. That the Castner Company was promoted and organized by the defendants Arnold and Wilson, and is controlled by them, and they are chiefly interested in its affairs. That plaintiffs only obtained knowledge of the existence of that company within the past few days, and of the conveyance to it, but have no precise knowledge of its affairs, and believe that the great body of the stockholders of the Mathieson Company are ignorant of the existence of the Castner Company or of the conveyance to it. That, by a communication from the secretary of state, it appears that the Castner Company was incorporated April 30, 1901, under the laws of Virginia,

and that its officers consisted of a president, vice president, and seven directors; and a provision in the articles of incorporation shows that the defendants Wilson, Arnold, and Agar are directors, and that Richard T. Wilson, Jr., a son of the defendant Wilson, is also a director. It is alleged that the other officers and directors are mere servants and instruments of the defendants Arnold and Wilson, and they created and organized the Castner Company as a means and contrivance to cheat and defraud the creditors [431] *and stockholders of the Mathieson Company by means of the conveyance to the Castner Company. The conveyance is set out in full. It recites that it is executed for and in consideration of one dollar, and other valuable considerations, and purports to convey certain patent rights and all of the property of the Mathieson Company in the state of New York. The bill also alleges the property conveyed was delivered to the Castner Company, and it is in the possession thereof; that the patents and property conveyed are "essentially necessary" to enable the Mathieson Company to carry on the business for which it was organized, and their conveyance in effect wholly destroys the business of that corporation and renders its capital stock utterly worthless, and deprives the creditors of the corporation, of whom there then were and are a large number, and for a large amount in the aggregate, of all remedy for the collection of their debts. That the conveyance is *ultra vires*, and the defendant directors are trustees and agents of and for the stockholders, and had no power to convey away the property and patents of the company essential to the carrying on of its business. And, by reason of the facts alleged, the defendant directors are unfit persons to have the charge and management of the affairs of the company, and that a receiver of the corporation should be appointed, and the defendants enjoined. That, for the reasons set forth, plaintiffs have not applied to the defendant the Mathieson Company to bring this action, being advised that its directors "would not be proper persons to prosecute an action in the name of the company, which was practically an action to redress frauds they themselves had committed."

The specific relief asked is stated in the opinion.

*Mr.* **W. W. MacFarland** submitted the cause for appellants. *Messrs. MacFarland, Taylor, & Costello* were with him on the brief.

There is no separable cause of action stated in the complaint, and, therefore, no right of removal on that ground.

Black's Dillon, Removal of Causes, §§ 77, 143, 144; *Hyde* v. *Ruble*, 104 U. S. 409, 26 L. ed. 823; *Fraser* v. *Jennison*, 106 U. S. 191, 27 L. ed. 131, 1 Sup. Ct. Rep. 171; *Ayers* v. *Wiswall*, 112 U. S. 187, 28 L. ed. 693, 5 Sup. Ct. Rep. 90. See also *Broadway Ins. Co.* v. *Chicago G. W. R. Co.* 101 Fed. 507.

The directors are not nominal and unnecessary parties, when by the bill they are expressly implicated in a breach of trust, an abuse of the corporate name and seal, and a fraudulent disposition of the property intrusted to their management, as they are in this case, and where, as in this case, the bill prays for relief against them.

*Seddon* v. *Virginia, T. & C. Steel & I. Co.* 1 L. R. A. 108, 36 Fed. 6; *Hanover Nat. Bank* v. *Credits Commutation Co.* 118 Fed. 110.

The directors are the real defendants; the corporations, whose names they have used and abused, are merely legal entities whose presence is legally essential for mechanical purposes.

Black's Dillon, Removal of Causes, § 87.

The directors of a business corporation, which is practically a copartnership (*Ervin* v. *Oregon R. & Nav. Co.* 23 Blatchf. 517, 27 Fed. 625; Morawetz, Priv. Corp. §§ 973, 818), are in a very strict sense accountable agents.

The case is substantially a suit *in rem*.

Waples, Proceedings in Rem, chaps. 56, 57.

*Mr.* **Alfred Ely** submitted the cause for appellees. *Messrs. Agar, Ely, & Fulton* were with him on the brief.

The service of summons was invalid.

*Goldey* v. *Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Wabash Western R. Co.* v. *Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126; *Barrow S. S. Co.* v. *Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526.

Only necessary parties are to be regarded by the court, and the residence of president and directors, codefendants, does not bar the corporation's right of removal.

*New York* v. *New Jersey S. B. Transp. Co.* 24 Fed. 818.

The decision of the circuit court denying the plaintiff's motion to remand should be affirmed.

*Barney* v. *Latham*, 103 U. S. 205, 26 L. ed. 514.

Mr. Justice **McKenna**, after stating the facts as above, delivered the opinion of the court:

The facts and arguments by which it is attempted to sustain the service on the Mathieson Company are the same as *were [432] presented in the case of *Conley* v. *Mathieson Alkali Works*, decided May 18 of this term. 190 U. S. 406, *ante*, 1113, 23 Sup. Ct. Rep. 728. On the authority of the case the service in this must be held insufficient to give jurisdiction of the Mathieson Company, and the order of the circuit court setting aside the service of summons must be affirmed if the case was properly removed to that court. And this depends upon the question whether the complaint exhibits a separable controversy between the plaintiffs and the companies.

A suit may, consistently with the rules of pleading, embrace several distinct controversies. *Barney* v. *Latham*, 103 U. S. 212, 26 L. ed. 517. It was said in *Hyde* v. *Ruble*, 104 U. S. 409, 26 L. ed. 824: "To entitle a party to a removal under this clause [2d

clause of § 2 of the act of 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), same as 2d clause in the act of 1887 (24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 582)], there must exist in the suit a separate and distinct cause of action in respect to which all the necessary parties on one side are citizens of different states from those on the other." In other words, as expressed in *Fraser* v. *Jennison*, 106 U. S. 194, 27 L. ed. 132, 1 Sup. Ct. Rep. 171 "the case must be one capable of separation into parts, so that, in one of the parts, a controversy will be presented with citizens of one or more states on one side, and citizens of other states on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun." And, when two or more causes of action are united in one suit, there can be a removal of the whole suit on the petition of one or more of the plaintiffs or defendants (now only the defendants) interested in the controversy which, if it had been sued on alone, would be removable. *Hyde* v. *Ruble*, 104 U. S. 409, 26 L. ed. 824. See also *Ayers* v. *Wiswall*, 112 U. S. 187, 28 L. ed. 693, 5 Sup. Ct. Rep. 90. The application of these principles to the case at bar will be seen by the relief prayed for.

The relief prayed against the companies is as follows: Against the Mathieson Company, that the conveyance in its name be adjudged fraudulent and void, and that the same be annulled; that a receiver of its works be appointed; that its directors be enjoined from making any further disposition of its property; that it be required to make a full disclosure in respect to all of the prem-[433]ises set forth and alleged, and that *the complainants have access to all books, records, and papers, including the stock book. Against the Castner Company, that it may be required to account for all acts and doings in the premises set forth; to make good and pay all of the damages sustained by complainants to the Mathieson Company by reason thereof; that it be adjudged to reconvey the property so wrongfully conveyed to it in the name of the Mathieson Company; that it account for and pay all of the income, earnings, and revenue of the property since the date of the conveyance.

To the relief asked against the companies, were the directors of the Mathieson Company necessary parties? In *Winch* v. *Birkenhead, L & C. Junction R. Co.* 5 De G. & S. 562. it was held, in a suit by a stockholder of the corporation in behalf of himself and all other stockholders, to restrain the performance of an *ultra vires* agreement, that it was not necessary that the directors should be made parties. It was said by the vice chancellor: "The act that is sought to be restrained is the act of the company. It is quite sufficient if there is an order restraining the company. The company itself cannot act except by means of its officers. It appears to me that the suit is properly framed, by the relief being sought against the company alone."

*Hatch* v. *Chicago, R. I. & P. R. Co.* and *Same* v. *Same*, 6 Blatchf. 105, Fed. Cas. No. 6,204, were suits brought by the plaintiff in each in behalf of himself and all other stockholders of the defendant corporation, to restrain it from executing a contract which was alleged to be in excess of its powers. The plaintiff was a citizen of New York. The suits were brought in the supreme court of the state of New York. The individual defendants were directors of the corporation, and resided in the state of New York, except one, who was a citizen of the state of Illinois. In the second suit one Denham was made a party, who was the treasurer of the company, but not one of its directors. His citizenship does not appear. The plaintiff in the second suit alleged that the committee of directors had determined to close the transfer office of the company in the city of New York, and to remove all of its books, moneys, securities, and property beyond the jurisdiction of the *court; that the defendants had refused to[434] permit any transfer of the shares of stock on the books of the company. Judgment was prayed in the first suit for an injunction against the execution of the illegal contract, and of the acts which were alleged to be contemplated in the performance thereof. In the second suit judgment was prayed for the same injunction, and an injunction against the other acts alleged. On the petition of Tracy and the company, the cases were removed to the circuit court for the southern district of New York, and a motion was made to remand. The motion was heard by Mr. Justice Blatchford, who was then United States district judge, who said:

"These suits, therefore, are suits brought in the state of New York, by Hatch, a citizen of New York, against the members of the company, all of whom are citizens of the state which created the company, and which is a state other than New York, and against Tracy, a citizen of Illinois, and against other defendants, who are citizens of New York."

And describing the suits, said further:

"All the relief that is prayed for in either suit is by injunction, except the prayer in the first suit for a receiver. All the relief by injunction is prayed for in respect to all of the defendants. No such relief is prayed for in respect to any defendant other than the company that is not prayed for in respect to the company. The suits are really, both of them, wholly against the company alone. The directors and the treasurer, who are its codefendants, are merely its servants and agents, through whom necessarily it acts. It was not necessary or proper to make them parties to the suit at all. The injunctions prayed for and the injunctions issued, if issued against the company alone, and served on any director, or on the treasurer, would bind the person so served to obedience, and, even without such service, knowledge by the officer of the existence of the injunction against the company would bind the officer to obedience. *People ex rel. Davis* v. *Sturtevant*, 9 N. Y. 263, 277, 59 Am. Dec. 536. The directors and the treasurer are, therefore, not real parties to the suits, but merely nominal parties. No personal demand is made against any one of

[435] them, nor is any personal accounting *asked from any one of them, and it is only in his relation to the company, and in the official position that he occupies toward the company, that any one of them is made a party. The test of this is, that, if any one of the directors or the treasurer were to resign his office, he would necessarily cease, *ipso facto*, to be a proper party to the suit, and the plaintiff would be obliged to make his successor in office a party, and so on with every change. The reason for this would be that, there being no relief prayed against the individual in his individual capacity, and the injunction asked being to restrain him merely from doing or not doing what his official relation to the company alone enables him to do, or to refrain from doing, when such official relation ceases, the relief asked and the injunction issued become, as to him, utterly futile. This would not be the case where he was made a party defendant, jointly with the corporation of which he was an officer, for the purpose of obtaining some specific relief against him on a personal liability, or in order to obtain a discovery from him in regard to matters peculiarly within his knowledge. There, the dissolution of his official relation would not affect the propriety of his being retained as a defendant. This view is conclusive to show that the entire real controversy in both suits, so far as it is shown by the prayer of the complainants, and which is the only guide the court can have, is between the plaintiff on the one side, and the company, as a corporate body, on the other. The plaintiff cannot, by joining as nominal defendants with the corporation persons who are citizens of the same state with the plaintiff, deprive the corporation of any right which it would otherwise have in respect to removing the cause into this court."

*Heath* v. *Erie R. Co.* came up before the same learned justice, and is reported in 8 Blatchf. 347, Fed. Cas. No. 6,306, 8 Blatchf. 413, Fed. Cas. No. 4,513. It was a suit by stockholders against the railway company and Jay Gould, James Fisk, Jr., and Frederick A. Lane, who were directors of the company. The object of the suit was to restrain *ultra vires* acts. The bill prayed for an injunction, for a receiver, for an accounting by Gould, Fisk, and Lane of the profits made by them, and that they "make payment and compensation to the company, for the [436] benefit of the plaintiffs and the *other bona fide shareholders, to the full extent of all such profits, benefits, gains, and advantages, and of all such damages, losses, and injuries." The bill was demurred to, on the ground, among others, that the other directors, fourteen in number, were not made parties to the bill. The court overruled the demurrer. The main part of the opinion, which was very elaborate, is devoted to the consideration of the right of the stockholders to maintain the suit, which right was sustained on the authority of many cases. Of the ground of demurrer that the other directors had not been made parties, the court said:

"The objection that such fourteen persons ought to be made parties, as appearing to have been directors when the bill was filed, for the reason that the bill asks for an injunction against the corporation, and for a receiver of the corporation, is not well taken. The relief so asked is against the corporation. If such fourteen persons were made parties, they would be merely nominal parties, and not real parties, in respect to any relief that is asked against the corporation; and no relief is asked as against them, except in respect to the matter of the classification, which has already been disposed of. This question was fully considered in the case of *Hatch* v. *Chicago, R. I. & P. R. Co.* 6 Blatchf. 105, 114-116, Fed. Cas. No. 6,204."

It was, however, said by Lord Cairns in *Ferguson* v. *Wilson*, L. R. 2 Ch. 90, and it was held in *Clinch* v. *Financial Corporation*, L. R. 4 Ch. 117, that it was proper in a suit by a stockholder to restain *ultra vires* acts of a corporation to join as defendants the directors of the corporation. This ruling is reconcilable with the other cases. The reconciliation lies in the distinction between proper and indispensable parties in view of the statute providing for the removal of causes to the Federal courts. *Barney* v. *Latham*, 103 U. S. 212, 26 L. ed. 517.

But relief is prayed against the individual defendants as follows:

"That the individual defendants, directors of the said Mathieson Alkali Works, may be compelled to account as agents and trustees of the said company for all their acts and doings in the premises above set forth; and that they may severally and respectively be adjudged and required to make good and pay *to the said Mathieson Alkali Works [437] and to the plaintiffs all loss and damage caused by their wrongful conduct in the premises as hereinabove set forth."

If it be conceded that, in a suit which seeks such relief, the Mathieson Company is a necessary party, it is certain the Castner Company is not. Besides, the relief is distinct from—separable from, to keep to the language of the cases—that which is sought as a result of the grounds of suit against the companies.

It follows from these views that the bill exhibits a controversy between the plaintiffs and the defendant companies, to which the individual defendants are not necessary parties, and the case was rightfully removed to the circuit court.

*The order of the latter court setting aside the service of summons on the Mathieson Company, and dismissing the bill for want of jurisdiction of that company, is affirmed.*

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BOARD OF COMMISSIONERS OF STANLY COUNTY and I. W. Snuggs, Treasurer of Stanly County, *Petitioners*,

*v.*

W. N. COLER & COMPANY.

(See S. C. Reporter's ed. 437-451.)

*Railway aid—validity of county bonds—ef-*

NOTE.—*On municipal bonds generally*—see notes to Sutliff v. Lake County, 37 L. ed. U. S.

*fect of recitals—bona fide purchaser—construction of state statute—when not binding on Federal courts.*

1. Purchasers of county bonds purporting to be issued for subscriptions to the capital stock of a railroad company, under the authority of N. C. Code, §§ 1996–1999, authorizing such subscriptions when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest, are not entitled to assume, for the purpose of sustaining the validity of the bonds, that the railroad had been begun before the adoption of N. C. Const. 1868, which antedated the charter of the railroad company.
2. Federal courts, in determining the validity, in the hands of bona fide purchasers, of county bonds issued in aid of railroad construction under the authority of N. C. Code, §§ 1996–1999, are not bound by the construction given such statute by a decision of the highest state court subsequent to such purchase, but will exercise an independent judgment as to its meaning.
3. An interest in an unfinished railroad begun before the adoption of N. C. Const. 1868 cannot be deemed essential to the exercise by a county of the power to issue bonds in aid of railroad construction, conferred by N. C. Code, §§ 1996–1999, "when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest," on the theory that such sections, being a reproduction of a statute passed shortly after the adoption of such Constitution, must be construed in the light of the constitutional provision which forbade the state to lend its aid to any corporation except in aid of the completion of such railroads as might be unfinished at the time of its adoption, or in which the state had a direct pecuniary interest.
4. Recitals in county bonds that they were issued, under the authority of N. C. Code, §§ 1996–1999, to pay a subscription to the capital stock of a railway, entitled bona fide purchasers to assume that the condition of the railroad as to construction and the "interest" of the county therein were such as, by § 1996, were required to exist before the power to issue such bonds could be exercised.

[No. 264.]

*Argued April 27, 28, 1903. Decided June 1, 1903.*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which on rehearing affirmed a decree of the Circuit Court for the Western District of North Carolina sustaining the validity of county bonds issued in aid of railroad construction. *Affirmed.*

See same case below, 37 C. C. A. 484, 96 Fed. 284, 51 C. C. A. 379, 113 Fed. 705.

Statement by Mr. Justice **McKenna:**

*This suit was brought in the United States circuit court for the western district of North Carolina, by the respondents against the petitioner, to recover on certain coupons attached to bonds alleged to have been issued by Stanly county, state of North Carolina, in part payment of the subscription of said county to the capital stock of the Yadkin Valley Railroad Company. The bill alleged the following facts: [438]

The Yadkin Valley Railroad Company was organized as a corporation under the laws of North Carolina, to construct and operate a railroad running from Salisbury in that state, south to Norwood, a point in Stanly county.

The incorporation of the said company was under and by virtue of chapter 236 of the Acts of 1870, passed by the legislature for that year; and the said chapter was amended by an act of the legislature,—chapter 183 of the Acts of 1887.

The county, being desirous of aiding in the construction of said road, and acting through its proper authorities, subscribed the amount of $100,000 to the capital stock of the company, in pursuance of the authority and power conferred upon the said county under and by virtue of the acts of the legislature of North Carolina as above set out; and, also, under and by virtue of §§ 1996, 1997, 1998, and 1999 of the Code of North Carolina, all of the said acts and sections of the Code of North Carolina having been enacted and become laws in accordance with the Constitution of the state.

The county still holds the stock and derives benefit from the road in increased facilities for transportation, greatly increased value of the lands of the county, and from the taxes paid thereon. A copy of the bonds was attached to the bill, and is inserted in the margin.†

†EXHIBIT A.

(Copy.)

*County of Stanly Six per Cent Bond.*

Stanly county, state of North Carolina, is indebted to the bearer in the sum of five hundred dollars, lawful money of the United States, payable on the first day of July, A. D. one thousand nine hundred and twenty, with interest thereon from the first day of July, A. D. one thousand eight hundred and ninety, at the rate of six per cent per annum, payable on the first day of July in each year at the First National Bank of Salisbury, North Carolina, on presentation and surrender of the respective coupons hereto attached, as they severally become due and payable. This bond is one of a series of eighty of the denomination of one thousand dollars each, and forty of the denomination of five hundred, making a total of one hundred thousand dollars, issued by authority of an act of the general assembly of North Carolina, ratified the third day of March, A. D. 1887, entitled "An Act to Amend the Charter of the Yadkin Railroad Company," and of §§ 1996, 1997, 1998, and 1999 of the Code of North Carolina, and author-

145; Harper County v. Rose, 35 L. ed. U. S. 344; Rich v. Mentz, 33 L. ed. U. S. 1075, and Citizens' Sav. & L. Asso. v. Perry County, 39 L. ed. U. S. 585.

*On estoppel by recital in negotiable bonds*—see note to Mercer County v. Hackett, 17 L. ed. U. S. 548.

*As to state decisions and laws as rules of decision in Federal courts*—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson *ex dem.* St. John v. Chew, 6 L. ed. U. S. 583; United States *ex rel.* Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334, and Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

[439] *The bonds were exposed for sale, and the respondents became purchasers of them in good faith, and at the highest market price, and without any notice, express or implied, that there was any suggestion of their being void, invalid, fraudulent, or otherwise than perfectly legal in their issue and sale.

Interest on the bonds issued, as the same has become due, has been paid for the last four years. The coupons due and the amounts thereof are as follows:

| | |
|---|---|
| 48 Stanly county coupons, Nos. 2, 46, 48, 49, and 72, $60.00 each.. | $2,880 00 |
| 33 Stanly county coupons, Nos. 81, 92, 95, 96, 98, 108, 110, 112, 116, 118, 120, all numbers inclusive, $30.00..... | 990 00 |
| Making the sum of..... | $3,870 00 |

[440] *The payment of said sums was demanded at the proper time and refused, although the said total sum had been collected from the taxpayers of the county by the board of commissioners, in pursuance of the power conferred upon them, and was in the hands of I. W. Snuggs (one of the petitioners here), as treasurer of the county, and, having received the same for the payment of said interest, he became and is the trustee and agent of the bond and coupon holders, and therefore holds the same "for the use and in trust for complainants." The complainants are informed and believe that the reason why said treasurer has not accounted to them is that he has been restrained by a certain process of injunction, issued by one of the superior courts of the state of North Carolina in a suit brought in the name of the board of commissioners, and in the names of James P. Nash and G. R. McCain as plaintiffs, and against the said I. W. Snuggs as defendant, but that complainants were not made parties to the same, nor was any other bondholder. The treasurer and board of commissioners, unless restrained, will dispose of the fund collected as aforesaid. An injunction was prayed, and the statement of an account, and the appointment of a receiver asked.

The answer attacked the validity of the bonds, and averred that their invalidity was adjudged by the supreme court of the state in the case of *Stanly County* v. *Snuggs*, 121 N. C. 394, 39 L. R. A. 439, 28 S. E. 539, "and that there has been no other decision or judgment given by said supreme court in conflict with the aforesaid decision; but that the said decision is uniform with the decision of the same court, delivered in the case of *Union Bank* v. *Oxford*, 119 N. C. 214, 34 L. R. A. 487, 25 S. E. 966, which are the only two cases in which the principle, or validity of these bonds has ever been before the supreme court of the state." There were proper replications made to the answer. The case was submitted on the pleadings and certain exhibits, some of them being the records of the suits in the courts of North Carolina.

The grounds upon which the bonds are claimed to be invalid are indicated in the opinion. A decree was entered declaring and adjudging the bonds to be valid obligations of the county of Stanly; that complainants (respondents here) in the suit *were bona [441] fide purchasers and holders thereof; that I. W. Snuggs was the trustee of the bondholders, and held the sum of $6,000 as such trustee, for the benefit of the bondholders, under and by virtue of the law and the orders of the board of commissioners of the county, and for the sole purpose of paying off and discharging the interest due on the bonds as set out in the bill. The decree also appointed a receiver for said sum, and ordered that said I. W. Snuggs pay the same to the receiver. It was further adjudged that the board of commissioners of Stanly county be enjoined from in any manner interfering with the execution and performance of the decree. The decree was reversed by the circuit court of appeals, and the cause was remanded "with directions to dissolve the injunction, discharge the receiver, and dismiss the bill." 37 C. C. A. 484, 96 Fed. 284. A rehearing was granted, and the decree of the circuit court was affirmed. 51 C. C. A. 379, 113 Fed. 705.

*Messrs.* **James E. Shepherd** and **A. C. Avery** argued the cause, and, with *Mr. Charles M. Busbee*, filed a brief for petitioners:

The construction by the courts of a state of its Constitution and statutes is, as a general rule, binding on the Federal courts.

*Claiborne County* v. *Brooks*, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *Detroit* v. *Osborne*, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012; *South Branch Lumber Co.* v. *Ott*, 142 U. S. 622, 35 L. ed. 1136, 12 Sup. Ct. Rep. 318; *Kaukauna Water Power Co.* v. *Green Bay & M. Canal Co.* 142 U. S. 254, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; *McElvaine* v.

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ized by a majority vote of the qualified voters of Stanly county, at an election regularly held for that purpose on the 15th day of August, A. D. 1889, duly ordered by the board of commissioners of Stanly county.

This series of bonds is issued to pay the subscription of one hundred thousand dollars made by Stanly county to the capital stock of the said railroad, known as "The Yadkin Railroad Company." Stanly county reserves the privilege of paying the principal and interest of any or all of this series of bonds at any time after the expiration of ten years, upon the board of commissioners of said county first giving three months' notice of such payment in some newspaper published in said county, when such bonds shall be paid, according to number, beginning with number one.

In testimony whereof, the chairman of the board of county commissioners of Stanly county hath hereunto subscribed his name, for and on behalf of said board, and the clerk of the superior court of Stanly county hath countersigned the same and affixed thereto the seal of said superior court, this first day of July, A. D. one thousand eight hundred and ninety.

——— ———, *Chairman.*

Countersigned:

———, *Clerk of Superior Court.*

*Brush*, 142 U. S. 155, 35 L. ed. 971, 12 Sup. Ct. Rep. 156; *Stutsman County* v. *Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227; *Norton* v. *Shelby County*, 118 U. S. 425, 30 L. ed. 178, 6 Sup. Ct. Rep. 1121; *Gormley* v. *Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, 13 Sup. Ct. Rep. 54; *Bauserman* v. *Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *May* v. *Tenney*, 148 U. S. 60, 37 L. ed. 368, 13 Sup. Ct. Rep. 491; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Lewis* v. *Monson*, 151 U. S. 545, 38 L. ed. 265, 14 Sup. Ct. Rep. 424; *Balkam* v. *Woodstock Iron Co.* 154 U. S. 177, 38 L. ed. 953, 14 Sup. Ct. Rep. 1010; *Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261.

When it is found that no construction had been given to a statute by the state court when the transaction was entered into, the Federal courts will lean toward an agreement of views with the state courts, if the question seems to them balanced with doubt.

*Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10.

The courts have uniformly construed the word "interest" in such connection as here used to mean "pecuniary interest" in the thing referred to.

*Smedly* v. *Kirby*, 120 Mich. 253, 70 N. W. 188; *Taylor* v. *Normal Highway Comrs.* 88 Ill. 527; *Northampton* v. *Smith*, 11 Met. 395; *Dunlap* v. *Philadelphia*, 13 W. N. C. 98; *McGrath* v. *People*, 100 Ill. 464; *State, National R. Co., Prosecutors*, v. *Easton & A. R. Co.* 36 N. J. L. 184; *Linden* v. *Alameda County*, 45 Cal. 7; *Ashe* v. *Colusa County*, 71 Cal. 236, 16 Pac. 783.

Interest has often been construed as meaning a pecuniary, valuable, or beneficial interest, not merely a patriotic or sentimental interest, which a citizen of a state or county feels in a public improvement.

*Todd* v. *Robinson*, L. R. 14 Q. B. Div. 739; *Hunnings* v. *Williamson*, L. R. 11 Q. B. Div. 536; *Dexter* v. *Cotting*, 149 Mass. 92, 21 N. E. 230; *Bachman* v. *Packard*, 2 Sawy. 264, Fed. Cas. No. 709; *Northampton* v. *Smith*, 11 Met. 395; *Goodall* v. *Tuttle*, 3 Biss. 219, Fed. Cas. No. 5,533; *Whitney* v. *Britton*, 16 App. Div. 457, 45 N. Y. Supp. 1150; *Horn* v. *Volcano Water Co.* 13 Cal. 62, 73 Am. Dec. 569; *Brigham* v. *Gott*, 20 N. Y. S. R. 420, 3 N. Y. Supp. 518; *Whiteley* v. *Barley*, L. R. 21 Q. B. Div. 154; *Burgess* v. *Clark*, L. R. 14 Q. B. Div. 735; *Gasquet* v. *Johnson*, 1 La. 431; *Sauls* v. *Freeman*, 24 Fla. 209, 4 So. 525; *Chicago, B. & Q. R. Co.* v. *Kellogg*, 54 Neb. 138, 74 N. W. 403; *Taylor* v. *Normal Highway Comrs.* 88 Ill. 527; *Re White*, 37 Cal. 190; *Shelton* v. *Derby*, 27 Conn. 415; *Phillips* v. *Smith*, 62 Ala. 578.

The definitions of lexicons and law-books uniformly define an interest in any kind of property in the same way. If the word has no technical meaning, then it must be interpreted according to its ordinary meaning. If the courts have given it a technical meaning, that must be adopted.

*Adams* v. *Turrentine*, 30 N. C. (8 Ired. L.) 147; *Blue* v. *McDuffie*, 44 N. C. (Busbee, L.) 131; *Randall* v. *Richmond & D. R. Co.* 107 N. C. 748, 11 L. R. A. 460, 12 S. E. 605.

The question of legislative authority in a municipal corporation to issue bonds in aid of a railroad company cannot be concluded by mere recitals.

*Gunnison County* v. *E. H. Rollins & Sons*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390.

The estoppel does not arise except upon matters of fact, which the corporate officers had authority by law to determine and to certify.

*Dixon County* v. *Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; *Gunnison County* v. *E. H. Rollins & Sons*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390.

No recital will create or dispense with the requisite authority to issue the bond.

1 Randolph, Com. Paper, § 345a.

Otherwise, it would always be in the power of a municipal body, to which power is denied, to usurp the forbidden authority by declaring that its assumption was within the law.

*Dixon County* v. *Field*, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315.

The rule, as settled by the latest authority, seems to be that where the law authorizes the municipal authorities to determine whether a condition precedent to subscribing and issuing bonds has been complied with, or when the data for determining whether it has been complied with are peculiarly within the knowledge or possession of such authorities, as to such conditions the recitals in bonds issued are conclusive.

*Gunnison County* v. *E. H. Rollins & Sons*, 173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390.

Neither the question whether Stanly county had an interest, nor whether the road was complete, was within the peculiar knowledge of the commissioners of Stanly county, nor were they custodians of a record by which alone that question could be determined, as in the case where the Constitution or law prescribed a limit as to the amount of indebtedness, and the county authorities only have the data for ascertaining the outstanding indebtedness.

*Ibid.*

The respondents are deemed to have notice of the fact that the railroad had never been begun, and was not such a road as the supreme court of the state had defined to be an unfinished or incomplete road, or one in which the county was interested.

*Galloway* v. *Jenkins*, 63 N. C. 149.

The preliminary question whether the railroad was incomplete, or the county had an interest, was not one as to which the commissioners had peculiar knowledge, qualifying them to answer. They had such knowledge as the whole public could obtain, —nothing more. It was incumbent on the respondents to inquire about the fact, because the incompleteness or completeness, or the interest of the county, was a test of the existence of the power of the board, not a

condition precedent to the exercise of a power granted.

2 Dill. Mun. Corp. § 542; *Sherrard* v. *Lafayette County*, 3 Dill. 236, Fed. Cas. No. 12,771; *Marsh* v. *Fulton County*, 10 Wall. 676, 19 L. ed. 1040; *Kelly* v. *Milan*, 21 Fed. 842; *East Oakland Twp.* v. *Skinner*, 94 U. S. 255, 24 L. ed. 125; *McClure* v. *Oxford Twp.* 94 U. S. 429, 24 L. ed. 129; *South Ottawa* v. *Perkins*, 94 U. S. 261, 24 L. ed. 154; *Hayes* v. *Holly Springs*, 114 U. S. 120, 29 L. ed. 81, 5 Sup. Ct. Rep. 785; *Ogden* v. *Daviess County*, 102 U. S. 634, 26 L. ed. 263; *Buchanan* v. *Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Purdy* v. *Lansing*, 128 U. S. 557, 32 L. ed. 531, 9 Sup. Ct. Rep. 172; *Knox County* v. *Aspinwall*, 21 How. 539, 16 L. ed. 208; *Coloma* v. *Eaves*, 92 U. S. 484, 23 L. ed. 579.

Even if this were not so the recital, to be conclusive, must have been in this case to the effect that the bonds were issued to aid in the completion of the Yadkin railroad; were "necessary to aid in the completion" of that railroad; and that "the citizens" of Stanly county had an interest in said railroad, at the time contemplated by the legislature in passing the act of 1869.

*Orleans* v. *Platt*, 99 U. S. 676, 25 L. ed. 404; *Gunnison County* v. *E. H. Rollins & Sons*, 173 U. S. 264, 43 L. ed. 694, 19 Sup. Ct. Rep. 390.

*Mr.* **John F. Dillon** argued the cause, and, with *Messrs. Harry Hubbard, John M. Dillon*, and *Charles Price* filed a brief for respondents:

No court in this country has stated in stronger language than the supreme court of North Carolina the doctrine of the negotiability of municipal bonds and of estoppel by recitals in such bonds.

*Belo* v. *Forsythe County*, 76 N. C. 489.

Federal courts will follow the decisions of the state court which had been rendered at the time the bonds were issued.

*Wilkes County* v. *Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; *Folsom* v. *Township Ninety-Six*, 159 U. S. 616, 40 L. ed. 278, 16 Sup. Ct. Rep. 174; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Pine Grove Twp.* v. *Talcott*, 19 Wall. 667, 22 L. ed. 227.

Decisions in a state court rendered after the issuance of bonds by some municipality in such state are not binding on the Federal courts.

*Venice* v. *Murdock*, 92 U. S. 494, 23 L. ed. 583; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10; *Pine Grove Twp.* v. *Talcott*, 19 Wall. 666, 22 L. ed. 227.

The words "issued by authority of §§ 1996, 1997," etc., in favor of bona fide purchasers for value, import full compliance with these sections of the Code.

*Evansville* v. *Dennett*, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613; *Independent School Dist.* v. *Stone*, 106 U. S. 183, 27 L. ed. 90, 1 Sup. Ct. Rep. 84; *Waite* v. *Santa Cruz*, 184 U. S. 302, 46 L. ed. 552, 22 Sup. Ct. Rep. 327.

It is immaterial that the bonds also recited the act of 1887 (even if said act is invalid).

*Wilkes County* v. *Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; *Evansville* v. *Dennett*, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613; *Anderson County* v. *Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433.

The order of the commissioners recites that the citizens of the county have an interest in the railroad, and this is conclusive of the fact, whatever these words of the Code may mean.

*Belo* v. *Forsythe County*, 76 N. C. 489.

The express recital in these bonds is conclusive in favor of the bona fide holder of these bonds, that all those conditions existed which were required by the said sections of the Code to exist precedent to the issue of the bonds.

*Evansville* v. *Dennett*, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613.

The recital of the act of March 3, 1887, in the bonds is immaterial.

*Wilkes County* v. *Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458; *Anderson County* v. *Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; *Evansville* v. *Dennett*, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613; *Knox County* v. *Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Cairo* v. *Zane*, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803.

Whether or not the railroad had been begun before April 10, 1869, or even before the adoption of the Constitution, was a fact *in pais* to be determined by the county commissioners before they issued the bonds, and not a matter with which the bona fide purchaser of these negotiable municipal bonds is concerned.

*Knox County* v. *Ninth Nat. Bank*, 147 U. S. 91, 37 L. ed. 93, 13 Sup. Ct. Rep. 267; *Cairo* v. *Zane*, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803; *Anderson County* v. *Beal*, 113 U. S. 227, 28 L. ed. 966, 5 Sup. Ct. Rep. 433; *Evansville* v. *Dennett*, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613; *Wilkes County* v. *Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458.

Mr. Justice **McKenna**, after stating the case as above, delivered the opinion of the court:

It will be observed that the bonds recited that they were "issued by authority of an act of the general assembly of North Carolina, ratified the 3d day of March, A. D. 1887, entitled 'An Act to Amend the Charter of the Yadkin Railroad Company,' and of §§ 1996, 1997, 1998, and 1999 of the Code of North Carolina, and authorized by the majority vote of the qualified voters of Stanly county, at an election regularly held for that purpose, on the 15th day of August, A. D. 1889, duly ordered by the board of commissioners of Stanly county." The act of March 3, 1887, referred to, was an amendment of the act by which the Yadkin Railroad Company was incorporated (1870–71), and was declared by the supreme court of the state not *to have been passed in accord- [442

ance with the constitutional provision requiring the yeas and nays to be entered upon the journals of each house of the general assembly. *Union Bank* v. *Oxford*, 119 N. C. 214, 34 L. R. A. 487, 25 S. E. 966; *Stanly County* v. *Snuggs*, 121 N. C. 394, 39 L. R. A. 439, 28 S. E. 539. The ruling was decided to be binding upon this court. *Wilkes County* v. *Coler*, 180 U. S. 506, 45 L. ed. 642, 21 Sup. Ct. Rep. 458, 190 U. S. 107, *ante*, 971, 23 Sup. Ct. Rep. 738.

The same objection does not lie to the sections of the Code of North Carolina recited in the bonds, and the controversy in the pending case turns upon the meaning of those sections and the effect of the recitals in the bonds.

Section 1996 provides as follows: "The boards of commissioners of the several counties shall have power to subscribe stock to any railroad company or companies, when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest." This section and the four succeeding sections were the reproductions of a statute passed in 1868-69, a few days more than a year after the Constitution of 1868, and were passed upon and interpreted by the supreme court of North Carolina in *Stanly County* v. *Snuggs*, 121 N. C. 394, 39 L. R. A. 439, 28 S. E. 539. The court said:

"It is most reasonable to conclude that the policy and purpose of both the constitutional provision and the statute [Code provisions] were the same, the only difference being that, in case of state aid, no approval by vote of the people was required, while a majority vote of the people was required in cases of county aid. The object of the statute must have been to provide, by a general act, means by which the counties, without special legislation for each county by separate bills, might be enabled to complete unfinished railroads in which the counties had a pecuniary interest. At the time of the enactment of the statute of 1868-69, and always since that time, any county of the state, duly observing the limitations of § 7 of article 7 of the Constitution, and under an act passed according to the requirements of § 14, art. 2, of the Constitution, could and can subscribe to the capital stock of the railroad company, whether unfinished or to be begun. The act of 1868-69, however, considering the condition of affairs then existing, that is, that there were counties which had a pecuniary [443] interest in railroads *that had been begun but were unfinished, enabled such counties to make subscriptions of bonds to complete such unfinished roads at the earliest moment and with the least cost, by a general law passed according to § 14, art. 2, of the Constitution. This reasoning leads us to the still further conclusion that, at the time when the act of 1868-69 was brought forward in the Code, § 1996, and the four succeeding sections, it could have had reference to no cases except those where the counties had a pecuniary interest in unfinished railroads at the adoption of the Constitution of 1868, and that, therefore, the Code sections could not apply to the present case, because the Yadkin Railroad was not begun to be constructed until about 1889."

It will be observed, therefore, that the supreme court decides that the interest of the county must have been *pecuniary*, and the railroad must have been begun *at the adoption of the Constitution of* 1868.

To this case the respondents oppose the contentions that its interpretation of the Constitution and Code sections is (1) incorrect, and this involves the further contention that we may exercise an independent judgment of them; (2) that the recitals in the bonds were assurances to bona fide purchasers that the conditions expressed had been fulfilled. In other words, the recitals were assurances that the county had a pecuniary interest (assuming such to be the interest meant) in the Yadkin Railroad, and that the road had been begun before the bonds were issued,—even begun before the adoption of the Constitution of 1868. As far as the contention includes both dates, we may immediately dispose of it. We cannot assent to the view that purchasers of the bonds could have assumed that the railroad had been begun before the adoption of the Constitution of 1868. The adoption of the Constitution antedated the charter of the company. It would therefore be extreme to hold that purchasers of the bonds could have assumed that the railroad had been begun before it was authorized to be built, or that a different act of incorporation could have been assumed from that which the bonds themselves indicated. Commercial securities must necessarily be fortified by many presumptions, as *we shall hereafter have occa- [444] sion to remark, but it would be straining somewhat to hold that a purchaser of bonds issued for a subscription to the capital stock of a railroad company could assume that the company existed prior to the time stated in the bonds or was incorporated by a different statute than that mentioned. Pretermitting consideration of the other conditions for a time, we are brought to the contention of the respondents, that we are not constrained to follow the opinion of the supreme court of North Carolina.

The general rule undoubtedly is that we accept the interpretation put by the state courts upon the state constitutions and statutes. There are exceptions to the rule, and the case at bar presents one of them. The rule and its exceptions are stated in *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359, 2 Sup. Ct. Rep. 10, and the many cases by which the rule was sustained are collected in a note on page thirty of the opinion. In that case a statute of Missouri provided that the stockholders of a corporation at its dissolution were liable for its debts. It also provided that no person holding stock as executor, etc., or holding stock as collateral security, should be personally liable, but the persons who pledged the stock should be considered as holding the same, and be liable. The supreme court of Missouri held that the exemption of the statute did not extend to persons receiving from the corporation itself stock as collateral security. This court

decided to the contrary, and held that it was not bound to follow the decision of the supreme court of the state. The question presented was regarded as one of commercial law and general jurisprudence, and the right to exercise our own judgment was asserted. It was said that state decisions were to be followed when they had become a rule of property, and that "this is specially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled it is the right and duty of the Federal courts to exercise their own judgment, as they also always do in reference to the doctrines of [445] commercial law and general *jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of the state tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued."

*Burgess* v. *Seligman* was applied in *Folsom* v. *Township Ninety-Six*, 159 U. S. 611, 40 L. ed. 278, 16 Sup. Ct. Rep. 174, to sustain the validity of bonds issued by the defendant township to aid in the construction of a railroad. The power to issue them depended upon several statutes and the Constitution of the state. After the bonds were issued, the supreme court of the state decided that the statutes authorizing the issue of the bonds were unconstitutional. There had been no decision to that effect prior to the issuing of the bonds. We held that the decision of the supreme court was not binding, and construed the Constitution and statutes for ourselves, and sustained the bonds.

It was, however, said in *Burgess* v. *Seligman* that, even in cases in which we may exercise an independent judgment, if the question seems "balanced with doubt," we will "lean towards an agreement of views with the state courts." But we are unable to yield that deference to the decision in *Stanly County* v. *Snuggs*, notwithstanding our respect for the learned tribunal that delivered it. We are unable to construe the Code sections as having had "reference to no cases except those where the counties had an interest in unfinished railroads at the adoption of the Constitution of 1868." The prohibition of the Constitution was directed to the state; the power given by the Code sections was directed to counties. It is easy to conceive the reasons which induced the different provisions. The state might, indeed, not have desired to extend its general aid beyond what had been done or commenced. Local interest might be different, and the exact fulfilment of the conditions upon which aid could be granted was assured, and any abuse guarded against, by requiring a vote of the people. Besides, there is no reference in the Code sections to the Constitution of 1868, or any retrospective implications in them. The language is that *which would natural- [446] ly be employed to express a present and continuing power, to be exercised as occasion should arise. And the contemporaneous construction sustains this view. There was a vote of the people of the county authorizing the subscription, and not through all the publicity and discussion of the canvass, not in the proceedings before the board of commissioners when the subscription was made, was there an intimation expressed, as far as the record shows, that the power by the counties of the state was limited by and depended upon what existed at the date of the Constitution of 1868. And for four years a tax was levied and interest paid on the bonds.

As we have seen, § 1996 confers power on the boards of commissioners of counties "to subscribe stock to any railroad company or companies, when necessary to aid in the *completion* of any railroad in which the *citizens* of the county may have an *interest*." These conditions, as we have also seen, were defined to mean, by the supreme court of the state, in *Stanly County* v. *Snuggs*, an interest of the county, as distinguished from the interest of its citizens, and a pecuniary interest, as distinguished from that which comes from the facilities afforded by a railroad; and the completion of a railroad to signify one begun, but not finished. These definitions may be disputed, and are disputed.

A county is, in many ways, a distinct legal entity from its citizens, but it is created for their benefit, and its duties and powers are conferred to be exercised for their welfare. This is true even of its ordinary and governmental functions; it is especially true of the power to subscribe to the stock of a railroad company, and, in conferring such power, the predominant thought would be, not the interests of the county as such, but the interest of its citizens as such. And the language of the Code of North Carolina conforms to and exactly expresses the thought,—accurately marks a distinction between the county, acting through its board of commissioners, and the citizens of the county; and provides that the interests of the latter shall induce the exercise of the powers and duties of the former. Such interest could not be pecuniary,—could only be that which comes from the possession and advantages of railroads. And *the same consideration would [447] seem to lead to a different definition of the word "completion" than that given by the supreme court of North Carolina. Of course, there can be no completion of a thing which has not been begun, but it does not follow that the legislature intended to express a distinction between railroads which could receive, according to the degree of their construction. The statute regards not actual construction, but aid to construction. Its purpose is the production of a result,—the building of railroads; and it is manifest that aid given before their commencement would be as efficient, and might be more necessary,

than that given after their commencement. It is not easy to conceive what purpose would be subserved by confining the aid to roads which have been begun; and there would be certain embarrassment in deciding the degree to which construction must be advanced. However, these are but passing observations. We may rest the validity of the bonds on the right of a bona fide holder, from their recitals, to assume that the county had the interest claimed and that the railroad had been begun before subscription to its stock was made. It makes no difference whether the existence or nonexistence of those conditions could have been ascertained by inquiry. Purchasers were not expected to be at or near the sources of information. The bonds were not offered in Stanly county only, or in the state of North Carolina only. They were expected to be offered in the financial markets of the other states of the Union; even offered in the financial markets of the world. They were payable to bearer. They were expected to have, and their value, to an extent, depended upon their having, almost the currency and sanction of money. If a buyer of bonds is chargeable not only with want of power to issue them (a considerable risk, as the records of the courts show), but also with the performance of conditions *in pais*, their value would be much diminished. And what good would such a holding subserve? The affairs of a county can only be administered by its officers, and to their attention and duty its interests must be intrusted. When the power to issue bonds, therefore, depends upon the existence of conditions, the local officers are charged with the duty and the responsibility of ascertain-
[448] ing *them; and the presumption that the duty was exercised should and does accompany and guarantee the bonds in every financial market. And this court has so decided. In *Evansville* v. *Dennett*, 161 U. S. 434, 40 L. ed. 760, 16 Sup. Ct. Rep. 613, the bonds passed upon recited that they were "issued by the city of Evansville in payment of a subscription to the Evansville, Henderson, & Nashville Railroad Company, made in pursuance of an act of the legislature of the state of Indiana, and ordinances of the city council of said city, passed in pursuance thereof." The bonds were dated May 1, 1858. Other bonds were issued December 1, 1870, in payment of the subscription of the city to the stock of the Evansville, Carmi, & Paducah Railroad Company. The recital in the latter bonds was as follows:

"By virtue of an act of the general assembly of the state of Indiana, entitled 'An Act Granting to the Citizens of the Town of Evansville, in the County of Vanderburg, a City Charter,' approved January 27, 1847, . . . conferring upon the city council of said city power to take stock in any company authorized for the purpose of making a road of any kind leading to said city; and by virtue of the resolution of said city council of said city, passed October 4, 1869, ordering an election of the qualified voters of said city upon the question of subscribing $300,000 to the capital stock of the Evansville, Carmi, & Paducah Railroad Company, and said election, held on the 13th day of November, 1868, resulting in a legal majority in favor of such subscription, and by virtue of a resolution of said city council, passed May 23, 1870, ordering an issue of the bonds of the city of Evansville (of which this is a part) to an amount not to exceed $300,000, bearing interest at the rate of 7 per cent per annum, for the purpose of paying the subscription as authorized above. [The charter of Evansville authorized the city to take stock in any chartered company for making roads to said city.] . . . *Provided*, That no stock shall be subscribed or taken by the common council in any such company unless it be on the petition of two thirds of the residents of said city, who are freeholders of the city, distinctly *setting[449] forth the company in which stock is to be taken, and the number and amount of shares to be subscribed."

The charter of Evansville was amended in 1865, but the amendment was declared unconstitutional by the supreme court of the state, and another act was passed in 1867. The latter act authorized a subscription to the stock of the railroad company, when a majority of the qualified voters of the city, who were also taxpayers, should vote therefor. The ordinances of the city recited that an election was held, but did not recite that a petition of resident freeholders of the city was presented to the common council as required by the charter, and no such petition was in fact presented. The case came to this court on certificate, and the following questions were propounded: Did the recital in the first series of bonds put the purchaser upon inquiry as to the terms of ordinances under which the bonds were issued? Did the recital in the second series of bonds, those issued to the Evansville, Carmi, & Paducah Railroad Company, (1) put the purchaser upon inquiry as to the terms of the resolution under which they were purported to have been issued? (2) estop the city from asserting that the bonds were not issued for a stock subscription upon a petition, as prescribed by the charter? (3) "Was a bona fide purchaser for value of the bonds issued to the Evansville, Carmi, & Paducah Railroad Company charged, by the recitals in said bonds, with notice that they were issued in pursuance of an invalid act, and in pursuance of an election under it, or had such a purchaser a right to assume, from the recital, that the prerequisites of both the valid act and the invalid act had been observed by the common council before the issuance of such bonds?"

Sustaining the validity of the first series of bonds, the court said, by Mr. Justice Harlan, it could not be doubted that the city had the power to subscribe to the stock, upon the performance of the conditions expressed in the questions propounded, and further said they "were only conditions which the statute required to be performed or met before the power given was exercised. That there was legislative authority to subscribe to the stock of these companies cannot be

[450]questioned, although *the statute declared that the power should not be exercised except under the circumstances stated in the statute."

And of the effect of the recital that the subscription was "made in pursuance of an act of the legislature thereof," it was observed: "This imports not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared, in terms, that all had been done that was required to be done in order that the power given might be exercised."

Passing on the second series of bonds, and expressing the principle applicable, *Independent School Dist.* v. *Stone*, 106 U. S. 183, 27 L. ed. 90, 1 Sup. Ct. Rep. 84, was quoted from as follows: "Numerous cases have been determined in this court, in which we have said that where a statute confers power upon a municipal corporation, upon the performance of certain precedent conditions, to execute bonds in aid of the construction of a railroad, or for other like purposes, and imposes upon certain officers—invested with authority to determine whether such conditions have been performed—the responsibility of issuing them when such conditions have been complied with, recitals, by such officers, that the bonds have been issued 'in pursuance of,' or 'in conformity with,' or 'by virtue of,' or 'by authority of' the statute, have been held in favor of bona fide purchasers for value to import full compliance with the statute, and to preclude inquiry as to whether the precedent conditions had been performed before the bonds were issued. *Coloma* v. *Eaves*, 92 U. S. 484, 23 L. ed. 579; *Douglas County* v. *Bolles*, 94 U. S. 104, 24 L. ed. 46; *Mercer County* v. *Hacket*, 1 Wall. 83, 17 L. ed. 548; *Anderson County* v. *Beal*, 113 U. S. 227, 238, 239, 28 L. ed. 966, 970, and authorities there cited *Cairo* v. *Zane*, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803."

And again: "As, therefore, the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals be-[451]fore *them, they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature."

In *Gunnison County* v. *E. H. Rollins & Sons* [173 U. S. 255, 43 L. ed. 689, 19 Sup. Ct. Rep. 390], the bonds passed on recited that all the requirements of law had been fully complied with by the proper officers in the issuing of the bonds. It was held that the county was estopped from asserting, against a bona fide holder for value, that the bonds so issued created an indebtedness in excess of the limit prescribed by the Constitution of Colorado. See also *Waite* v. *Santa Cruz*, 184 U. S. 302, 46 L. ed. 552, 22 Sup. Ct. Rep. 327, where effect of recitals in bonds was thoroughly considered, and the doctrine of prior cases repeated and affirmed.

The application of these cases to that at bar is denied by petitioners. The argument is (to quote counsel):

"The preliminary question, whether the railroad was incomplete or the county had an interest, was not one as to which the commissioners had peculiar knowledge, qualifying them to answer. They had such knowledge as the whole public could obtain,—nothing more. It was incumbent on the respondents to inquire about the fact, because the incompleteness or completeness or the interest of the county was a test of the existence of the power of the board, not a condition precedent to the exercise of a power granted."

It is also said that counties having an interest were constituted a class, and only members of the class could have exercised the power conferred by the Code sections. We think the distinctions made are not substantial. No matter how you may designate the interest of the county or the condition of the railroad, they were facts which bore the same relation to the power of the board of commissioners of Stanly county as the facts in the cited cases bore to the power of the officers, the exercise of which was sustained. It is indifferent whether you call the facts which were to be ascertained tests of power or conditions precedent or marks of a class. They were something which were to exist prior to the exercise of the power, and the existence of which the law imposed on the board of commissioners the duty to ascertain.

*Decree affirmed.*

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*ANNIE R. KEAN *et al.*, *Plffs. in Err.*, [452]
*v.*
CALUMET CANAL & IMPROVEMENT COMPANY.

(See S. C. Reporter's ed. 452-507.)

*Public lands — fractional sections on nonnavigable waters — effect of resurvey.*

1. Letters patent from the United States to the state of Indiana, purporting to be in pursuance of the swamp land act of September 28, 1850, chap. 84 (9 Stat. at L. 520), which refer to the official plat of survey and describe the land as "the whole of fractional sections" therein enumerated, convey to the extent of full subdivisions the land under non-navigable water on which such fractional sections border, as appears from the meander line shown on such plat, beyond which the survey did not extend.
2. The title to lands embraced within patents from the United States in pursuance of the swamp land act of September 28, 1850, chap. 84 (9 Stat. at L. 520), cannot be affected by a resurvey of the land covered by water at

NOTE.—*As to the effect of bounding a grant on river or tide water*—see note to Hanlon v. Hobson (Colo.) 42 L. R. A. 502.

*On title to land under water*—see note to Goff v. Cougle (Mich.) 42 L. R. A. 161.

**the time of the original survey, and patents granted, pursuant to such resurvey, for tracts below the original water line.**

[No. 8.]

*Argued October 23, 1901. Ordered for re-argument December 22, 1902. Reargued January 9, 12, 1903. Decided May 4, 1903.*

IN ERROR to the Supreme Court of the State of Indiana to review a judgment which affirmed a judgment of the trial court in favor of plaintiff in a suit to quiet title. *Affirmed.*

See same case below, 150 Ind. 699, 50 N. E. 85.

The facts are stated in the opinion.

*Mr.* **William P. Fennell** argued the cause and filed a brief for plaintiffs in error:

A survey made by proper officers of the United States and confirmed by the Land Department cannot be shown to be inaccurate by collateral attack in the courts.

*Russell* v. *Maxwell Land Grant Co.* 158 U. S. 253, 39 L. ed. 971, 15 Sup. Ct. Rep. 827.

The fact that the survey under which the patents issued was contested at every step by the interested parties and was finally decided after six months' consideration by the Secretary of the Interior affirming the decision of the Land Office affords strong evidence of its correctness and honesty.

*United States* v. *San Jacinto Tin Co.* 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850.

This case is identical in law and in fact with *Hardin* v. *Jordan*, 140 U. S. 379, 35 L. ed. 432, 11 Sup. Ct. Rep. 808, 838, only the rule of property is different in Indiana from what this court assumed to be the law in Illinois.

*State* v. *Portsmouth Sav. Bank*, 106 Ind. 459, 7 N. E. 379.

By reference, the plat became a part of the patent as much so as if it had been copied therein.

*Piper* v. *Connelly*, 108 Ill. 646; *Louisville & N. R. Co.* v. *Koelle*, 104 Ill. 455.

When lands are purchased and conveyed in accordance with a plat, the purchaser will be restricted to the boundaries as shown by the plat.

*McCormick* v. *Huse*, 78 Ill. 363; *McClintock* v. *Rogers*, 11 Ill. 279.

As to mere intruders, the patents issued under the new survey are conclusive that the lands were of the character which by the patents they were represented to be.

*Wright* v. *Roseberry*, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; *Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 29 L. ed. 346, 5 Sup. Ct. Rep. 1157.

It is the duty of the Land Department to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and its judgment as to this fact is not open to contestation in an action at law.

*Ehrhardt* v. *Hogaboom*, 115 U. S. 67, 29 L. ed. 346, 5 Sup. Ct. Rep. 1157; *Iowa Railroad Land Co.* v. *Antoine*, 52 Iowa, 429, 3 N. W. 468.

Riparian rights have nothing to do with the title to land under the water.

*Diedrich* v. *Northwestern Union R. Co.* 42 Wis. 262, 24 Am. Rep. 399.

Deeds of the border lands did not convey the bed of the lake.

*State* v. *Portsmouth Sav. Bank*, 106 Ind. 459, 7 N. E. 379; *Indiana* v. *Milk*, 11 Biss. 197, 11 Fed. 389; *Boorman* v. *Sunnuchs*, 42 Wis. 233; *State* v. *Gilmanton*, 9 N. H. 461; *Seaman* v. *Smith*, 24 Ill. 521; *Fletcher* v. *Phelps*, 28 Vt. 257; *Mansur* v. *Blake*, 62 Me. 38; *Wheeler* v. *Spinola*, 54 N. Y. 377; Angell, Watercourses, § 41; *Paine* v. *Woods*, 108 Mass. 160; *Diedrich* v. *Northwestern Union R. Co.* 42 Wis. 248, 24 Am. Rep. 399.

The action of the Land Department in issuing a patent is conclusive in all courts and in all proceedings where by the rules of law the legal title must prevail.

*Johnson* v. *Towsley*, 13 Wall. 83, 21 L. ed. 485; *Warren* v. *Van Brunt*, 19 Wall. 653, 22 L. ed. 219; *Shepley* v. *Cowan*, 91 U. S. 340, 23 L. ed. 428; *Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848; *Marquez* v. *Frisbie*, 101 U. S. 473, 25 L. ed. 800; *Vance* v. *Burbank*, 101 U. S. 519, 25 L. ed. 931; *United States* v. *Schurz*, 102 U. S. 401, 26 L. ed. 173; *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 646, 26 L. ed. 879; *Steel* v. *St. Louis Smelting & Ref. Co.* 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; *Quinby* v. *Conlan*, 104 U. S. 421, 26 L. ed. 800; *Baldwin* v. *Stark*, 107 U. S. 465, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; *Powell* v. *Lammers*, 10 Sawy. 246, 21 Fed. 200; *Wight* v. *Dubois*, 21 Fed. 693; *Cragin* v. *Powell*, 128 U. S. 693, 32 L. ed. 566, 9 Sup. Ct. Rep. 203; *Gazzam* v. *Phillips*, 20 How. 374, 15 L. ed. 958.

Land cannot pass as appurtenant to land.

*Child* v. *Starr*, 4 Hill, 369; *Webber* v. *Eastern R. Co.* 2 Met. 147; *Parker* v. *Framingham*, 8 Met. 260; *Harris* v. *Elliott*, 10 Pet. 25, 9 L. ed. 333; *Jackson ex dem. Yates* v. *Hathaway*, 15 Johns. 447, 8 Am. Dec. 263.

*Mr.* **Silas H. Strawn** for defendant in error on original argument. *Messrs. James F. Meagher, Frederick S. Winston*, and *G. E. Hamilton* were with him on the brief:

*Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, and *Mitchell* v. *Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840, control this case.

It is the settled law in the state of Indiana that where an inland non-navigable lake covers a portion of a section of land and the government survey designates the dry land in such subdivision as a fractional subdivision or lot, the purchaser from the government of such lots acquires title to all that portion of the bed of the lake included in the whole subdivision.

*Stoner* v. *Rice*, 121 Ind. 51, 6 L. R. A. 387, 22 N. E. 968; *Brophy* v. *Richeson*, 137 Ind. 114, 36 N. E. 424; *Tolleston Club* v. *State*, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; *Tolleston Club* v. *Clough*, 146 Ind. 93, 43 N. E. 647; *Mason* v. *Calumet Canal & Im-*

*prov. Co.* 150 Ind. 699, 50 N. E. 85; *Kean* v. *Roby*, 145 Ind. 221, 42 N. E. 1011; *Kirwan* v. *Murphy*, 28 C. C. A. 348, 49 U. S. App. 658, 83 Fed. 275; *Forsyth* v. *Smale*, 7 Biss. 201, Fed. Cas. No. 4,950.

When a patent has been awarded, delivered, and accepted thenceforth all right to control the title or to decide the right to the title has passed from the Land Office. Not only has it passed from the Land Office, but it has passed from the Executive Department of the government.

*Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Mitchell* v. *Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *Davis* v. *Weibbold*, 139 U. S. 507, 35 L. ed. 238, 11 Sup. Ct. Rep. 628.

This court has repeatedly decided that if lands patented or attempted to be patented were not at the time public property, having been previously disposed of, the Department had no jurisdiction to transfer the lands, and their attempted conveyance by patent is inoperative and void.

*St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 640, 26 L. ed. 876; *Wright* v. *Roseberry*, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; *Francoeur* v. *Newhouse*, 40 Fed. 618; *Doolan* v. *Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228.

*Mr.* **Frederick S. Winston** for defendant in error on reargument. *Mr. Silas H. Strawn* was with him on the brief:

The supreme court of Indiana, having held that all of the land involved in this suit was in fact included in the survey of 1834–35, this court will not disturb that finding of fact.

*Gardner* v. *Bonestell*, 180 U. S. 362, 45 L. ed. 574, 21 Sup. Ct. Rep. 399; *Egan* v. *Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Dower* v. *Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Hedrick* v. *Atchison, T. & S. F. R. Co.* 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; *Republican River Bridge Co.* v. *Kansas P. R. Co.* 92 U. S. 315, 23 L. ed. 515.

All of the land in question having been included in the survey of 1834–35, the United States having conveyed it all under that survey to the state of Indiana in 1853, and defendant in error holding under mesne conveyances from the state, by the same description, the survey of 1875 was void, and plaintiffs in error acquired no rights thereunder.

*Mason* v. *Calumet Canal & Improv. Co.* 150 Ind. 699, 50 N. E. 85; *Kean* v. *Roby*, 145 Ind. 221, 42 N. E. 1011; *Tolleston Club* v. *State*, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Mitchell* v. *Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840; *Moore* v. *Robbins*, 96 U. S. 530, 24 L. ed. 848; *St. Louis Smelting & Ref. Co.* v. *Kemp*, 104 U. S. 640, 26 L. ed. 876; *Wright* v. *Roseberry*, 121 U. S. 488, 30 L. ed. 1039, 7 Sup. Ct. Rep. 985; *Doolan* v. *Carr*, 125 U. S. 618, 31 L. ed. 844, 8 Sup. Ct. Rep. 1228.

The rights of the owners of land bordering on inland, non-navigable lakes are settled by the law of the state wherein the land lies.

*Hardin* v. *Jordan*, 140 U. S. 380, 35 L. ed. 433, 11 Sup. Ct. Rep. 808, 838; *Lowndes* v. *Huntington*, 153 U. S. 1, 38 L. ed. 615, 14 Sup. Ct. Rep. 758; *Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157.

The owner of lands bordering on non-navigable inland lakes, when the subdivisions of the land are surveyed by running a meander line between the dry land and the water to ascertain the number of acres of dry land, and designating such subdivision as a fractional quarter or a lot, giving the number of acres of dry land, takes the title to all the land contained within the subdivision.

*Ross* v. *Faust*, 54 Ind. 471, 23 Am. Rep. 655; *Ridgway* v. *Ludlow*, 58 Ind. 248; *Edwards* v. *Ogle*, 76 Ind. 302; *Kean* v. *Roby*, 145 Ind. 221, 42 N. E. 1011; *Tolleston Club* v. *State*, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; *Indiana* v. *Milk*, 11 Biss. 197, 11 Fed. 389; *Stoner* v. *Rice*, 121 Ind. 51, 6 L. R. A. 387, 22 N. E. 968; *Brophy* v. *Richeson*, 137 Ind. 114, 36 N. E. 424; *Tolleston Club* v. *Clough*, 146 Ind. 93, 43 N. E. 647.

If there be any inconsistency in the several opinions of a state court, the general rule is that this court will follow the latest settled adjudications in preference to the earlier ones.

*Wade* v. *Travis County*, 174 U. S. 499, 43 L. ed. 1061, 19 Sup. Ct. Rep. 715; *Leffingwell* v. *Warren*, 2 Black, 599, 17 L. ed. 261; *Fairfield* v. *Gallatin County*, 100 U. S. 47, 25 L. ed. 544.

If the common law of Indiana were as found by this court, in *Hardin* v. *Jordan*, to be the common law of Illinois, then the defendant in error, as a riparian owner of bordering lands, owns to the center of the lakes, and, consequently, all of the land in controversy.

*Forsyth* v. *Smale*, 7 Biss. 201, Fed. Cas. No. 4,950; *Fuller* v. *Shedd*, 161 Ill. 462, 33 L. R. A. 146, 44 N. E. 286; *Hardin* v. *Jordan*, 140 U. S. 381, 35 L. ed. 433, 11 Sup. Ct. Rep. 808, 838.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a proceeding to quiet title, brought by the Calumet Canal & Improvement Company in a court of the state of Indiana. The company got judgment, which was affirmed by the supreme court of the state (150 Ind. 699, 50 N. E. 85), and the case is brought here by writ of error. The land in question is land bordering on and extending under certain non-navigable water up to the state line, the Illinois side of which was the subject of the decisions in *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, and *Mitchell* v. *Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840. But the facts in

this case are somewhat different. The Calumet company claims title through mesne conveyances from the state of Indiana. The state of Indiana got its title under the swamp-land act, September 28, 1850, chap. 84 (9 Stat. at L. 520, Rev. Stat. §§ 2479 *et seq.*, U. S. Comp. Stat. 1901, p. 1586), and pat-[459]ents *of the United States, dated 1853, purporting to be in pursuance of that act, and referring to the official plat of survey, which was made in 1834. The patent set forth describes "the whole of fractional sections" enumerated and bordering on the water, in which sections lies the disputed land. The state afterwards conveyed by the same description. It is not denied that the company got the land above the water line, as shown in the plat referred to, but it is denied that it got more. The water has been receding and drying up, so that the question is important. The defendants set up a later survey in 1875 of the land which was covered by water in 1834, and is covered, to a less extent, still, and patents from the United States in pursuance of the same, for tracts below the original water line. They deny that the state ever owned this land, or, if it did, that it conveyed it, and they allege the later survey to be conclusive.

On general principles of conveyancing, the state would have acquired the land in controversy here by a conveyance from the United States describing the upland according to the survey, because the local law of Indiana, and the common law as understood by this court, are the same, so far as this case is concerned. *Stoner* v. *Rice*, 121 Ind. 51, 6 L. R. A. 387, 22 N. E. 968; *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838. The case is stronger if the land passed under the swamp land act, as has been held by the state court with regard to this and similar patents. *Mason* v. *Calumet Canal & Improv. Co.* 150 Ind. 699, 50 N. E. 85; *Kean* v. *Roby*, 145 Ind. 221, 42 N. E. 1011; *Tolleston Club* v. *Clough*, 146 Ind. 93, 43 N. E. 647; *Tolleston Club* v. *State*, 141 Ind. 197, 38 N. E. 214. See *Mitchell* v. *Smale*, 140 U. S. 406, 414, 35 L. ed. 442, 445, 11 Sup. Ct. Rep. 819, 840.

The making of a meander line has no certain significance. *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 47, 52, 46 L. ed. 800, 802, 22 Sup. Ct. Rep. 563. It does not necessarily import that the tract on the other side of it is not surveyed, or will not pass by a conveyance of the upland shown by the plat to border on the lake. It is not always a boundary. *St. Paul & P. R. Co.* v. *Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Hardin* v. *Jordan*, 140 U. S. 371, 380, 35 L. ed. 428, 432, 11 Sup. Ct. Rep. 808, 838; *Mitchell* v. *Smale*, 140 U. S. 406, 414, 35 L. ed. 442, 445, 11 Sup. Ct. Rep. 819, 840; *Horne* v. *Smith*, 159 U. S. 40, 43, 40 L. ed. 68, 69, 15 Sup. Ct. Rep. 988; *Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87, 93, 40 L. ed. 85, 87, 15 Sup. Ct. Rep. 991. In this case its immediate import was only to indicate the contour of the lake. It would *seem, to be sure, that[460] the settled understanding of the Land Department has been that in cases like the present the meander line marked the limit of the grant. But probably the cases are comparatively rare in which that understanding was acted on by an attempt subsequently to convey the land under water on the further side of the line at dates before the transactions with which we have to deal. The title to such land was not considered of much importance in the early days, or worth the trouble of an independent survey. See *Newson* v. *Pryor*, 7 Wheat. 7, 11, 5 L. ed. 382, 383. The United States was more anxious for settlers than for revenue from that source. It is not necessary to consider how we should decide the case with our present light if the question were a new one. It is not new. For twelve years the decisions in *Hardin* v. *Jordan* and *Mitchell* v. *Smale* have stood as authoritative declarations of the law. Probably in most cases the statute of limitations has cured the defects of title which those cases may have shown. Meantime many titles must have passed on the faith of those decisions. The United States can meet them by the form of its conveyances. It seems to us that it would be likely to do more harm than good to allow them to be called in question now.

It is said that the land under water was not embraced in the survey of 1834. It would seem from the plat and the field notes that the sections and dividing lines were clearly marked off and posts set. The case is similar to *Kean* v. *Roby*, 145 Ind. 221, 42 N. E. 1011, where the survey was pronounced sufficient. No difficulty was felt, on the ground that the survey did not cover the submerged land in *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838. But furthermore, the land was selected as "swamp and overflowed lands" by the state. It not appearing otherwise, the selection must be presumed to have included the land overflowed, and if so it was confirmed to the state by the act of March 3, 1857, chap. 117 (11 Stat. at L. 251, Rev. Stat. § 2484, U. S. Comp. Stat. 1901, p. 1588). The confirmation encounters none of the difficulties of cases like *Stoneroad* v. *Stoneroad*, 158 U. S. 240, 39 L. ed. 966, 15 Sup. Ct. Rep. 822. The land surrounding the water, at least, was surveyed, so that the identification of the submerged portion was absolute. We are of opinion that the state of Indiana got a title to the whole land in dispute.

*If the state of Indiana got a title, it gave[461] one. There is not much controversy on this point. We should follow the decision of the state court in this case so far as this question is concerned, if there was no other evidence of the state law. But the law of Indiana is shown, by the other cases cited above, to be clear on this point.

The resurvey by the United States in 1874 does not affect the Calumet company's rights. As the United States already had conveyed the lands, it had no jurisdiction

to intermeddle with them in the form of a second survey. *Hardin* v. *Jordan*, 140 U. S. 371, 400, 35 L. ed. 428, 439, 11 Sup. Ct. Rep. 808, 838; *Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87, 94, 95, 40 L. ed. 85, 88, 15 Sup. Ct. Rep. 991; *St. Paul & P. R. Co.* v. *Schurmeir*, 7 Wall. 272, 289, 19 L. ed. 74, 78.

Of course, we shall not undertake to revise the finding of the state courts that the statute of limitations had not run in favor of the plaintiffs in error, and that, if anyone is to profit by it, the Calumet company would prevail.

*Judgment affirmed.*

Mr. Justice **White**, with whom concurs Mr. Justice **McKenna**, dissenting:

The importance of the question which this cause involves, and the far-reaching and injurious consequences which, in my opinion, must arise from the continued application of what seems to me to be the erroneous theories upon which it is now decided, not only constrain me to dissent, but cause me to state fully the reasons by which I am controlled.

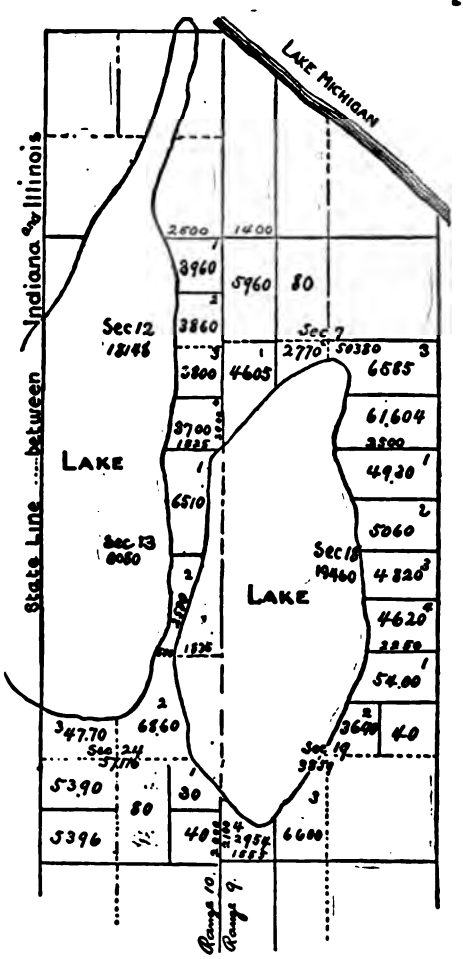
The controversy is between opposing claimants to lands once a part of the beds of certain non-navigable bodies of waters, styled lakes,—and which shall be hereafter referred to by such designation. Both parties asserted title under patents of the United States.

In 1834 surveys were made by the United States of townships 37 north, in ranges 9 and 10 west, second principal meridian, lying in Lake county, in the extreme northwestern portion of the state of Indiana. Township 37 in range 9 was bounded on the west by township 37 in range 10, and the latter was bounded on the west by the state [462] of Illinois. From *the eastern boundary of township 37 in range 10 there was less than a mile intervening to the Illinois boundary on the west. In consequence, the sections or fractional sections appearing on the plat of survey of that township were only the extreme easterly tier of sections, being those numbered 1, 12, 13, 24, 25, and 36. A copy of a portion of the government plat of survey of the townships named, in which are embraced the lands whose title is in dispute, is here inserted for convenience of reference.

The easterly of the two bodies of water, lying partly in both townships, is known as Lake George or Mud lake. The westerly body is called Wolf lake. As shown by the plat, the lines of survey were not actually run across the water of the lakes, and, consequently, no attempt was made to subdivide the lands in the then beds of the lakes into legal subdivisions. The lines of survey were in fact run around the rim of each lake, and the fractional lots resulting from the meander line were given numbers, as was customary in such cases.

The land about the margin of the lakes was very flat, and the average depth of water at the time of the surveys was conjectured to be about 5 or 6 feet.

None of the fractional lots abutting on the two lakes in the townships in question had been disposed of by the United States prior to the passage of the swamp land act of September 28, 1850 (9 Stat. at L. 520, chap. 84, Rev. Stat. §§ 2479 *et seq.*, U. S. Comp. Stat. 1901, p. 1586). Thereafter, the state of Indiana transmitted a list of lands which it desired should be patented to the state under said act, and the list embraced the portions of the townships in which Wolf lake and Lake George were sit- [463]




uated. This list, however, referred only to entire sections, took no note of the plat of survey, and made no reference to the fractional lots abutting on the lakes or the other subdivisions of sections. In the approved list of selections made by the Secretary of the Interior the general description of the lands as given in the state lists was followed, except that, where, by the meander line shown on the plat of survey, it appeared that a section was made fractional, the section was termed a fractional section, and the quantity of land shown on the plat to be contained in each minor subdivi-

sion or fractional section was specifically stated.

[464] *A patent dated March 24, 1853, was issued to the state of Indiana for the approved selections. The mode in which the lands were described in the patent is illustrated in the following excerpt:

"Also, the whole of fractional sections one, twelve, thirteen, and twenty-four, the north half of the southeast quarter, the southeast quarter of the southeast quarter, and the northeast quarter of section twenty-five and the whole of fractional section thirty-six, all one thousand seven hundred and ninety-one acres and sixty-hundredths of an acre. . . ."

After the description of the lands was the following:

"According to the official plats of survey of the said lands returned to the General Land Office by the surveyor general."

Soon after acquiring title in this manner to the border lots, the state of Indiana conveyed them, by the plat numbers, to private individuals.

While the record does not show the causes which led to the drying up of the beds of the two lakes within the meander lines on the plats of surveys of 1834, it is nevertheless certain that about the year 1874 the waters of these lakes had in great part disappeared. In the years 1874 and 1875 various persons settled on the uncovered lands referred to, with the intent of acquiring title under the homestead law. Application was made to the Interior Department for a survey thereof. In virtue of this application, a survey was made in 1875,—known as the Walcott survey,—and a plat was drawn exhibiting the subdivisions thereof. The confirmation of this survey was resisted in the Land Department by one who had acquired title to border lots from the state of Indiana, on the ground that the United States had no land to survey in the beds of the lakes, as the effect of the conveyance by the United States to the state had been to pass title to the beds of the lakes. This controversy before the Land Department was finally disposed of on February 23, 1877, by the Secretary of the Interior, in favor of the validity of the Walcott survey. Thereafter, patents for the lands in the beds of the lakes covered by the survey were issued by the United States.

In 1895, the Calumet Canal & Improvement Company brought an action in the [465] Lake circuit court of Indiana, to *quiet its asserted title to certain of these border lots and its alleged title as riparian owner to land in front thereof, once part of the beds of the lakes, and, upon a second trial of the action, obtained judgment. On appeal, the supreme court of Indiana affirmed the judgment, and the cause was then brought to this court on a writ of error prosecuted by claimants under the Wolcott survey, based upon the contention that the decision of the supreme court of Indiana was against a title and right specially set up "under the statutes, patents, deed of conveyance, and authority of the United States of America."

In deciding against the validity of the Wolcott survey and the patents to land in the beds of the lakes based on such survey the supreme court of Indiana said (p. 699, 150 Ind. p. 85, 50 N. E.):

"In 1875 certain persons, under the assumption that the beds of the lakes had not been surveyed in 1834, procured a resurvey of that part of the lands formerly covered by the waters, and it is through this last survey and the sales made in pursuance thereof, that appellants claim title. The case before us, therefore, in so far as concerns source of title, does not differ from that of *Kean* v. *Roby*, 145 Ind. 221, 42 N. E. 1011. On the authority of the decision in that case, there can be no question that the resurvey of 1875, as also the sales made thereunder, were wholly invalid, and consequently that appellee's title, as based upon the original survey of 1834, and the sales made under that survey, is good. No real distinction in this regard has been shown between the two cases."

It becomes necessary, therefore, to refer to the case of *Kean* v. *Roby*, upon which the supreme court of Indiana rested its conclusion. As, moreover, the comprehension of the doctrines involved in that case necessitates a consideration of the course of previous decisions in Indiana relative to the subject involved, I shall review the Indiana cases preceding *Kean* v. *Roby*, in order, as far as may be, to an exact elucidation of the legal principles by which the decision of this case was below controlled.

*Ross* v. *Faust* (1876) 54 Ind. 471, 23 Am. Rep. 655, involved the title to land under the bed of a non-navigable river. The land abutting on the stream had been surveyed and the stream had been *meandered. The [466] question was whether patents of the United States conveyed land under water within the meander lines. Determining the construction of the patent solely by reference to the laws of the United States, the court decided that, as the stream was in fact non-navigable, the holder of the patent to the border lots had title to the center of the stream despite the meander line.

*Ridgway* v. *Ludlow* (1877) 58 Ind. 248, involved a controversy respecting the ownership of land once forming part of the bed of a non-navigable lake. The land bordering on the lake had evidently been acquired from the United States, and the lake had been meandered. The rule in *Ross* v. *Faust* was applied, the court saying:

"We can see no difference in principle in this rule, whether applied to non-navigable rivers or non-navigable lakes, when they are within the congressional surveys."

*Edwards* v. *Ogle* (1881) 76 Ind. 302, presented the following state of facts: On a plat of survey of a section of land, which was in great part covered by the waters of a pond, the banks of the pond were shown as meandered, but the lines of the sections, half sections, and quarter sections were extended across the pond by dotted lines. A fractional portion of the southwest quarter, represented as containing 39 acres—the dry

land outside of the meander—was patented by the United States in 1845. In 1851 the United States, under the swamp land act, executed to the state of Indiana a patent for the east half of the southwest quarter, being within the meander line. In 1858 the United States issued a patent to one Ogle for the west half of the same quarter section. Edwards, as owner of the 39-acre tract, asserted a right to the center of the pond, which, if allowed, would have absorbed the land claimed by Ogle. Edwards was confined to the actual quantity of land specified in the patent. *Ross* v. *Faust* was distinguished, the court remarking of that case: "The bed of the river had not been surveyed as a part of the public domain, but, on the theory that White river was a navigable stream, the government surveys had been terminated at the margin thereof."

*State* v. *Portsmouth Sav. Bank* (1886) [467]106 Ind. 459, 7 N. E. 379,*involved the question whether conveyances of fractional lots bordering on Beaver lake, in Newton county, Indiana, passed title to land under the bed of the lake. The controversy was between the state claiming the bed of the lake and certain private individuals who deraigned title from the state, claiming that, as the state had transferred to them rights derived under patents from the United States, their rights were coterminous with the patent, and extended across a meander line to the center of the lake. Beaver lake was a body of water covering about 17,000 acres of land, and averaging from 5 to 7 miles in length and from 2 to 4 miles in width. The border lands had been surveyed in 1835 by authority of the United States, and were subject to private entry. In making the survey the same was extended around the lake and a meandering line established. As a necessary result of the meander line fractional lots were shown on the plat around the margin of the lake. Under the swamp land act the border lands, by the government subdivisions, were selected by the Secretary of the Interior and patented to the state of Indiana.

The supreme court of Indiana declared that it was not necessary "to determine whether the patents of the United States to the state for the fractional lots bordering upon and surrounding the lake, being grants from one government to another, by their own force carried the bed of the lake." Reviewing previous decisions of this court, construing the swamp land act, the Indiana court held that that act was a grant *in præsenti*. It was further held that, although the bed of Beaver lake was not embraced in the list of selections made by the state, yet, by the acts of its officials, immediately after the grant to it of the border lands, the state had treated the bed of the lake as swamp and overflowed land, and constructively selected the same, and that an act of Congress, approved January 11, 1873 (17 Stat. at L. 409, chap. 32), releasing and quitclaiming the bed of Beaver lake to the state of Indiana, did not operate as a grant, but simply as a confirmation of the prior selection, thereby perfecting the title as indefeasible.

The court came next to consider the claims of the grantees of the state of border lots, described in the patent from the *state according to the plat of survey which [468] had been made by the United States. It was declared that state patents for border lots must be construed with reference to the power conferred upon state officials by the state law, and not by the rules which would govern a conveyance by a private individual; and, applying this rule, it was held that the patents for border lots carried to the grantees "no more of the swamp and overflowed lands than were included in the several surveyed subdivisions *bounded by the lake*."

*Stoner* v. *Rice* (1889) 121 Ind. 51, 6 L. R. A. 387, 22 N. E. 968, was a controversy between owners of border lots as a meandered non-navigable lake claiming under patents of the United States and patentees of the United States under a subsequent survey of the bed of the lake. Despite its previous ruling in *Ridgway* v. *Ludlow*, 58 Ind. 248, it was now held that the rule giving a riparian owner of fractional lots abutting on a meander line title to the thread or center of the stream was not applicable. The case was decided upon what the court assumed to be the law of the United States governing surveys of the public domain. The court said (p. 54, L. R. A. p. 389, N. E. p. 969):

"The true doctrine to apply, in the disposition of such land as is covered by the body of such lakes, we think is that the government in making surveys included in such surveys all the land within the district surveyed, and if there was a lake or large pond, which covered a part of a subdivision, it was meandered out, and the dry land in such subdivision designated as a fractional subdivision or lot; that, in the purchase of such fractional subdivision or lot, the purchaser took title to it as a riparian owner, with the right to the land, as the water receded, within the boundary lines of the subdivision conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision, though it was described as a fractional subdivision or lot. The authorized survey divided all the land within the district into subdivisions, and if, by reason of water upon a tract of land, a portion of it was regarded at the time as worthless and unsalable, there was a meander line run to ascertain the amount of dry land, and such subdivision was designated as a fractional subdivision or lot, and, although thus described, the sale passed title to the whole subdivision."

*The court declared that the doctrine thus [469] announced by it was not in conflict with its previous ruling in *Edwards* v. *Ogle*.

*Brophy* v. *Richeson* (1894) 137 Ind. 114, 36 N. E. 424, was a contest between the patentees of a fractional tract of dry land termed the southeast fractional quarter of

a certain section, lying north and east of a meandered lake, and the patentees under a later survey made by the United States of the bed of the lake. It was held—following *Stoner* v. *Rice*—that the claimant under the first patent took title to all the land within the quarter section, whether dry or covered by the waters of the lake.

*Tolleston Club* v. *State* (1894) 141 Ind. 197, 38 N. E. 214, was an action brought by the state of Indiana for the recovery of lands within the meander lines of a United States survey. The claim was that the state had acquired title to the lands within the meander upon selections made under the swamp land act of certain land, for which patents of the United States had been issued to the state of Indiana in 1853. Although the state had conveyed the border lots which she had acquired from the United States, the theory of the claim of the state was that, despite this conveyance, she remained the owner of, and was entitled to recover, the land within the meander, because it was deemed, in accordance with the ruling in the *Portsmouth Bank Case* (involving Beaver lake), that the state, in transferring the border lots, by their designation on the government plat of survey, had retained to herself, and not conveyed, her title to the land under water. The defendants asserted title derived from the United States under patents issued subsequent to 1870, based upon a survey made of the bed of the water by reason of an act of Congress, which is excerpted in the margin.†

[470] *It suffices to remark that it was held that, although the United States survey showed a meander line and fractional lots or sections thereon, this meander line, under the laws of the United States, was not a boundary, because, under said laws, its sole purpose was, not to limit the survey in any way, but simply to indicate how much dry land there was in the subdivision purchased. Consequently, it was determined that the land, both dry and wet, should be treated as having been wholly surveyed, because the lines of survey might be protracted across the meander so as to make complete surveyed sections, embracing both the dry and the wet land. The enumeration in the plat of the quantity of land contained in the subdivisions of the sections was considered as immaterial, and the doctrine of *Stoner* v. *Rice* was applied.

Whilst the claims of the patentees under the subsequent United States survey of the land within the meander were therefore rejected, and the act of Congress directing the survey was decided to be void, it was yet held that, as the state must recover upon the strength of her own title, she was not entitled to judgment for any land within the meander lines, because the grants made by the state of the fractional lots passed title to the legal subdivision beyond the meander lines, upon the theory of survey above noticed and the controlling effect of the decision in *Stoner* v. *Rice*. A petition for rehearing was filed on behalf of the state. An opinion denying such rehearing is reported in 141 Ind. 214, 40 N. E. 690. The principal contention on behalf of the state was that "the court erred in holding that the land in controversy had been surveyed, either by the government of the United States, or by the state of Indiana, at the time of the *sale of such border [471] lots by the state." The court, however, observing that this contention was dangerous ground for the state to stand upon, considered at length the provisions of §§ 2395 and 2396 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, pp. 1471, 1473), and concluded as follows:

"The land in controversy was therefore surveyed into sections, as provided by law, by the United States government surveyors, in 1834. But, even if we were mistaken in this, it would, as we have said, be a dangerous contention for appellee to undertake to show that such survey was not made. The swamp land act of 1850, under which the state claims title, requires that the lands should be selected, and the selections approved, by the Secretary of the Interior, as swamp lands. The land in dispute consists of parts of surveyed sections of land, selected, approved, and certified from the General Land Office of the United States. The land so selected is described as in township No. 36, range 8 west, and being 'all of . . . [sections] 12, 15, 17, 18, 19, and 20. All of 21 and 22 [and] N. W. ¼ 23.' But, if there were in fact no survey, then no such sections would exist,—at least between the meanders of the Calumet river; and so no selections would ever have been made by the state, or approved by the Secretary of the Interior. The consequence would be that the state had never received title, and the unsurveyed lands, having remained in possession of the general govern-

†Act approved July 1, 1870 (16 Stat. at L. 187). Chap. CXCIX.—An Act in Relation to Certain Unsold Lands in the Counties of Porter and Lake, in the State of Indiana.

Whereas, there is lying along the Little Calument river, in the counties of Porter and Lake, in the state of Indiana, a body of lands supposed to contain about four thousand acres, which has never been sold or surveyed, and which was described in the original government surveys as impassable morass; and whereas, the Calumet Drainage Company has been organized under the laws of said state, for the purpose of draining the valley of said river, including said morass: Therefore,

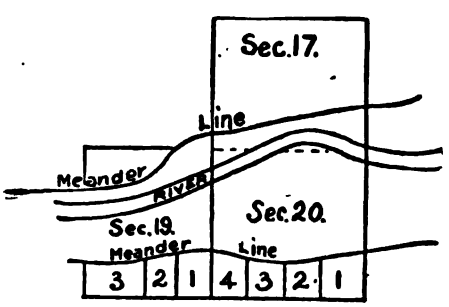
*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That said unsold lands shall be subject to a lien under the laws of the state of Indiana for its proper proportion of the cost of such drainage, and such lien may be enforced against said lands in the same manner and to the same extent as if the said lands were owned by private persons: *Provided*, That no claim shall be held to exist against the United States for such drainage.

Sec. 2. *And be it further enacted*, That said lands may be surveyed and sold to the highest bidder, under the directions of the Secretary of the Interior, subject to said lien.

ment, were correctly surveyed, and sold under the act of Congress of 1870. If, therefore, we should admit this main contention of counsel for appellee, the consequence would inevitably follow that the state had never acquired title to the land in dispute. We are satisfied, however, that the conclusions reached in the original opinion—that the lands were surveyed in 1834; that they were selected, and the selections approved, under the swamp land act of 1850; that the state therefore acquired good title under that act; and that the act of 1870, with the resurvey and sales thereunder, was a nullity—are all correct; and we are quite unable to understand why counsel should here insist upon a contention which, if agreed to, would cut the ground entirely from under their own feet."

The *Portsmouth Savings Bank Case* was [472] distinguished by *the statement that "Beaver lake was a large body of water, of shallow depth, which had not been surveyed by the United States government.

The precise import of the doctrine which, following *Stoner* v. *Rice*, the court applied in the case just reviewed is so aptly portrayed in the case of *Tolleston Club* v. *Clough*, 146 Ind. 93, 45 N. E. 647, that it is here noticed out of its chronological order. The plaintiff commenced his action to quiet title to land derived from the state through patents issued to the state by the United States under the swamp land act. The lands in controversy were part of those which were involved in the case of *Tolleston Club* v. *State*, 141 Ind. 197, 38 N. E. 214, 40 N. E. 690. The exact situation of the lands is shown on the following plat, which is reproduced from the opinion of the supreme court of Indiana:




To convey a clear conception of the situation and character of the land, a passage is here excerpted from the opinion in *Tolleston Club* v. *State*, 141 Ind. 205, 38 N. E. 216:

"The lands claimed by the state are within the meander lines of the United States survey, on each side of the Little Calumet river, being a tract about 6 miles in length, and from about three-quarters of a mile to about a mile and a quarter in width. In the original field notes of the survey the region is referred to as a 'lake,' while on the plat it is marked 'impassable marsh.' At the time of the United States survey in 1834 the territory was completely covered with water, in which, outside the river proper, there was a heavy growth of cattails, wild rice, and other swamp-like products."

*The plaintiff, deriving title from the patents of the United States covering the fractional lots outside of the meander line, claimed to be the owner of the marsh land inside of the meander up to the thread of the stream marked on the plat as a river. [473]

The court followed its ruling in *Tolleston Club* v. *State*, and said:

"It is plain that the lots described, being lot 1 and parts of lots 2 and 3, in section 19, and lots 1, 2, 3, and 4 in section 20, all extend north to the north section lines of their respective sections."

By this ruling the lots abutting on the meander were made to cross that line, embrace the marsh land lying between them and the river, and would have extended across the river, so as to include practically the entire river in those sections, except where, in the sinuosity of the river, it crossed the section line. As, however, the court found that the owner of the lots abutting on the meander had only claimed to the bed of the river, it limited his rights in consequence of the pleadings to that extent, thus preventing the acquisition of the entire section where the section line was beyond the bed of the river.

I now come to the case of *Kean* v. *Roby* (1890) 145 Ind. 221, 42 N. E. 1011, upon the authority of which case the supreme court of Indiana affirmed the judgment of the trial court in the case at bar. *Kean* v. *Roby* was an action brought by the owner of lands abutting on Wolf lake, to quiet her title to land once part of the bed of the lake. The plaintiff claimed title to the border lots as well as to the lake-bed land by virtue of the survey made in 1834 and a patent from the United States to the state, made in 1853, under the swamp land act. The defendants claimed title under patents, based upon the Wolcott survey of 1875, of lands once part of the bed of the lake. Despite the fact that on the plat of survey the lake was meandered, and there were no sectional corners to which the lines could be protracted, the court held that the case was covered by the Tolleston Club decision, because it was deemed that the field notes showed that it would be possible to protract the lines so as to make regular and complete sections, *and it was therefore held [474] that the owner of the border lots was entitled to the adjacent land under water as well.

It therefore results that the doctrine embodied in the case of *Kean* v. *Roby*, and the previous cases commencing with *Stoner* v. *Rice*, was the rule applied in the decision of the case now under review, and by which the beds of the lakes were given to the owner of the border lots.

All the cases which have been recapitulated, I submit, divide themselves into two classes, the first, those prior to *Stoner* v. *Rice*; the second, the case of *Stoner* v. *Rice*, and those subsequent to it, including the

ruling therein made. Without pausing to ascertain whether the cases in the first class are reconcilable with each other, or those in the second class can be made to harmonize with those in the first, one thing it seems to me is apparent: That is, that all the cases in both the classes, including the decision in the case at bar, indubitably held—

1. That the government of the United States owned the soil under all bodies of non-navigable water lying within the public domain of the United States, and that the title thereto remained in the United States until it had parted with it pursuant to the laws of the United States; and

2. That, in determining whether the United States had parted with title to such lands, the Indiana court always decided that question, not upon the controlling effect of any supposed rule of state or local law, but by what it deemed to be the proper construction of the laws of the United States governing the survey and disposition of the public domain.

The right of the defendants under patents of the United States, which they specially set up, having been denied, because it was conceived by the court below that no title vested in them under the laws of the United States, it would seem that the question arising for decision is this: Did the court correctly interpret the statutes of the United States?

This is a Federal question. But it is pressed that what title to the beds of the lakes passed to the state from the United States, either under the swamp land act or in virtue of the patents issued to the state, is to be determined, not by the law of the United States, but solely by the state or lo-
[475] cal law; hence, it *is insisted the case must be decided by the law which is rightfully applicable to it, and not by the law of the United States, which the supreme court of Indiana erroneously deemed was essential to its decision. If I entertained the opinion that the state or local law governed, and in consequence that this case was to be disposed of by considerations inherently local, I would, of course, be obliged to conclude that the controversy must be judged by that law which properly controlled it, and not by the law of the United States, which was mistakenly applied by the lower court. In that view my mind would be driven to the conclusion that this case should be dismissed for want of jurisdiction, since here there is no authority to review the action of the state court in a cause inherently depending upon the state or local law. Nor would this result be changed because the defendants asserted rights to the beds of the lakes under patents of the United States issued subsequent to those relied upon by the plaintiff, as its ultimate source of title. This follows, since the claim of the plaintiff was that title had passed to it and out of the United States by the swamp land act or the patents issued prior to those upon which the defendants relied. Now, if the question whether the land claimed by both parties had passed to the plaintiff or its grantors, prior to the issue of the patents to the defendants, is to be determined solely by the state or local law, it would follow that a decision of the state court in favor of the right of the plaintiff involved only a conclusion of state or local law broad enough to sustain the judgment, wholly irrespective of the Federal rights asserted by the defendants, and also entirely without reference to the soundness of the reasoning by which the court had reached its all-sufficient and non-Federal conclusion. Before, therefore, coming to consider the correctness of the ruling of the state court concerning the United States law which that court deemed to be decisive, it becomes necessary for me to ascertain whether, as asserted, the question as to the extent of the title derived from the United States by the plaintiff or its grantors is to be determined by the state or local law.

The issue which first arises then is, By what law is the quantity of land which passed to the state under the statutes of the *United States and its patents to be de-[476]
termined,—by the law of the United States, which conferred on the state whatever rights it acquired, or solely by the state or local law, which had no agency on influence in passing rights from the United States to the state? In solving this question it is at once conceded that there are two cases—decided by this court on the same day, one resting upon the other, and therefore virtually but one case—announcing the doctrine that where the United States has conveyed land bordering on the meander line of a non-navigable body of water the question of what rights in the land under water passed from the United States to its grantee is to be determined solely by the state or local law.

The cases referred to are *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, reported respectively in 140 U. S. 371 and 406, 35 L. ed. 428 and 442, 11 Sup. Ct. Rep. 808, 838, and 819, 840. Both cases were actions of ejectment, and the judgments reviewed were rendered by the circuit court of the United States for the northern district of Illinois. The plaintiff in each case was the owner, by mesne conveyances, under patents of the United States, based upon surveys made in 1834 of fractional lots abutting on the portion of Wolf lake situated in the state of Illinois, and they claimed as such abutting owners title to land once forming part of the bed of the lake. The defendants asserted title to the lake-bed lands upon the survey made in 1874 by the United States, and patents issued to them founded upon such survey. The trial court had held that the title of the owners of the border lots extended only to low-water mark, and found in favor of the defendants as to the land under water. The ground upon which the decision of the court reversing the trial court in both cases was based is shown in the following excerpts from the opinion in *Hardin* v. *Jordan*, pages 379–381 and 384,

L. ed. pages 432, 433, and 434, Sup. Ct. Rep. pages 811 and 813:

"The government surveys made in 1834–35, upon which the patent was issued, not only laid down a meander line next to the lake, but also described said lines as running 'along the margin of the lake;' and the plat of the survey, returned to the general and local land offices, and referred to in the patent for identification of the land granted, exhibited the granted tracts as actually bordering upon the lake; and the lake itself on said plat was marked with the words 'navigable lake,' although the fact [477] *found by the court is that the lake was not and is not a navigable lake, but a non-navigable fresh-water lake or pond. The patent itself does not contain all the particulars of the survey, but the grant of the lands is recited to be according to the official plat of the survey of said lands, returned to the General Land Office by the surveyor general, thereby adopting the plat as a part of the instrument.

. . . . . .

"It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted out to other persons, to the injury of the original grantees. The attempt to make such grants is calculated to render titles uncertain, and to derogate from the value of natural boundaries, like streams and bodies of waters.

. . . . . .

"Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the state of Illinois.

. . . . . .

"It has been the practice of the government, from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.

. . . . . .

"We do not think it necessary to discuss this point further. In our judgment the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed as to their effect according to the law of the state in which the lands lie."

What was the law of Illinois with regard [478] to such grants, was *next considered, and it was determined "that the law of Illinois in this regard is the common law, and nothing else;" and that the title of the owners of border lots on a non-navigable body of water extended to the middle of the water.

If the doctrine announced in the cases referred to is to be here applied, then, as I have said, there is an end to this case, and the writ should be dismissed for want of jurisdiction, since in that view there is no substantial Federal contention in this record, for the reason, as I have previously remarked, that the decision of the state question would be broad enough to sustain the judgment without reference to the Federal rights asserted by the defendants. The doctrine, however, of *Hardin* v. *Jordan*, as it is given me to understand it, is not only unsound in reason, but incompatible with many cases decided in this court prior to and since its announcement, and, besides, is in conflict with the legislation of Congress and the practice of the government from the beginning. Impressed with the correctness of these views, and entertaining the conviction that the enforcement of the doctrine will lead to the gravest consequences in the future, it is proposed to consider its correctness as an original question, before agreeing that its application in the case at bar is proper. If the result of my investigation be the conclusion that the state or local law should not be applied, contrary to the ruling in *Hardin* v. *Jordan*, I shall then proceed to ascertain what are the rights of the parties, when measured by the law of the United States. If that investigation develops that the court below erroneously interpreted the law of the United States, and therefore wrongfully denied the title of the plaintiffs in error, it will be left for me to consider whether it is my duty, under the principle of *stare decisis*, to give my assent to the legal wrong which, under the views stated, was below committed.

It is unnecessary to elaborately demonstrate the elementary proposition that the United States, under the Articles of Confederation, was the owner of the public domain, however acquired, and that, since the adoption of the Constitution, the United States had also possessed, in full proprietorship, the public domain, from whatever source its title has been derived. *The doc- [479] trine on the subject was summarized by Chancellor Kent (Com. vol. 1, p. 257) in the following language:

"Upon the doctrine of the court in that case [*Johnson* v. *M'Intosh* (1823) 8 Wheat. 543, 5 L. ed. 681] and in that of *Fletcher* v. *Peck* (1810) 6 Cranch, 142, 143, 3 L. ed. 179, 180, the United States own the soil as well as the jurisdiction of the immense tracts of unpatented lands included within their territories, and of all the productive funds which those lands may hereafter create. The title is in the United States by the treaty of peace with Great Britain, and by subsequent cessions from France and Spain, and by cessions from the individual states."

The matter was aptly epitomized in *Irvine* v. *Marshall* (1858) 20 How. 558, 15

L. ed. 994, where it was said (p. 561, L. ed. p. 996):

"It cannot be denied that all the lands in the territories, not appropriated by competent authority before they were acquired, are in the first instance the exclusive property of the United States, to be disposed of to such persons, at such times, and in such modes, and by such titles, as the government may deem most advantageous to the public tiec, or in other respects most politic."

It is also elementary that land covered by water within the public domain of the United States is as much a part thereof as the dry land. Thus, in *Illinois C. R. Co.* v. *Chicago* (1900) 176 U. S. 646, 44 L. ed. 622, 20 Sup. Ct. Rep. 509, speaking through Mr. Justice Brown, it was said:

"We do not question the general principle that the word 'lands' includes everything which the land carries or which stands upon it, whether it be natural timber, artificial structures, or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers, and waters of every description by which such lands, or any portion of them, may be submerged; since, as was said by the court in *Queen* v. *Leeds & L. Canal Nav. Co.* 7 Ad. & El. 671, 685, 'lands are not the less land for being covered with water.'"

But, whilst the ownership of the United States, under the Confederation and under the Constitution, both of the dry land and that covered with water in the public domain, cannot be controverted, from the beginning it was conceded that the ownership [480]*of the public domain did not carry with it navigable waters or the land constituting the beds thereof, as such waters were considered within the class of public waters to be forever devoted to the public use. This was recognized by a provision of the ordinance of 1787 for the government of the Northwest territory, as follows:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor."

And, early in the history of Congress, prior to the adoption in 1805 of a general system for the survey of the whole public domain of the United States, the same principle was expressed in the act of May 18, 1796 (1 Stat. at L. 464, chap. 29, U. S. Comp. Stat. 1901, p. 1567), the 9th section of which act was as follows:

"Sec. 9. *And be it further enacted*, That all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to be and remain public highways. And that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both."

And because navigable waters were thus, from the beginning, recognized as public highways, and have ever since then been treated as sacredly devoted to the public use, they were always in principle excluded from the sales of the public domain. But the contrary rule has from the beginning prevailed as respected non-navigable waters, which have always been surveyed and sold and paid for. I shall take occasion hereafter, in reviewing the legislation of Congress, to demonstrate this fact, and, therefore, to point out that the statement to the contrary in the passage from the opinion in *Hardin* v. *Jordan*, which I have already quoted, must have been the result of confounding the general practice not to sell public waters with the universal practice to survey and sell non-navigable or private waters. No better illustration of the truth of this statement is required than is shown by this case, where the United States sold and *surveyed the beds of the non-navigable [481] waters to the defendants below long after the grant of the border lots; and the same condition of things is evidenced by other of the Indiana cases which have been reviewed, and it is to be observed that in two of the cases the grant or direction to sell the land covered by non-navigable waters was made by special acts of Congress long after the border lots had been disposed of.

Doubtless, as the result of the provisions treating navigable waters as public highways, and from a consideration of the nature and extent of the powers vested by the Constitution in the Federal government and those reserved to the states, and by a consideration of the doctrine of public and private waters known to the common law, it was early decided, and has been repeatedly reiterated, that the navigable waters and the land under them belonged to the states—as well the new as the old—in virtue of their sovereignty, to be held in trust for their people subject to the power of Congress to regulate commerce. And, in harmony with the principle just stated, it has been decided that such navigable waters and the land under them in the public domain of the United States within the territories, while subject to be disposed of by Congress, under the trust for public use, were yet held by the United States to be transmitted to the new states to be formed, and which should, when endowed with statehood, possess them with the same rights and powers as the original states. A list of the cases in which this doctrine is stated is appended in the margin.†

†Martin v. Waddell (1842) 16 Pet. 367, 410, 10 L. ed. 997, 1012; Pollard v. Hagan (1845) 3 How. 213, 11 L. ed. 566; Goodtitle *ex dem.* Pollard v. Kibbe (1850) 9 How. 471, 13 L. ed. 220; Doe *ex dem.* Hallett v. Beebe (1851) 13 How. 25, 14 L. ed. 35; United States v. Pacheco (1864) 2 Wall. 587, 17 L. ed. 865; Mumford v. Wardwell (1867) 6 Wall. 423, 18 L. ed. 756; Smith v. Maryland (1855) 18 How. 74, 15 L. ed. 270; Weber v. State Harbor Comrs. (1873) 18 Wall. 57, 21 L. ed. 798; Barney v. Keokuk

[482] *The doctrine of the cases was clearly stated in the opinion delivered by Mr. Justice Field, speaking for the court, in *Illinois C. R. Co.* v. *Illinois*, 146 U. S. 387, 435, 36 L. ed. 1018, 1036, 13 Sup. Ct. Rep. 110, 111, where it was said:

"It is the settled law of this country that the ownership of, and dominion and sovereignty over, lands covered by tide waters, within the limits of the several states, belong to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject, always, to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the states. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard* v. *Hagan*, 3 How. 212, 11 L. ed. 565; *Weber* v. *State Harbor Comrs.* 18 Wall. 57, 21 L. ed. 798.

"The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes, over which is conducted an extended commerce with different states and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the state of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes."

And, as a necessary consequence of the ownership by the states, in trust, of the navigable waters and the land under them within their territorial jurisdiction, it came to be decided that rights in and incident to such navigable waters or the land under them were to be determined solely with reference to the law of the state in which such navigable waters were situated. *Barney* v. *Keokuk* (1876) 94 U. S. 324, 24 L. ed. 224; *St. Louis* v. *Myers* [483]*(1885) 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; *Packer* v. *Bird* (1891) 137 U. S. 669, 670, 34 L. ed. 821, 11 Sup. Ct. Rep. 210; *St. Louis* v. *Rutz* (1891) 138 U. S. 226, 242, 34 L. ed. 941, 947, 11 Sup. Ct. Rep. 337; *Shively* v. *Bowlby* (1894) 152 U. S. 1, 40, 38 L. ed. 331, 346, 14 Sup. Ct. Rep. 548; *Grand Rapids & I. R. Co.* v. *Butler* (1897) 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* (1897) 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157. But, resting, as this last rule necessarily does, upon the ownership of such waters by the states, it can have no application to the proposition that rights in and to the land beneath the non-navigable waters of the public domain which belong to the United States, are to be determined solely by the law of the states. On the contrary, the decision that the right to the property belonging to the states is to be determined by the state law, because of the state ownership, involves the converse proposition that the effect of a grant of land and waters in the public domain of the United States, which are not navigable, and, therefore, belong to the United States, is to be determined by the law of the United States.

The ownership by the United States of the public domain being thus unquestionable, there can be no room for the contention that the quantity and character of property in the public domain which passes by grant from the United States is not to be exclusively measured by the law of the United States, because of want of power in the United States over the subject-matter of sale of the public domain. Such a contention would be obviously without merit, in view of the express delegation of authority concerning the property of the United States, contained in the 3d section of the 4th article of the Constitution, whereby Congress was vested with power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

The comprehensive system of legislation, beginning with the very birth of the government, providing for the survey and sale of the public domain, the administrative machinery devised for executing these laws, and the multitude of decisions of this court concerning questions which have arisen thereunder, which have ever been deemed proper to be determined solely from a consideration of the laws of the United States, to my mind serve to demonstrate the unsoundness of the proposition that *any oth- [484] er law than that of the United States measures the nature and extent of title to the public domain conveyed by authority of the laws of the United States.

Besides the implication resulting from the general legislation of Congress concerning the sale and disposition of the public domain, the special statutes granting rights

(1876) 94 U. S. 324, 24 L. ed. 224; McCready v. Virginia (1876) 94 U. S. 391, 24 L. ed. 248; St. Louis v. Myers (1885) 113 U. S. 566, 28 L. ed. 1131, 5 Sup. Ct. Rep. 640; Manchester v. Massachusetts (1891) 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; Packer v. Bird (1891) 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210; St. Louis v. Rutz (1891) 138 U. S. 226, 34 L. ed. 941, 11 Sup. Ct. Rep. 337; San Francisco v. Le Roy (1891) 138 U. S. 656, 671, 34 L. ed. 1096, 1101, 11 Sup. Ct. Rep. 364; Knight v. United Land Asso. (1891) 142 U. S. 161, 183, 35 L. ed. 974, 981, 12 Sup. Ct. Rep. 258; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. (1891) 142 U. S. 255, 35 L. ed. 1004, 12 Sup. Ct. Rep. 173; Illinois C. R. Co. v. Illinois (1892) 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; Shively v. Bowlby (1894) 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; Grand Rapids & I. R. Co. v. Butler (1895) 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. (1897) 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; and Mobile Transp. Co. v. Mobile (1903) 187 U. S. 479, *ante*, 266, 23 Sup. Ct. Rep. 170.

in, and regulating the use of, the non-navigable waters upon the public lands, are very conclusive. Act of July 26, 1866 (14 Stat. at L. 253, chap. 262); Act of March 3, 1877 (19 Stat. at L. 377, chap. 107, U. S. Comp. Stat. 1901, p. 1548); Act of March 3, 1891 (26 Stat. at L. 1095, chap. 561, U. S. Comp. Stat. 1901, p. 1535); Act of June 17, 1902 (32 Stat. at L. 388). See, in this connection, *Gutierres* v. *Albuquerque Land & Irrig. Co.* 188 U. S. 545, *ante*, 588, 23 Sup. Ct. Rep. 338, and *United States* v. *Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 704, 43 L. ed. 1136, 1142, 19 Sup. Ct. Rep. 770.

I refer to a few cases in which the complete and efficient power of the United States and the controlling effect of its laws have been considered and lucidly stated.

In *Bagnell* v. *Broderick* (1839) 13 Pet. 436, 10 L. ed. 235, it was held that a state legislature was not competent to declare a certificate of purchase of equal dignity with a patent; and it was observed (p. 450, L. ed. p. 242):

"Congress has the sole power to declare the dignity and effect of titles emanating from the United States."

*Wilcox* v. *Jackson ex dem. M'Connel* (1839) 13 Pet. 498, 10 L. ed. 264, was an action in ejectment, brought in a state court of Illinois, to recover property which had at one time been part of a military post. The plaintiff based his claim upon a register's certificate, which the laws of Illinois declared to be evidence of title sufficient to support an action in ejectment. In reversing the judgment for the plaintiff, the court, in the course of the opinion, speaking through Mr. Justice Barbour, said (p. 516, L. ed. p. 273):

"It has been said that the state of Illinois has a right to declare by law that a title derived from the United States, which, by their laws, is only inchoate and imperfect, shall be deemed as perfect a title as if a patent had issued from the United States, and the construction of her own courts seems to give that effect to her statute. . . . We hold the true principle to be this, that whatever the question in any court, state or Federal, is, whether a title [485] to land which had once been the *property of the United States has passed, that question must be resolved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the state, is subject to state legislation, so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States."

*Irvine* v. *Marshall* (1858) 20 How. 558, 15 L. ed. 994, was an action originally brought in a court of the territory of Minnesota. It was alleged that the defendant Marshall, as the agent of the plaintiff, had purchased certain public lands with funds belonging to plaintiff and a codefendant; that Marshall thereafter took a patent certificate in his own name, and refused to convey an undivided half of the land to the plaintiff. The bill of complaint was demurred to upon the ground that the action could not be maintained because of certain provisions of the territorial statute relating to resulting trusts. Applying its previous ruling in *Wilcox* v. *Jackson ex dem. M'Connel*, the court, in the course of the opinion, speaking through Mr. Justice Daniel, said (p. 563, L. ed. p. 997):

"Within the provisions prescribed by the Constitution, and by the laws enacted in accordance with the Constitution, the acts and powers of the government are to be interpreted and applied so as to create and maintain a *system*, general, equal, and beneficial as a whole. By this rule, the acts and the contracts of the government must be understood as referring to and sustaining the rights and interests of all the members of this Confederacy, and as neither emanating from, nor intended for the promotion of, any policy peculiarly local, nor in any respect dependent upon such policy. The system adopted for the disposition of the public lands embraces the interests of all the states, and proposes the equal participation therein of all the people of all the states. This system is, therefore, peculiarly and exclusively the exercise of a Federal power. The theater of its accomplishment is the seat of the Federal government. The mode of that accomplishment, the evidences or muniments of right it bestows, are all the work of Federal functionaries alone."

*In *United States* v. *Gratiot* (1840) 14 [486] Pet. 526, 537, 10 L. ed. 573, 578, considering an objection that Congress was without power to lease the public lands, it was said (p. 537, L. ed. p. 578):

"Congress has the same power over . . . [the public lands] as over any other property belonging to the United States; and this power is vested in Congress without limitation."

In *Gibson* v. *Chouteau* (1872) 13 Wall. 92, 20 L. ed. 534, a state statute of limitations was held ineffective as against a patent from the United States. The court, speaking through Mr. Justice Field, said (p. 100, L. ed. p. 536):

"The same principle which forbids any state legislation interfering with the power of Congress to dispose of the public property of the United States also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land; and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued."

In *Fink* v. *O'Neill* (1882) 106 U. S. 283, 27 L. ed. 200, 1 Sup. Ct. Rep. 325, Mr. Justice Matthews, delivering the opinion of the court, considering the 4th section of the homestead act of May 20, 1862 (12 Stat. at L. 393, chap. 75, U. S. Comp. Stat. 1901, p. 1398), which provided that no lands acquired thereunder should in any event become liable to any debt contracted prior to the issuing of the patent therefor, it was declared that Congress, by such provision had made the exemption of such lands from sale on execution a *permanent* part of the national policy.

In *Packer* v. *Bird* (1891) 137 U. S. 661, 34 L. ed. 319, 11 Sup. Ct. Rep. 210, the court passed on the extent of the grant contained in a patent of the United States, to land in California, one portion whereof abutted on the Sacramento river. The patent was issued upon a decree of confirmation on a previously existing right or equity of the patentee to the lands, and the survey made [487] pursuant to the *decree was incorporated in the patent. In the course of the opinion, speaking through Mr. Justice Field, the court said (p. 669, L. ed. p. 821, Sup. Ct. Rep. p. 212):

"The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but, whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee."

In *Shively* v. *Bowlby* (1894) 152 U. S. 1, 44, 38 L. ed. 331, 347, 14 Sup. Ct. Rep. 548, Mr. Justice Gray delivering the opinion, the language just quoted was approvingly referred to; and Mr. Justice Peckham, speaking for the court, in *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* (1897) 168 U. S. 349, 362, 42 L. ed. 497, 502, 18 Sup. Ct. Rep. 157, again approvingly referred to the statement.

How completely these authorities apply to this case becomes, I think, manifest when it is borne in mind that the question is whether the United States, by the conveyance which it made of the land abutting on the water, parted with the title, which it confessedly owned prior to the conveyance, to the beds of the lakes themselves. The reservation as to rights and incidents referred to in the excerpt made above from the opinion in *Packer* v. *Bird* is but a reiteration of the doctrine enunciated by the court in the concluding sentences of the opinion in *Irvine* v. *Marshall*, 20 How. 558, 15 L. ed. 994, and its import is further shown by the opinion in *Barney* v. *Keokuk*, 94 U. S. 324, 24 L. ed. 224. In the latter case, the question presented was what rights in the beds of navigable streams attached to abutting lands conveyed by grants of the United States, and the court said that, as the beds of navigable waters within a state were the property of the state, by virtue of its sovereignty, no rights in the bed of such a stream could be conferred by a conveyance from the United States, unless the state law vested such rights in the owners of the upland without reference to the source from which the title to the upland had been derived. If such be the power of the states as to navigable waters which they hold in trust, it necessarily follows *that [488] what rights pass by a conveyance from the United States to land under non-navigable waters must be determined by the laws of the United States, to whom such land and water when situated in the public domain belong in absolute ownership.

The ownership in the United States and its exclusive power under the Constitution to administer and control its property being thus demonstrated, it follows that the state law is not the proper criterion by which to ascertain what the United States conveyed, and, therefore, there is a Federal question to be examined.

The court below held, although the United States survey had not, in fact, been extended beyond the meander line, and the lots conveyed by the United States were described as fractional on the plat and in the patents, that the patentees yet took full subdivisions. The principle applied was this: Where marsh land or non-navigable waters were within a meander line upon which fractional lots were abutted, the conveyance of such lots by the United States carries also the marsh land or non-navigable water beyond the meander to the extent of a full subdivision. And, in order to accomplish this result, the marsh land and water inside of the meander will be considered to have been surveyed, and the lines of the survey be hence protracted across the meander so as to embrace a full subdivision. Whilst this theory was plainly irreconcilable with the construction given to the United States law by the supreme court of Indiana in cases decided by it prior to *Stoner* v. *Rice*, 121 Ind. 51, 6 L. R. A. 387, 22 N. E. 968, that case announced the rule, and the subsequent cases in Indiana have sanctioned it down to and including *Kean* v. *Roby*, upon which the decision in this case was rested. In *Hardin* v. *Jordan* the doctrine of *Stoner* v. *Rice* was criticised as an unwarranted departure from the common law, and it was observed—as was undoubtedly the case—that the Indiana court, in *Stoner* v. *Rice*, but adopted the rule announced by the supreme court of Michigan in *Clute* v. *Fisher*, 65 Mich. 48, 31 N. W. 614, decided in 1887, shortly before the decision in *Stoner* v. *Rice*. Now, the opinion in *Clute* v. *Fisher* shows that the Michigan court in that case but followed a prior ruling made by it at the same term, in *Palmer* v. *Dodd*, 64 Mich. 474, 31 N. W. 209. The latter case involved title to land within a *section made frac- [ tional by a meandered lake or marsh, and the controversy turned upon whether, under the law of the United States, the rights of the owner of the fractional section extended beyond the meander line. The su-

preme court of Michigan, in deciding the question, said:

"When the United States grants by patent land described by a legal subdivision, the grantee is entitled to all the land embraced within the legal subdivision contained in his grant, and is not limited by the number of acres specified in the patent or upon the government plat. The meanders have no significance as boundaries, and are not intended as such. They are run simply to afford a means of computing the area contained in the fraction which the United States requires payment for on sale of the public domain. But no grantee by such patent, granting a legal subdivision of land, can derive title to land upon another legal subdivision. This we have decided in the cases of *Wilson* v. *Hoffman*, 54 Mich. 246, 20 N. W. 37; *Keyser* v. *Sutherland*, 59 Mich. 455, 26 N. W. 865, which were based upon the decision of the Supreme Court of the United States in *Brown* v. *Clements*, 3 How. 650, 11 L. ed. 767."

It is, hence, apparent that the rule in *Clute* v. *Fisher* was based upon the construction of the law of the United States expounded by this court in *Brown* v. *Clements*, 3 How. 650, 11 L. ed. 767. But, long prior to the decision in *Clute* v. *Fisher*, this court, in *Gazzam* v. *Phillips* (1857) 20 How. 372, 15 L. ed. 958, had reviewed the case of *Brown* v. *Clements*, and decided that the sale of a fractional lot did not convey a full subdivision; and, in consequence of this view, the case of *Brown* v. *Clements* was expressly overruled. In subsequent cases in Michigan the fact that that court had mistakenly predicated its conclusion in *Clute* v. *Fisher* on a case which this court had overruled, has been conceded. *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.* 102 Mich. 227, 25 L. R. A. 815, 60 N. W. 681. But, whilst the Michigan court has thus recognized the error into which it inadvertently fell in *Clute* v. *Fisher*, the Indiana court has continued to apply that rule, although the sole authority upon which it rests has been repudiated.

Besides the error in the ruling below [490] which is thus shown to *exist, the principle applied is, moreover, in conflict with decisions of this court since the ruling in *Gazzam* v. *Phillips*.

In *Horne* v. *Smith*, 159 U. S. 40, 40 L. ed. 68, 15 Sup. Ct. Rep. 988, certain fractional lots appeared by the plat of survey to be bounded on the west by the meander line of the Indian river. It was, however, found as a fact that the water line which was surveyed and made the boundary of the lots was the line of a bayou or savannah, and that there had been an omission to make a survey of the land west of the bayou and between it and the main bed of the Indian river. The court, speaking through Mr. Justice Brewer, said (p. 45, L. ed. p. 70, Sup. Ct. Rep. p. 990):

"Although it was unsurveyed, it does not follow that a patent for the surveyed tract adjoining carries with it the land which, perhaps, ought to have been, but which was not in fact, surveyed. The patent conveys only the land which is surveyed; and, when it is clear from the plat and the surveys that the tract surveyed terminated at a particular body of water, the patent carries no land beyond it."

In *Niles* v. *Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124, it appeared that a survey was made in 1834–1835 of fractional townships in the northern part of Ohio, adjacent to Lake Erie. By the field notes and plat certain sections were shown as fractional, because a tortuous meander line was shown upon the plat of survey upon which the fractional lots abutted. Across this meander line there was a region of country described as a marsh, and agreed in the statement of facts to be a body of low, swamp land, partly boggy and partly dry, stretched beyond to the shores of Lake Erie. The claim of the owner of the abutting lands was that his boundary was not the meander at the edge of the marsh, but Lake Erie. By referring to the plat previously excerpted in reviewing one of the *Tolleston Club Cases*, showing the situation of the land which was in controversy in those cases, it will be seen that the precise condition passed upon in those cases was involved in *Niles* v. *Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124. With the exact situation confronting it, instead of applying the erroneous rule announced in Indiana, this court held that the purchaser of the fractional lots abutting on the meander did not take a complete subdivision, but was *con- [491] fined by the meander line and got only the land which he bought and paid for. The court, speaking through Mr. Justice Brewer, said (p. 306, L ed. p. 173, Sup. Ct. Rep. p. 127):

"It appears distinctly from the field notes and the plat that the surveyor, Rice, stopped his surveys at this 'marsh,' as he called it. These surveys were approved and a plat prepared, which was based upon the surveys and field notes, and showed the limits of the tracts which were for sale. The patents, referring in terms to the survey and plat, clearly disclose that the government was not intending to, and did not, convey any land which was a part of the marsh.

. . . . . .

"It may be that surveyor Rice erred in not extending his surveys into this marsh, but his error does not enlarge the title conveyed by the patents to the surveyed fractional sections. The United States sold only the fractional sections, received only pay therefor, an amount fixed by the number of acres conveyed, and one receiving a patent will not ordinarily be heard to insist that, by reason of an error on the part of the surveyor, more land was bought than was paid for, or than the government was offering for sale."

And the same meaning was attributed to a meander line in *French-Glenn Live Stock Co.* v. *Springer*, 185 U. S. 54, 46 L. ed. 803, 22 Sup. Ct. Rep. 563.

But it is said the state of Indiana was

entitled to the land under the beds of the lakes in and by virtue of the act of Congress of September 28, 1850, known as the swamp land act, and, therefore, the error committed below, as to the meaning of the survey and patents, is without importance. But the state could not acquire a legal title to land under the swamp land act except by patent (*Niles* v. *Cedar Point Club*, 175 U. S. 309, 44 L. ed. 174, 20 Sup. Ct. Rep. 124; *Brown* v. *Hitchcock*, 173 U. S. 473, 43 L. ed. 772, 19 Sup. Ct. Rep. 485; *Rogers' Locomotive Mach. Works* v. *American Emigrant Co.* 164 U. S. 559, 574, 41 L. ed. 552, 558, 17 Sup. Ct. Rep. 188; *Michigan Land & Lumber Co.* v. *Rust*, 168 U. S. 589, 592, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208), and such patent must have been based upon a survey, as the statute clearly contemplated the selection and patenting only of "legal subdivisions." Act September 28, 1850 (9 Stat. at L. 519, chap. 84, U. S. Comp. Stat. 1901, p. 1587). The survey having stopped at the bank, and the bed of the lake not having been surveyed, platted, or subdi-[492]vided, or the area thereof ascertained, *no right of the state had attached to the lake-bed land under the swamp land act. Indeed, whilst some of the earlier cases in Indiana construed the swamp land act in direct conflict with the meaning of that act as interpreted by this court in the cases above cited, in a later case (*Tolleston Club* v. *State*) the Indiana court, on the rehearing, pointed out that, under a correct construction of the swamp land act, a survey and a patent were essential prerequisites to the passing of rights to the state under the swamp land act. And the confirmatory act of March 3, 1857 (11 Stat. at L. 251, chap. 117, U. S. Comp. Stat. 1901, p. 1588), clearly has no application, as patents had issued in 1853 upon all the selections made for the state.

The mind cannot fail at once to perceive the serious disturbance to vested rights which must follow from the suggestion that title passed to the state of Indiana, under the swamp land act, to land belonging to the United States, which at the time of the issue of the patents to the state had not been surveyed or selected by the Secretary of the Interior for account of the state, and which was not parceled into legal subdivisions until 1875, when the lake-bed land in question was surveyed as the property of the United States.

I am brought, then, to these questions: Did the United States, by running meander lines, lose her title to the lands within such lines? and, Did she, by issuing patents for the fractional lots abutting on lakes which were thus meandered, convey to her grantees title to the center of the lakes?

It cannot be successfully controverted that from the beginning, both under the Confederation and since the adoption of the Constitution, the laws for the survey and sale of the public domain have contemplated as well the survey and sale of both dry land and land covered by water, except that under navigable waters. This so clearly results from the text of the statutes that I content myself with making reference to the sections of the Revised Statutes relating to the subject, and to a citation in the margin of some of the earlier statutes.†

*The fact that land under non-navigable[493] waters was subject to survey and sale, and the settled practice of meandering navigable streams and making fractional abutting lots, is aptly illustrated by the case of *Surgett* v. *Lapice* (1850) 8 How. 48, 12 L. ed. 982. The question presented in that case arose under the act of March 3, 1811 (2 Stat. at L. 662, chap. 46), relating to the mode of surveying public lands in the territory of Orleans. By the 2d section of that act power was conferred to depart from the rectangular mode of survey as respected lands abutting on certain waters in the territory. Such lands were to be laid out into tracts as near as practicable of a specified frontage and depth on a river or bayou, and to be bounded by such lines as the nature of the country would render practicable and most convenient. By the 5th section of the act certain rights of pre-emption or double concessions in the lands back of tracts fronting on such waters were created under described conditions in favor of the front proprietors, it being provided in the act that double concessions should in no event extend so far in depth as to include lands fit for cultivation "bordering on another river, creek, bayou, or water course." Within the area of a double concession involved in the controversy in the case named, there was a bayou, and the claim on one side was that the double concession should extend back and embrace the lands on the bayou on the theory that it was non-navigable, while, on the other hand, it was contended that the bayou should be treated as navigable, and that the double concession could not be extended back to embrace the lands bordering on the bayou. Considering the contention that the waters of the bayou in question, though non-navigable, came within the description of water courses recited in the act, the court said (p. 69, L. ed. p. 991):

"To what description of water course did the legislature refer? *The enacting clause[494] provides that every person who owns a

†Ordinances of Confederation: May 20, 1785 (1 Birchard's Land Laws, p. 11); July 13, 1787, art. 4 (Id. p. 18); July 23, 1787 (Id. p. 24); June 20, 1788 (Id. p. 29); and July 9, 1788 (Id. p. 33). Acts of Congress: April 21, 1792 (1 Stat. at L. 257, chap. 25); May 5, 1792 (1 Stat. at L. 266, chap. 30); May 18, 1796 (1 Stat. at L. 464, chap. 29, U. S. Comp. Stat. 1901, p. 1362): May 10, 1800 (2 Stat. at L. 73, chap. 55); March 3, 1803 (2 Stat. at L. 233, chap. 27); March 26, 1804 (2 Stat. at L. 277, chap. 35); February 11, 1805 (2 Stat. at L. 313, chap. 14); March 2, 1805 (2 Stat. at L. 329, chap. 26); March 3, 1811 (2 Stat. at L. 662, chap. 46); April 24, 1820 (3 Stat. at L. 566, chap. 51); April 5, 1832 (4 Stat. at L. 503, chap. 65). Revised Statutes: Title 32, *The public lands*, particularly chapter 4 (*Pre-emptions*), chapter 5 (*Homesteads*), chapter 7 (*Sale and disposal of the public lands*), and chapter 9 (*Survey of the public lands*).

tract of land, 'bordering' on any river, creek, bayou, or water course, shall have the right of pre-emption to the back land. The act of 1811 has been construed, in the Department of Public Lands, for nearly forty years, to mean that those owners whose lands fronted on a navigable stream were only provided for; and that the word 'border,' both in the enacting clause and in the exception, meant to front on a navigable water course; that is to say, such waters as are described in the 3d section of the act of February 20, 1811 [2 Stat. at L. 642, chap. 21], by which Louisiana was authorized to form a state Constitution and government, by which act the River Mississippi, and the navigable rivers and waters leading into the same, or into the Gulf of Mexico, were declared to be common highways, and forever free, as well to the inhabitants of the said state, as to other citizens of the United States.

"Similar provisions as respects navigable waters are common to other states where there are public lands, and the practice has been uniform to survey and sell the lands 'bordering' on navigable streams as fractional sections; nor is the channel ever sold to a private owner. Of necessity, it had to be left almost exclusively to the Department of Lands executing the public surveys to ascertain what stream was navigable, and should be bordered by fractions and reserved from sale; and on the other hand, what waters were not navigable, and should be included in square sections, and the channel sold."

Whilst, of course, the case arose under the act of 1811, the opinion points to the general rule obtaining for years in the Land Department on the subject of the sale of land under non-navigable waters and the exclusion of land forming the beds of navigable or public waters from survey and sale.

Without presently developing this subject further, I append in the margin† a reference to acts of Congress, rules of the *Land [495] Department governing surveys, and reports of the executive officers charged with the survey and disposition of the public domain, which, beyond peradventure, show that, from the very beginning of the government up to the decision in *Hardin* v. *Jordan*, the general practice was to treat the land under non-navigable waters as the property of the United States, and to survey and sell the same as part of the public domain. Indeed, the proposition just stated is established by the facts disclosed in the various cases decided by the supreme court in Indiana which I have at the outset reviewed.

Whilst, as pointed out in *Surgett* v. *Lapice*, the existence of a navigable stream was the reason which usually occasioned a meander line, and hence fractional subdivisions, the provisions of the surveying laws, both under the Confederation and since, contemplated such a meander line also wherever there existed an Indian reservation or private land claim which at the time of the survey was made prevented the extension of the public surveys. But it is apparent that from an early day meander lines and resulting fractional sections came to be established, not only when occasioned by navigable rivers, Indian reservations, or private land claims, but from other causes. Thus, where the deputy surveyor encountered a morass or swamp which he deemed impassable, or such a body of non-navigable water as in his judgment it would not be profitable then to survey, a meander line would be run and fractional sections created. When this practice first originated, and whether the surveyor general of the respective surveying districts applied uniform rules concerning it, the official documents of which I can take judicial notice do not enable me to determine. But certain it is that the practice prevailed prior to 1827. This is evidenced *by a communica- [496] tion from the Land Department to the surveyor general at Washington, Mississippi, dated January 30, 1827 (2 Birchard's Comp. p. 862), and also by a letter from the Commissioner to the surveyor general at Cincinnati, Ohio, dated March 11, 1836 (Id. 962). That complaint was sometimes made that deputy surveyors had mistakenly meandered marsh land, which it was asserted should have been surveyed, subdivided, and platted, is also indicated by the official communication last referred to. The practice as to non-navigable lakes, above alluded to, is, moreover, shown by the meandering of the very lakes here in controversy (Wolf and George) as early as 1835, of Beaver lake and the lands adjacent to the Calumet river about the same time, as shown by the Indiana decision in the *Portsmouth Bank* and *Tolleston Club Cases*, and of Cross, Soda, Clear, and Fairy lakes in Louisiana in 1839. Sen. Doc. 101, 54 Cong. 1st session.

The general practice as to meandering lakes and ponds, prevailing in the survey-

†Act of July 1, 1870 (16 Stat. at L. 187, chap. 190); Act of January 11, 1873 (17 Stat. at L. 409, chap. 32); Act of February 19, 1874 (18 Stat. at L. 16, chap. 30); Act of December 21, 1874 (18 Stat. at L. 298, chap. 5); Manual of Surveying Instructions, February 22, 1855, approved by Congress, May 30, 1862 (12 Stat. at L. 409, chap. 86); Instructions of Commissioner of General Land Office of July 13, 1874 (Copp's Public Land Laws, p. 765); Report of Commissioner of General Land Office, 1868 (p. 131); Manual of Surveying Instructions, May 3, 1881 (p. 34), January 1, 1890 (p. 33), and June 30, 1894 (p. 57), which last was approved by act of August 15, 1894 (28 Stat. at L. 285, chap. 288, U. S. Comp. Stat. 1901, p. 1474); Report of the Commissioner of the General Land Office, 1877 (p.11); Letter of Secretary of Interior in response to a resolution of the House of Representatives respecting the survey of Lakes Wolf and George in Indiana and Illinois (H. R. Ex. Doc., No. 83, 45th Congress, 2d session); Report of the Commissioner of the General Land Office, in response to Senate resolution of January 14, 1896, giving information relative to certain lakes in Louisiana (Sen. Doc., No. 101, 54th Congress, 1st session).

ing districts created prior to 1850, is, however, conclusively shown by the "Manual of Instructions" dated February 22, 1855, issued by the Land Department for the guidance of the surveyors and deputy surveyors. In a letter transmitting this manual, the Commissioner of the General Land Office directed attention to the fact that it was a revised edition of the previous instructions on the subject. Among the instructions contained in this manual was the following (Lester Land Laws, p. 714):

"3. You are also to meander, in manner aforesaid, all *lakes* and deep ponds of the area of 25 acres and upwards; also navigable bayous; *shallow* ponds, readily to be drained, or likely to dry up, are not to be meandered."

This manual was approved by Congress on May 30, 1862 (12 Stat. at L. 409, chap. 86). Like manuals, reiterating the instructions above referred to, were issued on May 3, 1881, January 1, 1890, and June 30, 1894 (p. 57); and the manual of 1894 was approved by Congress on August 15, 1894. 28 Stat. at L. 285, chap. 288, U. S. Comp. Stat. 1901, p. 1474.

Whilst the statements already made are sufficient to demonstrate that the rule contained in the manuals but substantially expressed the practice prevailing from the be-[497]ginning, such *fact is additionally demonstrated by the report of the Commissioner of the General Office for 1868 (p. 131), wherein, referring to the rule, he said that, in substance, it but reiterated the practice always followed in the Land Department.

There is in reason, then, no support for the proposition announced in some cases decided by state courts,—presumably on the authority of the rule in *Hardin* v. *Jordan*, —that the stopping of a survey at the margin of a non-navigable body of water and the meandering of the same operate to deprive the United States of the title to land within the meanders, which the United States had owned before the meander lines were run. To say this would be only to declare that power existed in the executive officers of the government to strip the United States of its property by a mere method of survey, when from the beginning no authority to that effect had been conferred, and no such purpose was contemplated. The practice of the government and the decisions of this court, it seems to me, leave no room for controversy on this subject. Thus, where a navigable stream was meandered, and within the meander lines were unsurveyed islands forming part of the public domain of the United States, and a request was subsequently made under the provisions of the statutes of the United States for their survey (12 Stat. at L. 410, chap. 90), the practice of the department was to comply with the request and survey and dispose of the islands as parts of the public domain. Report Land Office, 1868, p. 121. And, as said in the same report, in referring to the rule prevailing from the beginning concerning the meandering of lakes and ponds, where, subsequently to such meandering, lake beds were reported as dry, they "were surveyed and brought into the market. In all these instances the United States has but exercised the ordinary right of proprietorship."

The decisions of this court already referred to conclusively establish at the same time that the mere running of a meander line did not affect the title of the United States to the land within such meanders. Without going over all the cases, it suffices to call attention on this point to *Gazzam* v. *Phillips*, 20 How. 372, 15 L. ed. 958, and *Niles* v. *Cedar Point Club*, 175 U. S. 300, 44 L. ed. 171, 20 Sup. Ct. Rep. 124. *Quite recently the subject was again passed[498] upon in *United States* v. *Mission Rock Co.* 189 U. S. 391, *ante*, 865, 23 Sup. Ct. Rep. 606. In that case there existed in navigable waters a small island, and, whilst the title of the state to the land under the navigable waters was sustained, the title of the United States to the island was upheld.

The prior title of the United States being unaffected by the meander, did the conveyance by the United States of a specified quantity of land contained in described fractional lots abutting on a meander, the land under water within the meanders being unsurveyed and unplatted, convey by legal intendment more than the grant purported to embrace?

It cannot be controverted that, at common law, as elaborately pointed out in *Hardin* v. *Jordan*, the owner of land abutting on an unnavigable body of water, by conveying the upland as bounding on the water, without restriction or reservation in the deed, in legal effect, caused the center of the stream to be the boundary of the land conveyed. But, it seems to me, it cannot be questioned that the statutes of the United States relating to the disposal of the public domain confer no power whatever to sell unsurveyed public land, nor do such statutes invest courts with the authority to enlarge the grants actually specified in the patents of the United States. A grant by the United States is to be interpreted by the statutes of the United States, and therefore is not subject to be enlarged by any principle of conveyance beyond the express intendment of the statute under the authority of which the grant is made. The difference between the rules of construction applicable to grants made by a government and the grant made by an individual is that grants of the government are to be strictly construed in its favor and against the grantee; in other words, that nothing passes by the grant but that which is necessarily and expressly embraced in its terms.

The doctrine on this subject was aptly stated by the court in *Shively* v. *Bowlby*, speaking through Mr. Justice Gray, where it was said (152 U. S. 10, 38 L. ed. 335, 14 Sup. Ct. Rep. 551):

"It was argued for the defendants in error that the question presented was a mere question of construction of a grant bounded *by tide water, and would have been the[499] same as it is if the grantor had been a pri-

vate person. But this is not so. The rule of construction in the case of such a grant from the sovereign is quite different from that which governs private grants. The familiar rule and its chief foundation were felicitously expressed by Sir William Scott: 'All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights, and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.' *The Rebeckah*, 1 C. Rob. 227, 230. Many judgments of this court are to the same effect. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544-548, 9 L. ed. 773, 822-824; *Martin* v. *Waddell*, 16 Pet. 367, 411, 10 L. ed. 997, 1013; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, 49, 35 L. ed. 55, 64, 11 Sup. Ct. Rep. 478."

Applying this doctrine to the lands in question, as the law of the United States conferred no authority to transfer unsurveyed land, and confined the patentee to the land actually described in the patent as strictly construed, it follows that, by the issue of its patents for fractional lots abutting on the water, the United States did not transfer the title to the beds of the lakes in question within the meander lines.

And the Land Department, in executing the acts of Congress, and Congress itself, in dealing with the subject, have so uniformly manifested the purpose that the grants of the United States to land bordering on a non-navigable body of water should not convey the land under the water belonging to the United States beyond the limits of the land actually expressed in the patent as conveyed, that it seems to me the statutes for the disposition of the public domain should be read as if they contained an express provision to that effect.

I have already shown the rule prevailing from the earliest day for the meandering of non-navigable lakes and ponds, and, in doing so, called attention to the report of the Commissioner of the General Land Office made in [500] 1868, in which he stated *that it had been the constant practice from the beginning, after lakes had been meandered and on the lakes becoming dry, to survey and dispose of the beds thereof. As evidencing this practice, I call attention to the following:

The Land Department, on July 13, 1874 (Copp's Public Land Laws, p. 765), issued directions which were to govern the survey of the bed of non-navigable lakes and other like bodies of water which had been meandered at the time of the original survey, and which had become suitable for survey and sale. As the circular of instructions related only to districts where the office of surveyor general had been abolished, and could not have been intended to create a rule in such districts different from that obtaining in other districts, the legitimate inference from the instructions is that it was intended to put in effect in such districts the practice usual in other districts where the office of surveyor general had not been done away with. This view finds support in the prelude to the letter forwarding the circular of instructions, which says: "As inquiries arise in regard to the survey of the beds of meandered lakes or other similar bodies of water in districts where the office of surveyor general has been discontinued, the following is communicated," etc. The instructions which followed authorized the survey of the beds of such lakes as the property of the United States, when the waters had "so permanently receded or dried up as to leave within the unsurveyed area dry land fit, in ordinary seasons, for agricultural purposes." The remainder of the instructions dealt with the mode of proceeding to have a survey made and title obtained by individuals.

Here, again, as in the case of the rule of 1855, concerning the meandering of non-navigable lakes, the fact that it but in substance formulated the practice prevailing from the beginning, is shown by the report of the Commissioner of the General Land Office made in 1877 (Report, Land Office, p. 11), where, referring to the practice of the department as to surveying islands situated in navigable waters within a meander and the circular in respect thereto issued in 1868, and also referring to the circular of July 13, 1874, above referred to, it was said:

"The regulations embraced in these circulars were not new *in their substance, but [501] were simply a formulation of the pre-existing practice of the office theretofore administered with reference to the class of lands to which they were applicable."

It is then established that from the very beginning of the government, until at least the date of the circular just referred to, the practice was, after non-navigable bodies of water had been meandered, when the beds thereof became uncovered, to dispose of such beds as the property of the United States, separately from the former border lots. As the record does not disclose the number of instances in which this practice was observed during nearly one hundred years prior to *Hardin* v. *Jordan*, I may not state them, but, as no single instance to the contrary appears, it seems to me that the statement in *Hardin* v. *Jordan*, that the contrary rule had always prevailed, is left without any support whatever, and must have arisen from confounding the uniform practice not to sell the channel of navigable rivers, which belonged to the states, with the uniform practice to the contrary as to non-navigable waters, which belonged to the United States. But, the acts of Congress on the subject are so clear that they leave no room for substantial controversy, and they, in effect, amount to a legislative approval of the construction of the laws of the United States affixed by the administrative officers to those laws from the

very foundation of the government. Thus, on July 1, 1870 (16 Stat. at L. 187, chap. 199), after the sale of border lots abutting on the meander of a marsh and the Little Calumet river, Congress provided for the survey and sale of the lands within the meanders. So, also, after the patenting to the state of Indiana of the fractional lots abutting on Beaver lake, Congress, by act of January 11, 1873 (17 Stat. at L. 409, chap. 32), granted the bed of the lake to the state. Again, by the act of February 19, 1874 (18 Stat. at L. 16, chap. 30), the bed of a meandered lake, known as Tarkio lake, situated in Holt county, Missouri, was conveyed to the county, with a reservation, however, that the county should make title to such person as might have settled upon any portion of the land once part of the bed of the lake, under the homestead and pre-emption laws. Yet a further illustration, which, because of [502] its brevity and importance, is excerpted *in full. Congress passed an act, approved on December 21, 1874 (18 Stat. at L. 293, chap. 5), which reads as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of the bed of the marsh or pond in sections fourteen, twenty-three, and twenty-six, in township sixteen north, of range twenty east of the fourth principal meridian in the county of Sheboygan, in the state of Wisconsin, as shall or may be reclaimed by draining the water from the same, shall be owned and held, so far as any rights or interests of the United States are concerned, by the owners of the lands abutting upon said marsh or pond, and draining the same to the center or thread thereof, and divided among the several owners adjoining and abutting said marsh or pond, according to the rules of law, upon payment by said adjoining owners into the treasury of the United States of $1.25 per acre for the amount of land that has been or may be so reclaimed."

But, it is said, although it be conceded that the patentee, under the law of the United States, was confined to the land within the actual boundaries of the fractional lots conveyed, nevertheless if, as a matter of conveyancing, a grant by an individual would be construed under the state law as extending beyond the dry land to the center of the water, such construction should be applied to the patents of the United States. This, however, but asserts the same proposition which I have already fully considered, and, whilst seemingly accepting the true meaning of the law of the United States and the interpretation given to it from the beginning, proceeds to overthrow it.

To argue that, because conveyances made by individuals are controlled by the law of the states, therefore conveyances made by the United States are likewise so controlled, involves, as I see it, not only a *non sequitur*, but, besides, amounts to denying, so far as the public domain is concerned, that there is a government of the United States having complete ownership and supreme power in the premises. The suggestion that courts as a matter of convenience will determine by the state *law the extent of a grant made by [503] the United States is without force, since courts have no power upon their conception of convenience to deprive the United States of its property by resorting to the laws of a state in order to devest the title of the United States in and to property which it owns, and which it has never voluntarily parted with if its own laws be applied. Moreover, the argument of convenience, when inherently considered, is without merit, since it rests on the assumption that, for the purpose of convenience, it will be held that what property passed by a grant of the United States is to be measured by a variable standard, the divergent laws of the several States, instead of the law of the United States operating generally throughout the United States, thus creating uncertainty and confusion by causing it to come to pass that a grant made by the United States in virtue of the authority conferred by the statutes of the United States will mean one thing in one state and a wholly different thing in another.

As pointed out by this court in *Irvine* v. *Marshall*, 20 How. 558, 563, 15 L. ed. 994, 997, one of the very objects of the provision of the Constitution conferring ample power upon Congress with respect to the property of the United States was to prevent this very condition of things. In other words, the proposition is that, for the sake of assumed convenience, a rule of interpretation should be resorted to to bring about the very condition of inconvenience which it was the purpose by the constitutional provision in question to guard against.

Conceding, however, *arguendo*, that a grant by the United States should be construed as a matter of conveyancing by the local law prevailing in a particular state, it nevertheless seems to me clear that the conclusion which the court reaches is erroneous. As has been shown in the *Portsmouth Bank Case*, the supreme court of Indiana expressly decided that a conveyance of border lots by the state was to be governed, not by the rules of conveyancing applicable to private individuals, but that the power of the state officers was to be ascertained from the statutes of the state alone; consequently, it was decided that, where the state had conveyed the lots abutting *on Beaver lake by the ex- [504] act description contained in the patents of the United States, such conveyances gave no right to the bed of the lake, because power existed in the officers of the state only to sell lands which had been regularly surveyed and platted. In other words, the local decisions in Indiana establish the exact distinction between the rule of conveyancing applicable to individuals and those controlling the grant by a government, which was pointed out by this court in the passage from the opinion in *Shively* v. *Bowlby*, previously quoted.

Surely, if it be the rule in Indiana that the construction of a grant made by the state of its public lands is to be controlled

by the state statutes, it should not now be held that a grant by the United States of its lands situated in Indiana is not to be construed by the statutes of the United States, but by the rules of conveyancing applicable to private grants. In other words, that, in dealing with the lands of the United States, the government is to be subjected to the local law of Indiana, and yet at the same time be deprived of the rights which are accorded by that law to the state, regarded as a government. To now so hold, it seems to me, is but to declare that it is within the province of the local law to strip the United States of its governmental attributes and reduce it to the condition of a mere private individual. This difficulty cannot be avoided by suggesting that in this particular case the Indiana courts have decided that the transfer of the border lots carried the beds of the lakes, and hence it must be construed that such land passed by the local law. As has been previously demonstrated, the decision of the supreme court of Indiana in this case was in effect predicated on its previous rulings in *Stoner* v. *Rice* and the *Tolleston Club Cases*. In those cases it was declared that the doctrine previously announced in the *Portsmouth Bank Case* was not overruled, but the court proceeded upon the theory that that case was inapplicable, because it held in the subsequent cases that there had been in those cases a survey of the land under water at the time the border lots were conveyed by the United States. This was based, not upon any local law, but upon the law of the United States as construed by the state [505] court. That *construction being overthrown by the decision of this court in *Gazzam* v. *Phillips* and the many other cases in this court which have followed it, it results *that by the Federal law, upon which the court based its decision, the beds of the lakes did not pass*. And that this result was understood by the supreme court of Indiana is shown by the opinion on the rehearing in the *Tolleston Club Case*, where it was expressly declared that, if the theory of survey announced by the court was incorrect, it was its opinion that the bed of the lake did not pass, and title thereto remained in the United States. The decision now announced, therefore, holds that the question whether the beds of the lakes passed is to be determined by the local law as a matter of conveyancing. When it develops by the decision of the Indiana court that, under the local law, as a matter of conveyancing, the beds of the lakes did not pass, it is then in effect decided that the beds did pass, because it has been decided by the supreme court of Indiana that there had been a survey under the law of the United States, although the fact that there had been none conclusively results from a line of decisions of this court which are not now questioned. It comes then, as my mind sees it, to this: The beds of the lakes did not pass by the local law, and they did not pass by the Federal law correctly construed; but, although passing by neither the Federal nor the local law, they must yet be held to have passed because of a principle of law which it is impossible for me to state, because my mind does not perceive it.

Pretermitting, however, this view, and considering the case as controlled by the rule of *Hardin* v. *Jordan*, it only remains to determine whether, under the principle of *stare decisis*, my duty is to assent to its application in the case at hand. Undoubtedly, since *Hardin* v. *Jordan* was decided, rights of property may have accrued predicated on the ruling made in that case; but it is also unquestionable that rights of property which had vested prior to that ruling under the acts of Congress, and the settled construction and practice of the government prevailing for almost a century, would be devested if that case were applied. Indeed, the case in hand is but an illustration of this fact, since patents of the United States to land once forming *part of the beds of the lakes [506] which are in controversy in this case were issued prior to the decision in *Hardin* v. *Jordan*. Two classes of rights of property then must be considered,—the one resting on the true rule existing from the foundation of the government, and the other upon the mistaken theory of *Hardin* v. *Jordan*. I do not feel at liberty to indulge in the conjecture that the rights which were brought into existence during a century are less important than those which may have arisen in the comparatively short period since the decision in *Hardin* v. *Jordan*. Putting this view aside, if only the rights of those who had actually received the patents of the United States for the beds of the lakes which had once been meandered were concerned, it might be that I should consider it my duty to accept as controlling, under the rule of *stare decisis*, the decision in *Hardin* v. *Jordan*, and thus deprive the plaintiffs in error, whose rights are here at issue, of their property, and this upon the assumption that the legislative department of the government would rectify the wrong which would be thus inflicted. My mind, however, cannot escape the conviction that the consequence of adhering to the doctrine of *Hardin* v. *Jordan* cannot be limited merely to the rights of those who may have in the past actually acquired from the United States title to land once forming the beds of meandered lakes. On the contrary, that doctrine strips the United States of the title to the bed of every pond or lake which was meandered during the nearly a century which preceded the decision in *Hardin* v. *Jordan*, where the lots bordering on such meandered lakes had been disposed of by the United States. This shows the inadequacy of the suggestion that the United States may, by a change of the form of conveyancing, obviate the doctrine now maintained. Whatever be the change in the rules of conveyancing whenever the bed of a meandered lake hereafter becomes fit for sale, the question must recur and call for a reiteration of the ruling now made. Under these circumstances, the line upon which I should act seems to me to have already been plainly pointed out by the court in *Gazzam* v. *Phillips*, 20 How. 372, 15

L. ed. 958. There the court, as I have said, having been called upon to consider the correctness of the rule announced by it twelve [507] years *before in *Brown* v. *Clements*, 3 How. 650, 11 L. ed. 767, and having concluded that that case had been wrongly decided, was required to determine whether it was its duty under the rule of *stare decisis* to perpetuate an erroneous principle or apply a correct one. In deciding to follow the latter course, the reason which controlled to the conclusion is so directly applicable to the subject-matter of this case, and was so frankly and ably stated, that I excerpt a passage from the opinion, as follows (p. 378, L. ed. p. 961):

"It is possible that some rights may be disturbed by refusing to follow the opinion expressed in that case; but we are satisfied that far less inconvenience will result from this dissent, than by adhering to a principle which we think unsound, and which, in its practical operation, will unsettle the surveys and subdivisions of fractional sections of the public land running through a period of some twenty-eight years. Anyone familiar with the vast tracts of the public domain surveyed and sold, and tracts surveyed and yet unsold, within the period mentioned, can form some idea of the extent of the disturbance and confusion that must inevitably flow from an adherence to any such principle. We cannot, therefore, adopt that decision or apply its principles in rendering the judgment of the court in this case."

Concluding that the patents of the United States to the state of Indiana for the fractional lots abutting upon Wolf lake and Lake George did not convey title to land under the water, and that the patents subsequently issued by the United States, based upon the Wolcott survey of 1875, purporting to pass the title to land once a part of the beds of the lakes were valid, I dissent.

I am authorized to say that Mr. Justice **McKenna** joins in this dissent.

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[508] *GERTRUDE H. HARDIN and the Cook County Canal & Dock Company, *Plffs. in Err.*,

*v.*

CHARLES B. SHEDD.

(See S. C. Reporter's ed. 508-524.)

*Public lands—grant of land bordering on non-navigable water—title to adjoining submerged land—question of local law.*

Whether the patentee of the United States to land bounded on a non-navigable lake belonging to the United States takes title to the adjoining submerged land is determined by the law of the state where the land lies.

[No. 56.]

*Submitted January 13, 1902. Ordered for reargument December 22, 1902. Reargued January 12, 13, 1903. Decided May 18, 1903.*

IN ERROR to the Supreme Court of the State of Illinois to review a decree which affirmed a decree of the Circuit Court of Cook County in favor of petitioner in a proceeding under the burnt records act of that state. *Affirmed.*

See same case below, 177 Ill. 123, 52 N. E. 380.

The facts are stated in the opinion.

*Mr.* **Thomas Dent** submitted the cause for plaintiffs in error:

Land belonging to the United States cannot be disposed of, except by the authority of Congress.

*Gibson* v. *Chouteau*, 13 Wall. 92, 20 L. ed. 534; *Irvine* v. *Marshall*, 20 How. 558, 15 L. ed. 994.

Whenever the question in any court, state or Federal, is whether a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States.

*Wilcox* v. *Jackson ex dem. M'Connel*, 13 Pet. 498, 516, 10 L. ed. 264, 273; *Bagnell* v. *Broderick*, 13 Pet. 436, 10 L. ed. 235; *Paige* v. *Peters*, 70 Wis. 178, 35 N. W. 328; *Irvine* v. *Marshall*, 20 How. 564, 15 L. ed. 997; *Gibson* v. *Chouteau*, 13 Wall. 92, 20 L. ed. 534; *Seymour* v. *Sanders*, 3 Dill. 440, Fed. Cas. No. 12,690; *Gilmore* v. *Sapp*, 100 Ill. 297.

The supreme court of Illinois has been in accord with this court in treating the meander of a body of water in the government surveys as having been run, not as a limitation upon boundaries, but for showing the water as a boundary, and ascertaining quantities approximately.

*St. Paul & P. R. Co.* v. *Schurmeir*, 7 Wall. 272, 19 L. ed. 74; *Middleton* v. *Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; *Houck* v. *Yates*, 82 Ill. 179; *Fuller* v. *Dauphin*, 124 Ill. 542, 16 N. E. 917.

The courts of the United States will construe the grants of the general government, without reference to the rules of construction adopted by the states for their grants

*Packer* v. *Bird*, 137 U. S. 661, 34 L. ed. 819, 11 Sup. Ct. Rep. 210.

The presumption is in ordinary cases that a deed for a tract having water frontage conveys as far as the grantor owns.

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NOTE.—*As to title to land under water*—see note to Goff v. Cougle (Mich.) 42 L. R. A. 161.

*As to ownership of the bed of lakes and ponds*—see note to Gouverneur v. National Ice Co. (N. Y.) 18 L. R. A. 695.

*As to state decisions and laws as rules of decision in Federal courts*—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmendorf v. Taylor, 6 L. ed. U. S. 290; Jackson *ex dem.* St. John v. Chew, 6 L. ed. U. S. 583; United States *ex rel.* Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334, and Forepaugh v. Delaware, L. & W. R. Co. (Pa.) 5 L. R. A. 508.

*Paine* v. *Woods*, 108 Mass. 160; *Trustees of Schools* v. *Schroll*, 120 Ill. 509, 60 Am. Rep. 575, 12 N. E. 243; *Bristol* v. *Carroll County*, 95 Ill. 84; *Hogg* v. *Beerman*, 41 Ohio St. 81, 52 Am. Rep. 71; *Middleton* v. *Pritchard*, 4 Ill. 510, 38 Am. Dec. 112; 3 Kent, Com. 428; Elphinstone, Interpretation of Deeds, 182, 183.

The weight of authority as to what is the common law is most decidedly with the view that was adopted by this court in *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Mitchell* v. *Smale*, 140 U. S. 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840.

*Beckman* v. *Kreamer*, 43 Ill. 447, 92 Am. Dec. 146; *Bristol* v. *Carroll County*, 95 Ill. 84; *Bristow* v. *Cormican*, L. R. 3 App. Cas. 641; *Smith* v. *Rochester*, 92 N. Y. 463, 44 Am. Rep. 393; *Gouverneur* v. *National Ice Co.* 134 N. Y. 355, 18 L. R. A. 695, 31 N. E. 865; *Lamprey* v. *State*, 52 Minn. 181, 18 L. R. A. 670, 53 N. W. 1139; *Kirkpatrick* v. *Yates Ice Co.* 45 Mo. App. 335; *Grand Rapids Ice & Coal Co.* v. *South Grand Rapids Ice & Coal Co.* 102 Mich. 227, 25 L. R. A. 815, 60 N. W. 681; *Olson* v. *Huntamer*, 6 S. D. 364, 61 N. W. 479; *Shell* v. *Matteson*, 81 Minn. 38, 83 N. W. 491; *Kanouse* v. *Slockbower*, 48 N. J. Eq. 42, 21 Atl. 197; *State* v. *Portsmouth Sav. Bank*, 106 Ind. 435, 7 N. E. 379.

This court is not required, in passing upon the effect of a patent for public lands, to surrender its own judgment as to what is the common law.

*Yates* v. *Milwaukee*, 10 Wall. 497, 19 L. ed. 984.

This court should not feel bound to surrender its convictions on the subject on account of a contrary subsequent decision of the state court.

*Pease* v. *Peck*, 18 How. 595, 15 L. ed. 518; *Roberts* v. *Bolles*, 101 U. S. 119, 25 L. ed. 880; *Nelson* v. *Madison*, 3 Biss. 244, Fed. Cas. No. 10,110; *Morgan* v. *Curtenius*, 20 How. 1, 15 L. ed. 823; *Gelpcke* v. *Dubuque*, 1 Wall. 175, 17 L. ed. 520.

*Mr.* **Thomas Dent** also argued the cause for plaintiffs in error on reargument.

*Mr.* **Harry S. Mecartney** submitted the cause for defendant in error:

The local law of the state in which lands patented by the United States lie governs the construction to be given to grants of lands bordering upon waters, whether navigable lake, navigable stream, or non-navigable lake or stream.

*Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Shively* v. *Bowlby*, 152 U. S. 1, 38 L. ed. 331, 14 Sup. Ct. Rep. 548; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157.

*Mr.* **Harry S. Mecartney** also argued the cause for defendant in error on reargument.

Mr. Justice **Holmes** delivered the opinion of the court:

This is a proceeding under the burnt records act of the state of Illinois, by which the defendant in error, Shedd, seeks to establish his record title to certain land adjoining and under a non-navigable lake called Wolf lake, lying partly in Illinois and partly in Indiana. The plaintiff in error, Hardin, also owns land adjoining the same lake, by succession to a title under patents from the United States, and under these patents makes claims to land now or originally under the lake, which conflict with the claim of Shedd and with the decree of the court. The other plaintiff in error is a grantee of Hardin. The decree having been affirmed by the supreme court of the state (177 Ill. 123, 52 N. E. 380; S. C. 161 Ill. 462, 33 L. R. A. 146, 44 N. E. 286), the case is brought here by writ of error. *Mitchell* v. *Smale*, 140 U. S. 406, 410, 35 L. ed. 442, 443, 11 Sup. Ct. Rep. 819, 840; *Shively* v. *Bowlby*, 152 U. S. 1, 9, 10, 38 L. ed. 331, 335, 14 Sup. Ct. Rep. 548. It seems unnecessary to go into details of the difference, as the main question here goes to the foundation of *Hardin's Case*, and we are against her on that. Her title and a plan of the territory in which lies the disputed land will be found set out in *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

The claim of the plaintiffs in error to the land below the original water line depends on its having passed by the patent of the United States. The patent to Holbrook, from which they derive an important part of their title, was dated May 20, 1841, long before the swamp land act. [9 Stat. at L. 519, chap. 84.] At that time the land under the lake, as well as that surrounding it, belonged to the United States, and, if grants [519] of the United States should be construed without regard to state laws, it may be assumed that, subject to all questions of the proper adjustment of lines, Hardin would have prevailed. When land is conveyed by the United States bounded on a non-navigable lake belonging to it, the grounds for the decision must be quite different from the considerations affecting a conveyance of land bounded on navigable water. In the latter case the land under the water does not belong to the United States, but has passed to the state by its admission to the Union. Nevertheless, it has become established almost without argument that in the former case, as in the latter, the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies. In the case of land bounded on a non-navigable lake the United States assumes the position of a private owner subject to the general law of the state, so far as its conveyances are concerned. *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838; *Shively* v. *Bowlby*, 152 U. S. 1, 45, 38 L. ed. 331, 347, 14 Sup. Ct. Rep. 548; *Grand Rapids & I. R. Co.* v. *Butler*, 159 U. S. 87, 90, 93, 40 L. ed. 85–87, 15 Sup. Ct. Rep. 991; *St. Anthony Falls Water Power Co.* v. *St. Paul Water Comrs.* 168 U. S. 349, 363, 42 L. ed. 497, 502, 18 Sup. Ct. Rep. 157. Such cases are not affected by Rev. Stat. §§ 2476.

5251, U. S. Comp. Stat. 1901, pp. 1567, 3522. When land under navigable water passes to the riparian proprietor, along with the grant of the shore by the United States, it does not pass by force of the grant alone, because the United States does not own it, but it passes by force of the declaration of the state which does own it that it is attached to the shore. The rule as to conveyances bounded on non-navigable lakes does not mean that the land under such water also passed to the state on its admission or otherwise, apart from the swamp land act, but is simply a convenient, possibly the most convenient, way of determining the effect of a grant. We are particular in calling attention to this difference, because we fear that there has been some misapprehension with regard to the point.

The law of Illinois has been settled since *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, and it now is clear, by the decision in this case and later, that conveyances of the upland do not carry adjoining land below the water line. *Fuller* v. *Shedd*, 161 Ill. 462, 33 L. R. A. 146, 44 N. E. 286; *Hardin* v. *Shedd*, 177 Ill. 123, 52 N. E. 380; *Hammond* v. *Shepard*, 186 Ill. [520] 235, 57 N. E. 867. *Following these decisions, we must hold that the title set up by the plaintiffs in error fails. Even accepting the principles of the common law, it may be a question whether one consideration in this case was not overlooked in *Hardin* v. *Jordan*. It was noted that the conveyance was by reference to the official plat. The plat of the Illinois portion, unlike that of the part in Indiana, described the lake as a "navigable lake." It is true that this was a mistake, but it might be urged that the description must be taken to have the same effect as if it were true when we are determining the effect of a conveyance adopting it. It would seem that if a conveyance of land bounded by navigable water would not pass land below the water line, a conveyance purporting to bound the land by navigable water does not purport to pass land below the water line. The common law as understood by this court and the local law of Illinois with regard to grants bounded by navigable water are the same. *Shively* v. *Bowlby*, 152 U. S. 1, 43, 47, 51, 38 L. ed. 331, 347, 348, 350, 14 Sup. Ct. Rep. 548; *Seaman* v. *Smith*, 24 Ill. 521.

Of course, it would result from the Illinois ruling that the survey of the submerged land in 1874, referred to in *Hardin* v. *Jordan*, and the conveyances in pursuance of it, may have been good on the Illinois side of the state line, unless the state had got a title before that date under the swamp land act. Whether it did so or not, it is unnecessary to consider in this case.

The land which Shedd gets under the decree of the state court he gets, not in derogation of the foregoing principles, but on findings of fact as to what land was above water at the date of the patents from the United States (161 Ill. 469, 470, 33 L. R. A. 149, 154, 44 N. E. 289), and as to accretions to that land by the gradual drying up of the water at a later date. 161 Ill. 473, 494, 33 L. R. A. 155, 161, 44 N. E. 289, 297. We perceive no need for considering the decree in detail.

*Decree affirmed.*

Mr. Justice **White**, with whom concurs Mr. Justice **McKenna**, dissenting:

This case, in some aspects, involves contentions supposed to have been finally decided by this court in *Hardin* v. *Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838, *and *Mitchell* v. *Smale*, 140 U. S. [521] 406, 35 L. ed. 442, 11 Sup. Ct. Rep. 819, 840. In those cases there was a controversy between persons holding the patents of the United States to fractional lots abutting on the meander line of Wolf lake in Illinois and those holding the patents of the United States subsequently issued to the bed of the lake. The latter patents were based upon a survey made of the bed, approved after contest in the Land Department. It was held in the cases referred to that the rights of the claimants to the bed of the lake were to be determined by the local law of Illinois. Ascertaining what the local law was, it was decided that the abutting lot owners took to the center of the lake, and hence the subsequent patents to the bed were void.

The controversy presented by this record originated from conflicting claims made in two suits (subsequently consolidated) to the bed of Wolf lake, between Mrs. Hardin (who was the plaintiff in *Hardin* v. *Jordan*) and one of her grantees, as owners of the border lots, Shedd (grantee of Mitchell, the plaintiff in *Mitchell* v. *Smale*), also as an owner of border lots, and various claimants under patents of the United States based upon the survey of the bed of the lake. Although the judgment below was against the second patentees, they have not prosecuted error. The supreme court of Illinois declined to apply the rule laid down by this court because it held that this court had, in *Hardin* v. *Jordan* and *Mitchell* v. *Smale*, misconceived the state law. By the local law it was held that the lot owners, by the conveyance to them of lots abutting on the meander line, took no title whatever to the bed of the lake. It was, however, decided that the effect of the conveyance by the United States to private persons of the border lots was to transfer the title of the bed of the lake to the state of Illinois. The doctrine of the supreme court of Illinois on the subject is not only shown in the opinion of that court in this case (*Fuller* v. *Shedd*, 161 Ill. 462, 33 L. R. A. 146, 44 N. E. 286), but also in the subsequent case of *Hammond* v. *Shepard*, 186 Ill. 235, 57 N. E. 867. In the first case (*Fuller* v. *Shedd*), after expressly deciding that the state of Illinois did not acquire title to the bed of the lake under the swamp land act, the court declined to hold that "the grant to the riparian owner conveys the bed of a non-navigable [meander] lake, and makes its waters mere private waters;" *and, further, said that, "so long as such [522] meander lakes exist, over their waters and

bed, when covered with water, the state exercises control, and holds the same in trust for all the people who alike have benefit thereof, in fishing, boating, and the like." In the second case (*Hammond* v. *Shepard*) the supreme court of Illinois said (p. 241, N. E. p. 867):

"The law of this state, as repeatedly announced, is that shore owners on meandered lakes, whether navigable or non-navigable, take title only to the water's edge, the bed of the lake being in the state.

. . . . . .

"No shore owner can take away from the state its title to the former bed of the lake unless he can establish by proof that the dry land was formed by the water receding from his shore line."

Under the doctrine thus stated, having treated the bed of the lake as the property of the state, the court determined the rights of the parties by reference to principles of accretion which it deemed applicable to the property in the bed of the lake owned by the state. Now, in *Kean* v. *Calumet Canal & Improv. Co.*, quite recently decided by this court [190 U. S. 452, *ante*, 1134, 23 Sup. Ct. Rep. 651], the doctrine announced in *Hardin* v. *Jordan* was re-examined, and it was in effect held that that case, whilst recognizing that the ownership of the beds of non-navigable lakes on the public domain was in the United States, simply decided that when the United States sold lots bordering on such a lake the question whether or not the bed of the lake passed by the grant of the border lots was to be determined by the principles of conveyancing in force under the local law of the state where the lake was situated. Now, as the settled rule in Illinois is that, under the principles of conveyancing prevailing in that state, no title to the bed of a lake passes to the patentees of the United States by the sale of border lots, I do not perceive how the United States has been devested of its title to the bed of Wolf lake. To say that, although, on the principles of conveyancing under the local law, the bed did not pass, nevertheless, because the United States sold the border lots, the state of Illinois thereby became the [523] owner of the bed of the lake, is, *as I understand it, to declare that it is in the power of the state of Illinois to appropriate the property of the United States.

The suggestion that the considerations just stated are immaterial, because, even although by the local law the United States did not convey to the patentees of the border lots title to the bed of the lake, it may have parted with its title to the bed by the swamp land act, involves a departure from the settled construction of the swamp land act to which attention was called in the dissent in *Kean* v. *Calumet Canal & Improv. Co.* Besides the disturbance of vested rights to which it seems to me such a suggestion must give rise, it must be remembered that it is directly in conflict with the opinion of the supreme court of Illinois in this very case, where it was expressly declared that the state did not take title to the bed of Wolf lake under the swamp land act, because as a matter of fact the converse had been explicitly decided by the Secretary of the Interior in a contest before the Land Department to which the state of Illinois was a party. The result of the suggestion as to the swamp land act then, as I see it, is to cause the state of Illinois to become the owner of the bed of the lake under the swamp land act, in derogation of the act of Congress, contrary to the rulings of this court and of the supreme court of the state, and in disregard of the express findings of fact made by the Secretary of the Interior when he approved the second survey, and also when he rendered the decision on the contest to which the state of Illinois was a party.

I fail to perceive if, as a matter of conveyancing under the local law, the title to the bed of the lake did not pass with the sale of the border lots, how the United States has lost its title. If it be conceded that the view of the local law, announced by this court in *Hardin* v. *Jordan*, was a mistaken one, and that the local law must be taken to be what the lower court held it to be in this case, then it seems to me the only foundation upon which the title of the United States to the bed of the lake can be disputed has disappeared, since, in my opinion, the theory of accretion which the court below applied cannot be *sustained [524] either by reason or authority. I content myself with merely stating this view, which involves the merits, and do not elaborate, because, in my opinion, if it be — as the court now decides — that the question whether the title of the United States to the bed of Wolf lake passed to the state of Illinois is to be determined solely by the local law of Illinois, as construed by the courts of that state, I do not perceive how a Federal question arises on this record, since I find it impossible to think that there can be a Federal question depending exclusively for its solution upon non-Federal or state law.

I am authorized to say that Mr. Justice **McKenna** concurs in this dissent.

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REPUBLIC OF COLOMBIA, *Appt.*,
*v.*
CAUCA COMPANY and Colombian Construction & Improvement Company.

(See S. C. Reporter's ed. 524-532.)

*Appeal—from circuit court of appeals—suit by foreign state—arbitration—majority award—elements of award—indemnity for railway construction.*

1. An appeal lies to the Supreme Court of the

NOTE.—*As to when equity will set aside an award*—see notes to Burchell v. Marsh, 15 L. ed. 96; District of Columbia v. Bailey, 43 L. ed. 118; Hartford F. Ins. Co. v. Bonner Mercantile Co. (C. C. D. Mont.) 11 L. R. A. 623, and Nolan v. Colorado Cent. Consolidated Min. Co. 12 C. C. A. 592.

United States from a decree of a circuit court of appeals in a controversy between a foreign state and citizens of one of the United States, since such decree is not made final by the provision of the act of March 3, 1891, chap. 517, § 6 (26 Stat. at L. 826, 828, U. S. Comp. Stat. 1901, p. 550), declaring decrees of such court to be final "in all cases where the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states."

2. An award signed by two of the three members of a commission appointed to determine the amount of the indemnity to be paid by the Republic of Colombia to the assignee of a railroad concession in exchange for the surrender of the concession and railroad cannot be defeated by that government because its commissioner resigned after the discussions were closed, where the commission had, at the outset, resolved, under the power given to it by the submission agreement to determine the procedure to be followed, that a majority vote should govern,—especially where possession of the railroad was surrendered to the government pursuant to the terms of the submission.

3. The salaries and traveling expenses of executive officers of a railway construction company devoting itself solely to the business of building a railroad in the Republic of Colombia, and the office expenses of its New York office, are elements of the indemnity which that Republic agreed, in exchange for the surrender of the concession and the railroad, to pay to the assignee of such concession for the works and labors (*las obras y trabajos*) executed by it and its expenditures on the works and labors executed by it in the construction of such railroad.

4. Cash paid by a railway construction company for the purchase of a railway concession granted by the Republic of Colombia, and sums voted by that company to its officers for services in securing an agreement to submit to arbitration the question of the amount of the indemnity to be paid by such Republic to the assignee of the concession in exchange for the latter's surrender of the concession and railroad, for the works and labors (*las obras y trabajos*) executed by it, and expenditures on works and labors executed by it in the construction of the railroad, are not properly allowed as elements of such indemnity.

[No. 259.]

*Argued April 23, 24, 1903. Decided May 18, 1903.*

APPEAL from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of West Virginia confirming in part an award under a submission entered into between the Republic of Colombia and the Cauca Company. *Reversed* and remanded to the Circuit Court, with directions to confirm the award in part.

See same case below, 51 C. C. A. 604, 113 Fed. 1020.

The facts are stated in the opinion.

*Mr.* **William G. Johnson** argued the cause and filed a brief for appellant:

"Aliens" and "foreign states" are not identical.

Story, Const. §§ 1699, 1700.

Jurisdiction in *The Sapphire*, 11 Wall. 164, 20 L. ed. 127, rested upon the character of the party as a "foreign state."

The term "foreign state" is synonymous with "foreign nation."

*Cherokee Nation* v. *Georgia*, 5 Pet. 15, 5 L. ed. 30.

In *Stone* v. *South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799, this court pointed out the obvious distinction between a state and a citizen of a state.

A voluntary submission to arbitration is a contract.

*District of Columbia* v. *Bailey*, 171 U. S. 161, 43 L. ed. 118, 18 Sup. Ct. Rep. 868.

The decision of the arbitrators, that a matter does come within the terms of the submission, cannot be conclusive of the fact. If it could, all matters would be included which they pleased to consider to be so, however at variance with the terms of the submission and contrary to the intent of the parties to it.

*Sawyer* v. *Freeman*, 35 Me. 546.

Preliminary negotiations, bases of agreement, discussions, claims and counterclaims of the parties, as to the matters to which the proposed submission should extend, are merged, superseded, abrogated, and utterly annulled by the ultimate written agreement which the parties signed.

*Van Ness* v. *Washington*, 4 Pet. 232, 7 L. ed. 842; *Emerson* v. *Slater*, 22 How. 28, 16 L. ed. 360; *Oelricks* v. *Ford*, 23 How. 49, 16 L. ed. 534; *The Delaware*, 14 Wall. 579, 20 L. ed. 779; *Bast* v. *First Nat. Bank*, 101 U. S. 93, 25 L. ed. 794; *Ruggles* v. *Illinois*, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; *Palmer* v. *Green*, 6 Conn. 14; *De Long* v. *Stanton*, 9 Johns. 38; *Efner* v. *Shaw*, 2 Wend. 567; *Billington* v. *Sprague*, 22 Me. 34; *Loring* v. *Alden*, 3 Met. 576; *District of Columbia* v. *Bailey*, 171 U. S. 161, 43 L. ed. 118, 18 Sup. Ct. Rep. 868.

Defendants cannot be permitted to use, for their own benefit, evidence which they did not themselves offer for any purpose and which the complainant has no right to use in its own behalf.

*Marine Ins. Co.* v. *Hodgson*, 6 Cranch, 206, 3 L. ed. 200; *Tappan* v. *Beardsley*, 10 Wall. 427, 19 L. ed. 974.

At common law, an arbitrator cannot administer an oath.

Morse, Arbitration & Award, 131, 132, 133; Russell, Power & Duty of Arbitrator, 5th ed. § 179; *Tobey* v. *Bristol County*, 3 Story, 800, Fed. Cas. No. 14,065; *People* v. *Townsend*, 5 How. Pr. 315; *Regina* v. *Hallett*, 20 L. J. M. C. N. S. 197; *Wellington* v. *Mackintosh*, 2 Atk. 569; *Street* v. *Rigby*, 6 Ves. Jr. 815.

Statements of witnesses in a common-law arbitration are not admissible in evidence in judicial proceedings.

*Jessup* v. *Cook*, 6 N. J. L. 434.

The fact that the arbitrators, or some of them, or some one or other of the parties, or some persons appearing before the arbitrators, might have supposed that there was

uncertainty or ambiguity in the agreement, does not constitute an ambiguity.

1 Greenl. Ev. 15th ed. § 298.

If the arbitrators act in excess of their powers, if they consider and make their award as to matters not submitted, their award is void.

*Leslie* v. *Leslie*, 50 N. J. Eq. 107, 24 Atl. 319, Affirmed in 52 N. J. Eq. 332, 31 Atl. 724; *Cook* v. *Carpenter*, 34 Vt. 126, 80 Am. Dec. 670; *Adams* v. *Adams*, 8 N. H. 91; *Gilmore* v. *Hubbard*, 12 Cush. 221; *Sawyer* v. *Freeman*, 35 Me. 546; *Wyman* v. *Hammond*, 55 Me. 537; *Swann* v. *Deem*, 4 W. Va. 369; *Dunlap* v. *Campbell*, 5 W. Va. 197; *Gibson* v. *Powell*, 5 Smedes & M. 726; *Glade* v. *Schmidt*, 20 Ill. App. 160; *Carmack* v. *Grant*, 5 Litt. (Ky.) 33; *Lynch* v. *Nugent*, 80 Iowa, 431, 46 N. W. 61; *White* v. *Arthur*, 59 Cal. 33; *Reynolds* v. *Reynolds*, 15 Ala. 398; *Butler* v. *New York*, 7 Hill, 330; *Bullock* v. *Bergman*, 46 Md. 277; *McCormick* v. *Gray*, 13 How. 35, 14 L. ed. 36; *DeGroot* v. *United States*, 5 Wall. 419, 18 L. ed. 700.

Upon the resignation of one arbitrator the others were not competent to make an award before the vacancy had been filled.

Morse, Arbitration & Award, p. 151; *Brower* v. *Kingsley*, 1 Johns. Cas. 334; *Harris* v. *Norton*, 7 Wend. 534; Russell, Arbitration & Award, p. 209; *Re Beck*, 1 C. B. N. S. 695; *Little* v. *Newton*, 2 Mann. & G. 351; *Lord* v. *Lord*, 5 El. & Bl. 404; *Hoff* v. *Taylor*, 5 N. J. L. 829; *Moore* v. *Ewing*, 1 N. J. L. 144, 1 Am. Dec. 195.

Even if the arbitrators' work had been completed and there only remained the formal rendition of their decision in the form of an award at the time of Pena's resignation, it would not remove the objection to the validity of the award.

*Moore* v. *Ewing*, 1 N. J. L. 144, 1 Am. Dec. 195.

*Messrs.* **John W. Beaumont** and **John K. Cowen** argued the cause, and, with *Mr. Edward H. Murphy* and *Messrs. Cowen, Cross, & Bond*, filed a brief for appellees:

Where matter of a purely private nature has been submitted to arbitration, it is essential to the validity of the award that it must be concurred in by all of the arbitrators; unless the intention of the parties appears to the contrary.

*Hobson* v. *M'Arthur*, 16 Pet. 182, 10 L. ed. 930.

But in matters of public concern a different rule seems to prevail; there the voice of the majority shall govern.

*Green* v. *Miller*, 6 Johns. 39, 5 Am. Dec. 184; *Eames* v. *Eames*, 41 N. H. 177; *People ex rel. Hawes* v. *Walker*, 23 Barb. 304; *Grindley* v. *Barker*, 1 Bos. & P. 236, Co. Litt. 181a; *King* v. *Beeston*, 3 T. R. 592; *McCoy* v. *Curtice*, 9 Wend. 17, 24 Am. Dec. 113; *Ex parte Rogers*, 7 Cow. 526; *People ex rel. Washington* v. *Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *Cooley* v. *O'Connor*, 79 U. S. 391, 20 L. ed. 446; *Patterson* v. *Leavitt*, 4 Conn. 50, 10 Am. Dec. 98; *Young* v. *Buckingham*, 5 Ohio, 485; *First Nat. Bank* v. *Mt. Tabor*, 52 Vt. 87, 36 Am. Rep. 734; *Soens* v. *Racine*, 10 Wis. 271; *Com. ex rel. Hall* v. *Canal Comrs.* 9 Watts, 466; *Williams* v. *Lunenburg School District No. 1*, 21 Pick. 75, 32 Am. Dec. 243.

If it can be inferred from the agreement of submission that the parties intended the vote of a majority to govern, an award made by them will be binding, even in the case of a purely private matter.

*Hobson* v. *M'Arthur*, 16 Pet. 182, 10 L. ed. 930.

In the case at bar, that such was the intention of the parties is clearly inferable from the personnel of the commission.

*Ibid.; Wheeling Gas Co.* v. *Wheeling*, 8 W. Va. 320.

A resignation to be effective must be accepted.

*People ex rel. McCune* v. *Board of Police*, 26 Barb. 487; *Edwards* v. *United States*, 103 U. S. 471, 26 L. ed. 314; *Thompson* v. *United States*, 103 U. S. 480, 26 L. ed. 521.

Pena's withdrawal did not deprive the majority of its power to award, because it took place at a time when his membership in the commission had ceased to be material.

*Carpenter* v. *Wood*, 1 Met. 409; *Dodge* v. *Brennan*, 59 N. H. 138; *Crofoot* v. *Allen*, 2 Wend. 494; *Dickerson* v. *Rorke*, 30 Pa. 390; *King* v. *Grey*, 31 Tex. 22; *Doyle* v. *Patterson*, 84 Va. 800, 6 S. E. 138; *Hobson* v. *M'Arthur*, 16 Pet. 182, 10 L. ed. 930; *Savannah, F. & W. R. Co.* v. *Decker*, 94 Ga. 149, 21 S. E. 372; *Scudder* v. *Johnson*, 5 Mo. 551; *Stiringer* v. *Toy*, 33 W. Va. 86, 10 S. E. 26; *Maynard* v. *Frederick*, 7 Cush. 251; *Witz* v. *Tregallas*, 82 Md. 351, 33 Atl. 718; *Ex parte Rogers*, 7 Cow. 526.

Even in a court of law the rule of unanimity has been disregarded where rights had vested under a contract of arbitration.

*Phippen* v. *Stickney*, 3 Met. 384.

Unless there is a reservation made in the submission, the parties are presumed to agree that everything both as to law and fact, which is necessary to the ultimate decision, is included in the authority of the referees.

*Kleine* v. *Catara*, 2 Gall. 69, Fed. Cas. No. 7,869.

In deciding whether or not the commission erred in its interpretation of the submission the court must consider the evidence laid before that tribunal.

*Burchell* v. *Marsh*, 17 How. 344, 15 L. ed. 96.

The appellant is estopped from asserting that the award was invalid.

Morse, Arbitration & Award, pp. 171, 264; 2 Am. & Eng. Enc. Law, p. 727 (2d ed.)

*Messrs. E. J. D. Cross, John W. Beaumont* and *Edward H. Murphy*, and *Messrs. Cowen, Cross & Bond*, filed a brief in support of motion to dismiss:

An appeal does not lie to the Supreme Court from a decree of the circuit court of appeals, in a case in which the jurisdiction of the circuit court is dependent entirely upon the opposite parties to the controversy being aliens and citizens of the United States.

*American Constr. Co.* v. *Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 47 L. ed. 486, 13 Sup. Ct. Rep. 758.

A foreign independent government, as a legal entity, is a person within the meaning of the provision of N. Y. Code Civ. Proc. § 3268, providing that a defendant in an action brought by "a person residing without the state" may require security for costs.

*Honduras* v. *Soto*, 112 N. Y. 310, 2 L. R. A. 642, 19 N. E. 845.

The term "alien" as used in the judiciary act of 1789 has been held to apply to a personal foreign sovereign.

*King of Spain* v. *Oliver*, 2 Wash. C. C. 429. Fed. Cas. No. 7,814.

A foreign government is exempt from suits; and this exemption is based on its sovereign character. However, it may bring suit in the courts of another country. But in doing so it devests itself of its sovereign character and privileges as regards all matters connected with or growing out of that particular suit. In other words, it has descended from its high plane of sovereignty to the level of an ordinary private litigant, and thereafter in reference to the suit it has no greater rights, exemptions, or privileges than has an ordinary litigant.

*Rhode Island* v. *Massachusetts*, 12 Pet. 657, 9 L. ed. 1233.

A foreign sovereign cannot bring suit for an infringement of his prerogative rights. His right of suit is confined to those cases in which it is sought to enforce his private rights.

1 Dan. Ch. Pl. & Pr. chap. I., § 2, p. 17; *Austria* v. *Day*, 3 DeG. F. & J. 217.

The word "state" has been held by this court to comprehend only a state of the Union.

*Texas* v. *White*, 7 Wall. 700, 19 L. ed. 227; *Hepburn* v. *Ellzey*, 2 Cranch, 445, 2 L. ed. 332.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an appeal by the Republic of Colombia from a decree of the circuit court of appeals, affirming a decree of the circuit court upon a bill brought by the Republic and a cross bill by the defendant, the Cauca Company. The bill is a bill to set aside an award under a submission entered into by the above-mentioned parties. The cross bill is to establish the award as valid, notwithstanding the withdrawal of the representative named by the plaintiff, and prays specific performance. The decree confirms the award after rejecting certain items. Of course it does not attempt to order specific performance.

Before going further with the statement of facts we must dispose of an objection to the jurisdiction of this court to entertain this appeal. As a foreign government has seen fit to submit its case to the courts of the country with whose citizens its controversy exists, it would be unfortunate if, through any mistake, it was prevented from carrying questions of law to the court of last resort. We are of opinion that it had the right to appeal. The circuit court had jurisdiction under the Constitution, art. 3, § 2, and the act of August 13, 1888, chap. 866, § 1 (25 Stat. at L. 434), as the suit is "a controversy between citizens of a state and foreign states, citizens, or subjects," within the words and meaning of the act. *The Sapphire*, 11 Wall. 164, 167, *sub nom. The Sapphire* v. *Napolean III.*, 20 L. ed. 127, 130. The right to appeal from the decree of the circuit court of appeals is given by the act of March 3, 1891, *chap. 517, § 6 (26 Stat. [526] at L. 826, 828, U. S. Comp. Stat. 1901, p. 550), "in all cases not hereinbefore, in this section, made final." The only words of the section relied upon as making the decree of the circuit court of appeals final are those which declare it so "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states." We see no reason to doubt that Congress was as well aware of the distinction between foreign states and foreign citizens when it passed the act of 1891 as when it passed the act of 1888, and that when it spoke of aliens it meant foreign citizens alone. We are confident that it did not dream of excluding sovereign powers that choose to sue here from the right to an appeal. The word "aliens" could be given that effect only by straining it beyond its natural meaning and away from the indications of the context. As the decree of the circuit court of appeals is not made final by § 6, an appeal lies to this court.

Whether technically proved or not, we assume the commission making the award to have found the facts hereafter stated, and we think that they were fully warranted in doing so. The subject-matter of the award was a railroad intended to run from Buenaventura to the Pacific, *via* Cali, to the city of Manizales, and partly built. In 1890 one Cherry received a concession to build and operate this road, with land grants and various guaranties from the government, and with the right to transfer the concession, but all subject to the condition of the work being done in four years. Thereupon the Cauca Company was incorporated in West Virginia for the purpose, among other things, of building and operating the road, and Cherry transferred his concession to it, stipulating that he should be employed to do the work, receive all the company's stock and bonds and various benefits of the concession. On the same day the Colombian Construction & Improvement Company also was incorporated, for many purposes, including that of building the road, and Cherry forthwith assigned to it his contract with the Cauca Company, stipulating that he should receive in return a large amount of full-paid stock of the company and $135,000 in cash. Cherry was to be employed as chief constructor *of the road, and the com- [527] pany was to take his place under the Cauca Company's contract.

The time for building the road went by, the road was not built, and the government claimed a forfeiture. On the other hand, the Cauca Company set up that the failure was due to the fault of the government, and

other justifications, and the matter became a subject of diplomatic discussion between this country and Colombia. With the merits of this controversy we have nothing to do. As a result, a submission to a special commission, as it was termed, was agreed upon and signed. The essential features of the agreement were that the company by the second article surrendered the railroad, and that Colombia agreed to pay a just indemnity, the scope of which will be considered later, and which was to be determined by the commission. The commission consisted of three,— one appointed on behalf of Colombia, one on behalf of the company and the third by agreement between the Secretary of State of this country and the Colombian Minister at Washington. The commission, spoken of in the agreement in the singular, was to "determine the procedure to be followed in the exercise of the power conferred upon it, both as to its own acts and as to the proceedings of the parties." In pursuance of this power, it resolved that all decisions should be by majority vote. Thereafter the case was tried, and several items were allowed to the company which it was contended by the representatives of Colombia were not within the scope of the submission. At the end of the trial, when hardly anything remained to be done except to sign the award, the questions remaining open concerning only matters of interest which have been disallowed, the Colombian commissioner announced his resignation to the commission.

The agreement gave Colombia thirty days to appoint a new member, and on its failure the Secretary of State for the United States and the Colombian Minister were to appoint him. But the commission was allowed only one hundred and fifty days "from its installation," which might be extended sixty days more for justifiable grounds. It had sat two hundred and three days when the resignation was announced. Manifestly it was possible, if not certain, that its only way of saving [528] the proceedings *from coming to naught was to ignore the communication and to proceed to the award. This it did. Colombia by its bill and argument now lays hold of the resignation of its commissioner as a ground for declaring the award void.

Colombia thus is put in the position of seeking to defeat the award after it has received the railroad in controversy and while it is undisputed that an appreciable part of the consideration awarded ought to be paid to the company under the terms of the submission. It is fair to add that the bill offers to pay the undisputed sum, but not to rescind the submission and return the railroad. We shall spend little argument upon this part of the case. Of course, it was not expected that a commission made up as this was would be unanimous. The commission was dealt with as a unit, as a kind of court, in the submission. It was constituted after, if not as the result of, diplomatic discussion in pursuance of a public statute of Colombia. It was to decide between a sovereign state and a railroad, declared by a law of Colombia to be a work of public utility. In short, it was dealing with matters of public concern. It had itself resolved, under the powers given to it in the agreement, that a majority vote should govern. Obviously that was the only possible way, as each party appointed a representative of its side. We are satisfied that an award by a majority was sufficient and effective. We are satisfied, further, that whatever might be the technical rule for three arbitrators dealing with a private dispute, neither party could defeat the operation of the submission, after receiving a large amount of property under it, by withdrawing or adopting the withdrawal of its nominee when the discussions were closed. See *Cooley* v. *O'Connor*, 12 Wall. 391, 398, 20 L. ed. 446, 448; *Kingston* v. *Kincaid*, 1 Wash. C. C. 448, Fed. Cas. No. 7,821; *Ex parte Rogers*, 7 Cow. 526; *Carpenter* v. *Wood*, 1 Met. 409; *Maynard* v. *Frederick*, 7 Cush. 247; *Kunckle* v. *Kunckle*, 1 Dall. 364, 1 L. ed. 178; *Cumberland* v. *North Yarmouth*, 4 Me. 459, 468; *Grindley* v. *Barker*, 1 Bos. & P. 229, 236; *Dalling* v. *Matchett*, Willes Rep. 215, 217. In private matters the courts are open if arbitration fails, but in this case the alternative was a resort to diplomatic demands.

We pass now to the main and serious question of the case, *which is, whether the [529] scope of the submission was exceeded by any of the items of the award. The submission was in Spanish only, and there is a dispute about the translation of the most important words. In exchange for the surrender of the concession and the railroad with all of its fixed plant, rolling stock, *obras*, etc., Colombia is to pay to the company "a just indemnity *por las obras y trabajos* (literally, the works and labors) which the company may have executed during the time in which the undertaking has been in its charge, and for the rolling stock," etc. So, in the following article: "The government of Colombia and the company recognize in advance as just and sole indemnity a sum which shall equal that which the company shall prove that it has expended *en los trabajos y obras ejecutados por ella en la construccion de la expresada via ferrea y en los materiales rodantes, herramientas*, etc., etc., *introducidos con destino á la misma via*."

It is argued for Colombia that the untranslated words limit the indemnity to the immediate cost on the ground of the works and labors executed there. On the other side, it is argued, especially in view of the previous dealings, that indemnity for the total cost of the enterprise was intended. Our opinion falls between these two extremes. The company, to be sure, was claiming the larger amount, but Colombia had asserted a forfeiture. The submission was a compromise, and presumably the company meant the most and Colombia the least which the words used were capable of meaning. The only fair way is to take the language in its natural sense, not straining it either way. In article 5 it is contemplated.

as the means of reaching the indemnity mentioned, that the commission shall appraise *obras, trabajos, y materiales* aforesaid; that it shall examine the books and accounts of the Cauca Company in New York; and that it shall inspect on the ground *los obras y trabajos* of the railroad and the rolling stock. In article 10 it is said that Colombia calculates approximately that the Cauca Company has disbursed in the *obra* of the railroad a sum of $200,000 (somewhat less than the cost on the ground as agreed before the commission), while the company considers that sum as much below the just price of the *obras y trabajos por ella ejecu-* [530] *tados.* *And the sum named is paid on account in advance for the purpose of obtaining the immediate delivery of the railway. Whether the preliminary negotiations be considered or not, it seems to us to carry out the import of the words used if we limit the indemnity to expenditures which fairly could be found to have contributed in a direct way to the result on the surface of the earth, but extend it to such expenditures, even when they took place at a distance. If the latter were not included, there was no sufficient reason for a commission meeting in New York.

It is for us to determine the scope of the commission, whatever may have been its own finding with regard to its powers. But when its powers are established we are not called upon to revise any finding that could have been made without going beyond the line which we lay down. On this footing, subject to a further point to be mentioned, the salaries of executive officers of the Colombian Construction & Improvement Company ($108,181.42), the traveling expenses of these officers ($29,386.30), and the office expenses of the New York office ($21,727.58), properly were allowed, so far as appears. Although the facts were gone into with superfluous detail, it cannot be said, as matter of law, that those items might not have been necessary in order to lay the tracks upon the ground. The company devoted itself wholly to the business of building the road. The initial expense naturally would be the greatest, and the company's contention was that but for Colombia the work would have been done.

It is said that the last-named company was not a party to the submission, which is true. But, as we have said, it reasonably might have been found by the commission that it was assignee of the contract between Cherry and Cauca Company, by which Cherry was to build the road and to receive the Cauca Company's stock and bonds. Therefore the work done by the construction company had to be paid for by the Cauca Company, and the result of its work was the railroad which the company surrendered. Under such circumstances we can listen to no hair splitting as to whether work done upon the road by the construction company can be called the Cauca Company's *obras y trabajos.* We certainly should not disturb [531] a *finding by the commission that the cost of building, by whomsoever incurred, was part of the Cauca Company's work.

On the other hand, we cannot uphold the award of $135,000, for cash paid for purchase of the concession. If, as would seem, this was the sum which the construction company was to pay Cherry for the assignment of the Cauca Company contract, it requires a layman's superiority to form in the interest of substance to connect this with the Cauca Company at all. But, assuming that connection established, the expense is too remote from cost of construction to be allowed under the words used in this submission. It was contemplated by the concession that it might come to the hands of a corporation having its headquarters elsewhere, and the expenses which we have allowed might have been found necessary, if a Virginia or New York corporation were to begin the construction of this road in Colombia. But the purchase of the right to do the job was an accident. The cost of it would not have been incurred, so far as appears, if the concession had been made to the company direct. Therefore it is not to be paid for unless we adopt the view that the company is to be made whole for all that it paid in connection with the enterprise, rather than for what it paid to get the tracks laid, assuming that it had the right to lay them. As we have said, we adopt the latter view. We think it unlikely and not within the clear meaning of the words that the government undertook to pay an additional sum because its own concession had changed hands.

It is much more obvious that the submission did not warrant charging Colombia with an extra sum of $29,200, voted by the construction company to its officers for services in securing the agreement of submission. We have indicated our reasons sufficiently above.

The award was for a single sum, which the report of the proceedings of the commission shows to have been made up of items, some of which we have considered. These items were discussed by the courts below, seemingly at the instance of Colombia, and without objection on the part of the company, and some of them were disallowed without appeal. If they are open to consideration they show that the award was made up of several *items, some of which [532] may be disallowed without affecting the rest. If they should not be considered, the only course would seem to be to presume that the commission followed its authority, and to sustain the award for the whole original amount. Certainly they could not be given a partial consideration and be taken account of so far as to invalidate the award, and yet be denied examination on the further question whether they could not be stricken out without affecting the residue of the award.

In addition to the oral arguments, we have considered every detail of the elaborate briefs submitted and the record, but have not thought it necessary to mention many of those details, or to protract our judg-

ment to an equal length. The amount allowed by the circuit court of appeals is reduced as stated by $164,200, but in our opinion the following items must stand:

| | |
|---|---|
| Agreed cost of work on the ground and rolling stock .. | $233,909 14 |
| Salaries of executive officers.. | 108,181 42 |
| Traveling expenses of officers.. | 29,385 88 |
| Expenses and incidentals New York office ..... | 21,727 58 |
| | $393,204 02 |
| Deduct paid on account.. | 200,000 00 |
| Amount of award ..... | 193,204 02 |

*Decree reversed*, and cause remanded to the Circuit Court with directions to enter a decree confirming the award for and up to the sum of $193,204.02.

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533] *RANDOLPH & RANDOLPH, *Appts.*,
*v.*
J. W. SCRUGGS, Trustee in Bankruptcy of the Langstaff Hardware Company.

(See S. C. Reporter's ed. 533-540.)

*Bankruptcy—preferred claims—charge for preparing general assignment—services rendered assignee.*

1. A general deed of assignment is so far avoided by an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment as to defeat the right of any claim against the bankrupt's estate to the preference given by such deed.
2. A charge for the preparation of a general deed of assignment which is avoided by an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment may be proved as an unsecured claim against the bankrupt's estate.
3. An assignee in a general deed of assignment which has been avoided by an adjudication in bankruptcy against his assignor on a petition filed within four months after the making of the assignment has a lien on the bankrupt's estate for the sums paid by him for such services rendered to him prior to such adjudication as were beneficial to the estate.
4. Claims for services rendered to the assignee in a general deed of assignment prior to an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment are preferred claims against the bankrupt's estate to the same extent as if the assignee had paid the claims.
5. A claim for legal services rendered to the assignee in a general deed of assignment in unsuccessfully resisting an adjudication of bankruptcy against his assignor on a petition filed within four months after the making of the assignment is not provable against the bankrupt's estate.

[No. 272.]

*Submitted April 24, 1903. Decided May 18, 1903.*

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Sixth Circuit presenting questions as to the allowance of claims for services rendered a bankrupt in preparing a general deed of as-

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NOTE.—*On the effect of the bankruptcy act on state laws*—see notes to State *ex rel.* Strohl v. King County Super. Ct. (Wash.) 45 L. R. A. 177; Garner v. Second Nat. Bank, 16 C. C. A. 96; Carling v. Seymour Lumber Co. 51 C. C. A. 11, and Sturgis v. Crowninshield, 4 L. ed. U. S. 529.

*Allowances in bankruptcy proceedings to bankrupt's assignee for creditors.*

Cases under the bankrupt act of 1867.

Where a Federal court set aside a deed of assignment for creditors made within six months before proceedings in bankruptcy it was held that an allowance of expenses and charges of the assignee for creditors should not be made where it could not be guarded so as to prevent duplicate charges, and no allowance should be made to include any reservation for the expense of a future settlement in the state court. Burkholder v. Stump, 8 Phila. 172, Fed. Cas. No. 2,165.

This case was approved in Platt v. Archer, 13 Blatchf. 351, Fed. Cas. No. 11,214, where the question was as to a receiver's fees as against an assignee in bankruptcy.

And compensation for services of an assignee for creditors was refused where an assignment was avoided. *Re* Stubbs, 4 Nat. Bankr. Reg. 376, Fed. Cas. No. 13,557; *Re* Kurth, 17 Nat. Bankr. Reg. 573, Fed. Cas. No. 7,948.

And an allowance for attorneys' fees was refused. *Re* Cohn, 6 Nat. Bankr. Reg. 379, Fed. Cas. No. 2,066.

An assignee for creditors should be allowed for disbursements made legitimately for collections, as this was beneficial to the estate. But the claims for personal services and for attorneys' fees should be disallowed in his settlement with the assignee in bankruptcy. *Re* Lains, 16 Nat. Bankr. Reg. 168, Fed. Cas. No. 7,989. The court held that these claims could only be allowed as other claims against the bankrupt's estate, and be proved against it.

In Clark v. Marx, 6 Ben. 275, Fed. Cas. No. 2,830, where an assignment was set aside, it was said that the assignee should not be allowed for any disbursements or expenses which he made or incurred by virtue of such transfer, or to maintain his title or possession thereunder; but that, so far as he acted with the permission of the court given in its orders in making sales of the property, he ought to be allowed such expenses as were necessary.

In Hunker v. Bing, 9 Fed. 277, where the assignment for creditors was avoided by the assignee in bankruptcy as void under the state law for failure of the assignee to file an inventory within thirty days, it was held that the assignee was not entitled to any compensation as "assignee." But for acts performed in the way of services and disbursements, which, considered independent of the assignment itself, were lawfully rendered and were beneficial to the general body of creditors or necessary to the care of the property, or its conversion into money, allowance should be made, and the sum of $500 for attorneys' fees was allowed covering charges for collection suits, for advice concerning disputed claims,

signment, and for services rendered the assignee prior to the adjudication in bankruptcy. *Answered* in the negative except that, so far as the assignee would be allowed for the payment of such claims, they may be preferred in the right of the assignee, and that the charge for the preparation of the deed may be proved as an unsecured claim.

The facts are stated in the opinion.

*Messrs.* **William M. Randolph** and **Wassell Randolph** submitted the cause for appellants. *Mr. George Randolph* was with them on the brief:

The act of Congress, having gone no further than to declare a general assignment an act of bankruptcy, it is not the province of the courts to go beyond that, and add a penalty as a result of what the statute has declared.

*Hanover Nat. Bank* v. *First Nat. Bank*, 48 C. C. A. 482, 109 Fed. 422; *Fritts* v. *Palmer*, 132 U. S. 282, 33 L. ed. 317, 10 Sup. Ct. Rep. 93; *Union Nat. Bank* v. *Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank* v. *Whitney*, 103 U. S. 99, 26 L. ed. 443; *First Nat. Bank* v. *Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778; *Thompson* v. *St. Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66; *McBroom* v. *Scottish Mortg. & Land Invest. Co.* 153 U. S. 323, 38 L. ed. 731, 14 Sup. Ct. Rep. 852.

In order to render a transfer fraudulent under the bankrupt act, it must fall within the provisions of that statute.

Loveland, Bankruptcy, § 157; *Tiffany* v. *Lucas*, 15 Wall. 410, 21 L. ed. 198.

It is the fraudulent intent of the debtor alone that determines whether the act complained of is an act of bankruptcy or not.

Loveland, Bankruptcy, § 51; *Re McKibben*, 12 Nat. Bankr. Reg. 97, Fed. Cas. No. 8,859; *Re Drummond*, 1 Nat. Bankr. Reg. 231, Fed. Cas. No. 4,093; *Re Franklin*, 8 Ben. 233, Fed. Cas. No. 5,053; *Tiffany* v. *Lucas*, 15 Wall. 410, 21 L. ed. 198; *Cook* v. *Tullis*, 18 Wall. 332, 21 L. ed. 933; *Clark* v. *Iselin*, 21 Wall. 360, 22 L. ed. 568; *Armstrong* v. *Chemical Nat. Bank*, 6 L. R. A. 226, 41 Fed. 234.

The *pro rata* distribution of the property of the bankrupt was the main purpose of the bankrupt statute.

*Reed* v. *McIntyre*, 98 U. S. 507, 25 L. ed. 171; *Trimble* v. *Woodhead*, 102 U. S. 650, 26 L. ed. 290; *International Bank* v. *Sherman*, 101 U. S. 406, 25 L. ed. 866; *Mayer* v. *Hellman*, 91 U. S. 496, 23 L. ed. 377.

A general assignment for the benefit of creditors is valid, except against the administration of the estate in bankruptcy in the bankrupt court.

*Sedgwick* v. *Place*, 1 Nat. Bankr. Reg. 673, Fed. Cas. No. 12,622; *Langley* v. *Perry*, 2 Nat. Bankr. Reg. 596, Fed. Cas. No. 8,067; *Haas* v. *O'Brien*, 66 N. Y. 597; *Bostwick* v. *Burnett*, 74 N. Y. 317; *Boese* v. *King*, 78 N. Y. 471; *Thrasher* v. *Bentley*, 59 N. Y. 649; *Hawkins's Appeal*, 34 Conn. 548; *Patty-Joiner & E. Co.* v. *Cummins*, 93 Tex. 598,

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and for negotiations concerning litigations beneficial to the creditors.

In Jones v. Kinney, 5 Ben. 259, Fed. Cas. No. 7,473, where an assignment was set aside, the assignee was allowed for disbursements to lawful creditors before bankrupt proceedings. But as to disbursements and other expenses the question was reserved until the master should make a report, and that evidence could be given by either side.

In Wald v. Wehl, 18 Blatchf. 495, 6 Fed. 163, where the assignment was avoided only under the bankrupt statute, the assignee was allowed on accounting for all proper services and expenses under the assignment prior to the bringing of this suit to avoid the same.

But in the following cases, where the assignment was set aside at the instance of an assignee in bankruptcy, the assignee for creditors was allowed his expenses for making a sale. *Re* Cohn, 6 Nat. Bankr. Reg. 379, Fed. Cas. No. 2,966; Stobaugh v. Mills, 8 Nat. Bankr. Reg. 361, Fed. Cas. No. 13,461.

And he was allowed his expense of administering the estate while in his hands. *Re* Kurth, 17 Nat. Bankr. Reg. 573, Fed. Cas. No. 7,948.

And he was allowed compensation for his services in such a case. Catlin v. Foster, 3 Nat. Bankr. Reg. 540, Fed. Cas. No. 2,519.

And in such a case was allowed for his services and counsel fees. MacDonald v. Moore, 8 Ben. 579, Fed. Cas. No. 8,763,

In *Re* Cohn, 6 Nat. Bankr. Reg. 379, Fed. Cas. No. 2,966, the court referred to Catlin v. Foster, 3 Nat. Bankr. Reg. 540, Fed. Cas. No. 2,519; *Re* Stubbs, 4 Nat. Bankr. Reg. 376, Fed. Cas. No. 13,557, and Burkholder v. Stump, 8 Phila. 172, Fed. Cas. No. 2,165, and said that the decisions on this point were variant; and further said: "In some of the judicial districts of the United States the allowance is refused wholly, and occasional precedents of contrary directions here will not be followed, if to follow them would result in any injustice to creditors."

Cases under bankrupt act of 1898.

A similar divergence of opinion prevails in cases arising under the bankrupt act of 1898.

Actual and necessary expenses incurred in preserving the estate while in the possession of the assignee will be allowed. *Re* Tatum, 112 Fed. 50; *Re* Bussey, 6 Am. B. R. 608; *Re* Pauly, 2 Am. B. R. 333; *Re* Mays, 114 Fed. 600.

But reimbursement for such expenses was confined, by the referee in *Re* Gliblom, 2 N. B. N. Rep. 60, to those incurred in the care and preservation of the estate subsequent to the filing of the petition in bankruptcy and prior to the appointment of a trustee or receiver in bankruptcy. To the same effect is *Re* B. H. Gladding Co. 9 Am. B. R. 171.

And in Stearns v. Flick, 103 Fed. 919, the court went to the full extent of disallowing all the expenses of the assignee whether incurred before or after the petition in bankruptcy had been filed, though it did not require the assignee to refund to the bankrupt's estate disbursements in good faith prior to the filing of such petition.

These last decisions must be regarded as overruled by RANDOLPH v. SCRUGGS, which declares that compensation should be allowed for such services rendered to the assignee prior to the adjudication in bankruptcy as were beneficial to the estate.

In some cases an allowance has been made to the assignee for his services as custodian while in possession of the property. *Re* Pauly 2 Am. B. R. 333; *Re* Bussey, 6 Am. B. R. 603.

An assignee for the benefit of creditors of a

57 S. W. 566 (Tex. Civ. App.) 59 S. W. 297; *Reed* v. *McIntyre*, 98 U. S. 507, 25 L. ed. 171; *Mayer* v. *Hellman*, 91 U. S. 502, 23 L. ed. 379; *Simonson* v. *Sinsheimer*, 37 C. C. A. 337, 95 Fed. 948; *George M. West Co.* v. *Lea Bros.* 174 U. S. 591, 43 L. ed. 1098, 19 Sup. Ct. Rep. 836; *Re Gutwillig*, 34 C. C. A. 377, 63 U. S. App. 191 92 Fed. 337; *Davis* v. *Bohle*, 34 C. C. A. 372, 92 Fed. 325; *Leidigh Carriage Co.* v. *Stengel*, 37 C. C. A. 210, 95 Fed. 638; *Re Plotke*, 44 C. C. A. 282, 104 Fed. 968; *Bryan* v. *Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557.

State legislation on the subject of general assignments, and on the subject of insolvencies, is abrogated or displaced by the bankrupt law only so far as there is necessary conflict between the state legislation and the bankrupt law.

*Sturges* v. *Crowninshield*, 4 Wheat. 122, 4 L. ed. 529; *Ogden* v. *Saunders*, 12 Wheat. 213, 6 L. ed. 606; *Baldwin* v. *Hale*, 1 Wall. 223, 17 L. ed. 531; *Tua* v. *Carriere*, 117 U. S. 201, 29 L. ed. 855, 6 Sup. Ct. Rep. 565; *Butler* v. *Goreley*, 146 U. S. 303, 36 L. ed. 981, 13 Sup. Ct. Rep. 84; *Denny* v. *Bennett*, 128 U. S. 497, 32 L. ed. 494, 9 Sup. Ct. Rep. 134; *Brown* v. *Smart*, 145 U. S. 457, 36 L. ed. 775, 12 Sup. Ct. Rep. 958; *Geilinger* v. *Philippi*, 133 U. S. 257, 33 L. ed. 618, 10 Sup. Ct. Rep. 266; *Stewart* v. *Platt*, 101 U. S. 731, 25 L. ed. 816; *Smith* v. *Union Bank*, 5 Pet. 518, 8 L. ed. 212; *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Walworth* v. *Harris*, 129 U. S. 355, 32 L. ed. 712, 9 Sup. Ct. Rep. 340; *Crapo* v. *Kelly*, 16 Wall. 610, 21 L. ed. 430; 2 Story, Const. § 1115.

Such portions of the assignment, and of the laws of Tennessee applicable to it, as necessarily conflicted with the bankrupt law, and excluded or denied or withheld such substantial rights and remedies of administration as the creditors are entitled to under the bankrupt law, but no more, were displaced and superseded by the bankrupt law, upon the adjudication, and the creditors had the right to apply to the court in bankruptcy, and to have the assets and property embraced in the assignment, administered there through a trustee, under the terms and provisions of the bankrupt law.

*Parmenter Mfg. Co.* v. *Hamilton*, 172 Mass. 178, 51 N. E. 529; *Tua* v. *Carriere*, 117 U. S. 210, 29 L. ed. 858, 6 Sup. Ct. Rep. 565; *Butler* v. *Goreley*, 146 U. S. 303. 36 L. ed. 981, 13 Sup. Ct. Rep. 84; *Boese* v. *King*, 108 U. S. 379, 27 L. ed. 760, 2 Sup. Ct. Rep. 765.

Equity never allows a trust to fail for the want of a trustee. And in the application of this principle, it has frequently occurred that the courts, by construction, or interpretation, or in order to execute the trust and give it force and effect, have displaced one trustee and substituted another, for the purposes of the trust.

*Field* v. *Arrowsmith*, 3 Humph. 442, 39 Am. Dec. 185; *Mills* v. *Haines*, 3 Head, 332; *Hughes* v. *Brown*, 88 Tenn. 578, 8 L. R. A. 480, 13 S. W. 286; *Brennan* v. *Willson*, 71

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corporation was allowed by the referee in *Re* Lock-Stub Check Co. 5 Am. B. R. 106, note, compensation out of the estate as custodian for services in preserving the assigned property and carrying on the business, from the date of the assignment to the date of the possession by the trustee in bankruptcy.

An assignee for the benefit of creditors who, while bankruptcy proceedings were pending against his assignor, but prior to the adjudication, makes a sale for full value of the property in his hands which would have depreciated in value if not promptly sold, is entitled to retain out of the proceeds in his hands a reasonable sum allowed by the state court as compensation for his services and for those of his attorneys. *Re* Scholtz, 106 Fed. 834.

Only in unusual circumstances, however, can an allowance be made out of the bankrupt's estate to the attorneys of his assignee for the benefit of creditors. *Re* Pauly, 2 Am. B. R. 333; *Re* Bussey, 6 Am. B. R. 603.

A distinction as to the time when such services were rendered has been drawn in some cases, and the conclusion reached that while services rendered by a general assignee in preserving the assigned estate subsequent to the institution of bankruptcy proceedings against his assignor may be compensated by an allowance out of the bankrupt's estate (*Re* Peter Paul Book Co. 104 Fed. 786; *Re* B. H. Gladding Co. 9 Am. B. R. 171), no such allowance can be made for services rendered prior to the filing of the petition in bankruptcy. *Ibid.*; Wilbur v. Watson, 111 Fed. 493.

This question was not directly involved in RANDOLPH v. SCRUGGS, but grave doubt as to the soundness of the cases making such a distinction, as well as those which, like Stearns v. Flick, 103 Fed. 919; *Re* Tatum, 112 Fed. 50; *Re* Mays, 114 Fed. 600, deny any right of the assignee to compensation for his services, arises in view of this language from the opinion by Mr. Justice Holmes: "But the assignee is acting lawfully in what he does before proceedings in bankruptcy are begun, and, although it may be assumed that the avoidance of the assignment relates back to the date of the deed, still, so far as his services, or services procured by him, tend to the preservation or benefit of the estate, the mere fiction of relation is not enough to forbid an allowance for them."

In *Re* Kingman, 5 Am. B. R. 251, the referee held that an assignee for the benefit of creditors under an assignment made with the express understanding and agreement that it was liable to be rendered void by the institution of bankruptcy proceedings within four months from its date, who did nothing more than to take possession of the property, file an inventory, and make some effort to sell it, was not entitled to an allowance for such services or for attorneys' fees based upon services rendered in connection with the assignment, where voluntary bankruptcy proceedings were instituted within four months from the date of the assignment.

In *Re* McCauley, 2 N. B. N. Rep. 1089, the referee held that a voluntary assignee for the benefit of creditors, who accepts the trust knowing that it is liable to be avoided by bankruptcy proceedings, cannot be allowed compensation for his services, at least where such allowance would lead to a duplication of charges.

Where the services of the assignee and of his counsel, instead of benefiting the estate, were injurious thereto, no compensation therefor will be allowed out of the bankrupt's estate. Sinsheimer v. Simonson, 106 Fed. 870.

N. Y. 502; *Mark's Appeal*, 85 Pa. 233; *Price* v. *Parker*, 11 Iowa, 144; *Holtoquist* v. *Clark*, 59 Minn. 59, 60 N. W. 1077; *Brown* v. *Parker*, 38 C. C. A. 261, 97 Fed. 447; Perry, Tr. §§ 38, 45, 240, 248, 427; Burrill, Assignm. § 240, 6th ed.

The requirement of uniformity in the Constitution does not prevent Congress leaving in force state laws on the subject of bankruptcies or insolvencies, or providing for the administration of the bankrupt system it has created through the courts of the several states, or permitting such administration through such courts either wholly, or to any prescribed extent.

*Hanover Nat. Bank* v. *Moyses*, 186 U. S. 181, 46 L. ed. 1113, 22 Sup. Ct. Rep. 857.

Acts of Congress, where exclusive jurisdiction of their enforcement is not given to the Federal courts, may be enforced in the courts of the states of competent jurisdiction.

*Bardes* v. *First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Hicks* v. *Knost*, 178 U. S. 541, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1006; *Claflin* v. *Houseman*, 93 U. S. 130, 23 L. ed. 833.

Why does not the rule apply to bankruptcy which has been applied to foreign and interstate commerce?

Until some inconsistent action, in the form of legislation, is taken by Congress in the exercise of its power to regulate foreign and interstate commerce, the legislation of a state, not directed against commerce in any of its regulations, but relating generally to the rights, duties, and liabilities of citizens, is of obligatory force within its territorial jurisdiction, although it may directly and remotely affect the operations of foreign and interstate commerce, or persons engaged therein.

*Cooley* v. *Philadelphia Port Wardens*, 12 How. 299, 13 L. ed. 996; *Sherlock* v. *Alling*, 93 U. S. 99, 23 L. ed. 819; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77; *Peik* v. *Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238.

Even if the general assignment is adjudicated to have been void, and is set aside, the appellants are entitled to compensation for their services.

*Williams* v. *Gibbes*, 20 How. 535, 15 L. ed. 1013; *Douglas* v. *Bank of Commerce*, 97 Tenn. 133, 36 S. W. 874; *Lassiter* v. *Travis*, 98 Tenn. 330, 39 S. W. 226; *Knower* v. *Central Nat. Bank*, 124 N. Y. 552, 27 N. E. 247; *McBlair* v. *Gibbes*, 17 How. 232, 15 L. ed. 132; *Williams* v. *Gibbes*, 17 How. 239, 15 L. ed. 135; *Pullman's Palace Car Co.* v. *Central Transp. Co.* 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808.

It was the plain duty of the assignee to see that no adjudication of bankruptcy was made against the assignor except upon a petition presenting a case within the jurisdiction of the court, and setting forth with sufficient accuracy a cause of bankruptcy sufficient to support the petition.

*Re Meyer*, 39 C. C. A. 368, 98 Fed. 980.

The bankruptcy, or the adjudication of bankruptcy, could no more relieve or impair the obligations of the Langstaff Hardware Company to the appellants, as its creditors, than the death of a natural person could relieve his representatives from the payment of his debts out of his assets.

*Winchester* v. *Heiskell*, 16 Lea, 556, 119 U. S. 450, 30 L. ed. 462, 7 Sup. Ct. Rep. 281, 120 U. S. 273, 30 L. ed. 464, 7 Sup. Ct. Rep. 562; *Jeffries* v. *Mutual L. Ins. Co.* 110 U. S. 305, 28 L. ed. 156, 4 Sup. Ct. Rep. 8; *Wylie* v. *Coxe*, 15 How. 415, 14 L. ed. 753; 2 Morawetz, Priv. Corp. §§ 1010, 1035; Wait, Insolvent Corp. §§ 199, 236, 277, 305, 486; Burrill, Assignm. 6th ed. § 349; Perry, Tr. 1st ed. §§ 231, 907; *Fewlass* v. *Keeshan*, 32 C. C. A. 8, 60 U. S. App. 133, 88 Fed. 573; *Kinsey* v. *McDearmon*, 5 Coldw. 392.

As the trustee is "vested with the title of the bankrupt" and hence takes no greater interest in, or better title to, the property than the bankrupt had at the date of the adjudication, except only as to the property disposed of by the bankrupt, in fraud of the bankrupt law, the trustee can claim no more than the bankrupt had, and in the same condition in which he had it.

*Donaldson* v. *Farwell*, 93 U. S. 631, 23 L. ed. 993; *Yeatman* v. *New Orleans Sav. Inst.* 95 U. S. 766, 24 L. ed. 589; *Stewart* v. *Platt*, 101 U. S. 738, 25 L. ed. 816; *Porter* v. *Lazear*, 109 U. S. 84, 27 L. ed. 865, 3 Sup. Ct. Rep. 58; *Dudley* v. *Easton*, 104 U. S. 103, 26 L. ed. 668; *Adams* v. *Collier*, 122 U. S. 388, 30 L. ed. 1208, 7 Sup. Ct. Rep. 1208; Loveland, Bankruptcy, § 149, p. 285.

Taking the title the bankrupt had, the trustee also takes such title subject to all equities, liens, or encumbrances, whether created by operation of law, or by the act of the bankrupt, which existed against the property in the hands of the bankrupt, except in cases of judicial liens created against the property within four months preceding the commencement of the proceedings in bankruptcy, and except in cases where the disposition of the property by the bankrupt is declared by the law to be fraudulent and void.

*Yeatman* v. *New Orleans Sav. Inst.* 95 U. S. 764, 24 L. ed. 589; *Jerome* v. *McCarter*, 94 U. S. 734, 24 L. ed. 136; *Donaldson* v. *Farwell*, 93 U. S. 631, 23 L. ed. 993; *Cook* v. *Tullis*, 18 Wall. 332, 21 L. ed. 933; *Gibson* v. *Warden*, 14 Wall. 244, 20 L. ed. 797; *Stewart* v. *Platt*, 101 U. S. 731, 25 L. ed. 816; *Hauselt* v. *Harrison*, 105 U. S. 401, 26 L. ed. 1075; *Re Blair*, 108 Fed. 529; Loveland, Bankruptcy, § 149, pp. 285, 286.

There is no room for the operation of the doctrine of relation under the very terms of the act itself. But if there was room for the operation of such doctrine, it could not be applied to defeat any right or claim of the appellants in this case, as the courts apply such doctrine only to subserve the ends of justice, and to protect parties deriving their interests from the claimant, pending the proceedings for the confirmation of his title.

*Lynch* v. *Bernal*, 9 Wall. 317, 19 L. ed. 714.

The Langstaff Hardware Company had the power, and the right, to employ the appellants as its counsel and attorneys, to perform the services they rendered, and to bind its assets by the contract contained in the general assignment for their payment.

See *Graham* v. *La Crosse & M. R. Co.* 102 U. S. 160, 26 L. ed. 111; *Hollins* v. *Brierfield Coal & I. Co.* 150 U. S. 385, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127; *First Nat. Bank* v. *Lumber & Mfg. Co.* 91 Tenn. 12, 18 S. W. 400; *McClaren* v. *Union Roller Mills & Elevator Co.* 95 Tenn. 696, 35 S. W. 88.

No counsel for appellee.

Mr. Justice **Holmes** delivered the opinion of the court:

The certificate in this case is as follows:

"This is an appeal from the district court for the western district of Tennessee, sitting [534] as a court of bankruptcy, disallowing *a claim filed by the appellants against the bankrupt estate, exceeding $500 in amount. From the transcript of the record it appears:

"(1.) That the Langstaff Hardware Company is a mercantile corporation, organized under the general law of Tennessee, providing for the organization of such corporations, which was engaged in carrying on a general hardware business at Memphis, in the western district of Tennessee.

"(2.) Being embarrassed, it, on the 13th day of August, 1900, made a general deed of assignment, under the general-assignment law of Tennessee, by which it conveyed to one C. W. Griffith, as assignee, all its corporate property of every kind, for the equal benefit of all its creditors. The assignee accepted the trust and qualified by executing bond and taking the oath prescribed by the Tennessee statute, and entered into possession of all the assigned estate. This deed of assignment provided that the assignee should pay 'reasonable counsel and attorneys' fees for preparing this deed and for advice and service to be furnished and rendered him in the course of the administration of the trust hereby created.' Within four months after this deed of assignment the Langstaff Hardware Company, upon a petition by its creditors, was adjudicated a bankrupt, and this deed set aside as in contravention of the bankrupt law. A trustee was duly chosen, who has taken possession of the assigned assets of the bankrupt.

"(3.) The appellants filed a claim against the bankrupt estate for professional services rendered the bankrupt in preparing the said deed of general assignment, and the assignee thereunder in advising and counseling him in respect of his duties, and in defending a suit brought to wind up the corporation in a state chancery court, and for services rendered the assignee in resisting the adjudication of bankruptcy.

"The items of this claim were as follows:

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|---|---|
| (*a.*) For services rendered the corporation in preparing the general assignment ..... | $500 00 |
| (*b.*) For general advice and counsel to the assignee in respect to the duties of his trust ..... | 250 00 |
| *(*c.*) For legal services in defense of a suit brought in a state court wherein it was sought to have the corporation wound up as an insolvent corporation, and its assets distributed under the orders and decrees of the court ..... | 100 00 |
| (*d.*) For services rendered by employment of the assignee in resisting an adjudication of bankruptcy against the Langstaff Hardware Company ..... | 300 00 |

[535]

"The appellants asserted and claimed that each of said items constituted a prior charge upon the assets, and asked to have same paid by the trustee in preference to the unsecured creditors. The trustee and certain creditors excepted to each item of this account.

"The referee, upon the evidence, found and certified that the services had been rendered as claimed, and were reasonably worth the amount claimed, but that the same did not constitute expenses allowable as a preference, and were not otherwise a lien. He allowed the item of $500.00 as an unsecured claim against the bankrupt, but disallowed the other items as not being debts of the bankrupt. His order was duly excepted to and the questions certified to the court in due form. The district judge sustained the referee so far as he held the claim to be non-preferential and adjudged that none of the items constituted a debt, provable for any purpose against the bankrupt estate. From this judgment the appellants have appealed and assigned error.

"Upon this state of facts this court desires the instruction of the Supreme Court, that it may properly decide the questions of law thus arising:

"(1) Is a claim for professional services rendered to a bankrupt corporation in the preparation of a general assignment, valid under the law of Tennessee, entitled to be paid as a preferential claim out of the estate of the corporation in the hands of a trustee in bankruptcy, when the corporation was adjudicated an involuntary bankrupt within four months after the *making of the [536] assignment, and the assignment set aside as in contravention of the bankrupt law?

"(2) Is a claim for professional advice and legal services rendered such an assignee, prior to an adjudication of bankruptcy against the assignor, the assignment providing that the costs and expenses of administering the trust should be first paid, entitled to be proved as a preferential claim against the bankrupt estate?

"(3) Is a claim against such an assignee for legal services rendered at his employment in resisting an adjudication of involuntary bankruptcy against the assignor al-

lowable as a preferential claim, when the necessary effect of the adjudication would be to set aside the assignment under which the assignee was acting?

"(4) If not entitled to be allowed as preferential claims, may either of the items described in the foregoing questions be proved as unsecured debts of the bankrupt corporation?"

It is admitted that a general assignment for the benefit of creditors, made within four months from the filing of a petition in bankruptcy, is void as against the trustee in bankruptcy, so far as it interferes with his administering the property assigned. This could not be denied. *George M. West Co.* v. *Lea Bros.* 174 U. S. 590, 595, 43 L. ed. 1098, 1099, 19 Sup. Ct. Rep. 836; *Boese* v. *King*, 108 U. S. 379, 385, 27 L. ed. 760, 762, 2 Sup. Ct. Rep. 765; *Bryan* v. *Bernheimer*, 181 U. S. 188, 45 L. ed. 814, 21 Sup. Ct. Rep. 557. It hardly is necessary to discuss whether such an assignment should be held to be embraced in the express avoidance of conveyances made with intent to hinder, delay, or defraud creditors in § 67*e*, of the bankruptcy law. (30 Stat. at L. 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450.) It is possible to say that constructively a genral assignment falls under that description. *Re Gutwillig*, 90 Fed. 475, 34 C. C. A. 377, 63 U. S. App. 191, 92 Fed. 337; *Davis* v. *Bohle*, 34 C. C. A. 372, 92 Fed. 325. One ground for such a construction would be that making the assignment is declared an act of bankruptcy by § 3. As it could not have been intended that the very conveyance which warranted putting the grantor into bankruptcy should withdraw all his property from distribution there, it seems sufficient to rely upon the necessarily implied effect of § 3. At all events, if such a conveyance be called constructively fraudulent, it would be severe to deduce conse-[537]quences as *to the validity of the appellants' claim from that circumstance alone.

The assignment was not illegal. It was permitted by the law of the state, and cannot be taken to have been prohibited by the bankruptcy law absolutely in every event, whether proceedings were instituted or not. *Re Sievers*, 91 Fed. 366; *Re Romanow*, 92 Fed. 510. It had no general fraudulent intent. It was voidable only in case bankruptcy proceedings should be begun. At the time when it was made the institution of such proceedings was uncertain. It seems to us that it would be a hard and subtle construction to say, as seems to have been thought in *Bartlett* v. *Bramhall*, 3 Gray, 257, 260, that when they were instituted they not only avoided the assignment, but made it illegal by relation back to its date, when, if they had not been started, it would have remained perfectly good. No doubt the corporation had notice of the bankruptcy law, but it could not go into bankruptcy by voluntary petition, and there is no objection to a debtor's distributing his property equally among his creditors of his own motion, if bankruptcy proceedings do not intervene. The view we take is that which has been taken by state decisions with reference to similar questions raised by creditors or under state insolvent laws. *Bigelow* v. *Baldwin*, 1 Gray, 245, 247; *White* v. *Hill*, 148 Mass. 396, 19 N. E. 407; *Clark* v. *Sawyer*, 151 Mass. 64, 23 N. E. 726; *Wakeman* v. *Grover*, 4 Paige, 23, 43, 11 Wend. 187, 226, 25 Am. Dec. 624. See also *Mayer* v. *Hellman*, 91 U. S. 496, 500, 501, 23 L. ed. 377, 378.

The appellants do not stop here, however, but argue that the avoidance of the voluntary assignment goes only to the administration of the property, and not to the title; that the trustee simply succeeds the privately chosen assignee in the administration of the trust under the deed. Of course the object of this contention is to uphold the provision in favor of the appellants for preparing the deed and for service to be rendered the assignee. It does not seem to us to need much argument to show that this artificial refinement cannot stand. If by declaring the assignment an act of bankruptcy, the statute means that the conveyance shall not be effectual against the bankruptcy *proceedings, as is agreed, the natural [538] and simple construction is that it means that the deed shall be avoided as a whole when the trustee takes the goods. The cases which we have cited and others under insolvent and bankruptcy laws evidently take that view. It follows that the appellants can assert no preference by way of lien under the deed.

It does not follow, however, from the avoidance of the deed, that the service of preparing it did not raise a valid debt. There is no sufficient reason why it should not when once it is decided that the service for which the debt is alleged was lawful when it was rendered. *Re Lains*, 16 Nat. Bankr. Reg. 168, 170, Fed. Cas. No. 7,989.

The more difficult question is how to deal with the services rendered to the voluntary assignee. The claim for them must be worked out through the assignee, and cannot be put higher than his claim for allowances, supposing that they had been paid. We may assume that there is no question of form before us, and that whatever the appellants properly might have been paid by the assignee they may prove for now. See *Central R. & Bkg. Co.* v. *Pettus*, 113 U. S. 116, 124, 125, 28 L. ed. 915, 918, 5 Sup. Ct. Rep. 387; *Mason* v. *Pomeroy*, 151 Mass. 164, 167, 7 L. R. A. 771, 24 N. E. 202. But it has been held that the assignee, even of a corporation, cannot be allowed anything for his services before the filing of the petition in bankruptcy. See *e. g. Re Peter Paul Book Co.* 104 Fed. 786. So far as this opinion rests on constructive fraud, we have indicated above that it does not command our assent. The case would be different if the assignee were party to an actual fraud. *Hastings* v. *Spencer*, 1 Curt. C. C. 504, 507, Fed. Cas. No. 6,201; *Smith* v. *Wise*, 132 N. Y. 172, 178, 30 N. E. 229; *Perry-Mason Shoe Co.* v. *Sykes*, 72 Miss. 390, 401, 28 L. R. A. 277, 17 So. 171. But the assignee is acting lawfully in what he does before proceedings

in bankruptcy are begun, and, although it may be assumed that the avoidance of the assignment relates back to the date of the deed, still, so far as his services, or services procured by him, tend to the preservation or benefit of the estate, the mere fiction of relation is not enough to forbid an allowance for them. See *Lynch* v. *Bernal*, 9 Wall. 315, 325, 326, 19 L. ed. 714, 716. This is the doctrine of the state courts with reference to the operation of insolvent laws upon voluntary assignments, and of the better-con-
[539] sidered decisions under *the bankrupt laws. *Platt* v. *Archer*, 13 Blatchf. 351, Fed. Cas. No. 11,214; *Havemeyer* v. *Loeb*, 5 Abb. N. C. 338, 345; *Macdonald* v. *Moore*, 15 Nat. Bankr. Reg. 26, Fed. Cas. No. 8,763; *Wald* v. *Wehl*, 18 Blatchf. 495, 6 Fed. 163, 169; *Hunker* v. *Bing*, 9 Fed. 277; *Re Kurth*, 17 Nat. Bankr. Reg. 573, Fed. Cas. No. 7,948; *Re Scholtz*, 106 Fed. 834; *White* v. *Hill*, 148 Mass. 396, 19 N. E. 407; *Clark* v. *Sawyer*, 151 Mass. 64, 23 N. E. 726; *Wakeman* v. *Grover*, 4 Paige, 23, 43, 11 Wend. 187, 25 Am. Dec. 624; *Collumb* v. *Read*, 24 N. Y. 505, 515; *T. T. Haydock Carriage Co.* v. *Pier*, 78 Wis. 579, 47 N. W. 945; *Perry-Mason Shoe Co.* v. *Sykes*, 72 Miss. 390, 28 L. R. A. 277, 17 So. 171. See *Williams* v. *Gibbes*, 20 How. 535, 15 L. ed. 1013; *Internal Improvement Fund* v. *Greenough*, 105 U. S. 527, 532, 26 L. ed. 1157, 1160; *Thompson* v. *Phenix Ins. Co.* 136 U. S. 287, 294, 295, 34 L. ed. 408, 412, 10 Sup. Ct. Rep. 1019; *Woodruff* v. *New York, L. E. & W. R. Co.* 129 N. Y. 27, 29 N. E. 251. If beneficial services are allowed for they are to be regarded as deductions from the property which the assignee is required to surrender, and in that way they gain a preference. *Platt* v. *Archer*, 13 Blatchf. 351, Fed. Cas. No. 11,214; *Re Scholtz*, 106 Fed. 834; *White* v. *Hill*, 148 Mass. 396, 19 N. E. 407; *Clark* v. *Sawyer*, 151 Mass. 64, 23 N. E. 726.

We are not prepared to go further than to allow compensation for services which were beneficial to the estate. Beyond that point we must throw the risk of his conduct on the assignee, as he was chargeable with knowledge of what might happen.

It does not appear how far the services to the assignee were beneficial. Therefore the questions of the circuit court of appeals cannot be answered in full. But the principles as to which it desired instruction may be stated sufficiently for the disposition of the case upon a subsequent finding of facts. None of the claims is entitled to preference under the deed. The charge for the preparation of the assignment properly may be proved as an unpreferred debt of the bankrupt. The services to the voluntary assignee may be allowed so far as they benefited the estate, and, inasmuch as he would be allowed a lien on the property if he had paid the sum allowed, the appellants may stand in his shoes, and may be preferred to that extent. No ground appears for allowing the item for services in resisting an adjudication of bankruptcy. See *Platt* v. *Archer*, 13 Blatchf. 351, 354, Fed. Cas. No. 11,214; *Perry-Mason Shoe Co.* v. *Sykes*, 72 Miss. 390, 398, 28 L. R. A. 277, 17 So. 171; *T. T.
[540] *Haydock Carriage Co.* v. *Pier*, 78 Wis. 579, 582, 47 N. W. 945; *Clark* v. *Sawyer*, 151 Mass. 64, 23 N. E. 726.

We answer the questions as follows: (1) No. (2) Not under the deed, but, so far as the assignee would be allowed for payment of the claim, the claim may be preferred in the right of the assignee. (3) Not on the facts appearing in the certificate. (4) The charge for the preparation of the deed may be proved as an unsecured claim.

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GLOBE REFINING COMPANY, *Plff. in Err.*,

*v.*

LANDA COTTON OIL COMPANY.

(See S. C. Reporter's ed. 540-547.)

*Damages—breach of seller's agreement to deliver—pleading—sufficiency of allegations to show jurisdictional amount involved.*

1. Mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law, to charge the seller with special damage on that account if he fails to deliver the goods.
2. The amount of the damages involved in an action for the breach of a written contract to deliver oil at a specified price f. o. b. buyer's tanks at seller's mill is not increased, for jurisdictional purposes, over and above the difference between the contract and market value by allegations in the petition that the seller had notice that the buyer would be compelled to send its tanks from distant points to the seller's mill; that in so doing transportation charges were incurred and the use of the tanks lost for thirty days; that seller was well aware that buyer had contracts over, and "had contracted to that end" with buyer; and that seller, contemplating the breach of its contract, maliciously caused the buyer to send the tanks a specified distance at a specified cost.

[No. 241.]

*Submitted April 16, 1903. Decided June 1, 1903.*

IN ERROR to the Circuit Court of the United States for the Western District of Texas to review a judgment sustaining a plea that the damages had been unduly magnified for the purpose of conferring jurisdiction, and dismissing the cause. *Affirmed.*

The facts are stated in the opinion.

*Mr.* **C. W. Ogden** submitted the cause for plaintiff in error. *Mr. J. D. Guinn* was with him on the brief:

The measure of damages is either such as may fairly and reasonably be considered as arising naturally or such as may reasonably

NOTE.—*As to the damages recoverable for the breach of a contract to deliver goods*—see notes to Osgood v. Bauder (Iowa) 1 L. R. A. 655; Shepherd v. Hampton, 4 L. ed. U. S. 369, and Telfener v. Russ, 36 L. ed. U. S. 800.

be supposed to have been in contemplation by both parties at the time they made the contract, as the probable result of the breach of it.

*Hadley* v. *Baxendale*, 9 Exch. 341; Field, Damages, §§ 252, 253, 254; *Taylor Mfg. Co.* v. *Hatcher Mfg. Co.* 3 L. R. A. 587, 39 Fed. 440; *Smith* v. *Bolles*, 132 U. S. 125, 33 L. ed. 279, 10 Sup. Ct. Rep. 39; *Grand Tower Min. Mfg. & Transp. Co.* v. *Phillips*, 23 Wall. 471, 23 L. ed. 71; *Gulf, C. & S. F. R. Co.* v. *Dunman*, 85 Tex. 179, 19 S. W. 1073.

In this case, while the buyer had not advanced the whole price of the goods, he had advanced freight, and advanced the use of tank cars so as not to have them for use to send to other places. This being true, the rule would be the same as when the price of the goods had been advanced; that is, the highest price up to the time of suit and such other losses as reasonably arose out of the breach.

*Chatham* v. *Jones*, 69 Tex. 745, 7 S. W. 600; *Hadley* v. *Baxendale*, 9 Exch. 341; *Wetmore* v. *Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; *Randon* v. *Barton*, 4 Tex. 295; *Cartwright* v. *McCook*, 33 Tex. 613; *Griffin* v. *Colver*, 16 N. Y. 489, 69 Am. Dec. 718; *Hamilton* v. *McPherson*, 28 N. Y. 72, 84 Am. Dec. 330; *Crater* v. *Binninger*, 33 N. J. L. 513, 97 Am. Dec. 737; *Richardson* v. *Chynoweth*, 26 Wis. 656.

The court having held that the pleadings state sufficient matter to state a cause of action, and that there were facts to be determined, in order to reach the entire case, it should have heard all the facts, and not merely those appertaining to the plea in abatement.

*Blachly* v. *Davis*, 1 McLean, 412, Fed. Cas. No. 1,456; *Allen* v. *Southern California R. Co.* 70 Fed. 370; *Foster* v. *Cleveland, C. C. & St. L. R. Co.* 56 Fed. 434; *Jones* v. *League*, 18 How. 76, 15 L. ed. 263; *Wetmore* v. *Rymer*, 169 U. S. 121, 42 L. ed. 684, 18 Sup. Ct. Ct. Rep. 293.

Plaintiff had the right to have a jury, to pass on these matters.

*Blachly* v. *Davis*, 1 McLean, 412, Fed. Cas. No. 1,456; *Wetmore* v. *Rymer*, 169 U. S. 117, 42 L. ed. 683, 18 Sup. Ct. Rep. 293.

No counsel for defendant in error.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an action of contract brought by [541] the plaintiff in error, *a Kentucky corporation, against the defendant in error, a Texas corporation, for breach of a contract to sell and deliver crude oil. The defendant excepted to certain allegations of damage, and pleaded that the damages had been claimed and magnified fraudulently for the purpose of giving the United States circuit court jurisdiction, when in truth they were less than $2,000. The judge sustained the exceptions. He also tried the question of jurisdiction before hearing the merits, refused the plaintiff a jury, found that the plea was sustained, and dismissed the cause. The plaintiff excepted to all the rulings and action of the court, and brings the case here by writ of error. If the rulings and findings were right, there is no question that the judge was right in dismissing the suit (*North American Transp. & Trading Co.* v. *Morrison*, 178 U. S. 262, 267, 44 L. ed. 1061, 1064, 20 Sup. Ct. Rep. 869); but the grounds upon which he went are re-examinable here. *Wetmore* v. *Rymer*, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293.

The contract was made through a broker, it would seem by writing, and, at all events, was admitted to be correctly stated in the following letter:

Dallas, Texas, 7/30/97.

Landa Oil Company,
New Braunfels, Texas.

Gentlemen:—

Referring to the exchange of our telegrams to-day, we have sold for your account to the Globe Refining Company, Louisville Kentucky, ten (10) tanks prime crude C/S oil at the price of 15¾ cents per gallon of 7½ pounds, f. o. b. buyers' tank at your mill. Weights and quality guaranteed.

Terms: Sight draft without exchange b/ldg. attached. Sellers paying commission.

Shipment: Part last half August and balance first half September. Shipping instructions to be furnished by the Globe Refining Company. Yours truly,

Thomas & Green, as Broker.

Having this contract before us, we proceed to consider the allegations of special damage over and above the difference between the contract price of the oil and the price at the time of the breach, which was the measure adopted by the judge. These *allegations must be read with care, for it [542] is obvious that the pleader has gone as far as he dared to go, and to the verge of anything that could be justified under the contract, if not beyond.

It is alleged that it was agreed and understood that the plaintiff would send its tank cars to the defendant's mills, and that the defendant promptly would fill them with oil (so far, simply following the contract), and that the plaintiff sent tanks. "In order to do this, the plaintiff was under the necessity of obligating itself unconditionally to the railroad company (and of which the defendant had notice) to pay to it for the transportation of the cars from said Louisville to said New Braunfels in the sum of $900," which sum plaintiff had to pay, "and was incurred as an advancement on said oil contract." This is the first item. The last words quoted mean only that the sum paid would have been allowed by the railroad as part payment of the return charges had the tanks been filled and sent back over the same road.

Next it is alleged that the defendant, contemplating a breach of the contract, caused the plaintiff to send its cars a thousand miles, at a cost of $1,000; that defendant canceled its contract on the 2d of September, but did not notify the plaintiff until the 14th, when, if the plaintiff had known of the cancelation, it would have been sup-

plying itself from other sources; that plaintiff (no doubt defendant is meant) did so wilfully and maliciously, causing an unnecessary loss of $2,000.

Next it is alleged that, by reason of the breach of contract and want of notice, plaintiff lost the use of its tanks for thirty days, — a loss estimated at $700 more. Next it is alleged that the plaintiff had arranged with its own customers to furnish the oil in question within a certain time, which contemplated sharp compliance with the contract by the defendant; "all of which facts, as above stated, were well known to the defendant, and defendant had contracted to that end with the plaintiff." This item is put at $740, with $1,000 more for loss of customers, credit, and reputation. Finally, at the end of the petition, it is alleged generally that it was known to defendant, and [543] in contemplation of the contract, *that plaintiff would have to send tanks at great expense from distant points, and that plaintiff "was required to pay additional freight in order to rearrange the destination of the various tanks and other points." Then it is alleged that by reason of the defendant's breach, the plaintiff had to pay $350 additional freight.

Whatever may be the scope of the allegations which we have quoted, it will be seen that none of the items was contemplated expressly by the words of the bargain. Those words are before us in writing, and go no further than to contemplate that when the deliveries were to take place the buyer's tanks should be at the defendant's mill. Under such circumstances the question is suggested how far the express terms of a writing, admitted to be complete, can be enlarged by averment and oral evidence; and, if they can be enlarged in that way, what averments are sufficient. When a man commits a tort, he incurs, by force of the law, a liability to damages, measured by certain rules. When a man makes a contract, he incurs, by force of the law, a liability to damages, unless a certain promised event comes to pass. But, unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured. The old law seems to have regarded it as technically in the election of the promisor to perform or to pay damages. *Bromage* v. *Genning*, 1 Rolle, 368; *Hulbert* v. *Hart*, 1 Vern. 133. It is true that, as people when contracting contemplate performance, not breach, they commonly say little or nothing as to what shall happen in the latter event, and the common rules have been worked out by common sense, which has established what the parties probably would have said if they had spoken about the matter. But a man never can be absolutely certain of performing any contract when the time of performance arrives, and, in many cases, he obviously is taking the risk of an event which is wholly, or to an appreciable extent, beyond his control. The extent of liability in such cases is likely to be within his contemplation, and, whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind. For instance, *in the present [544] case, the defendant's mill and all its oil might have been burned before the time came for delivery. Such a misfortune would not have been an excuse, although probably it would have prevented performance of the contract. If a contract is broken, the measure of damages generally is the same, whatever the cause of the breach. We have to consider, therefore, what the plaintiff would have been entitled to recover in that case, and that depends on what liability the defendant fairly may be supposed to have assumed consciously, or to have warranted the plaintiff reasonably to suppose that it assumed, when the contract was made.

This point of view is taken by implication in the rule that "a person can only be held to be responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract." *Grebert-Borgnis* v. *Nugent*, L. R. 15 Q. B. Div. 85, 92; *Horne* v. *Midland R. Co.* L. R. 7 C. P. 583, 591; *Hadley* v. *Baxendale*, 9 Exch. 341, 354; *Western U. Teleg. Co.* v. *Hall*, 124 U. S. 444, 456, 31 L. ed. 479, 483, 8 Sup. Ct. Rep. 577; *Howard* v. *Stillwell & B. Mfg. Co.* 139 U. S. 199, 206, 35 L. ed. 147, 150, 11 Sup. Ct. Rep. 500; *Primrose* v. *Western U. Teleg. Co.* 154 U. S. 1, 32, 38 L. ed. 883, 895, 14 Sup. Ct. Rep. 1098. The suggestion thrown out by Bramwell, B., in *Gee* v. *Lancashire & Y. R. Co.* 6 Hurlst. & N. 211, 218, that perhaps notice after the contract was made and before breach would be enough, is not accepted by the later decisions. See further, *Hydraulic Engineering Co.* v. *McHaffie*, L. R. 4 Q. B. Div. 670, 674, 676. The consequences must be contemplated at the time of the making of the contract.

The question arises, then, What is sufficient to show that the consequences were in contemplation of the parties, in the sense of the vendor taking the risk? It has been held that it may be proved by oral evidence when the contract is in writing. *Messmore* v. *New York Shot & Lead Co.* 40 N. Y. 422. See *Sawdon* v. *Andrew*, 30 L. T. N. S. 23. But, in the language quoted, with seeming approbation, by Blackburn, J., from Mayne on Damages, 2d ed. 10, in *Elbinger Actien-Gesellschafft* v. *Armstrong*, L. R. 9 Q. B. 473, 478, "it may be asked, with great deference, whether the mere fact of such consequences being communicated to the other party will be sufficient, without *going on to [545] show that he was told that he would be answerable for them, and consented to undertake such a liability." Mr. Justice Willes answered this question, so far as it was in his power, in *British Columbia & V. I. Spar, Lumber, & Saw-Mill Co.* v. *Nettleship*, L. R. 3 C. P. 499, 500: "I am disposed to take the narrow view that one of two contracting parties ought not to be allowed to obtain an advantage which he has not paid for. . . . If that [a liability for the full profits that might be made by machinery

which the defendant was transporting, if the plaintiff's trade should prove successful and without a rival] had been presented to the mind of the ship owner at the time of making the contract, as the basis upon which he was contracting, he would at once have rejected it. And though he knew, from the shippers, the use they intended to make of the articles, it could not be contended that the mere fact of knowledge, without more, would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind, that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it." The last words are quoted and reaffirmed by the same judge in *Horne* v. *Midland R. Co.* L. R. 7 C. P. 583, 591; S. C., L. R. 8 C. P. 131. See also Benjamin, Sales, 6th Am. ed. § 872.

It may be said with safety that mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law to charge the seller with special damage on that account if he fails to deliver the goods. With that established, we recur to the allegations. With regard to the first, it is obvious that the plaintiff was free to bring its tanks from where it liked,—a thousand miles away or an adjoining yard,—so far as the contract was concerned. The allegation hardly amounts to saying that the defendant had notice that the plaintiff was likely to send its cars from a distance. It is not alleged that the defendant had notice that the plaintiff had to bind itself to pay $900, [546] at the time when the *contract was made, and it nowhere is alleged that the defendant assumed any liability in respect of this uncertain element of charge. The same observations may be made with regard to the claim for loss of use of the tanks and to the final allegations as to sending the tanks from distant points. It is true that this last was alleged to have been in contemplation of the contract, if we give the plaintiff the benefit of the doubt in construing a somewhat confused sentence. But, having the contract before us, we can see that this ambiguous expression cannot be taken to mean more than notice, and notice of a fact which would depend upon the accidents of the future.

It is to be said further, with regard to the foregoing items, that they were the expenses which the plaintiff was willing to incur for performance. If it had received the oil, these were deductions from any profit which the plaintiff would have made. But, if it gets the difference between the contract price and the market price, it gets what represents the value of the oil in its hands, and to allow these items in addition would be making the defendant pay twice for the same thing.

It must not be forgotten that we are dealing with pleadings, not evidence, and with pleadings which, as we have said, evidently put the plaintiff's case as high as it possibly can be put. There are no inferences to be drawn, and therefore cases like *Hammond* v. *Bussey*, L. R. 20 Q. B. Div. 79, do not apply. It is a simple question of allegations which, by declining to amend, the plaintiff has admitted that it cannot reinforce. This consideration applies with special force to the attempt to hold the defendant liable for the breach of the plaintiff's contract with third persons. The allegation is that the fact that the plaintiff had contracts over was well known to the defendant, and that "defendant had contracted to that end with the plaintiff." Whether, if we were sitting as a jury, this would warrant an inference that the defendant assumed an additional liability, we need not consider. It is enough to say that it does not allege the conclusion of fact so definitely that it must be assumed to be true. With the contract before us it is in a high degree improbable that any such conclusion could have been made good.

The only other allegation needing to be dealt with is that *the defendant maliciously [547] caused the plaintiff to send the tanks a thousand miles, contemplating a breach of its contract. So far as this item has not been answered by what has been said, it is necessary only to add a few words. The fact alleged has no relation to the time of the contract. Therefore it cannot affect the damages, the measure of which was fixed at that time. The motive for the breach commonly is immaterial in an action on the contract. *Grand Tower Min. Mfg. & Transp. Co.* v. *Phillips*, 23 Wall. 471, 480, 23 L. ed. 71, 75; Wood's Mayne, Damages, § 45; 2 Sedgw. Damages, 8th ed. § 603. It is in this case. Whether, under any circumstances, it might give rise to an action of tort, is not material here. See *Emmons* v. *Alvord*, 177 Mass. 466, 470, 59 N. E. 126.

The allowance of the exceptions made the trial of the plea superfluous. If the question of fact was to be tried as to whether the amount of damages that fairly could be claimed was sufficient to give the court jurisdiction, the court had authority to try it. *Wetmore* v. *Rymer*, 169 U. S. 115, 121, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Act of March 3, 1875, 18 Stat. at L. 472, chap. 137, § 5, U. S. Comp. Stat. 1901, p. 511. In coming to his conclusion, apart from what was apparent on the face of the pleadings, the judge no doubt was influenced largely by a letter from the plaintiff to the defendant, inclosing an itemized bill for $1,021.28. This letter suggested no further claim except for "any additional mileage we may have to pay." Of course, if the judge accepted the plaintiff's own view of its case as expressed here, the pretence of jurisdiction was at an end. Some attempt was made to make out this was an offer of

compromise, and inadmissible. But the letter did not purport to be anything of the sort; it was an out and out adverse demand.

*Judgment affirmed.*

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548] *THOMAS P. QUEENAN, *Plff. in Err.*,

*v.*

TERRITORY OF OKLAHOMA.

(See S. C. Reporter's ed. 548–552.)

*Evidence—nonexpert opinion as to sanity—homicide—instructions — disqualification of juror waived by failure to object.*

1. A nonexpert witness cannot give his opinion formed since the commission of a crime, as to the accused's mental condition at the time the offense was committed, where his only knowledge in respect thereto was derived from his familiarity with the accused as a patron of the latter's barber shop.
2. An instruction to find defendant not guilty of murder if it should be found that he was not able to know that the act of killing was wrongful, and was not able to comprehend and understand the consequences of such act, is not open to the objection that it made it necessary for the jury to find that both conditions existed in order to acquit, where the condition of a verdict of guilty was made by the same instruction to be a finding beyond a reasonable doubt that the prisoner knew and understood that it was wrong to take the life, and was able to comprehend and understand the consequences of such act.
3. The right of defendant to object that a juror was disqualified because it appeared during the trial that he had been convicted of a felony, contrary to his statement on his *voir dire*, is waived by failure to raise the question until after verdict.

[No. 246.]

*Argued April 16, 17, 1903. Decided June 1, 1903.*

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a conviction for murder. *Affirmed.*

See same case below, 11 Okla. 261, 71 Pac. 218.

The facts are stated in the opinion.

*Mr.* **Stilwell H. Russel** argued the cause, and, with *Messrs. J. W. Johnson, H. H. Howard*, and *C. B. Ames*, filed a brief for plaintiff in error:

A nonexpert, after stating the facts upon which it is based, may give his opinion as to mental condition.

*Connecticut Mut. L. Ins. Co.* v. *Lathrop*, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. Rep. 533.

And this opinion must be that of the witness at the time of his examination.

*Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 459.

And the fact that the witness did not form his opinion at the time he observed the facts on which it is based, but afterwards, does not affect its competency.

Buswell, Insanity, § 246; *Hathaway* v. *National L. Ins. Co.* 48 Vt. 335.

It is held to be the correct practice to call for the opinion of the witness at the time of the delivery of his testimony, for the reason that subsequent consideration and reflection may have changed an opinion formed at the time the facts were observed by him.

*Runyan* v. *Price*, 15 Ohio St. 1, 86 Am. Dec. 468; 1 Clevenger, Med. Jur. 589.

An opinion is but a conclusion arrived at from an ascertained condition, and, expressed by one who has had opportunities of observation, becomes the statement of a fact.

*Connecticut Mut. L. Ins. Co.* v. *Lathrop*, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. Rep. 533.

The incapacity to know the wrongfulness of an act does not embrace necessarily the incapacity to understand the nature and consequences of the same. The conditions are not convertible.

*Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 581, 21 L. ed. 236; 1 Clevenger, Med. Jur. of Insanity, p. 410, § 6; *Ritter* v. *Mutual L. Ins. Co.* 169 U. S. 149, 150, 42 L. ed. 696, 697, 18 Sup. Ct. Rep. 300.

The law requires that an accused be ignorant of the character of the act as a crime, and not of the mere act itself.

*Bigelow* v. *Berkshire L. Ins. Co.* 93 U. S. 284, 23 L. ed. 918.

A mind so far bankrupt as to be unable to know the wrongfulness of an act, and unable to comprehend and understand the physical consequences or effect of the act, is reduced to such extremity as to make an act no more the act of such a mind, in the sense of the law, than if impelled by irresistible physical power.

*Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 131, 27 L. ed. 882, 3 Sup. Ct. Rep. 99.

An insurance company cannot, as a condition precedent to the payment of a policy upon the life of an assured who has taken his own life, require it to be shown that, at the time of the act, he was incapable of knowing its wrongfulness and incapable of understanding the consequences of it, for the reason that if the intellect is thus distressed it would be so far bereft of reason that the act would be no more his act in the sense of the law than that of the instrument used when committing it.

*Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 131, 27 L. ed. 882, 3 Sup. Ct. Rep. 99; *Charter Oak L. Ins. Co.* v. *Rodel*, 95 U. S. 241, 24 L. ed. 436; *Mutual L. Ins. Co.* v. *Terry*, 15 Wall. 581, 21 L. ed. 236; *Connecticut Mut. L. Ins. Co.* v. *Akens*, 150 U. S. 473, 37 L. ed. 1149, 14 Sup. Ct. Rep. 155.

In construing the Constitution, we look to the history of the times, and examine the state of things when it was framed and adopted.

*Rhode Island* v. *Massachusetts*, 12 Pet. 657, 9 L. ed. 1233.

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NOTE.—*As to nonexpert opinion of sanity or insanity*—see note to Ryder v. State (Ga.) 38 L. R. A. 721, and Dexter v. Hall, 21 L. ed. U. S. 73.

The history of the times discloses that the Constitution was framed in the light of the common law.

*United States* v. *Wong Kim Ark*, 169 U. S. 649, 42 L. ed. 890, 18 Sup. Ct. Rep. 456.

The "jury" mentioned in the Constitution means a common-law jury, and "according to the principles of the common law" means the common law of England, and not the common law of the several states, for to undertake to interpret according to the common law of the several states with their modifications would be to make it mean one thing at one place and something different in another.

*Capital Traction Co.* v. *Hof*, 174 U. S. 1, 43 L. ed. 873, 19 Sup. Ct. Rep. 580.

The adoption of the Constitution superseded the laws of the Confederation, but some of them were continued in force by the Federal Congress, and among them the ordinance of 1787, guaranteeing to the people of the Northwest Territory that they "shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury, of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of the common law."

1 Stat. at L. 50, chap. 8.

And when finally the territories were authorized to adopt codes and the proceedings had thereunder were ratified by Congress, it was upon the express condition, "that no party has been or shall be deprived of the right of trial by jury."

18 Stat. at L. 27, chap. 80.

The defendant could not waive a constitutional right.

*Thompson* v. *Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620.

There are some things a defendant may waive even in a capital case. But it appears they are such things as concern him alone, such as are for his benefit, in way of privilege, and not such as are general and apply to all cases wherein persons may be accused of crime, for there is a public interest in the administration of the criminal law.

*Hopt* v. *Utah*, 110 U. S. 574, 28 L. ed. 262, 4 Sup. Ct. Rep. 202; *Day* v. *Territory*, 2 Okla. 409, 37 Pac. 806.

Where the instructions are contradictory or inconsistent with each other; or if they were calculated to confuse and mislead the jury, or if they must have left the jury in doubt or uncertainty as to the law applicable, then the judgment should be reversed.

*Somers* v. *Pumphrey*, 24 Ind. 241; *Kirland* v. *State*, 43 Ind. 154, 13 Am. Rep. 386.

An objectionable instruction cannot be corrected by other instructions which are not objectionable, nor can an erroneous instruction be corrected by one not erroneous.

*Guetig* v. *State*, 63 Ind. 282; *People* v. *Bush*, 65 Cal. 129, 3 Pac. 590.

It is important that the deliberations of the jury be not influenced by an improper instruction.

*Shaw* v. *People*, 81 Ill. 151.

The language of the instructions ought to be unambiguous,—direct and comprehensible by persons not educated in the law, such as the men addressed will understand.

1 Bishop, Crim. Proc. 3d ed. § 980.

The grand jury with one or more unqualified members is an illegally constituted body, and its presentments void.

*Dovey* v. *Hobson*, 6 Taunt. 460; *United States* v. *Wilson*, 6 McLean, 610, Fed. Cas. No. 16,737; *Com.* v. *Parker*, 2 Pick. 550; *Doyle* v. *State*, 17 Ohio, 225.

The court should have declared a mistrial.

*United States* v. *Haskell*, 4 Wash. C. C. 410, Fed. Cas. No. 15,321; *Com.* v. *McCormick*, 130 Mass. 62, 39 Am. Rep. 423; *Simmons* v. *United States*, 142 U. S. 148, 35 L. ed. 968, 12 Sup. Ct. Rep. 171; *United States* v. *Morris*, 1 Curt. C. C. 23, Fed. Cas. No. 15,815.

*Mr.* **J. C. Robberts**, argued the cause, and, with *Mr. C. H. Woods*, filed a brief for defendant in error:

Under proper circumstances, the opinions of nonexperts upon the question of sanity are admissible; but they are not admitted, except when tested and when they pass the test of all the established rules of evidence, applicable generally.

*State* v. *Pike*, 49 N. H. 401, 6 Am. Rep. 533.

They are not admitted when they violate the established rules of evidence relating to relevancy or pertinency.

*Cochrane* v. *Little*, 71 Md. 323, 18 Atl. 701.

They are not admissible when they violate the doctrines of relevancy.

*State* v. *Pike*, 49 N. H. 401, 6 Am. Rep. 533; *Sullivan* v. *Hugly*, 32 Ga. 316.

They are not admitted when, from the facts detailed, it is as possible for the jury to arrive at an opinion as it was for the witness.

Wharton, Crim. Ev. § 459.

A wide discretion is vested in the trial court to determine whether, from the evidence disclosed by the witness, he has shown that degree of intimate acquaintanceship which would enable the court to receive his opinion with reference to sanity or insanity.

*Colee* v. *State*, 75 Ind. 511; *Sutherland* v. *Hankins*, 56 Ind. 349; *Com.* v. *Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; *Nunes* v. *Perry*, 113 Mass. 274.

A known cause of challenge is always waived by withholding it or raising it as an objection after verdict.

Thompson, Trials, § 114; *Hollingsworth* v. *Duane*, Wall. C. C. 147, Fed. Cas. No. 6,618; *Brewer* v. *Jacobs*, 22 Fed. 243; *Hill* v. *Yates*, 12 East, 229; Thomp. & M. Juries, § 295 *et nota;* 17 Am. & Eng. Enc. Law, 2d ed. p. 1161, note 5.

The Oklahoma statute is but confirmatory of the common law, so far as appellant's right to complain after verdict is concerned.

4 Cooley, Bl. Com. 3d ed. p. 350; 2 Hale P. C. 293; Bacon, Abr. "Juries," 365–66; *Brewer* v. *Jacobs*, 22 Fed. 217; *Fisher* v. *Yoder*, 53 Fed. 565; *State* v. *Ready*, 44 Kan. 700, 26 Pac. 58; *State* v. *Jackson*, 27 Kan. 581, 41 Am. Rep. 424; *Cox* v. *People*, 80 N. Y. 500; *Stewart* v. *State*, 15 Ohio St. 159;

*Dilworth* v. *Com.* 12 Gratt. 689, 65 Am. Dec. 264; *Bristow* v. *Com.* 15 Gratt. 646; *Childress* v. *Ford*, 10 Smedes & M. 25; *People* v. *Stewart*, 64 Cal. 60, 28 Pac. 112.

Under the common law if the objection that the juror is disqualified is not interposed at trial it is waived and the person disqualified may constitute a juror of twelve.

1 Co. Litt. § 234, pp. 155a–158b; *Re Chelsea Waterworks Co.* 10 Exch. 731; *Hill* v. *Yates*, 12 East, 229; *Kohl* v. *Lehlback*, 160 U. S. 293, 40 L. ed. 432, 16 Sup. Ct. Rep. 304; *Hollingsworth* v. *Duane*, Wall. C. C. 147, Fed. Cas. No. 6,618.

When a party has had an opportunity of challenge, no disqualification of a juror entitles him to a new trial after verdict.

*Wassum* v. *Feeney*, 121 Mass. 93, 23 Am. Rep. 258; *Jeffries* v. *Randall*, 14 Mass. 205; *Woodward* v. *Dean*, 113 Mass. 297; *People* v. *Scott*, 56 Mich. 154, 22 N. W. 274; *Leeper* v. *State*, 29 Tex. App. 63, 14 S. W. 398; *Lane* v. *State*, 29 Tex. App. 310, 15 S. W. 827; *Mays* v. *State*, 36 Tex. Crim. Rep. 437, 37 S. W. 721; *People* v. *Mortier*, 58 Cal. 262; *Garrett* v. *Weinberg*, 54 S. C. 127, 31 S. E. 341; *Mew* v. *Charleston & S. R. Co.* 55 S. C. 90, 32 S. E. 828; *State* v. *Hartley*, 22 Nev. 342, 28 L. R. A. 33, 40 Pac. 374; *State* v. *Pickett*, 103 Iowa, 714, 39 L. R. A. 302, 73 N. W. 346; *State* v. *Robertson*, 54 S. C. 147, 31 S. E. 868; *State* v. *Powers*, 10 Or. 145, 45 Am. Rep. 138.

A criminal has no vested constitutional right in the practice and procedure under which he is to be tried.

*Maxwell* v. *Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 449, 494; *Iowa C. R. Co.* v. *Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Hornbuckle* v. *Toombs*, 18 Wall. 648, 21 L. ed. 966; *Hershfield* v. *Griffith*, 18 Wall. 657, 21 L. ed. 968; *Davis* v. *Bilsland*, 18 Wall. 659, 21 L. ed. 969; *Miles* v. *United States*, 103 U. S. 304, 26 L. ed. 481.

The number of grand jurors necessary to find an indictment in the territory must be determined by the territorial laws, and not the acts of Congress.

*Reynolds* v. *United States*, 98 U. S. 145, 25 L. ed. 244.

The laws of the territorial legislature providing the mode and manner of impaneling grand and petit jurors must govern in the courts of the territory.

*Clinton* v. *Englebrecht*, 13 Wall. 434, 20 L. ed. 659; *Thiede* v. *Utah*, 159 U. S. 514, 40 L. ed. 241, 16 Sup. Ct. Rep. 62.

The 5th Amendment to the Constitution of the United States has the same relation to the territory that the 14th Amendment has to the states. The following cases have decided beyond question that the 14th Amendment does not operate to control the practice and procedure of state courts:

*Munn* v. *Illinois*, 94 U. S. 114, 24 L. ed. 77; *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Nashville, C. & St. L. R. Co.* v. *Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Hallinger* v. *Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588; *Maxwell* v. *Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 449, 494; *Scott* v. *Toledo*, 1 L. R. A. 688, 36 Fed. 385.

There are many grounds for challenge and disqualification under the common law that are entirely at variance with our institutions.

1 Co. Litt. § 234, pp. 155a–158a; 2 Sharswood, Bl. Com. pp. 352, 353, 354.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an indictment for murder, upon which the plaintiff in error has been found guilty, and has been sentenced to be hanged. It comes here by writ of error to the supreme court of the territory of Oklahoma, that court having decided that there *was [549] no error in the proceedings and having affirmed the judgment. 11 Okla. 261, 71 Pac. 218. The errors assigned will be taken up in the order in which they were argued.

1. The only defense was insanity. A lawyer, called as a witness for the defendant, stated that he knew the prisoner quite well; that the prisoner was his barber for some years, and that he saw him on the day before the killing. He then described the appearance and conduct of the prisoner, and said that at the time he did not notice any difference from the prisoner's usual demeanor. He then was asked if, since the killing, he had formed an opinion as to the prisoner's mental condition at that time. This opinion he was not allowed to state, and this is alleged as error. It will be seen that the witness was allowed to sum up his impressions received at the time. The court said in terms that he might state any condition that existed then or any impression that it made upon the witness's mind as to the prisoner's condition. That is all that was decided in *Connecticut Mut. L. Ins. Co.* v. *Lathrop*, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. Rep. 533. Some states exclude such opinions, even when formed at the time. But, as is pointed out in the case cited, it is impossible for a witness to reproduce all the minute details which he saw and heard, and most witnesses make but a meagre and halting effort. Therefore, in this as in many other instances, after stating such particulars as he can remember,—generally, only the more striking facts,—an ordinary witness is permitted to sum up the total remembered and unremembered impressions of the senses by stating the opinion which they produced. To allow less may deprive a party of important and valuable evidence that can be got at in no other way. But, on the other hand, to allow more, to let a witness who is not an expert state an opinion upon sanity which he has formed after the event, when a case has arisen and become a matter of public discussion, must be justified, if at all, on other grounds. It is unnecessary to lay down the rule that it never can be done, for instance, when the opinion clearly appears to sum up a series of impressions received at different times. *Hathaway* v. *National L. Ins. Co.* 48 Vt.

535, 350. It is enough to say that, at least, it should be done with caution and [550] not without special *reasons. In this case the only knowledge shown by the witness was the familiarity of a man with his barber. So far as the evidence went, his present opinion might have been the result of interested argument, and, leaving such suggestions on one side, no reason of necessity or propriety was shown for the statement that would not have applied to any other man who had had his hair cut in the prisoner's shop. It does not appear that there was error in the ruling of the court.

2. The next error alleged is in the following instruction of the court:

"Homicide committed by one who has not sufficient knowledge and understanding to understand right from wrong and to comprehend and understand the consequences of his act is excusable for any act in reference to which his mind is in such weakened condition. But it is not every derangement of the mind that will excuse one for the commission of crime. If one has sufficient mind and understanding to know right from wrong regarding the particular act, and is able to comprehend and understand the consequences of such act, the law recognizes him as sane, and holds him responsible for such acts; and in this connection, if you should find beyond a reasonable doubt that the defendant took the life of Ella Queenan, as charged in the indictment, and that at the time of such homicide he knew and understood that it was wrong to take her life, and was able to comprehend and understood the consequences of such act, then and in that event it will be your duty to find the defendant guilty of murder, as charged in the indictment. But, on the other hand, if you should find that he was not able to know that the act of taking her life was wrongful, and was not able to comprehend and understand the consequences of such act, then you should find the defendant not guilty."

By § 1852 of the Oklahoma Statutes of 1893, "all persons are capable of committing crimes, except . . . all persons of unsound mind, including persons temporarily or partially deprived of reason, upon proof that, at the time of committing the act charged against them, they were incapable of knowing its wrongfulness." It was argued very earnestly that the latter part of the instruction added a second condition [551] to acquittal *by directing it if the jury found that the prisoner was not able to know that the act was wrongful, "and was not able to comprehend and understand the consequences of such act." But, on the other hand, the condition of a verdict of guilty was made to be a finding that the prisoner knew and understood that it was wrong to take the life, "and was able to comprehend and understood the consequences of such act." So that the most material part of the charge, that relating to conviction, was favorable to the prisoner. If it be supposed that such abstract language was remembered and was nicely considered and analyzed by the jury, the total effect of the charge was that, unless the two conditions concurred, the prisoner must be acquitted. We do not mean to imply that any part of the instruction, fairly understood, was wrong, but for purposes of decision it is enough to say what we have said. The instructions asked and refused were covered by that which was given as stated above.

3. In the course of the trial the government announced that since the last adjournment it had been informed that one of the jurors, named, had been convicted in Nebraska of what, by the law of that state, was a felony,—grand larceny,—at a time and place mentioned, contrary to the statement of the juror on the *voir dire*. We assume, for the purposes of decision, that this disqualified the juror from serving in any case. Okla. Stat. §§ 3093, 5182, 5183. The court asked the counsel for the prisoner what they desired to do, and its intimation indicated that if the objection were pressed the juror would be excused. This, of course, meant that the trial would have to be begun over again. The counsel for the prisoner answered that they had nothing to say, and the trial went on. It now is argued that the defendant was deprived of a constitutional right, which he could not waive. *Thompson* v. *Utah*, 170 U. S. 343, 42 L. ed. 1061, 18 Sup. Ct. Rep. 620. The contrary plainly is the law as well for the territories as for the states. See *Kohl* v. *Lehlback*, 160 U. S. 293, 299, 40 L. ed. 432, 434, 16 Sup. Ct. Rep. 304 *et seq.*; *Raub* v. *Carpenter*, 187 U. S. 159, 164, *ante*, 119, 121, 23 Sup. Ct. Rep. 72.

It is argued that the court could not have permitted a challenge at that time, because the statutes of Oklahoma, § 5177, provided that "the court, for good cause shown, may permit a *juror to be challenged after he is [552] sworn to try the cause, but not after the testimony has been partially heard." This statute cannot be construed as going merely to the order of procedure,—as depriving a party of the right to challenge pending the trial, but as preserving the right for the purpose of a motion for a new trial. Either it does not apply to the case of a disqualification discovered, as this was, after a part of the evidence was in, or it purports to take away the right altogether. Whatever may be the true construction of the last clause, the court seems to have been ready to stop the trial. But if the court's view was wrong, if the statute is constitutional,—as to which we do not mean to express a doubt,—the prisoner had no right to complain; and if it is not, it was his duty to object at the time, if he was going to object at all. He could not speculate on the chances of getting a verdict and then set up that he had not waived his rights.

*Judgment affirmed.*

FREEDOM HUTCHINSON, Trustee, *Appt.*,
*v.*
OTIS, WILCOX, & COMPANY.

(See S. C. Reporter's ed. 552-556.)

*Bankruptcy—proof of claim—effect of record of satisfaction by invalid attachments—amendment of proof—independent ground of appeal—allowance of lien waived by mistake.*

1. Creditors of a bankrupt, who had collected their claim by attachments in suits begun less than four months before the filing of the petition in bankruptcy, are, notwithstanding the entry of satisfaction of record in such suits, entitled to have the proof of their claim against the bankrupt's estate allowed, where on demand of the trustee in bankruptcy they subsequently paid over to him the full amount of the debts, although the payment, for convenience of counsel, was delayed for a day or two beyond one year after the adjudication in bankruptcy.
2. An amended proof of claim against a bankrupt's estate, filed with the trustee's consent more than a year after adjudication, may be substituted for the defective original proof, although by the bankruptcy act of 1898, § 57*n* (30 Stat. at L. 561, chap. 541, U. S. Comp. Stat. 1901, p. 3418), proofs subsequent to one year after adjudication are forbidden.
3. A court of bankruptcy may allow an amended proof of claim against a bankrupt's estate, filed with the trustee's consent, to be substituted for the defective original proof, although an appeal has been taken by the trustee to the circuit court of appeals from a decree of such court permitting the owners of the claim to prove as creditors.
4. A petition filed in a bankruptcy court by creditors of the bankrupt, asserting a lien on the proceeds of a seat in the stock exchange, which had not been insisted upon because they had collected their claims by what they mistakenly supposed were valid attachments of the bankrupt's property, is a bankruptcy proceeding under the bankruptcy act of 1898, § 2, cl. 7, within the meaning of § 25, regulating appeals in bankruptcy proceedings, and a decree thereon is, therefore, not an independent ground of appeal, where it was not, within the meaning of § 25*a*, 3, "a judgment allowing or rejecting a debt or claim of $500 or over."
5. Creditors of a bankrupt who fail to insist upon a lien on proceeds of a seat in a stock exchange which had formerly belonged to the bankrupt, because they have collected their claims by what they mistakenly supposed were valid attachments of the bankrupt's property, are entitled to have such lien allowed in the bankruptcy court, where no one has changed his position on the faith of their waiver.

[No. 634.]

*Submitted May 4, 1903. Decided June 1, 1903.*

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the District Court for the District of Massachusetts allowing proof of a claim in bankruptcy. *Affirmed.*

See same case below, 53 C. C. A. 419, 115 Fed. 937.

The facts are stated in the opinion.

*Messrs.* **Frederic D. McKenney and Freedom Hutchinson** submitted the cause for appellant:

The record of satisfaction duly set up would have been a bar in the courts of New York to any further action upon the judgment by Otis, Wilcox, & Company, or upon the claim upon which such judgment was based, so long as the record entry remained unchanged.

*Taylor* v. *Ranney*, 4 Hill, 619; *Dundee Nat. Bank* v. *Wood*, 30 N. Y. S. R. 608, 9 N. Y. Supp. 351; *Todd* v. *Botchford*, 86 N. Y. 517; *Crotty* v. *McKenzie*, 10 Jones & S. 192.

The fact that bankruptcy proceedings intervened while the action begun in New York by Otis, Wilcox, & Company against the bankrupts was still pending did not affect the New York proceedings, nor in any way nullify the records made in that court.

*Eyster* v. *Gaff*, 91 U. S. 521, 23 L. ed. 403.

Such record of satisfaction duly set up has the same force and effect that it had in New York, in all courts, both state and Federal, within the United States.

*Mills* v. *Duryee*, 7 Cranch, 481, 3 L. ed. 411.

The allowance of a substituted proof of claim after the expiration of a year from the time of adjudication was plainly prohibited by the bankrupt act, § 57n.

*Re Moebius*, 116 Fed. 47.

The trustee's appeal was perfected on November 6, 1901, and the case was then removed from the district court. It was not within the power of the judge of the district court to allow amendments or pass orders in regard to a case which was no longer in his court.

*Draper* v. *Davis*, 102 U. S. 370, 26 L. ed. 121; *Keyser* v. *Farr*, 105 U. S. 265, 26 L. ed. 1025.

The question of priority in payment, or of the validity of a lien claimed by a creditor who has a provable debt, is an incident of the allowance of the claim, and reviewable by the circuit court of appeals on an appeal from such allowance.

*Cunningham* v. *German Ins. Bank*, 43 C. C. A. 377, 103 Fed. 932, 4 Am. B. R. 192.

The petition filed in the bankruptcy court by Otis, Wilcox, & Company, praying that the proceeds of the seat be paid to them, was in its nature an intervening petition to reach a fund in the registry of the court.

*Krippendorf* v. *Hyde*, 110 U. S. 276, 285, 28 L. ed. 145, 148, 4 Sup. Ct. Rep. 27; *Hinckley* v. *Gilman, C. & S. R. Co.* 94 U. S. 467, 24 L. ed. 166; *Van Norden* v. *Morton*, 99 U. S. 378, 25 L. ed. 453; *Williams* v. *Morgan*, 111 U. S. 684, 28 L. ed. 559, 4 Sup. Ct. Rep. 638; *Gumbel* v. *Pitkin*, 113 U. S. 545, 28 L. ed. 1128, 5 Sup. Ct. Rep. 616; *Gumbel* v. *Pitkin*, 124 U. S. 131, 145, 31 L. ed. 374, 378, 8 Sup. Ct. Rep. 379.

The provisions of the bankrupt act in regard to appeals do not in any way limit the scope of the judiciary act of 1891.

*Elliott* v. *Toeppner*, 187 U. S. 327, 334, *ante*, 200, 23 Sup. Ct. Rep. 133.

And even when the question arises in the bankruptcy court, the right of appeal to this court from the circuit court of appeals is not limited to the cases enumerated in § 25, ¶ b (1), of the bankrupt act.

*Page* v. *Edmunds*, 187 U. S. 596, *ante*, 318, 23 Sup. Ct. Rep. 200.

*Messrs.* **John C. Gray** and **Roland Gray** submitted the cause for appellee:

Under the bankrupt act of 1867, appeals from the allowance of proofs of claim were not allowed to be carried to the Supreme Court.

*Wiswall* v. *Campbell*, 93 U. S. 347, 23 L. ed. 923; *Leggett* v. *Allen*, 110 U. S. 741, 28 L. ed. 313, 4 Sup. Ct. Rep. 195.

The fact that a trustee in bankruptcy is a party to a suit, or that it concerns his rights as trustee to certain property, does not raise a Federal question, unless the question in issue involves the construction of part of the bankrupt act, or some other Federal statute.

*Scott* v. *Kelly*, 22 Wall. 57, 22 L. ed. 729; *McKenna* v. *Simpson*, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365.

That one of the parties to a suit claims rights under a law of the United States, or an authority or privilege derived therefrom, does not show that the question involved is a Federal one. The construction of the statute, or the validity of the authority or privilege under it, must be the point really at issue in the case, and on which a decision adverse to the appellant was rendered.

*Boatmen's Sav. Bank* v. *State Sav. Asso.* 114 U. S. 265, 29 L. ed. 174, 5 Sup. Ct. Rep. 878; *Blackburn* v. *Portland Gold Min. Co.* 175 U. S. 571, 576, 44 L. ed. 276, 279, 20 Sup. Ct. Rep. 222; *De Lamar's Nevada Gold Min. Co.* v. *Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; *Avery* v. *Popper*, 179 U. S. 305, 314, 45 L. ed. 203, 206, 21 Sup. Ct. Rep. 94.

The claim of the attaching creditors was properly allowed.

*Willis* v. *Jelineck*, 27 Minn. 18, 6 N. W. 373.

If there was any question as to a law of New York, which might have been raised, it was a question of construction, and not of validity.

*Johnson* v. *New York L. Ins. Co.* 187 U. S. 491, *ante*, 273, 23 Sup. Ct. Rep. 194.

Otis, Wilcox, & Company did not offer to prove the judgment in the garnishment case, which was rendered after the adjudication of bankruptcy. It proved its debt as it existed at the time of the bankruptcy; and that debt was not, for the purpose of bankruptcy proceedings, merged in the judgment.

*Boynton* v. *Ball*, 121 U. S. 457, 465, 30 L. ed. 985, 986, 7 Sup. Ct. Rep. 981.

The substituted proof of claim presented by the appellee was properly allowed by the district court.

*Re Parkes*, 10 Nat. Bankr. Reg. 82, Fed. Cas. No. 10,754; *Re Baxter*, 12 Fed. 72; *Re Glass*, 119 Fed. 509.

The jurisdiction of the Supreme Court under the act of March 3, 1891, was not widened by § 24a of the bankrupt act of 1898.

*First Nat. Bank* v. *Klug*, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899.

An appeal to the Supreme Court, from the circuit court and the circuit court of appeals, lies only from final decrees.

*McLish* v. *Roff*, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; *Kirwan* v. *Murphy*, 170 U. S. 205, 209, 42 L. ed. 1009, 1010, 18 Sup. Ct. Rep. 592.

None of the orders and decrees made in the course of a bankruptcy proceeding are final decrees for the purposes of appeal, in the absence of provisions of the bankruptcy act expressly giving an appeal.

*Wiswall* v. *Campbell*, 93 U. S. 347, 348, 23 L. ed. 923. See also *Sandusky* v. *First Nat. Bank*, 23 Wall. 289, 23 L. ed. 155; *Conro* v. *Crane*, 94 U. S. 441, 24 L. ed. 145.

The proceeding by Otis, Wilcox, & Company to establish its lien on the proceeds of the stock exchange seat was a "proceeding in bankruptcy."

*Bardes* v. *First Nat. Bank*, 178 U. S. 524, 534, 44 L. ed. 1175, 1180, 20 Sup. Ct. Rep. 1000.

The court is empowered to cause the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as herein otherwise provided.

*Re Whitener*, 44 C. C. A. 434, 105 Fed. 180; *Re McCallum*, 113 Fed. 393.

The determination of the justice of an assertion of a priority, or of a lien, as against other creditors, is a part of the administration of the estate, and not the allowance or rejection of a claim against the estate.

*Re Whitener*, 44 C. C. A. 434, 105 Fed. 180; *Re Worcester County*, 42 C. C. A. 637, 102 Fed. 808; *York's Case*, 1 Abb. (U. S.) 503, Fed. Cas. No. 18,139.

The question whether or not a "debt or claim" of a certain amount fixed by the proof is entitled to be paid in full, or is to be paid in full up to a certain sum, is independent of the question whether the "debt or claim" for which proof is offered is a just and valid debt. The latter question is to be appealed under § 25a, 3; the former cannot be appealed, but can be brought to the circuit court of appeals only by a petition for reversion under § 24*b*.

*Re Whitener*, 44 C. C. A. 434, 105 Fed. 180; *Re Worcester County*, 42 C. C. A. 637, 102 Fed. 808; *Re Rouse, H. & Co.* 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96; *Re Richards*, 37 C. C. A. 634, 96 Fed. 935; *Re Hutchinson*, 51 C. C. A. 159, 113 Fed. 202.

Under the bankrupt act of March 2, 1867, an appeal was given from the district court to the circuit court from the rejection of claims of creditors and the allowance of claims of creditors. This appeal did not extend to a question of the priorities of liens.

*York's Case*, 1 Abb. (U. S.) 503, Fed. Cas. No. 18,139.

Appeals under § 25a and petitions for re-

vision under § 24b are mutually exclusive remedies; and when a question can be brought up to the circuit court of appeals by one method, the other cannot be employed.

*Re Worcester County*, 42 C. C. A. 637, 102 Fed. 808; *Re Eggert*, 43 C. C. A. 1, 102 Fed. 735; *Re Good*, 39 C. C. A. 581, 99 Fed. 389.

A similar rule prevailed under the bankrupt act of 1867 as to appeals under § 8 of that act (Rev. Stat. § 4980), and petitions for revision under § 2 of the act (Rev. Stat. § 4986).

*Re Alexander*, 3 Nat. Bankr. Reg. 29, Fed. Cas. No. 160.

Mr Justice **Holmes** delivered the opinion of the court:

This is an appeal from a decree of the circuit court of appeals affirming, on appeal, a decree of the district court, which allowed a proof of a claim in bankruptcy by the appellee. 53 C. C. A. 419, 115 Fed. 937. The appeal to this court was allowed by a justice of this court under the bankruptcy act, § 25*b*, 1 [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432], and rule 36, 2, on grounds to be explained, and now is before us on a motion to dismiss or affirm. The facts, shortly stated, are as follows: Otis, Wilcox, & Co., having an admitted claim for $4,421.64, sued the bankrupts in New York and Illinois, and attached debts due to them, by trustee process. This was within four months before the filing of the petition in bankruptcy, and therefore was ineffectual as against the appellant by § 67 of the act. But Otis, Wilcox, & Co., supposing that they had valid attachments, took judgments by default, and collected their debt from the parties trusteed, agreeing to save the latter harmless from liability to others. Satisfaction was entered of record in each suit. Subsequently the trustee in bankruptcy demanded payment of these debtors of the bankrupt, and, as they had no defense, Otis, Wilcox, & Co. paid over to the trustee the full amount of the respective debts. Otis, Wilcox, & Co. filed a claim in bankruptcy, and were allowed to prove their claim.

The trustee in bankruptcy took the ground before the referee, and seems to have adhered to it, that full faith and credit to the record of satisfaction forbade the allowance of the proof. It was because of this contention that the writ of error was allowed. The jurisdiction of this court is established, and the motion to dismiss must be overruled. But so little attention was paid to the question, and the contention seems to us so unmeritorious, that we think that there was color for the motion, and we therefore take up the motion to affirm.

No one denies the fact or effect of the record of satisfaction. N. Y. Code Civ. Proc. § 1264; *Crotty* v. *McKenzie*, 10 Jones & S. 192, 201. What is said is that, although it [554] is *true that on a certain day a judgment on the appellee's claim was satisfied, since that time the satisfaction had been undone and the money restored. It is objected that Otis, Wilcox, & Co. did not purport to restore to the appellant what they had received from the parties indebted to the bankrupt estate, but simply paid the debts of those parties. But names make no difference in this case. There was no identified fund. When Otis, Wilcox, & Co. paid the debts out of which they had received satisfaction, they undid the satisfaction, and the trustee in bankruptcy knew it. We see no sufficient ground on which he can deny the consequence that the right to prove revived. That right cannot be made to depend on the views which the New York and Illinois courts may entertain as to the propriety of correcting the record of satisfaction to conform to present conditions, it having been right when it was made. Whether the record is corrected or not, it cannot be conclusive as to events of a later date. If it had been vacated, it would have restored the rights of the creditors by relation. *Taylor* v. *Ranney*, 4 Hill, 619, 623, 624.

The only difficulty is this: The adjudication of bankruptcy was on April 27, 1900. A petition and the original proof of claim of Otis, Wilcox, & Co. were filed on March 9, 1901. At this time the trustee in bankruptcy was suing for the debts in question, but, by agreement, time was given to the counsel for Otis, Wilcox, & Co. to look into the matter. The payment to the trustee by the last-named firm, although agreed upon before, was not made until April 29, 1901, more than a year after the adjudication, so that, technically, the record of satisfaction really was a bar until the time for proof had gone by. Subsequently, on November 12, 1901, an amended proof was filed by consent of the trustee, and was allowed as of November 4. We are of opinion that when the trustee accepted payment from Otis, Wilcox, & Co. in pursuance of his previous agreement, with this proof on file, and in this way undid the satisfaction of record, he must be taken to have done so on the understanding that he accepted the consequence that the bar to the proof was removed. We follow the interpretation of the circuit court of appeals, that the admitted belief of Otis, Wilcox, & Co., *that [555] they had been paid, was due to a mistake of fact, and the agreement to settle seemingly having been made within the year, the delay of actual payment for a day or two beyond, for convenience of counsel, ought not to affect the result.

The appeal being here, the trustee argues two other questions. The first concerns the amended proof. The proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee more than a year after the adjudication, the facts having been agreed in the meantime and an appeal taken. It is argued that the allowance of the amendment is within § 57*n*, forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow. The claim upon which the original proof was made is the same as that ultimately proved. The clause relied upon cannot be taken to exclude amendments. An

example similar in principle is the allowance of an amendment setting up the same cause of action after the statute of limitations has run, when the original declaration was bad. *Sanger* v. *Newton*, 134 Mass. 308. See *Re Parkes*, 10 Nat. Bankr. Reg. 82, Fed. Cas. No. 10,754; *Re Baxter*, 12 Fed. 72; *Re Glass*, 119 Fed. 509. The proceedings remained in the district court, notwithstanding the appeal, and the amendment properly was allowed there. It was little more than a form, as the facts had been agreed of record, and the filing was assented to by the trustee.

A petition was filed by Otis, Wilcox, & Co., asserting a lien on the proceeds of a seat in the New York Stock Exchange, which formerly belonged to the bankrupts. This lien had not been insisted on by Otis, Wilcox, & Co., because of their impression that they had been paid effectually. No one having changed his position on the faith of their waiver, the district court allowed the lien. The circuit court of appeals held that this portion of the decree of the district court was not subject to an appeal to the circuit court of appeals. The argument chiefly relied upon by the appellant is that this is an intervening petition to reach a fund in court, and is not a proceeding in bankruptcy. Under the circumstances of this case it seems to us that the petition was incident to the claim *Cunningham v. German Ins. Bank, [556] 41 C. C. A. 609, 101 Fed. 977, 4 Am. Bankr. Rep. 192), and was a bankruptcy proceeding under § 2, cl. 7, within the meaning of § 25, regulating appeals in bankruptcy proceedings, and that the decree upon it was not "a judgment allowing or rejecting a debt or claim of five hundred dollars or over," within § 25*a*, 3, and was not an independent ground of appeal. See *Re Whitener*, 44 C. C. A. 434, 105 Fed. 180, 186; *Re Worcester County*, 42 C. C. A. 637, 102 Fed. 808, 813; *Re Rouse, H. & Co.* 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96; *Re York*, 4 Nat. Bankr. Reg. 479, 483, Fed. Cas. No. 18,139. If the question should be held to come up as incident to the appeal on the proof (*Cunningham* v. *German Ins. Bank*, 41 C. C. A. 609, 101 Fed. 977, 4 Am. Bankr. Rep. 192), we see no error in the decree of the district court. It allowed Otis, Wilcox, & Co. to correct a mistake expressly made the ground of their waiver, no new rights having intervened. We deal somewhat summarily with this point, because the merits were brought before the circuit court of appeals by a petition for revision under § 24*b*, and were disposed of very satisfactorily, so far as appears on that petition. We find no error in the decree.

*Decree affirmed.*

# MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

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[557] MINNEAPOLIS & ST. LOUIS RAILROAD COMPANY, *Plaintiff in Error*, *v.* DAVID D. GANO *et al.* [No. 279.]

In Error to the Supreme Court of the State of Iowa.

*Mr. Albert E. Clarke* for plaintiff in error.

*Mr. Chapman W. Maupin* for defendants in error.

May 4, 1903. Judgment *affirmed* with costs and interest, on the authority of *Electric Co.* v. *Dow*, 166 U. S. 489, 41 L. ed. 1088, 17 Sup. Ct. Rep. 645; *Atchison, T. & S. F. R. Co.* v. *Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *St. Louis, I. M. & S. R. Co.* v. *Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419. See case below, *Gano* v. *Minneapolis & St. L. R. Co.* 114 Iowa, 713, 55 L. R. A. 263, 87 N. W. 714.

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GEORGE E. GEE, *Plaintiff in Error*, *v.* HENRY D. GEE. [No. 285.]

In Error to the Supreme Court of the State of Minnesota.

*Mr. Thomas G. Frost* for plaintiff in error.

*Messrs. Jed L. Washburn* and *Leon E. Lum* for defendant in error.

May 4, 1903. Writ of error *dismissed* for the want of jurisdiction, on the authority of *Beaupre* v. *Noyes*, 138 U. S. 402, 34 L. ed. 992, 11 Sup. Ct. Rep. 296; *Haseltine* v. *Central Nat. Bank*, 183 U. S. 130, 46 L. ed. 117, 22 Sup. Ct. Rep. 49. See case below, *Gee* v. *Gee*, 84 Minn. 384, 87 N. W. 1116.

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*Ex parte:* IN THE MATTER OF HELEN POST, *Petitioner*. [No. —, Original.]

Motion for Leave to File Petition for a Writ of Habeas Corpus.

*Messrs. H. Bisbee* and *George C. Bedell* for petitioner.

*Mr. Assistant General Purdy* opposing.

June 1, 1903. *Denied*, on the authority of *Re Mirzan*, 119 U. S. 584, 30 L. ed. 513, 7 Sup. Ct. Rep. 341; *Re Chapman*, 156 U. S. 211, 39 L. ed. 401, 15 Sup. Ct. Rep. 331; *Re Belt*, 159 U. S. 95, 40 L. ed. 88, 15 Sup. Ct. Rep. 987.

A. NELSON LEWIS, *Petitioner*, *v.* CHARLES H. TROWBRIDGE, *Trustee, etc. [No. 671.] [558]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. A. Nelson Lewis, propria persona.*

*Messrs. John K. Beach, Edmund Wetmore,* and *Frank W. Hackett* for respondent.

May 4, 1903. *Denied.*

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FULLER & JOHNSON MANUFACTURING COMPANY, *Petitioner*, *v.* A. J. SEILER. [No. 673.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Messrs. Wm. R. Bagley* and *Robert M. Bashford* for petitioner.

*Mr. Charles M. Peck* for respondent.

May 4, 1903. *Denied.*

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WESTERN ASSURANCE COMPANY OF TORONTO, CANADA, *Petitioner*, *v.* HENRI M. DE FARCONNET *et. al.* [No. 678.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. Harrington Putnam* for petitioner.

*Mr. Wilhelmus Mynderse* for respondent.

May 4, 1903. *Denied.*

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AMERICAN NATIONAL BANK OF DENVER, *Petitioner*, *v.* SAMUEL W. WATKINS. [No. 680.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. T. J. O'Donnell*, for petitioner.

No counsel for respondent.

May 4, 1903. *Denied.*

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SUPREME COUNCIL AMERICAN LEGION OF HONOR, *Petitioner*, *v.* AUGUSTA E. ORCUTT. [No. 674.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

*Messrs. Henry Newbegin, Robert Newbegin,* and *A. J. Carr* for petitioner.

*Mr. Alexander L. Smith* for respondent.

May 18, 1903. *Denied.*

ANGLO-AMERICAN PROVISION COMPANY, *Petitioner*, *v.* UNITED STATES. [No. 681.]
[559] Petition for a Writ of Certiorari *to the United States Circuit Court of Appeals for the Seventh Circuit.
*Mr. James C. McShane* for petitioner.
*Messrs. Attorney General* and *Solicitor General Hoyt* for respondent.
May 18, 1903. *Denied.*

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OCEAN STEAMSHIP COMPANY, *Petitioner*, *v.* JOHN RICHARD CROOKS. [No. 685.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Messrs. Julien T. Davies* and *Frederic D. McKenney* for petitioner.
*Mr. Henry Galbraith Ward* for respondent.
May 18, 1903. *Denied.*

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WILLIAM B. GURNEY, JR., *et al.*, *Petitioners*, *v.* STEAMBOAT JOHN H. STARIN, ETC. [No. 686.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Messrs. Samuel Park* and *Jas. K. Symmers* for petitioners.
*Mr. Henry G. Newton* for respondent.
May 18, 1903. *Denied.*

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ELBERT R. ROBINSON, *Petitioner*, *v.* CHICAGO CITY RAILWAY COMPANY *et al.* [No. 688.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Mr. J. Gray Lucas* for petitioner.
*Messrs. Thomas A. Banning* and *Ephraim Banning* for respondents.
May 18, 1903. *Denied.*

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FARMERS' LOAN & TRUST COMPANY, Trustee, *Petitioner*, *v.* LAKE STREET ELEVATED RAILROAD COMPANY. [No. 697.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Mr. I. K. Boyesen* for petitioner.
*Messrs. Charles H. Aldrich* and *Clarence A. Knight* for respondent.
June 1, 1903. *Granted.*

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W. O. JOHNSON, *Petitioner*, *v.* SOUTHERN PACIFIC COMPANY. [No. 701.]
[560] Petition for a Writ of Certiorari to *the United States Circuit Court of Appeals for the Eighth Circuit.
*Messrs. Solicitor General Hoyt* and *L. A. Shaver* for petitioner.
*Messrs. Maxwell Evarts* and *M. L. Clardy* for respondent.
June 1, 1903. *Granted.*

JAMES H. GILBERT, Sheriff, FOR USE OF ANDREW D. BISHOP, *Petitioner*, *v.* AMERICAN SURETY COMPANY OF NEW YORK *et al.* [No. 683.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Messrs. Lynden Evans* and *Frederic D. McKenney* for petitioner.
*Messrs. T. A. Moran, Levy Mayer*, and *Alfred S. Austrian* for respondents.
June 1, 1903. *Denied.*

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AMERICAN SALES BOOK COMPANY *et al.*, *Petitioners*, *v.* JOSEPHUS BULLIVANT, JR. [No. 693.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.
*Messrs. T. J. Geisler* and *Leon Tobriner* for petitioners.
*Messrs. C. H. Duell* and *Wm. A. Megrath* for respondent.
June 1, 1903. *Denied.*

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REID, MURDOCH & CO., *Petitioners*, *v.* UNITED STATES. [No. 698.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.
*Messrs. W. Wickham Smith* and *Charles Curie* for petitioners.
*Messrs. Attorney General* and *Solicitor General Hoyt* for respondent.
June 1, 1903. *Denied.*

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JOHN HOLMES *et al.*, *Petitioners*, *v.* SHIP QUEEN ELIZABETH. [No. 699.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Mr. Robert D. Benedict* for petitioners.
*Mr. Wilhelmus Mynderse* for respondent.
June 1, 1903. *Denied.*

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F. P. OLCOTT *et al.*, *Petitioners*, *v.* COLUMBUS CARTWRIGHT *et al.* [No. 700.]
Petition for a Writ of Certiorari *to the [561] United States Circuit Court of Appeals for the Fifth Circuit.
*Messrs. Maxwell Evarts* and *T. D. Cobbs* for petitioners.
*Messrs. M. L. Crawford* and *Edwin St. Clair Thompson* for respondents.
June 1, 1903. *Denied.*

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DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY, *Petitioner*, *v.* ESTON E. DEVORE, ETC. [No. 709.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
*Messrs. Walter W. Ross* and *Wm. D. Guthrie* for petitioner.
*Mr. Wm. M. Offley* for respondent.
June 1, 1903. *Denied.*

H. HOLLIS HUNNEWELL, *Plaintiff in Error*, *v.* EDWARD W. PRESHO *et al.*, Street Commissioners, etc. [No. 294.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

*Mr. Felix Rackemann* for plaintiff in error.

*Mr. Thomas M. Babson* for defendants in error.

May 18, 1903. *Dismissed* with costs, per stipulation.

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ALICE A. CABLE, Administratrix, etc., *Petitioner*, *v.* UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK. [No. 622.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

*Mr. H. H. C. Miller* for petitioner.

*Mr. William G. Beale* opposing.

April 14, 1902. *Granted.*

NICHOLAS C. BENZIGER *et al.*, ETC., *Petitioners*, *v.* UNITED STATES. [No. 679.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Messrs. W. Wickham Smith* and *Charles Curie* for petitioners.

*Mr. Attorney General* and *Mr. Solicitor General Richards* opposing.

June 2, 1902. *Granted.*

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LA REPUBLIQUE FRANCAISE *et al.*, *Petitioners*, *v.* SARATOGA VICHY SPRING COMPANY. [No. 677.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*Mr. Archibald Hopkins* for petitioners.

*Mr. Edgar T. Brackett* opposing.

June 2, 1902. *Granted.*

# APPENDIX I.

# Supreme Court of the United States.

OCTOBER TERM, 1902.

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## UNITED STATES
*v.*
## DORR *et al.*†

*Constitutional law—application of Constitution—Philippine islands—jury trial—Philippine Commission—legislative powers—criminal libel—presumption of malice—privileged publication—report of judicial proceedings—comments on reports—index to report—intent of publisher.*

1. While the Philippine islands belong to the United States, there is a difference between them and the territories which are a part of the United States, with reference to the Constitution of the United States.
2. The Constitution of the United States was not extended to the Philippine islands by the terms of the treaty of Paris, April 11, 1899, but by such treaty the status of the ceded territory was to be determined by Congress.
3. The mere cession of the Philippines to the United States did not extend the Constitution to those islands, except such parts as fall within the principles of fundamental limitations in favor of personal rights formulated in the Constitution and its amendments, and which exist rather by inference and the general spirit of the Constitution, and except those express provisions of the Constitution which prohibit Congress from passing laws in their contravention under any circumstances. The provisions contained in the Constitution in relation to jury trials do not fall within either of these exceptions, and hence the right to trial by jury was not extended to the Philippines by the mere cession of the territory.
4. Congress having passed no law extending to the Philippines the provision of the Constitution relating to jury trials, and there having been no laws in existence in the Philippines at the date of their cession providing for trial by jury, it was not error for the court of first instance to overrule the application of defendants in a prosecution for criminal libel for a trial by jury.
5. Congress could lawfully delegate to the Philippine Commission the power to enact laws, including the libel law enacted by it in October, 1901 (Act No. 277, Philippine Commission).
6. Philippine Commission, act No. 277, § 1, defines libel as malicious defamation, expressed either in writing or printing, or by signs or pictures or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead, or to impeach the honesty, virtue, or reputation, or publish the alleged or natural defects, of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. *Held,* that headlines above an article published in a newspaper, reading: "Traitor, Seducer, and Perjurer. Sensational Allegations against Commissioner Legarda. Made of Record and Read in English. Spanish Reading Waived. Wife would have Killed Him. Legarda Pale and Nervous,"—were libelous, under the act.
7. No attempt having been made to show a justifiable motive, the publication of the headlines was "malicious defamation," within the meaning of the act, as § 3 provides that an injurious publication is presumed to have been malicious if no justifiable motive for making it is shown.
8. Philippine Commission act No. 277, § 7, provides that no reporter, editor, or proprietor of a newspaper is liable to prosecution for a fair and true report of any judicial, legislative, or other public proceedings, or of any special argument or debate in the course of such proceedings, except upon proof of malice in making the report, which shall not be implied from the mere fact of publication. Section 8 provides that libelous remarks or comments connected with matters privileged by the last section receive no privilege by reason of being so connected. *Held,* that the headlines were not privileged because appended to a privileged report of judicial proceedings.
9. The fact that the headlines were inserted to aid the reader in determining whether he cared to read the article was no defense.
10. The privileged report was a written statement prepared by an attorney in a prosecution for libel, in which he made an offer to prove the truth of certain statements regarded as material in the defense, and which was by the court excluded. *Held,* that the headlines could not be considered as a fair index to the report.
11. The fact that the headlines were no worse than the matter contained in the report was immaterial.

(*Willard and Ladd, JJ., dissent.*)

[No. 1,049.]

FRED. L. DORR and Edward F. O'Brien were convicted of the publication of a false and malicious libel, and appeal. *Affirmed.*

**Cooper,** J. On May 23, 1902, a complaint was filed in the court of first instance of the city of Manila against Fred. L. Dorr and Edward F. O'Brien, charging them with

†The above decision of the supreme court of the Philippine islands is published at the suggestion of one of the Justices of the Supreme Court of the United States, as involving similar questions to those raised in Territory of Hawaii v. Mankichi, 190 U. S. 197, *ante,* 1016, 23 Sup. Ct. Rep. 787.

the publication of a false and malicious libel against Señor Benito Legarda, one of the United States Philippine Commissioners, by placing certain headlines or caption above an article published in the Manila Freedom, a newspaper in the city of Manila, of which the defendant Fred. L. Dorr was the proprietor, and the defendant Edward F. O'Brien was the editor.

The following are the headlines or caption upon which the prosecution is based: "Traitor, Seducer, and Perjurer. Sensational Allegations against Commissioner Legarda. Made of Record and Read in English. Spanish Reading Waived. Wife would have Killed Him. Legarda Pale and Nervous." The article over and above which the headlines were placed was a report of certain judicial proceedings had in the court of first instance of the city of Manila in the criminal case of *United States* v. *Valdez* for the offense of libel, and the report was a copy taken from a document prepared by the attorney for Valdez, in which the offer was made, as a defense, to prove the truth of the material allegations contained in, and which were the basis of, the complaint against Valdez. The facts offered to be proved were published in the Miau, a newspaper of which Valdez was editor, and related to Señor Legarda, the prosecuting witness in the *Valdez Case* as well as in this case. At that time, under the libel law, the truth of the libelous matter was inadmissible as evidence. The judge of the court of first instance excluded the proof tendered in the document, but permitted it to be filed in the case, and the copy was taken from it by one Vogel, the city reporter of the Manila Freedom. The report was handed by the reporter to the defendant O'Brien, the editor of the paper, and the headlines were written by O'Brien; and the report, with the headlines thus prepared, was published in the Manila Freedom of date April 16, 1902. The report seems to have been regarded by the prosecuting attorney as privileged matter, under § 7 of the libel act; and, as before stated, the prosecution is based upon the matter contained in the headlines.

On August 25, 1902, the defendants were tried and found guilty of the offense charged in the complaint, and each was sentenced to six months' imprisonment at hard labor, and a fine of $1,000, United States currency. From this judgment the defendants have appealed to this court.

A demurrer was filed to the complaint, based upon the ground that the facts charged in the complaint did not constitute a public offense. This demurrer was overruled by the trial court, and an exception to the ruling taken by the defendants.

During the course of the proceedings a motion was made by the defendants, asking that they be granted a trial by jury, as provided for in article 3, § 2, of the Constitution of the United States, and under the 6th Amendment to the Constitution, which motion was denied by the court, and an exception was also taken to this ruling.

Before entering into a discussion of the case upon its merits, it will be necessary to consider the questions of a preliminary nature which have been raised in the assignment of errors and brief of counsel for the appellants. The questions submitted may be embraced within the following propositions: (1) That by the treaty of peace between the United States and Spain, ratified on the 11th day of April, 1899, the Philippine islands became a part of the United States; (2) and, being a part thereof, they are subject to the provisions of § 2, art. 3, of the Constitution, and to the provisions contained in the 6th Amendment to the Constitution, by which in all criminal cases a trial by jury is guaranteed; (3) that Congress can exercise no power over the person or property of a citizen beyond what the Constitution confers, nor deny any right guaranteed to them by the Constitution.

Stated in its simple form, the proposition made is that the provisions of the Constitution of the United States relating to jury trials are in force in the Philippine islands. The determination of this question involves the consideration of the political status of these islands, the power of Congress under the Constitution, and the nature of the constitutional provisions relating to jury trials.

The political status of the Philippine islands has been defined, to a large extent, by the decision of the Supreme Court of the United States in the case of *Downes* v. *Bidwell*, 182 U. S. 244, 21 Sup. Ct. Rep. 770, 45 L. ed. 1088, in which case the status of Puerto Rico was directly involved. The question in that case was whether merchandise brought into the port of New York from Puerto Rico after the ratification of the treaty of peace with Spain, and since the passage of the Foraker act, is exempt from duty, and involved the question whether the revenue clauses of the Constitution extend of their own force to the newly acquired territories from Spain, and whether the act is in contravention of the uniformity clause of the Constitution. The conclusion was reached that the act in question was not unconstitutional. In the consideration of the case an exhaustive review was made of the powers of Congress to govern the territories belonging to the United States under the power to acquire territory by treaty and the incidental right to govern such territory, and under the clause of § 3, art. 4, of the Constitution, which vests Congress with the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. This review was made in the light of the opinion of contemporaries, the practical construction placed upon the Constitution by Congress, and the decisions of the Supreme Court of the United States upon questions arising thereunder. Distinctions were found to exist in the application of the Constitution, depending upon the relation which was borne to the national government, whether by a state or by the territories which belonged to certain states at the time of the adoption of the Constitution, and

which were situated within the acknowledged limits of the United States, also such territory as might be acquired by the establishment of a disputed line, or by those which were acquired by cession from foreign powers, and to which the Constitution was extended by the treaty under which they were ceded, sanctioned by Congress, or to which the Constitution was expressly extended by congressional act, or by those territories acquired from a foreign power by treaty, which have not been incorporated as a part of the United States, nor to which has been extended the Constitution by act of Congress. The following conclusions are deducible from the decision in that case: (1) That Puerto Rico (to which the Philippines are equally situated) did not, by the act of cession from Spain to the United States, become incorporated in the United States as a part of it, but became territory pertaining to and belonging to the United States; (2) that as to such territory Congress may establish a temporary government, and in so doing it is not subject to all the restrictions of the Constitution; (3) that the determination of what these restrictions are, and what particular provisions of the Constitution are applicable to such territories, involves an inquiry into the situation of the territory and its relations to the United States; (4) that the uniformity provided for in the revenue clause of the Constitution is not one of those restrictions upon Congress in its government of the territory of Puerto Rico.

What is the character of these restrictions, and how are they to be ascertained and determined? And to what extent is the Constitution in force and effect in these islands? Both Mr. Justice Brown, in delivering the majority opinion, and Mr. Justice White, in delivering the concurring opinion, refer to these constitutional restrictions. In formulating certain propositions as his conclusions, Justice White uses the following language: "Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles, which are the basis of all free government, which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that, even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution." He also says: "Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority, under any circumstances or conditions, to do particular acts. In the nature of things, limitations of this character cannot be, under any circumstances, transcended, because of the complete absence of power. The distinction which exists between the two characters of restrictions—those which regulate a granted power, and those which withdraw all authority on a particular subject—has, in effect, been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories, and was not operative in such districts of country." Mr. Justice Brown, in this connection, quotes the following language used by Mr. Justice Bradley in the case of *Mormon Church* v. *United States*, 136 U. S. 1, 10 Sup. Ct. Rep. 792, 34 L. ed. 481: "Doubtless Congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but those limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions." Again he says: "There are certain principles of natural justice inherent in the Anglo-Saxon character, which need no expression in constitutions or statutes to give them effect, or to secure dependencies against legislation manifestly hostile to their real interests."

The case of *American Ins. Co.* v. *Canter*, 1 Pet. 511, 7 L. ed. 242, is a very interesting and instructive case, which well illustrates the difference in the application of constitutional provisions to territories which are a part of and within the United States, and to those acquired from a foreign power by cession, which have not been incorporated into the United States, nor have had by act of Congress the Constitution extended to them. Florida was ceded by Spain to the United States, as were, also, the Philippines. The status of the Philippines at the present time is very similar to that of Florida at the date of the act passed by the legislative council of Florida, the constitutionality of which was considered in the case of *American Ins. Co.* v. *Canter*. The statement of the case and the decision are taken from the opinion of Justice Brown in the case of *Downes* v. *Bidwell*, and are as follows: This case originated in the district court of South Carolina, "for the possession of 356 bales of cotton, which had been wrecked on the coast of Florida, abandoned to the insurance companies, and subsequently brought to Charleston. Canter claimed the cotton as bona fide purchaser at a marshal's sale at Key West, by virtue of a decree of a territorial court, consisting of a notary and five jurors, proceeding under an act of the governor and legislative council of Florida. The case turned upon the question whether the sale by that court was effectual to devest the interest of the underwriters. The district judge pronounced the proceedings a nullity, and rendered a decree from which

both parties appealed to the circuit court. The circuit court reversed the decree of the district court upon the ground that the proceedings of the court at Key West were legal, and transferred the property to Canter, the alleged purchaser. The opinion of the circuit court was delivered by Mr. Justice Johnson of the supreme court, and is published in full in a note in Peter's Reports. It was argued that the Constitution vested the admiralty jurisdiction exclusively in the general government; that the legislature of Florida had exercised an illegal power in organizing this court; and that its decrees were void. On the other hand, it was insisted that this was a court of separate and distinct jurisdiction from the courts of the United States, and, as such, its acts were not to be reviewed in a foreign tribunal, such as was the court of South Carolina; 'that the district of Florida was not part of the United States, but only an acquisition or dependency, and as such the Constitution, *per se*, had no binding effect in or over it.' 'It becomes,' said the court, 'indispensable to the solution of these difficulties that we should conceive a just idea of the relation in which Florida stands to the United States. . . . And first, it is obvious that there is a material distinction between the territory now under consideration, and that which is acquired from the aborigines (whether by purchase or conquest) within the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question that the sovereignty of the state or territory within which it lies and of the United States immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered relates to territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the Crown of Spain. And on this subject we have the most explicit proof that the understanding of our public functionaries is that the government and laws of the United States do not extend to such territory by the mere act of cession. For in the act of Congress of March 30, 1822, chap. 13 (3 Stat. at L. 657), § 9, we have an enumeration of the acts of Congress which are to be held in force in the territory; and in the 10th section (3 Stat. at L. 658) an enumeration, in the nature of a Bill of Rights, of privileges and immunities which could not be denied to the inhabitants of the territory if they came under the Constitution by the mere act of cession. . . . These states, this territory, and future states to be admitted into the Union, are the sole objects of the Constitution. There is no express provision, whatever, made in the Constitution for the acquisition or government of territories beyond those limits.' He further held that the right of acquiring territory was altogether incidental to the treaty-making power; that their government was left to Congress; that the territory of Florida did 'not stand in the relation of a state to the United States;' that the acts establishing a territorial government were the Constitution of Florida; that while, under these acts, the territorial legislature could enact nothing inconsistent with what Congress had made inherent and permanent in the territorial government, it had not done so in organizing the court at Key West." Justice Brown further cites from the opinion of Chief Justice Marshall in this case, in which the latter held "that the judicial clause of the Constitution, above quoted, did not apply to Florida; that the judges of the superior courts of Florida held their office for four years; that 'these courts are not constitutional courts, in which the judicial power conferred by the Constitution on the general government can be deposited;' that 'they are legislative courts, created in virtue of the general right of sovereignty which exists in the government,' or in virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of the judicial power of the Constitution, but is conferred by Congress, in the exercise of those general powers which that body possesses over the territories of the United States; and that, in legislating for them, Congress exercises the combined powers of the general and of a state government. The act of the territorial legislature creating the court in question was held not to be 'inconsistent with the laws and Constitution of the United States,' and the decree of the circuit court was affirmed." Remarking upon this case, Justice Brown says: "As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution, and upon territory which is not part of the United States, within the meaning of the Constitution."

The act of Congress of July 1, 1902, chap. 1369 (32 Stat. at L. 691), entitled "An Act Temporarily to Provide for the Administration of the Affairs of Civil Government of the Philippine Islands, and for Other Purposes," in § 5, extends to the Philippine islands nearly all of the provisions of the Constitution known as the "Bill of Rights." But there was expected from it the provisions of the Constitution relating to jury trials, contained in § 2, art. 3, and in the 6th Amendment. It becomes necessary for us to determine whether these provisions of the Constitution of the United States relating to trials by jury are in force in the Philippine islands.

It is difficult to determine from the general statements contained in these decisions what are "those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments, and which exist by inference." It seems fairly deducible from all that has been said upon this subject that such provisions are negative in character, rather than of a

direct, positive, or affirmative nature, denying to Congress the power to pass laws in contravention of such principles of the Constitution. If this is their nature, and this be the true distinction, it cannot be said that either Congress or the Philippine Commission have passed any laws which would come within the inhibition of the Constitution, or which tend to impair the right to trial by jury in these islands. All that can be said is that, in extending the various provisions of the Bill of Rights here, Congress has failed to extend those provisions guarantying the right to trial by jury.

We will now turn to the consideration of the question as to whether a violation of the right to a jury trial falls within the inhibition arising from the existence of those fundamental limitations in favor of personal rights mentioned in the decisions.

There are a number of cases cited in *Downes* v. *Bidwell*, establishing the right to trial by jury in territories of the United States; but these decisions have all arisen in cases relating to territories which were a part of the United States, and had been incorporated as a part thereof, and to which Congress had expressly extended the Constitution. In *Webster* v. *Reid*, 11 How. 437, 13 L. ed. 761, it was held that the law of the territory of Iowa which prohibited the trial by jury of certain actions at law, founded on contract, to recover payment for services, was void; but, as it is said, this case is of little value as bearing upon the question of the extension of the Constitution to that territory, inasmuch as the organic law of the territory of Iowa enacted by Congress, by its express provision, extended to Iowa the laws of the United States, including the ordinance of 1787, which provided expressly for jury trials, so far as they were applicable, and the case was put upon this ground. In *Callan* v. *Wilson*, 127 U. S. 540, 8 Sup. Ct. Rep. 1301, 32 L. ed. 223, the defendant had been convicted, without jury trial, in the District of Columbia; but the District of Columbia was not only within and a part of the United States, but had formed a part of the original states of Virginia and Maryland. In the case of *Springville* v. *Thomas*, 166 U. S. 707, 17 Sup. Ct. Rep. 717, 41 L. ed. 1172, it was held that a verdict returned by less than the whole number of jurors was invalid, because in contravention of the 7th Amendment to the Constitution, and the act of Congress of April 7, 1874, chap. 80 (18 Stat. at L. 27), which provide that no party shall be deprived of the right of trial by jury in cases cognizable at common law. This is, as stated by Mr. Justice Brown, "obviously true with respect to Utah, since the organic act of that territory had expressly extended to it the Constitution and laws of the United States." The other decisions cited by counsel for the appellants can all be traced to the same principle; that is, that, where Congress has extended the laws and the Constitution to the territories, then Congress would be inhibited by the Constitution from enacting a law depriving persons living in such territories from the right to trial by jury.

The only case which we have been able to discover, arising under an act of Congress, which deprived a party of the right to a trial by jury at a place where the Constitution had not been extended by express provision, is the case of *Ross* v. *McIntyre*, 140 U. S. 453, 11 Sup. Ct. Rep. 897, 35 L. ed. 581. This was a case in which the American Consular Tribunal in Japan, created by act of Congress under treaty with the government of Japan, and vested with jurisdiction, to be exercised and enforced in accordance with the laws of the United States, to try Americans, had, in the exercise of this jurisdiction, convicted the defendant of the crime of murder, and he was sentenced by that court to the penalty of death. It was held that "the guaranties it [the Constitution] affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents and temporary sojourners abroad." It seems from this decision that the power of Congress to enact a law which would deprive a person of the right to a trial by jury is expressly recognized, and that such legislation does not come within the fundamental limitations in favor of personal rights, for this act of Congress which operated upon citizens of the United States abroad is recognized as a valid act of Congress. The act is saved from the constitutional inhibition by reason that in such country the Constitution of the United States does not extend, and is not in force there; but the decision in this case nevertheless establishes the doctrine that there is not upon Congress an absolute and total inhibition, under any and all circumstances, to enact a law in which a person is deprived of the right to a trial by jury.

It may be further observed that, if it should be held that the constitutional provision guarantying the right to trial by jury has been introduced here by the simple act of cession, there is no law in existence to give such provision effect. Trial by jury was unknown to the law in force in these islands prior to the date of cession, nor has the Philippine Commission passed any law which would give it effect. Such provisions of a Constitution as those relating to trial by jury can hardly be regarded as self-executing. It is necessary that there should be some legislation carrying them into effect, such as laws prescribing the qualifications of persons for jury duty, for the organization of juries, and provisions of a like character. Suppose the Constitution has been extended here by force of the cession of territory, and that it should be held that there could be no legal conviction for crime in the Philippines, on account of the absence of the law prescribing the qualification of jurors or for the organization of juries, and Congress, in the exercise of its sound judg-

ment, after a careful examination of the conditions prevailing in such territory, and in the exercise of its undoubted right to govern the territory, should reach the conclusion that an efficient territorial government could not be conducted, in which convictions for crime are dependent upon the verdict of juries, by reason of the hostility of the inhabitants of such country to the constituted authorities, or the lack of the qualification of the people of the country, or an extensive portion of it, to perform jury service, and should refuse to enact any law for jury trials; the criminal laws in such event must remain unenforced, and a state of anarchy would be the result. In such case the question assumes very much the nature of a political question, and the judicial department might well hesitate to interfere indirectly with Congress in the exercise of its judgment, and in the exercise of its broad discretion in the government of a territory so situated.

It is contended, also, by counsel for the defendants, that Congress could not lawfully authorize the Philippine Commission to enact the libel law passed by it on October 24, 1901, and under which the defendants have been convicted. The objection to the law is based upon the theory of the division of the Federal government into three branches, executive, legislative, and judicial, and that the powers of legislation vested in Congress to make laws cannot be delegated by that department to the judgment, wisdom, or patriotism of any other body or authority. While the authorities cited in support of the general proposition maintain the doctrine, there are well-known exceptions to the general rule, not referred to in these decisions, for the reason that the decision of the case did not require their consideration. A well-known exception is that of municipal corporations, upon which the powers of legislation are commonly bestowed. The case in question forms an exception to this general rule, equally well established. Congress, in the exercise of its power to make rules and regulations for the government of the territories, has often delegated the power of legislation to the territorial governments. The case of *American Ins. Co.* v. *Canter*, 1 Pet. 511, 7 L. ed. 242, before cited, originated under an act of the governor and legislative council of Florida organizing a court, and vesting in it admiralty jurisdiction, and in which the jurisdiction of the court was sustained by the Supreme Court of the United States. Speaking of the power of Congress in creating territorial governments, it is said in the case of *DeLima* v. *Bidwell*, 182 U. S. 1, 21 Sup. Ct. Rep. 743, 45 L. ed. 1041, that "the power to establish territorial government has been too long exercised by Congress and acquiesced in by the Supreme Court to be deemed an unsettled question."

We reach the conclusion in this case:

(1) That while the Philippine islands constitute territory which has been acquired by, and belongs to, the United States, there is a difference between such territory and the territories which are a part of the United States, with reference to the Constitution of the United States.

(2) That the Constitution was not extended here by the terms of the treaty of Paris, under which the Philippine islands were acquired from Spain. By the treaty the status of the ceded territory was to be determined by Congress.

(3) That the mere act of cession of the Philippines to the United States did not extend the Constitution here, except such parts as fall within the general principles of fundamental limitations in favor of personal rights formulated in the Constitution and its amendments, and which exist rather by inference and the general spirit of the Constitution, and except those express provisions of the Constitution which prohibit Congress from passing laws in their contravention under any circumstances; that the provisions contained in the Constitution relating to jury trials do not fall within either of these exceptions, and consequently the right to trial by jury has not been extended here by the mere act of the cession of the territory.

(4) That Congress has passed no law extending here the provision of the Constitution relating to jury trials, nor were any laws in existence in the Philippine islands at the date of their cession for trials by jury, and consequently there is no law in the Philippine islands entitling the defendants in this case to such trial; that the court of first instance committed no error in overruling their application for a trial by jury.

We also reach the conclusion that the Philippine Commission is a body expressly recognized and sanctioned by act of Congress, having the power to pass laws, and has the power to pass the libel law under which the defendants were convicted.

We will now pass to the third assignment of error, which is that the headlines or caption of the article charged to be libelous were legitimate deductions from a previous report of a public judicial proceeding, and were insufficient to constitute the offense of libel. The testimony shows that the defendant Fred. L. Dorr was the proprietor, and that the defendant Edward F. O'Brien was the editor, of the Manila Freedom; that the article upon which the complaint is founded was published in its issue of that paper on the 16th of April, 1902; that the privileged statements or report of the judicial proceedings, the headlines of which are the basis of the prosecution, arose on the trial of the case of *The United States* v. *Valdez*, in the court of first instance in the city of Manila, in which case Valdez was charged with the offense of libel, the complaining witness in that case being Señor Legarda, who was also the complaining witness in this case; that counsel for the defendant, Valdez, prepared a written statement of certain facts, and offered to prove the truth of these statements if permitted by the court. A copy of this statement was made by the reporter of the Manila Freedom,— one Vogel,— which

having been presented to the defendant O'Brien, the editor, he prepared the headlines or caption set forth in the complaint.

The attorney for the defendants, under his assignment of errors, makes the proposition that the headlines or caption was a legitimate deduction from the privileged report of the judicial proceedings, and, as such, was itself a privileged publication. This proposition is succinctly made, and is easily understood. No material facts are in dispute. Our law of libel is contained in the few sections in which the law upon this subject is concisely and clearly stated, and renders it unnecessary to refer to textbooks or decisions of the courts of other jurisdictions. Thus the labors of the court have been simplified in the determination of the case.

Section 1 of act No. 277, Philippine Commission, gives the following definition of libel: "A libel is a malicious defamation, expressed either in writing, printing, or by signs or pictures, or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead, or to impeach the honesty, virtue, or reputation, or publish the alleged or natural defects, of one who is alive, and thereby expose him to public hatred, contempt, or ridicule." Did the matter contained in these headlines or caption have a tendency to impeach the honesty, virtue, and reputation of the injured party? We need not stop to discuss this question. Was it a malicious defamation? This appears equally plain, for § 3 is as follows: "An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown." No attempt has been made by the defendants to show a justifiable motive, and the established presumption of law that the publication was malicious must prevail. Nor has there been any attempt made to show the truth of the matter contained in the headlines.

But it is attempted to bring the headlines or caption within the exception of privileged matter. Section 7 of the act defines this character of privileged matter as follows: "No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication." Section 8 reads as follows: "Libelous remarks or comments connected with matter privileged by the last section, receive no privilege by reason of being so connected." It has been seen that the matter is libelous; that it was a malicious publication, as defined by law. The only question that remains to be considered is, Were these headlines or caption "remarks" or "comments" on the privileged matter? The word "comment" is defined by Webster as a "remark, observation, or criticism; gossip, discourse, talk; a note or observation intended to explain, illustrate, or criticise the meaning of a writing, book, etc. Explanation; annotation; exposition." The word "remark" is defined by him as "an expression, in speech or writing, of something remarked or noticed. The mention of that which is worthy of attention or notice. A casual observation, comment, or statement." The headlines or caption come within the definition of "remarks" as given by Webster, in that they are "the mention of that which is worthy of attention or notice;" and they also fall within the definition of the word "comments," defined as "a note or observation intended to explain." The defendants' counsel denominates the character of the headlines or caption as a "legitimate deduction from the privileged report." The word deduction is defined by Webster as "that which is deduced or drawn from premises by a process of reason; inference; acquisition." It seems from these definitions that the word "deduction" conveys about the same meaning as the words "comment" and "remark." At least, it would be as objectionable to make injurious deductions as to make injurious comments or remarks. To say that the headlines or caption is not a remark or comment, but an "epitome" or "index" of what is contained in the privileged article, is simply a play upon words, and it is useless to follow this line of argument further. The intention of the statute, as shown in articles 7 and 8, is that the privileged matter should be a fair and true report, and must stand alone as such. If headlines or captions are used, the matter contained in them must not be remarks or comments of a libelous nature. If by any process additional significance is added, either by display letters or by the arrangement of catch words, under whatever name they may be designated, it comes within the denunciation of the statute. That the headlines were not a part of the report prepared by Vogel, the reporter who was present in the court, and who made a copy of the report, is shown in the testimony. The defendant O'Brien, who, so far as the testimony shows, knew nothing about the matters contained in the report, except that acquired by the reading of it after it was delivered to him, made the headlines or caption. It is said that it is the common practice in the United States to make such headlines in display letters, to render the necessary assistance to the reader in determining whether he cares to read the article. It is immaterial what the real intention of those who write such headlines may be. If such caption and headlines are libelous, the writer must bear the consequences. The law declares the motive of the writer, in the absence of proof of justifiable motive and the truth of the matter, to be malicious. The decisions of some of the courts of the United States have held that an index of words contained in the privileged matter, when fairly and truly made, will partake of the nature of the article indexed; but, as we have shown, our law does not permit this. Nor is it possible to reach the conclusion that the words contained in the headlines are a fair index. No idea can be gathered

from these headlines of the real nature of what is contained in the published article. The privileged report was a written statement prepared by the attorney in the *Valdes Case*, in which an offer was made to prove the truth of certain statements regarded as material in the defense of the case, and which was by the court excluded. This was the general nature of the matter contained in the report. Can anyone, by reading the headlines or caption, form any conception as to the real nature of the document to which the headlines have been prefixed? It is also said that the headlines in this case are not worse than the matter contained in the report. This may be admitted as true, but, in the eyes of the law, there is a distinction. The injurious matter contained in the report is regarded by the law as protected by a privilege which should be extended to the report of judicial proceedings, but here the privilege ends. It is unnecessary to inquire why this distinction should be made. It is sufficient that the law so makes it. It is stated that there is not a word contained in the headlines or caption which is not found in the privileged report. We have attempted to show that this is immaterial. But this statement is in fact incorrect. The sentences: "Sensational Allegations against Commissioner Legarda. Made of Record and Read in English. Spanish Reading Waived. Wife would have Killed Him. Legarde Pale and Nervous,"—are not found in the report. Nor can the sentence, "Legarda Pale and Nervous," even be deduced from anything contained in the report, nor does it appear from the testimony to have been in fact true. When the statement in writing was offered and read before the court, according to the testimony in the case, Señor Legarda was not at that time present in court.

We will notice briefly the character of the caption and headlines, the effect of which can well be imagined. The copy of the Manila Freedom containing the article is attached to the record. An examination of it shows that the words "Traitor, Seducer, and Perjurer" were printed in large display letters, and were of a size sufficient, in the use of these words, to cover a space equal to that of three columns across the paper. They were placed at the top of the first page of the paper. The other words were in smaller type, but much larger than the ordinary type. It is hard to conceive language stronger than that contained in the three words, "Traitor, Seducer, and Perjurer." No more effectual means could be adopted to destroy the good name and fame of a person. More significant words cannot be found in the English language to impeach the honesty, reputation, and virtue. By skilful selection, the sting of the entire document has been placed in the caption and headlines, in such a manner that, in a literal sense, "he who runs may read."

We conclude that the publication of the caption and headlines in the Manila Freedom, upon which the information is based, constituted the offense of libel; that the judgment is sustained by the evidence; that the defendants, Fred. L. Dorr and Edward F. O'Brien, are guilty of the offense charged in the information; that no error was committed in the trial of the case prejudicial to the rights of the defendants; and that *the judgment of the court of first instance should be affirmed*, with costs against the defendants.

It is so ordered and adjudged.

**Arellano, Torres, and Mapa, JJ.,** concur.

**Willard, J.,** dissenting: The case presents two questions: (1) Were the headlines privileged? And (2) if they were, was there express malice in publishing them?

1. The important part of the article in question, and the only part which contained any libelous matter, was the offer to prove contained in it. This offer was actually made a part of the record of the case on trial in the court of first instance. Under article 7 of the libel law, the defendants had the right to publish it, if they did so without malice. The government recognized this right when it limited the charge in the complaint to the headlines of the article, and it is not, and cannot be, claimed that the defendants are guilty of libel for publishing the article itself. Nothing could be worse or more libelous than the statements contained in this offer. I do not wish to give them currency by copying them here, but it is necessary to say that it was distinctly charged in this offer, in so many words, that the complaining witness in the case seduced a girl living in his house. It was also distinctly charged therein that he had added to his other crimes those of treason and perjury. For the publication of these most grave and unfounded charges, the defendants are not prosecuted. They are, however, prosecuted for placing over the article certain headlines. That headlines to a privileged article may be used cannot be doubted. The public must be able to get some idea of what a newspaper article contains, without reading it entirely through. And it is not claimed that the defendants had not a right to put a proper heading to this report. The question is, Was the one actually used proper? If the heading is a fair index, and nothing more, of the article, it is as much privileged as the article itself. If it expresses the opinion of the editor on the statements in the article, it is not privileged as to such expressions. Such expressions of opinion are called, in our law, "comments and remarks." The rule is well illustrated in this case. The words, "Spanish Reading Waived," are a mere statement of what the article contains. They express no opinion of the editor upon any part of it. On the contrary, the word "Sensational," in connection with the word "Allegations," is a comment or remark, and is not privileged. It says that, in the opinion of the editor, the allegations made in the offer are sensational. It is not an index of any statement of fact made in the article, but is an expression of

opinion upon such facts. The headline "Legarda Pale and Nervous" can perhaps be considered as an expression of opinion, although in this respect there is a statement of fact to this effect. But this is unimportant, for these words, even if not privileged, are not libelous. Neither is the word "Sensational" libelous. It is claimed that the words "Traitor, Seducer, and Perjurer," are not an index of the article, but are an expression of the opinion of the editor that the complaining witness was a traitor, seducer, and perjurer. In order to determine this question, it is necessary to consider the whole of the headline, and to consider it with reference to the article itself. The mechanical necessities of newspaper composition generally forbid the employment of complete grammatical sentences in headlines. They must of necessity be elliptical. The reader does not expect to find the whole thought contained in the first two or three isolated words. It is necessary to look at the whole of the headlines to ascertain this. The case at bar illustrates this proposition. The first line, consisting of these three words, of itself means nothing. The words are not spoken of any person. In order to find out to whom they refer, it is necessary to go to the line below, in which, while it is learned that they refer to Señor Legarda, it is also seen at the same time that they were allegations made against him. The necessity of reading the whole of the headlines in order to get the meaning of the isolated words is illustrated by the other half of this same page. On the first line are the words "Situation in Hongkong." On the next line are the words "Health Authorities," etc. The first line does not show what feature of the situation in Hongkong is treated of in the article. The second line does not show where the health authorities are taking action. It is only by reading them together that one learns what the article is about. Fairly construed, the headlines say that sensational allegations of being a traitor, seducer, and perjurer have been made against Commissioner Legarda. A person knowing nothing about the case or the parties to it, reading the whole of the headlines, could get no other idea from it. Omitting the word "Sensational," which has already been considered, this statement is a fair index of the offer to prove, which, as has been said before, was the principal part of the article, and the only libelous part. That these crimes were plainly and distinctly, and in these very words, alleged against him, is shown by a reading of the offer to prove. It is difficult to see how anyone could make a fair index of that offer without using those words. That was all there was of it. The result upon this branch of the case is that the headlines are nothing more than a fair index of the article, and are therefore privileged, with exception of the words, "Sensational" and "Legarda Pale and Nervous," which are not libelous.

2. What has been said already leaves out of consideration the question of malice. By the express terms of article 7, if the defendants published this judicial record with express malice, they are guilty. The government claims that there was express malice. It is not apparent why, with such a claim, the government did not prosecute the defendants for publishing the article itself, for, as we have said, it is infinitely worse in its details than the headlines. The article with the headlines being privileged, the burden of proving express malice was on the government. It relied upon two kinds of evidence. It claimed that the size of type and the arrangement of the headlines proves malice. There would be some force to this claim, were it not for the fact that the other headlines on the same page, to which we have referred, are in the same size of type, and the arrangement of the subheads is identical with the one in question. Each one takes up one half of the page. Any presumption of malice in the use of large type for the words "Traitor," etc., is to my mind conclusively rebutted by the use of the same size in printing the words "Situation in Hongkong." An examination of other numbers of this paper offered in evidence during the trial shows that this size of type was in frequent use for headlines of the most indifferent character. The only other evidence introduced consisted of articles in other numbers of the same paper relating to the same matter. These stated the gravity of the charges made, the condition of the law in regard to the presentation of the truth as a defense, and urged that an investigation be had for the purpose of showing whether the charges were true or not. There was no other proof of express malice. It was proved at the trial that neither of the defendants knew Commissioner Legarda, even by sight. There was no evidence that they had ever had dealings of any kind with him. The newspaper articles do not show any express malice, and any inference of that kind which could be drawn from them is, to my mind, overcome by the proof that the defendants did not know the person whom they are charged with having maliciously libeled.

In conclusion, it may be said that, while the defendants are not guilty, the person who made this offer in court is, for the reasons stated in my concurring opinion in the case against Lerma and, if prosecuted for this libel, could, as far as appears from the record in this case, have been convicted.

The judgment should be reversed, and the defendants acquitted.

**Ladd, J., concurs.**

# APPENDIX II.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

### ORDER.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Rufus W. Peckham, Associate Justice.
For the Second Circuit, Rufus W. Peckham, Associate Justice.
For the Third Circuit, George Shiras, Jr., Associate Justice.
For the Fourth Circuit, Melville W. Fuller, Chief Justice.
For the Fifth Circuit, Edward D. White, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, Henry B. Brown, Associate Justice.
For the Eighth Circuit, David J. Brewer, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.
*October 20, 1902.*

# APPENDIX III.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

### ORDER.

Ordered that the letter of resignation of the reporter of this court, Mr. J. C. Bancroft Davis, and the response of the court thereto, be entered upon the minutes of the court, as follows, *viz.:*

Nahant, Mass., September 11, 1902.

To the Chief Justice and Associate Justices of the Supreme Court.

Gentlemen:—

I hereby resign my office as reporter of this court, to take effect at once. I cannot do this without thanking you for the kindness and consideration which I have received from all.

Very respectfully, your obedient servant,

J. C. BANCROFT DAVIS.

Supreme Court of the United States,
October 18, 1902.

Dear Sir:—

In accepting your resignation as reporter we desire to express our appreciation of your long and valuable labors in that capacity, covering a period of nineteen years and seventy-nine volumes of reports.

We sever our relations, which have been uniformly intimate and cordial, with

sincere regret, and with the earnest hope that you may enjoy for many years the repose you have so well earned.

Very truly, yours,

MELVILLE W. FULLER.
JOHN M. HARLAN.
DAVID J. BREWER.
HENRY B. BROWN.
GEORGE SHIRAS, JR.
EDWARD D. WHITE.
JOSEPH MCKENNA.

Hon. J. C. BANCROFT DAVIS.

And it is further ordered, that Mr. Charles Henry Butler be, and he is hereby, appointed reporter of this court in place of Mr. J. C. Bancroft Davis, resigned, and he is charged with the duty of reporting the decisions of the present term from its commencement.

Mr. Butler being present in court, the oath of office was administered to him by the clerk.

*December 4, 1902.*

# APPENDIX IV.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

The Chief Justice said:

"It gives me pleasure to announce to the gentlemen of the bar the appointment of Oliver Wendell Holmes, of Massachusetts, to a seat upon this bench. Mr. Holmes is present and prepared to take the oath. The clerk will read the commission, to be subsequently recorded, and administer the oath accordingly."

The commission was then read and the oath administered by the clerk, and Mr. Justice Holmes took his seat on the bench.

*December 8, 1902.*

# APPENDIX V.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

### ORDER.

There having been an associate justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices of this court among the circuits, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Oliver Wendell Holmes, Associate Justice.
For the Second Circuit, Rufus W. Peckham, Associate Justice.
For the Third Circuit, George Shiras, Jr., Associate Justice.
For the Fourth Circuit, Melville W. Fuller, Chief Justice.
For the Fifth Circuit, Edward D. White, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, Henry B. Brown, Associate Justice.
For the Eighth Circuit, David J. Brewer, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.

*December 8, 1902.*

# APPENDIX VI.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

Mr. Attorney General Knox addressed the court as follows:

May it please the court:

The bar of this court has requested me to present to you the resolutions recently adopted by it expressing its estimate of the life and character of the late Mr. Justice Gray, and its deep sense of bereavement occasioned by his death.

They are as follows:

"The bar of the Supreme Court of the United States, deploring the recent death of Horace Gray, an associate justice of the court, would put upon record a brief memorial of their esteem and admiration for his judicial achievements, as well as for his qualities as a man. Therefore, be it

"*Resolved*, That we of the bar are met together to pay tribute to the memory of an able lawyer, a scholar versed in the learning of the books, and a judge who never failed to uphold the dignity of his office. He did his work thoroughly and with scrupulous efforts to dispense exact justice.

"*Resolved*, That the labors of Mr. Justice Gray, which have been constant and arduous, are deserving of the country's gratitude. He spared nothing of health or of strength. With patience he explored the sources of the law, and gathered from the past much that proved of value in its application to the needs of the present. Of sound judicial instincts, he year by year visibly grew, alike in clearness of vision and in breadth of apprehension, until in these later days his ripened powers declared him to be a fit example of the strong and truly great judge.

"*Resolved*, That we shall ever cherish a remembrance of the manly qualities of our deceased brother. Large of stature, vigorous and firm in demeanor, it needed but a slight acquaintance with the real man to recognize in Mr. Justice Gray a generous, noble spirit, a pure-minded, brave, and Christian gentleman.

"*Resolved*, That the Attorney General be asked to present these resolutions to the court, with the request that they be entered upon the records, and that the chairman of this meeting be directed to send to the widow and family of the late Mr. Justice Gray a copy of these resolutions as an expression of our sympathy for them in the loss that they have been called upon to sustain."

This just and temperate expression by the bar will be received, I am sure, with sentiments of full approval by the members of the court, to whom the death of Mr. Justice Gray is a personal grief, as well as by the profession and the people, to whom it is a most serious public loss.

The character and work of a judge are an open record to the world. They are impressed on judgments which survive the man, and may be imperishable. A great judge hearing contending arguments and settling their issues with convincing logic erects and leaves behind him a monument standing high in the public view. All men may know him, and may estimate and speak of his labors. So men regard John Marshall, almost as if they had seen him and talked with him; and so those who did not have the privilege of intimate acquaintance with the living man might speak of Mr. Justice Gray.

He was born of the New England ancestry which has done so much to strengthen and adorn this nation,—strong, self-controlled, intellectual, and aspiring. Such ancestry has produced faithful men, men of action, and men of culture. Mr. Justice Gray, true to these inheritances, made early use of his advantages of environment and education. His career from his youth shows the steady advance in capacity of a man formed and trained to be a scholar, a lawyer, and a judge.

From his recognized position as a leader of the bar of his native state, he was advanced to be an associate justice and later to be chief justice of the supreme court of Massachusetts,—the court which contributed the illustrious name of Shaw to the roll of distinguished American judges. In that court Mr. Justice Gray delivered many luminous opinions marked by the comprehensiveness, thoroughness, and learning which were characteristic of him, including leading ones on the law of charities, ancient grants and boundaries, contracts *ultra vires*, and the conflict of laws.

No eulogy is needed to bring before this court and bar the recollections of the steadfast labors, profound learning, and ripe ability of intellect by which his judicial service to his country was here rounded out and completed. The opinions which he delivered

reflect the robust vigor of his personality,—the clearness of mind and firmness of will, the strength and purity of moral purpose, which were part of his nature. His unremitting industry, his high conception of duty, his accumulated erudition, his dignity of diction and of character, combined to make him a great jurist in all branches of the law. This court is required to explore the entire field of jurisprudence. Its jurisdiction is as broad as the range of human controversy, and Mr. Justice Gray has left fitting memorials of his capacity throughout its range,—whether he deals with the technicalities of a statute, with constitutional or international law, with equity pleading, with admiralty, with the laws of property or of personal relations.

It is superfluous to comment particularly on his utterances for the court. The profession will not foregt them. They will survive the passage of time, and remain for the instruction and guidance of ourselves and of posterity.

In presenting these resolutions to your honors, on behalf of the bar I express the consciousness of loss to public life and service which Mr. Justice Gray's private life and character emphasize. The generosity and purity of his nature, the modesty and simple dignity which adorn worth, the courtesy of the gentleman,—these qualities also marked his career and endeared him to those who were privileged to know him intimately.

I have the honor to move that the resolutions be entered upon the records of the court.

The Chief Justice responded:

It is difficult to express our sense of the loss the court has sustained in the departure of this eminent judge and dear brother.

The results of the labors of the court are announced from the bench, but the burden of its labors can be known only to those who participate in them. They only can know the value of aid in the discharge and alleviation of that burden. They only can know the closeness of the ties which bind the company of faithful workers together.

Speaking from that standpoint, it may be truthfully said of Mr. Justice Gray as he himself, when chief justice of Massachusetts, said in commemoration of one of his colleagues, that "every year of association with him brought a greater reliance upon his counsel and a closer friendship."

And, portraying on that occasion the lineaments of another, he drew a striking likeness of himself as we knew him in our common consultations. This is the portrait:

"His minute and accurate observation of the facts, his thoughtful comparison of the arguments, his careful weighing and scrutiny of precedents, his nice appreciation of legal distinctions, his grasp of fundamental principles, his strength in presenting his own suggestions, and his candor in considering those of his associates,—guided throughout by a love of justice, and tempered by common sense,—made his presence a peculiar safeguard. In arriving at results that would affect the rights of his fellow men, no detail was so small as to be neglected, no field of investigation too wide to be explored. Very cautious in forming his conclusions, he was correspondingly tenacious of them when formed. He always wished the opinions of the court to be placed upon such grounds as, not going beyond what the decision of each case required, should afford a firm foothold in determining future controversies."

The description also measurably indicates the character of his judicial utterances.

It was observed of the judgments of Lord Cottenham, that he who read them felt that they "fixed the law on the matter in hand upon a defined basis for future years." The same impression is produced by many of the judgments of Mr. Justice Gray, while other judgments are confined, with keen precision, to the bare disposition of the particular case.

All excellent, his opinions in leading cases—and he made cases leading when he thought the occasion demanded—constitute permanent contributions to jurisprudence and imperishable monuments to his memory. They do not simply lay down rules for guidance. They are treasuries of doctrine and precedent. And in the time to come it will be found—

"Hither, as to a fountain,
Other suns repair, and in their urns
Draw golden light."

Mr. Justice Gray was preceded as the head of the supreme judicial court of Massachusetts by Lemuel Shaw; he was preceded on this bench by Joseph Story and Benjamin Robbins Curtis. Eulogy can rise no higher than the expression of the conviction that he will be ranked with them without appreciable interval.

For nearly forty years he was given grace to execute justice and to maintain truth, with the dignity and power befitting his great office, and he arrived at the resting place with unclouded mind and ready for the change. His lips are dumb, but the devouring Past, cannot destroy the works which follow him.

The resolutions and accompanying remarks will be entered upon the records of the court.

*January 5, 1903.*

# APPENDIX VII.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

The following correspondence is spread upon the record by direction of the Chief Justice.

Supreme Court of the United States.
In Chambers.
February 23, 1903.

Dear Brother Shiras:

We cannot refrain from the expression of our sincere regret at your retirement from the bench.

Some of us have been associated with you during the entire period of your service here, but all alike appreciate the single mindedness with which you have sought to do equal and exact justice, and the great value of your assistance to the court, and of your contributions to jurisprudence; and all alike feel for you the deepest affection and regard.

We earnestly hope that the personal intercourse with you we have so much enjoyed may be continued for many years to come.

MELVILLE W. FULLER,
JOHN M. HARLAN,
DAVID J. BREWER,
HENRY B. BROWN,
E. D. WHITE,
R. W. PECKHAM,
JOSEPH MCKENNA,
OLIVER WENDELL HOLMES.

Supreme Court of the United States.
Washington, D. C.

My dear Chief and Associate Justices:

I gratefully acknowledge your kind letter of farewell.

I am glad to be thus assured, though indeed I never doubted it, that, whether I fully performed my judicial duties or not, you all felt that I earnestly endeavored to do so.

The ten years and upwards that I have spent on the bench have been very pleasant to me, and I quit the court and its labors with much regret. I have much enjoyed my personal intercourse with each and all of you, and hope that, in the few years that are left to me, I shall frequently meet you, and hear from you when we are separated.

Sincerely your friend,

GEORGE SHIRAS, JR.

*February 24, 1903.*

# APPENDIX VIII.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

The Chief Justice said:

I am gratified at being able to announce to the gentlemen of the bar that William R. Day, of Ohio, appointed to a seat on this bench, is present and prepared to take the oath of office. His commission will be read by the clerk, to be afterwards recorded, and the oath will then be administered.

The commission was then read and the oath administered by the clerk, and Mr. Justice Day took his seat on the bench.

*March 2, 1903.*

# APPENDIX IX.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

### ORDER.

There having been an associate justice of this court appointed since the commencement of this term, it is ordered that the following allotment be made of the Chief Justice and Associate Justices, agreeably to the act of Congress in such case made and provided, and that such allotment be entered of record, *viz.:*

For the First Circuit, Oliver Wendell Holmes, Associate Justice.
For the Second Circuit, Rufus W. Peckham, Associate Justice.
For the Third Circuit, Henry B. Brown, Associate Justice.
For the Fourth Circuit, Melville W. Fuller, Chief Justice.
For the Fifth Circuit, Edward D. White, Associate Justice.
For the Sixth Circuit, John M. Harlan, Associate Justice.
For the Seventh Circuit, William R. Day, Associate Justice.
For the Eighth Circuit, David J. Brewer, Associate Justice.
For the Ninth Circuit, Joseph McKenna, Associate Justice.

*March 9, 1903.*

# APPENDIX X.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

### ORDER.

The reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to section 681 of the Revised Statutes.

*March 23, 1903.*

# APPENDIX XI.

## Supreme Court of the United States.

OCTOBER TERM, 1902.

### ORDER.

It is now here ordered by the court that all the cases on the docket not decided and all the other business of the term not disposed of by the court be, and the same are hereby, continued until the next term of the court.

*June 1, 1903.*

# GENERAL INDEX

TO THE

# FOUR VOLUMES CONTAINED IN THIS BOOK,

## 187, 188, 189, 190.

OCTOBER TERM, 1902.

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**ABUTTING OWNERS.**
Assessments for Paving According to Frontage, see CONSTITUTIONAL LAW, 8.

**ACCOMPLICE.**
Who Is, see CRIMINAL LAW, 1.

**ACTION OR SUIT.**
By Stockholder against Corporation, see CORPORATIONS, 6, 7.
Effect of Nonresident Defendant's Appearance in Divorce Suit, see HUSBAND AND WIFE.

1. A corporation referred to in a bill to restrain any further action by the Secretary of the Interior upon applications for leases of Indian lands for mining purposes, as one of the successful applicants, is not a necessary party defendant to the suit, which is instituted on the theory of the want of power in the Secretary to execute leases affecting such lands. Cherokee Nation v. Hitchcock, 183

2. So long as a board of supervisors defends a suit to have water rates fixed by them declared void for unreasonableness, there is a sufficient party respondent to enable the court to consider the merits of the controversy, notwithstanding the default of those who set in motion the proceedings before the board. San Diego Land & Town Co. v. Jasper, 892

3. The exigency presented by the death of Rear Admiral Sampson pending an appeal from a decree of condemnation in a libel in prize, filed in his own behalf and in behalf of other officers and enlisted men of the United States Navy, will be satisfactorily met by the substitution, to carry on the proceedings in the interest of all, of Rear Admiral Taylor, who is among those represented in the litigation by counsel, and is within the jurisdiction of the court. United States v. Sampson, 248

**ACTS OF PARLIAMENT.**
Admissibility of, see EVIDENCE, 5.

**ADMIRALTY.**
Division of Damages by Collision, see APPEAL AND ERROR, 80.
See also SHIPPING.

An unlawful interference with the exclusive jurisdiction of admiralty and maritime cases, vested by the Federal Constitution in the courts of the United States, is made by the attempt by 2 Bael. (Wash.) Codes & Stat. §§ 5953, 5954, to create a preferred lien on ocean-going vessels owned in other states or countries for work done and materials furnished on the order of a contractor, which lien may be enforced at any time within three years, although such contractor has been paid in full by the owner without knowledge of any unpaid claims. The Roanoke, 770

**ADMISSION.**
As to Person Sought to be Extradited, see EXTRADITION, 14.

**ADVERSE CLAIMANT.**
In Bankruptcy Proceedings, see BANKRUPTCY, 1.

**ADVERSE POSSESSION.**

Adverse ownership for private use under a state statute of limitations can confer no title on an individual to a portion of the right of way granted by the act of Congress of July 2, 1864, § 2 (13 Stat. at L. 365, chap. 217), to the Northern Pacific Railroad Company for the construction of its road. Northern P. R. Co. v. Townsend, 1044

**ADVERTISEMENT.**
As Subject of Copyright, see COPYRIGHT, 3.

**AFFIDAVITS.**
For Service by Publication, see MORTGAGE, 2.

**AGREED CASE.**
See APPEAL AND ERROR, 50, 51.

**ALASKA.**
License for Vessels Plying in Waters of, see APPEAL AND ERROR, 45.

**ALIENS.**

1. Japanese subjects who are "paupers or persons likely to become a public charge," and are therefore forbidden to enter the United States by the immigration act of March 3, 1891 (26 Stat. at L. 1085, chap. 551, U. S. Comp. Stat. 1901, p. 1294), are not given such right of entry by the provision of the treaty of March 21, 1895, with Japan, that the citizens or subjects of each of the two countries shall have "full liberty to enter, travel, or reside in any part of the territories of the other country,"—especially since such treaty expressly excepts from its operation any ordinance or regulation relating to "police and public security." Kaoru Yamataya v. Fisher, 721

**Deportation.**

2. Aliens of the excluded class are not protected from deportation by the executive officers of the government, because they have effected an entry into the United States, in view of the power given the Secretary of the Treasury by the act of October 19, 1888, chap. 1210 (25 Stat. at L. 566, U. S. Comp. Stat. 1901, p. 1294), if satisfied that an immigrant has been allowed to land contrary to law, to cause his deportation at any time within a year after the landing, which power was again substantially conferred by the provision of the act of March 3, 1891, chap. 551, § 11, that an alien immigrant may be sent out of the country, "as provided by law," at any time within a year after his illegal entry into the United States. Id.

3. Executive officers of the United States government were not invested, by the provisions of the acts of October 19, 1888, chap. 1210, and March 3, 1891, chap. 551, for the deportation of aliens of excluded classes within a year after their illegal entry, with the power arbitrarily to deport an alien who has entered the country and has become subject in all respects to its jurisdiction and a part of its population, without giving him an opportunity to be heard upon the question involving his right to be and remain in the United States. Id.

4. Federal courts will not intervene by habeas corpus to prevent the deportation by the executive officers of the government, under the authority of the acts of October 19, 1888, chap. 1210, and March 3, 1891, chap. 551, of an alien found to be one of the excluded class, where such alien had notice, though not a formal one, of the investigation instituted for the purpose of ascertaining whether she was legally in the United States, and was not denied an opportunity to be heard, although she pleads a want of knowledge of the English language preventing her from understanding the nature and import of the questions propounded to her, and that the investigation made was a "pretended" one, and that she did not at the time know that it had reference to her deportation. Id.

**ALLOTMENT.**
Of justices among circuits. 1196, 1197, 1201.

**AMENDMENT.**
Of Pleading, see PLEADING, 3.

**ANIMALS.**
Taxation of, while Being Driven through State, see COMMERCE, 4.
Prohibiting Importation of Diseased Animals, see COMMERCE, 8, 9.
Equal Privileges as to, see CONSTITUTIONAL LAW, 9.

**APPEAL AND ERROR.**

I. MODE OF REVIEW.
II. JURISDICTION.
a. *Over Federal Courts.*
b. *Over State Courts.*
c. *Finality of Decisions.*
III. THE RECORD.
IV. DISMISSAL.
V. HEARING AND DETERMINATION.
a. *In General.*
b. *Discretionary Matters.*
c. *Objections Not Taken Below.*
d. *Objections Waived or Cured Below.*
e. *Findings of Fact.*
f. *What Errors Warrant Reversal.*
VI. JUDGMENT.

Grounds of, in Bankruptcy Proceeding, see BANKRUPTCY, 2.

I. MODE OF REVIEW.

1. A judgment that a person is not a bankrupt, entered by a court of bankruptcy on a verdict of not guilty in a trial by jury demanded as of right under § 19 of the bankruptcy act (30 Stat. at L. 551, chap. 541, U. S. Comp. Stat. 1901, p. 3429), is reviewable only by writ of error, as no power to re-examine the facts determined by a jury under this section, otherwise than according to the rules of the common law, was conferred by § 24, investing the Federal appellate courts with "appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases," or by § 24*b*, providing for the revision of such proceedings "in matter of law," or by § 25*a*, authorizing appeals as in equity from a judgment in bankruptcy proceedings adjudging or refusing to adjudge defendant a bankrupt. Elliott v. Toeppner, 200

II. JURISDICTION.

a. *Over Federal Courts.*

**Of circuit court of appeals.**

2. A decree of the circuit court of appeals affirming a judgment of a circuit court in a cause in which the latter's jurisdiction depended on the sole ground that the cause of action arose under the Federal Constitu-

tion will, on appeal to the Supreme Court of the United States, be reversed for the lack of jurisdiction in the circuit court of appeals to review the circuit court judgment. Union & P. Bank v. Memphis, 712.

**Of Supreme Court.**

Certiorari to Circuit Court of Appeals, see CERTIORARI.

3. The judgment of the circuit court of appeals is not final under the circuit court of appeals act of 1891, § 6 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), unless the original jurisdiction of the circuit court was dependent "entirely" upon diverse citizenship. Northern P. R. Co. v. Soderberg, 575

4. An appeal lies to the Supreme Court of the United States from a decree of a circuit court of appeals in a controversy between a foreign state and citizens of one of the United States, since such decree is not made final by the provision of the act of March 3, 1891, chap. 517, § 6 (26 Stat. at L. 826, 828, U. S. Comp. Stat. 1901, p. 550), declaring decrees of such court to be final "in all cases where the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states." Colombia v. Cauca Co. 1159

5. A judgment of the circuit court of appeals which is made final by the judiciary act of March 3, 1891, § 6 (26 Stat. at L. 28, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550), is not reviewable by the Supreme Court of the United States on writ of error, although the suit involves constitutional rights, and therefore might have been brought directly from the circuit court to the Supreme Court. Cary Mfg. Co. v. Acme Flexible Clasp Co. 244

6. A judgment of the circuit court of appeals, in a case in which the jurisdiction of the circuit court was invoked solely on the ground of diverse citizenship, cannot be reviewed in the Supreme Court of the United States on writ of error because a Federal question arose in the course of the proceedings in the circuit court, even though such question may not be of such a character as would permit the case, under § 5 of the judiciary act of 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), to be brought directly from the circuit court to the Supreme Court. Ayres v. Polsdorfer, 314

7. A suit which involves the consideration of questions relating to the power of Congress, under the Constitution, over the navigable waters of the United States, is one which involves the construction or application of the Federal Constitution, within the meaning of the act of March 3, 1891 (26 Stat. at L. 830, chap. 517, U. S. Comp. Stat. 1901, p. 554), authorizing direct appeals from a circuit court to the Supreme Court of the United States. Cummings v. Chicago, 525

8. An appeal lies directly to the Supreme Court of the United States from a decree of a circuit court dismissing a bill which is based, not only upon diversity of citizenship, but upon the alleged unconstitutionality of certain municipal ordinances as impairing the obligation of a contract with the municipality under prior ordinances. Davis & F. Mfg. Co. v. Los Angeles, 778

9. A judgment of the district court of the United States imposing imprisonment for contempt cannot be reviewed in the Supreme Court of the United States on writ of error to that court, on the theory that the case is one "in which the jurisdiction of the court is in issue" within the meaning of the act of March 3, 1891, § 5 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 549), where jurisdiction over the person and subject-matter was not challenged, and the question asserted in the certificate of the lower court was whether it had jurisdiction to try and punish the defendant for contempt upon the facts and for the causes stated. O'Neal v. United States, 945

10. The jurisdiction of the Supreme Court of the United States to review judgments of the courts of the territory of Hawaii is, under the act of April 30, 1900, § 86 (31 Stat. at L. 141, chap. 339), to be measured by the power conferred upon the former court to review judgments of state courts. Equitable L. Assur. Soc. v. Brown, 190

11. The affirmance by a territorial supreme court of a judgment for plaintiff in an action of forcible entry and detainer, in which defendant set up an equitable title to the land, cannot be reviewed by the Supreme Court of the United States, where the value of the possession, which alone could be in contest in such an action, and which alone was determined by the judgment, was less than $5,000. McClung v. Penny, 751

b. *Over State Courts.*

**How Federal question must be raised.**

12. The Federal question relied upon as conferring original jurisdiction on a circuit court of the United States must appear necessarily by plaintiff's statement of his own claim, and cannot arise from mere allegations in the bill of the defense which the defendants intend to set up, or which they rely upon. Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 626

13. A Federal right is "specially set up or claimed in a state court," within the meaning of U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), so as to confer jurisdiction on the Supreme Court of the United States of a writ of error to such court, where a claim of such right sufficiently appears in a motion for new trial and in the assignments of error in the state supreme court, and was fully considered in the opinion of that court, whose decision was adverse to such claim. San José Land & Water Co. v. San José Ranch Co. 765

14. A decision of a state court in condemnation proceedings is not reviewable in the Supreme Court of the United States on

the theory that due process of law was denied thereby, or property taken without just compensation, where there is nothing in the record which adequately shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument. Hooker v. Los Angeles, 487

15. A certificate of the chief judge of the highest state court that a Federal question was involved is not properly a part of the record, and is insufficient in itself to confer jurisdiction on the Supreme Court of the United States to review a judgment of the state court or to determine Federal questions which do not appear from the record to have been brought to the attention of that court. Home for Incurables v. New York, 117

16. A claim that the admission in evidence of the previous testimony of an absent witness was in violation of the 14th Amendment to the Federal Constitution was not specially set up at the proper time and in the proper way to confer jurisdiction on the Supreme Court of the United States to review the judgment of the highest court of a state, by an assignment of error in that court, which was not considered by it presumably because no such question had been raised in the trial court. Jacobi v. Alabama, 106

**When Federal question must be raised.**

See also *supra*, 16; *infra*, 55; JUDGMENT, 10.

17. A Federal question was not set up too late to confer jurisdiction on the Supreme Court of the United States of a writ of error to a state court, where it was raised by the assignments of error in the state supreme court, and was considered and decided by a commission appointed to aid that court in the discharge of its duties, and the judgment of such commission was, for the reasons stated in its report, affirmed by the state supreme court. Farmers' & M. Ins. Co. v. Dobney, 821

18. A judgment of a state court cannot be reviewed in the Supreme Court of the United States on the ground that it denied a right, title, privilege, or immunity secured by the Federal Constitution, where it does not appear on the face of the record that such right, title, privilege, or immunity was specially set up or claimed in the state court. Home for Incurables v. New York, 117

19. A judgment of a state court upholding a state statute which is claimed to violate the Federal Constitution is not reviewable in the Supreme Court of the United States, where the state court declined to pass on the Federal question because it was not raised in the trial court as required by the state practice. Layton v. Missouri, 214

20. A Federal question is raised too late to confer jurisdiction on the Supreme Court of the United States to review the judgment of a state court, where it is first suggested upon application for a rehearing after the final decision of the highest state court. Weber v. Rogan, 363

21. A Federal question first raised in a petition for rehearing in the highest state court is raised too late to confer jurisdiction upon the Supreme Court of the United States, where such petition was denied without opinion. Mutual L. Ins. Co. v. McGrew, 480

22. The claim that a state court denied full faith and credit to a statute of another state is not raised in time to bring the case within the appellate jurisdiction of the Supreme Court of the United States, where it first appears in the petition for a writ of error from that court to the state court. Johnson v. New York L. Ins. Co. 273

23. The repugnancy to the Federal Constitution of a state statute under which the trial court assumed to try without a jury the questions of fact upon which the rights in controversy depended is not reviewable in the Supreme Court of the United States on writ of error to a state court, where the question first appears in the petition for such writ of error, and the state supreme court did not pass upon the action of the trial court in view of its unconstitutionality. Telluride Power Transmission Co. v. Rio Grande Western R. Co. 307

**What are Federal questions.**

See also *supra*, 23; *infra*, 56, 57.

24. The Supreme Court of the United States is not without jurisdiction of a writ of error to a state court because that court committed no error in deciding the Federal question involved. Andrews v. Andrews, 366

25. A decision of a state court adverse to a claim under the Federal Constitution, specially made in a motion to set aside the judgment, raises a Federal question, for the purpose of a review in the Supreme Court of the United States. Manley v. Park, 296

26. A decision of a state court, which merely construes a statute of another state as inapplicable to the case before it, and does not deny the validity of such statute, is not reviewable in the Supreme Court of the United States as a decision denying full faith and credit to such statute. Johnson v. New York L. Ins. Co. 273

27. An objection raised in the state court, that a state statute is unconstitutional and void, relates only to the power of the state legislature under the state Constitution, and raises no Federal question which will give the Supreme Court of the United States jurisdiction to review a judgment of the state court sustaining the validity of the statute. Layton v. Missouri, 214

28. A decision of a state court refusing a petition for a writ of mandamus, in which relator claimed and set up a right under the Constitution of the United States, is tantamount to the denial of that right, and is therefore reviewable in the Supreme Court of the United States. Detroit, Ft. W. & B. I. R. Co. v. Osborn, 860

29. An averment in an answer in a suit

by a divorced wife on a policy of insurance on her former husband's life, that, by virtue of the Hawaiian laws and the decree of divorce thereunder, all her rights in such policy had passed to and become the property of her husband, is not the special assertion of a right or claim under the treaty with Hawaii, which is essential, under U. S. Rev. Stat. § 709 (U. S. Comp. Stat. 1901, p. 575), to confer jurisdiction on the Supreme Court of the United States to review a judgment of a state court adverse to such right or claim. Mutual L. Ins. Co. v. McGrew, 480

30. The judgment of a state court sustaining the validity of the act of Congress of February 28, 1878 (20 Stat. at L. 25, chap. 20), making the silver dollar of 412.5 grains troy of standard silver a full legal tender, cannot be reviewed in the Supreme Court of the United States, since that court has jurisdiction, under U. S. Rev. Stat. § 709, to review the judgment of a state court upon the validity of a Federal statute, only when against its validity. Baker v. Baldwin, 75

31. The question whether a municipality, by refusing to hear objections to a public improvement, is estopped to collect any portion of the cost thereof from the objector, is not a Federal question which may be reviewed by the Supreme Court of the United States on writ of error to a state court. Schaefer v. Werling, 570

32. The question whether an advertising agent was entitled, on a proper construction of his contract with a newspaper corporation, to retain a specified sum each month out of the moneys received by him, is not Federal in its nature; and a decision of a state court thereon is therefore not subject to review in the Supreme Court of the United States on writ of error to that court. Commercial Pub. Co. v. Beckwith, 598

33. A change of view by the highest court of a state with respect to the limit of private ownership upon tide waters does not raise a case under the contract clause of the Federal Constitution, which can be reviewed in the Supreme Court of the United States. Mobile Transp. Co. v. Mobile, 266

34. Defenses, in an action in ejectment brought by a municipality in a state court, of estoppel, license, payment of taxes, the unconstitutionality of a state statute because the title does not describe its subject, want of power in the state to convey its title to the municipality, and the statute of limitations,—are of a local nature, and present no Federal question for review in the Supreme Court of the United States. Id.

35. A decision of a state court adverse to the claim of title to land set up by a state by virtue of its right of sovereignty over the beds of lakes meandered by the United States government presents no Federal question which will sustain a writ of error from the Supreme Court of the United States, as such sovereignty rests upon no Federal statute or provision of the Federal Constitution, but upon general principles of the common law, which long antedated the Constitution. Iowa v. Rood, 86

36. The action of surveyors for the Federal government, in segregating and setting apart a lake by meander lines from the public land, and the approval of such survey by the Commissioner of the General Land Office, is not such an adjudication by the Federal government, by its authorized officers and agents, that such lake is the property of the state, and not a part of the public domain, that a denial by a state court of the state's claim of title to the bed of such lake can be reviewed in the Supreme Court of the United States. Id.

37. The mere fact that an action is brought in a state court, under U. S. Rev. Stat. §§ 2325, 2326 (U. S. Comp. Stat. 1901, pp. 1429, 1430), in support of an adverse mining claim, does not of itself entitle the defeated party to a writ of error from the Supreme Court of the United States. Beals v. Cone, 435

38. A ruling of a state court adverse to plaintiff's claim that the decision by the Land Department of a question of fact on the hearing of a protest filed by him and others against defendants' original mineral entry was *res judicata* in an adverse suit in which defendants rely on a subsequent entry is not the decision of a Federal question which will give the Supreme Court of the United States jurisdiction to review the judgment of the state court. Id.

39. Whether statements made on a hearing, before the Land Department, of a protest against a mineral entry, work an estoppel *in pais* which amounts to a defense to a claim of title under a subsequent entry, involves no Federal question which will give the Supreme Court of the United States jurisdiction to review the judgment of a state court. Id.

40. A Federal question reviewable in the Supreme Court of the United States is involved in a decision of a state court in favor of plaintiff in a controversy over the ownership of ore, in which defendant claimed that under the act of May 10, 1872 (17 Stat. at L. 91, chap. 152, §§ 2, 3), title thereto passed to it through its patent, instead of to plaintiff, because the end lines of the latter's patent were not parallel, plaintiff contending that its title was acquired under the act of July 26, 1866 (14 Stat. at L. 251, chap. 262), which did not require parallelism of end lines. Kennedy Min. & Milling Co. v. Argonaut Min. Co. 685

41. A decision of a state court adverse to the claim that, under Mexican and Spanish grants confirmed and patented under the act of Congress of March 3, 1851 (9 Stat. at L. 631, chap. 41), the owners of the land were entitled to riparian rights and subterranean waters, involves no Federal question reviewable in the Supreme Court of the United States, where the validity of such act was not drawn in question. Hooker v. Los Angeles, 487

42. Allegations in a complaint, which set

up a right to recover as the result of a judicial sale under the decrees of courts of the United States and of a state, raise Federal questions which confer jurisdiction on the Supreme Court of the United States to review a judgment of a state court denying a recovery. Commercial Pub. Co. v. Beckwith, 598

43. A decision of a state court cannot be reviewed in the Supreme Court of the United States on the ground that by it full faith and credit were denied to an Hawaiian judgment, in violation of U. S. Const. art. 4, § 1, as carried out by U. S. Rev. Stat. § 905 (U. S. Comp. Stat. 1901, p. 677), where the judgment of the trial court was rendered prior to the act of April 30, 1900 (31 Stat. at L. 142, chap. 339), providing a government for Hawaii, and such contention was not brought to the attention of the highest state court in any form. Mutual L. Ins. Co. v. McGrew, 480

44. A claim that a right under the Federal Constitution would be denied by the rendition of a decree of foreclosure by a state court, unless leave to file a supplementary answer should be granted, is so clearly without foundation, where the defense sought to be interposed is without merit, as to confer no jurisdiction on the Supreme Court of the United States of a writ of error to the state court. Sawyer v. Piper, 757

c. *Finality of Decisions.*

See also *supra*, 3, 4.

45. A proceeding to obtain from the district court of the United States for the district of Alaska the license for ocean and coastwise vessels plying in Alaskan waters prescribed by the act of Congress of March 3, 1899. § 460 (30 Stat. at L. 1253, 1336, chap. 429), is not an action or suit in which a final judgment can be rendered from which petitioners can appeal to the Supreme Court of the United States, although their petition is coupled with a protest against being compelled to take out such a license. Pacific Steam Whaling Co. v. United States, 253

46. A decree of the court of appeals of the District of Columbia, which reverses so much of an order of the supreme court of that District as is appealed from, and remands the cause to that court, with directions to vacate that portion of the order, and for such further proceedings in the cause according to law as may be right and just, is not final so as to be within the appellate jurisdiction of the Supreme Court of the United States. Macfarland v. Byrnes, 162

47. A decree of the court of appeals of the District of Columbia, which reversed an order of the supreme court of that District in condemnation proceedings, and remanded the cause to that court, "that proceedings may be taken and a jury of twelve ordered as directed by the statute," is not a final decree for the purpose of an appeal to the Supreme Court of the United States. Macfarland v. Brown, 159

III. THE RECORD.

Adjourning Term of Court for Preparation of, see COURTS, 7.
See also *supra*, 15.

48. An exception to the refusal to give a requested instruction is sufficient to raise the question of the propriety of that portion of the general charge which affirms the contrary of such request. Connecticut Mut. L. Ins. Co. v. Hillmon, 446

49. An exception to the findings of a commissioner as to the damages to be awarded the claimants of vessels unlawfully captured as prize of war, on the ground that they were not warranted by the evidence, is sufficient to open the question as to whether or not such damages were excessive, where all the evidence is attached to the commissioner's report. United States v. The Habana, 900

50. The Supreme Court of the United States, though bound by an agreed statement of facts when reviewing the judgment of a state court, may inquire whether the facts agreed upon support the judgment. Kelley v. Rhoads, 359

51. A recital in an agreed statement, that defendant offered to introduce testimony of a discrimination against negroes in the selection of grand jurors, which was relied upon as the ground for his motion to quash the indictment, will not be taken as true on error to a state court, where such statement was signed "with relation to case as settled by judge," and he stated therein that he overruled the motion because the statement of facts set out in the grounds for quashing the indictment did not appear from the records or otherwise, and that in the absence of any showing to the contrary he was bound to assume that the jury commissioners had done their duty, and the record discloses no exception to the supposed refusal to hear the proffered evidence, and no contention in that regard on the appeal to the state supreme court. Brownfield v. South Carolina, 882

52. A second application for removal to a Federal court raising the issue of fraudulent joinder of defendants, when made after a ruling sustaining, in favor of one of two defendants, a demurrer to the evidence, cannot be regarded as erroneously denied by a state court, where the evidence demurred to is not made part of the record, and this issue was first raised on the second application, without stating when the petitioner first learned of the fraud, and the averments of fraud were specifically denied, and, so far as the record discloses, the petitioner, who had the affirmative of the issue failed to make out its case. Kansas City Suburban Belt R. Co. v. Herman, 76

IV. DISMISSAL.

Mandamus to Compel Reinstatement of Appeal, see MANDAMUS, 1.

53. A writ of error to review the judgment of a state court in an action for usurpation of public office, instituted under Shannon's (Tenn.) Code 1896, §§ 5165 *et seq.*, on the relation of persons superseded therein by a legislative act challenged as unconstitutional, will be dismissed where the terms of office of all the parties to the suit, both relators and defendants, have expired. Tennessee *ex rel.* Maloney v. Condon, 709

54. The dismissal of an appeal from an order of a United States circuit court dismissing writs of habeas corpus to inquire into a detention under a warrant of arrest issued in extradition proceedings is not required because of the pendency, as appears on the argument of such appeal, of proceedings on a second complaint by the demanding government, which reiterates the original charge with some amplification, and charges an additional offense. Wright v. Henkel, 948

55. A writ of error from the Supreme Court of the United States to a state court will be dismissed for want of jurisdiction, where no claim of Federal right was specially set up or called to the attention of the state court in any way. Onondaga Nation v. Thacher, 826

56. A writ of error to review a judgment of a state court adverse to a title claimed under a Spanish grant alleged to have been perfected under the treaty with Spain of February 22, 1819 (8 Stat. at L. 252), and a patent from the United States in alleged confirmation of such claim, will not be dismissed where the Federal questions so raised cannot be considered as frivolous and undeserving of notice. Mobile Transp. Co. v. Mobile, 266

57. The dismissal on motion of a writ of error to the supreme court of the territory of Hawaii, which is governed by the principles controlling writs of error to state courts, will be ordered, instead of granting a motion to affirm, where the subject-matter of the controversy is not inherently Federal, and the only Federal question raised has been so explicitly decided by the Supreme Court of the United States in accordance with the ruling of the lower court as to foreclose further argument on the subject. Equitable L. Assur. Soc. v. Brown, 190

V. HEARING AND DETERMINATION.

a. *In General.*

Refusal to Review Question Whether Officers in Charge of Jury Sworn, see CONSTITUTIONAL LAW, 20.

58. The construction by a state court of a law of the state as authorizing the court to try and determine in a condemnation proceeding an adverse claim of the plaintiff therein to an interest in the property sought to be condemned is conclusive on the Supreme Court of the United States on writ of error to that court. Hooker v. Los Angeles, 487

59. The jurisdiction of the Supreme Court of the United States to consider the whole case on a direct appeal from a circuit court taken under the act of March 3, 1891, chap. 517, § 5 (26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549), in a case in which a state Constitution is claimed to violate the Constitution of the United States, cannot be narrowed to a review of the question of the jurisdiction of the circuit court as a court of the United States, by a certificate of the circuit judge which raises that single question. Giles v. Harris, 909

b. *Discretionary Matters.*

60. The discretion of the trial court in permitting the cross-examination of a witness to be extended beyond the limits of his direct examination will not be reviewed on appeal. Fourth Nat. Bank v. Albaugh, 673

61. The refusal of the trial court to vacate a decree because of the incompetency of a juror, first discovered after verdict and judgment, is not an abuse of its discretion in the premises, where the verdict rendered was the only one which could be rendered consistently with the facts. Raub v. Carpenter, 119

62. The refusal to discharge a jury and postpone the trial because of the misleading effect of rulings admitting testimony on the question of damages, afterwards excluded from the consideration of the jury, is not an abuse of discretion, where no witnesses had been discharged, nor any books or documents in possession of counsel sent away, during the trial, and there was no offer at the time to present further testimony. Fidelity & D. Co. v. L. Bucki & Son Lumber Co., 744

c. *Objections Not Taken Below.*

63. Objections to the validity of an assignment for the benefit of creditors for want of acceptance, and to the form of the judgment, cannot be raised for the first time in the Supreme Court of the United States. Robinson v. Belt, 65

64. The absence of averments, in a bill in a circuit court of the United States, showing that the jurisdictional amount was in dispute, is not available on an appeal to the Supreme Court of the United States, which raises the question of the jurisdiction of the lower court on another ground, where no objection to the admission of such allegations was made in that court. Giles v. Harris, 909

d. *Objections Waived or Cured Below.*

65. The objection that plaintiff on the trial of two consolidated cases was allowed

six, instead of three, peremptory challenges, is not available to a defendant who used but two of the three peremptory challenges to which, under U. S. Rev. Stat. § 815 (U. S. Comp. Stat. 1901, p. 629), it was entitled. Connecticut Mut. L. Ins. Co. v. Hillmon, 446

66. The right of defendant to object that a juror was disqualified because it appeared during the trial that he had been convicted of a felony, contrary to his statement on his *voir dire*, is waived by failure to raise the question until after verdict. Queenan v. Oklahoma, 1175

67. Caveators who appear and go to trial in a proceeding to probate a will, without seeking further time for the purpose of securing additional testimony or preparing for the hearing, cannot claim to have been prejudiced by a defect in a notice of publication. Leach v. Burr, 567

e. *Findings of Fact.*

68. The evidence upon which the findings of fact in a state court rest cannot be reviewed by the Supreme Court of the United States on writ of error to the state court. Thayer v. Spratt, 845

69. Findings of fact or questions of local law upon which depends a party's right, under U. S. Rev. Stat. § 2339 (U. S. Comp. Stat. 1901, p. 1437), to the protection of vested water rights, are not reviewable in the Supreme Court of the United States on writ of error to a state court. Telluride Power Transmission Co. v. Rio Grande Western R. Co. 307

70. The disputed facts involved in concurrent findings of a master and both the circuit court and the circuit court of appeals that a society had not been dissolved, either by the consent of its members or by the abandonment of the purpose for which it was founded, will not be reviewed by the Supreme Court of the United States. Schwartz v. Duss, 53

71. A finding of the court of private land claims, that "the evidence as to the settlement and occupation of the tract purporting to have been granted, continuity of possession, cultivation, residence, improvement, claim of ownership, notoriety of the grant, and knowledge of the existence in the community or by the oldest inhabitants now living is so vague, contradictory, and uncertain as to be almost wholly wanting," will, in the absence of clear evidence to the contrary, be adopted on appeal by the Supreme Court of the United States. Sena v. United States, 787

f. *What Errors Warrant Reversal.*

See also STATUTES, 8.

72. The denial of an application for bail in foreign extradition proceedings, supported by the affidavit of petitioner's physician that he was suffering from bronchitis and a severe chill which might develop into pneumonia, and that the confinement tended greatly to injure his health and to result in serious impairment, is not reversible error, although the refusal was put upon the ground of the want of power. Wright v. Henkel, 948

73. The decision of a state court that a charter exemption from taxation of the property, of whatever kind and description, belonging or appertaining to a theological seminary, does not include property owned, rented, or held by it as an investment, but not used in immediate connection with the seminary, although the income thereof is used only for the purposes of the school, is not so obviously erroneous as to require reversal by the Supreme Court of the United States because the charter provides that the act "shall be construed liberally in all courts for the purposes therein expressed." Chicago Theological Sem. v. Illinois ex rel. Raymond, 641

74. Error, if any, committed by a court in declining jurisdiction of an appeal from an order overruling a motion to vacate a judgment dismissing the case for want of prosecution does not require reversal or modification in the Supreme Court of the United States, where, if the court had entertained jurisdiction, it must have affirmed the order appealed from. Tubman v. Baltimore & O. R. Co. 946

75. A ruling in a suit on a policy of life insurance, sustaining demurrers to pleas of breach of warranty with respect to the insured's use of intoxicating liquors, is not prejudicial, even though erroneous, where the jury found for plaintiff under the instructions that, if they found the insured's answers on that subject to be untrue, they should find for defendant. Home L. Ins. Co. v. Fisher, 667

76. Permitting the deposition of a witness to be read when the witness is actually in court and his presence is known is not prejudicial error, where he is subsequently called by the objecting party, and gives fully his explanation of the deposition and his testimony as to the subject to which it relates. Texas & P. R. Co. v. Watson, 1057

77. To charge the jury that the authority of a bank cashier to draw a draft in his official capacity in his individual favor may be implied from the course of previous business is error which requires the reversal of a judgment which sustains the right of a collecting bank to retain the proceeds in payment of his individual debt, where such draft was in fact not drawn to his individual order, but by him as cashier to his order as cashier, and indorsed for deposit to his credit as cashier. Rankin v. Chase Nat. Bank, 594

78. The refusal of a requested instruction which singles out certain testimony as determinative of a reasonable doubt of guilt is not error, even if such instruction be a correct one, where the whole case is submitted to the jury. Bird v. United States, 100

VI. JUDGMENT.

79. The circuit court of appeals in reversing an order of a circuit court granting upon *ex parte* affidavits a preliminary injunction in a suit for the infringement of a patent should not dismiss the bill, where complainants apparently had no opportunity, previous to the hearing in the lower court, to inspect the affidavits filed by defendants, and was granted no leave to rebut them. Brill v. Peckham Motor Truck & Wheel Co. 706

80. A mandate from the Supreme Court of the United States, which directs the entry of a decree in conformity with its opinion dividing the damages caused in a collision between vessels held in fault, but leaving undisturbed a judgment obtained by the owners of the cargo against one of such vessels for the full amount of their damages, does not require that such decree provide for the recoupment by the latter vessel of one half of the damages to such cargo from the moiety of damages awarded to the other vessel. Union Steamboat Co. v. Erie & W. Transp. Co. 854

**APPEARANCE.**
By Nonresident Defendant in Divorce Suit, see HUSBAND AND WIFE.

**APPROPRIATION.**
For French Spoliation Claims, see CLAIMS, 2.

**ARBITRATION.**
An award signed by two of the three members of a commission appointed to determine the amount of the indemnity to be paid by the Republic of Colombia to the assignee of a railroad concession in exchange for the surrender of the concession and railroad cannot be defeated by that government because its commissioner resigned after the discussions were closed, where the commission had, at the outset, resolved, under the power given to it by the submission agreement to determine the procedure to be followed, that a majority vote should govern, —especially where possession of the railroad was surrendered to the government pursuant to the terms of the submission. Colombia v. Cauca Co. 1159

**ARMY.**
1. The settled practice of the War Department to deny an officer discharged at his own request the travel pay and commutation of subsistence from the place of discharge to the place of enrollment, allowable by U. S. Rev. Stat. § 1289 (U. S. Comp. Stat. 1901, p. 915), as amended by the act of February 27, 1877, chap. 69 (19 Stat. at L. 243, 244), "when an officer is discharged from the service except by way of punishment for an offense," is not so clearly erroneous as to justify the courts in construing such provision as including a discharge on resignation. United States v. Sweet, 907

2. An enlisted man in the Volunteer Army of the United States, who has been discharged on his own application, is not entitled to recover the travel pay and commutation of subsistence from the place of his discharge to the place of his enrollment, which are allowable by U. S. Rev. Stat. § 1290 (U. S. Comp. Stat. 1901, p. 916), when discharged from the service except by way of punishment for an offense. United States v. Barnett, 908

**ASSESSMENT INSURANCE COMPANY.**
See INSURANCE, 1.

**ASSESSMENTS.**
On Stockholders, see CORPORATIONS, 1–4.

**ASSETS.**
Of Bankrupt, see BANKRUPTCY, 8.

**ASSIGNMENT FOR CREDITORS.**
First Objecting to Validity of, see APPEAL AND ERROR, 63.
Claims of Assignee against Assignor's Estate in Bankruptcy, see BANKRUPTCY, 12–20.
Effect of Bankruptcy Proceedings on, see BANKRUPTCY, 9, 10.
Law Governing Validity of, see CONFLICT OF LAWS, 3.
Admissibility of Declarations of Trustee in, see EVIDENCE, 12.

**ASSOCIATIONS.**
Presumption of Discharge of Obligation to Deceased Members by, see EVIDENCE, 3, 4.
Resulting Trust in Property for Benefit of, see TRUSTS, 1.

**ASSUMPSIT.**
For Money Paid on Contract Rescinded for Fraud, see CONTRACTS, 2.

One who has in good faith received currency in payment of an existing debt cannot be compelled to make repayment because it subsequently appears that such currency had been embezzled by the one who made the payment. Rankin v. Chase Nat. Bank, 594

**ASSUMPTION OF RISK.**
By Servant, see MASTER AND SERVANT, 2.

**ATTACHMENT.**
Amount of Recovery on Bond in, see DAMAGES, 2, 3.

**ATTORNEY GENERAL.**
Jurisdiction over Successors in Office of, see COURTS, 11.
Jurisdiction of Suit to Enjoin, see COURTS, 23.

**ATTORNEYS.**
Claim for Services in Unsuccessfully Resisting Bankruptcy Proceedings against Assignors for Creditors, see BANKRUPTCY, 12.
Contempt by, see CONTEMPT.

**ATTORNEYS' FEES.**
Against Insurance Company, see CONSTITUTIONAL LAW, 3, 10.
In Dissolving Attachment, as Element of Damages, see DAMAGES, 3.

**AWARD.**
By Majority of Arbitrators, see ARBITRATION.

**BAIL.**
In Foreign Extradition Proceedings, see APPEAL AND ERROR, 72.
Surety on Bankrupt's Bail Bond, see BANKRUPTCY, 1, 3.

**BANKRUPTCY.**
Mode of Reviewing Judgment in Proceedings in, see APPEAL AND ERROR, 1.
Contempt of Bankruptcy Court, see CONTEMPT.

1. The surety on a bankrupt's bail bond, in whose hands property was deposited by the bankrupt to indemnify him for his liability, is an adverse claimant within the meaning of the bankruptcy act of 1898, §§ 23*a*, *b* (30 Stat. at L. 552, chap. 541, U. S. Comp. Stat. 1901, p. 3431), and cannot be proceeded against in the bankruptcy court unless by his consent, as provided for therein. Jaquith v. Rowley, 620

2. A petition filed in a bankruptcy court by creditors of the bankrupt, asserting a lien on the proceeds of a seat in the stock exchange, which had not been insisted upon because they had collected their claims by what they mistakenly supposed were valid attachments of the bankrupt's property, is a bankruptcy proceeding under the bankruptcy act of 1898, § 2, cl. 7, within the meaning of § 25, regulating appeals in bankruptcy proceedings, and a decree thereon is, therefore, not an independent ground of appeal, where it was not, within the meaning of § 25*a*, 3, "a judgment allowing or rejecting a debt or claim of $500 or over." Hutchinson v. Otis, 1179

**Jurisdiction.**

3. A court of bankruptcy is without jurisdiction to enjoin the plaintiffs in suits against the bankrupt in the state courts from collecting their judgments from the surety on the bankrupt's bail bond. Jaquith v. Rowley, 620

4. A court of bankruptcy is without jurisdiction to enjoin further proceedings under the judgment of a state court in a judgment creditors' action commenced before the passage of the bankruptcy act, which set aside as fraudulent certain transfers of property made by the bankrupt, and directed the payment of the amount of the judgments out of the proceeds of a sale of the judgment debtor's property under an order of the state court. Metcalf Bros. & Co. v. Barker, 122

5. A suit to enjoin the further prosecution in a state court of a long pending suit by a judgment creditor to have a deed set aside as fraudulent, and the property described therein sold and the proceeds applied to the payment of the judgment and the satisfaction of the liens existing against the property, is not within the jurisdiction of a court of bankruptcy,—especially where instituted by the bankrupt himself. Pickens v. Roy, 128

6. The jurisdiction of a state court over a suit by a judgment creditor to set aside a deed as fraudulent is not lost by the action of the complainant in proving up her judgment as a preferred debt before the referee in bankruptcy proceedings; nor does such action amount to her consent to the exercise by a court of bankruptcy of jurisdiction to enjoin further proceedings in the state court. Id.

7. A court of bankruptcy has no jurisdiction to enforce, against the bankrupt's exemption, the rights of unsecured creditors whose evidences of indebtedness contain the waiver of homestead and exemption authorized by the state Constitution and laws, by reason of the authority conferred upon such court by the bankruptcy act of 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), to control exempt property, in order to set it aside, and thus exclude it from the assets of the bankrupt's estate to be administered. Lockwood v. Exchange Bank of Fort Valley, 1061

**Assets of bankrupt.**

8. The membership of a bankrupt in the Philadelphia Stock Exchange, which has a considerable vendible value, the purchaser taking it subject to his election by the exchange and certain other conditions, is property of the bankrupt within the meaning of the bankruptcy act of 1898, § 70 (30 Stat. at L. 566, chap. 541, U. S. Comp. Stat. 1901, p. 3451), vesting the trustee with the title of the bankrupt to "property which, prior to the filing of the petition, he could by any means have transferred." Page v. Edmunds, 318

**Preferences.**

9. A general deed of assignment is so far avoided by an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment as to defeat the right of any claim against the bankrupt's estate to the preference given by such deed. Randolph v. Scruggs, 1165

10. Claims for services rendered to the assignee in a general deed of assignment prior to an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment are preferred claims against the bankrupt's estate to the same extent as if the assignee had paid the claims. Id.

11. Payments by the vendees on a running account for goods which were sold and delivered after they had become insolvent, when received by the vendor in the regular course of business and without idea or intention on his part of obtaining a preference thereby, are not, though made within four months before the petition in bank-

ruptcy was filed for such vendees, preferences within the meaning of the bankruptcy act of 1898, § 60 (30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3445), which must be surrendered, under § 57*g*, before the vendor's claim for the balance due can be allowed. Jaquith v. Alden, 717

**Claims or liens against estate.**

12. A claim for legal services rendered to the assignee in a general deed of assignment in unsuccessfully resisting an adjudication of bankruptcy against his assignor on a petition filed within four months after the making of the assignment is not provable against the bankrupt's estate. Randolph v. Scruggs, 1165

13. A charge for the preparation of a general deed of assignment which is avoided by an adjudication in bankruptcy against the assignor on a petition filed within four months after the making of the assignment may be proved as an unsecured claim against the bankrupt's estate. Id.

14. An assignee in a general deed of assignment which has been avoided by an adjudication in bankruptcy against his assignor on a petition filed within four months after the making of the assignment has a lien on the bankrupt's estate for the sums paid by him for such services rendered to him prior to such adjudication as were beneficial to the estate. Id.

15. Creditors of a bankrupt who fail to insist upon a lien on proceeds of a seat in a stock exchange which had formerly belonged to the bankrupt, because they have collected their claims by what they mistakenly supposed were valid attachments of the bankrupt's property, are entitled to have such lien allowed in the bankruptcy court, where no one has changed his position on the faith of their waiver. Hutchinson v. Otis, 1179

16. Judgment creditors of a bankrupt by commencing a judgment creditors' action more than four months before the petition in bankruptcy is filed acquire a lien on the property of the bankrupt, of which they are not deprived by the bankruptcy act of July 1, 1898, § 67*f*, because the judgment enforcing the lien is recovered less than four months prior to the filing of such petition, although by that section all judgments obtained against a bankrupt within that period are avoided, as this provision must be regarded as referring only to judgments creating liens, and not to judgments which enforce an otherwise valid pre-existing lien. Metcalf Bros. & Co. v. Barker, 122

17. The proceeds in the hands of a sheriff, realized from a sale under an execution, are released from the claim of the execution creditor by the filing of a petition in bankruptcy against the debtor within four months after the judgment is rendered, by virtue of the provisions of the bankruptcy act of 1898, § 7, subd. f (30 Stat. at L. 544, 565, chap. 541, U. S. Comp. Stat. 1901, p. 3450), that all liens obtained against an insolvent through legal proceedings within four months prior to the filing of a petition in bankruptcy against him "shall be deemed null and void in case he is adjudged a bankrupt," and that the property affected thereby shall be deemed wholly discharged and released therefrom. Clarke v. Larremore, 555

18. Creditors of a bankrupt, who had collected their claim by attachments in suits begun less than four months before the filing of the petition in bankruptcy, are, notwithstanding the entry of satisfaction of record in such suits, entitled to have the proof of their claim against the bankrupt's estate allowed, where on demand of the trustee in bankruptcy they subsequently paid over to him the full amount of the debts, although the payment, for convenience of counsel, was delayed for a day or two beyond one year after the adjudication in bankruptcy. Hutchinson v. Otis, 1179

19. An amended proof of claim against a bankrupt's estate, filed with the trustee's consent more than a year after adjudication, may be substituted for the defective original proof, although by the bankruptcy act of 1898, § 57*n* (30 Stat. at L. 561, chap. 541, U. S. Comp. Stat. 1901, p. 3418), proofs subsequent to one year after adjudication are forbidden. Id.

20. A court of bankruptcy may allow an amended proof of claim against a bankrupt's estate, filed with the trustee's consent, to be substituted for the defective original proof, although an appeal has been taken by the trustee to the circuit court of appeals from a decree of such court permitting the owners of the claim to prove as creditors. Id.

**Exemptions.**

See also *supra*, 7.

21. A seat in a stock exchange having a considerable vendible value, which, if exempted from liability to satisfy the debts of its owner, is so exempted by decisions of the state courts which do not rest on any exemption by reason of a state statute, but upon definitions of property, will not be deemed exempt under the bankruptcy act of 1898 (30 Stat. at L. 566, chap. 541, U. S. Comp. Stat. 1901, p. 3451), by virtue of the provision of § 6 of that act, which allows to bankrupts the exemptions prescribed by the state laws in force at the time of filing the petition in bankruptcy. Page v. Edmunds, 318

**Discharge.**

22. A father is not relieved by his discharge in bankruptcy from his liability under an agreement to pay his divorced wife a certain sum yearly for the support of his children during their minority. Dunbar v. Dunbar, 1084

23. A discharge in bankruptcy is no bar to a claim under an agreement by a bankrupt to pay an annuity to his divorced wife "during her life or until she remarries," since, by reason of the substantial impossibility of estimating the value of the contingency of a remarriage, such a contract is

not provable under the provisions of the bankruptcy act of 1898, § 63*a* (30 Stat. at L. 562, chap. 541, U. S. Comp. Stat. 1901, p. 3447), for the proving, *inter alia*, of a fixed liability owing at the time of the filing of the petition in bankruptcy, whether then payable or not, and of debts which are "founded upon an open account or upon a contract express or implied." Id.

**BANKS.**

Instruction as to Cashier's Authority, see APPEAL AND ERROR, 77.

Conclusiveness of Judgment Sustaining Exemption of, from Taxation, see JUDGMENT, 3.

1. So far as Iowa Code, §§ 1884, 1885, attempts to prohibit national banks from receiving deposits when insolvent, and prescribes a punishment for a violation of such prohibition by any officer or agent thereof, it is invalid as an attempt to control and regulate the business operations of national banks. Easton v. Iowa, 452

**Stockholders.**

Liability of Pledgee as Shareholder, see CORPORATIONS, 8.

Admissibility of Memorandum as to Pledge of Stock, see EVIDENCE, 6, 7.

Presumption of Liability for Assessment, see EVIDENCE, 15.

Estoppel of Pledgee to Deny Liability as, see TRIAL, 6.

2. The insolvency of the purchaser of shares of stock of a national bank which subsequently suspends business does not render the sale void as in fraud of the bank's creditors, where the insolvency of the purchaser is unknown to the seller. Earle v. Carson, 373

3. A transfer of stock of a national bank, made with knowledge of the fact that the reserve of the bank is below the limit fixed by U. S. Rev. Stat. § 5191 (U. S. Comp. Stat. 1901, p. 3486), does not create a presumption of bad faith which will avoid the transaction as a fraud on the bank's creditors in the event of the future suspension of the bank, since the statute creates no presumption of inability to continue business as a consequence of a reduction of the reserve below the legal requirement. Id.

4. A bona fide sale of stock of a national bank, made in the exercise of the power given to stockholders by U. S. Rev. Stat. § 5139 (U. S. Comp. Stat. 1901, p. 3461), to transfer their stock "like other personal property," was not void as a fraud on the bank's creditors because the bank was insolvent at the time of the transfer in the sense that its assets were then unequal to the discharge of its liabilities, when such fact was unknown to the seller of the stock at the time of the sale. Id.

**BARGES.**

As Subject of Capture, see PRIZE, 4.

**BENEVOLENT SOCIETIES.**

Presumption as to Discharge of Obligations to Deceased Members by, see EVIDENCE, 3, 4.

Resulting Trust in Property for Benefit of, see TRUSTS, 1.

**BONA FIDE PURCHASERS.**

Of Forfeited Land from Railroad Company, see CLOUD ON TITLE.

Of Railroad-Aid Bonds, see BONDS, 5.

**BONDS.**

Amount of Recovery on, see DAMAGES, 2–6.

Of Superintendent of Mint, Extent of Liability on, see DAMAGES, 4–6.

Exemption of, from Stamp Tax, see INTERNAL REVENUE.

Absolute Judgment against Administrator of Surety on, see JUDGMENT, 1.

Of Treasurer, Judgment in Action on, see PLEADING, 4, 5.

1. The destruction of moneys in the custody of the superintendent of the Mint at New Orleans by a fire occurring without his fault or negligence is no defense to a suit upon his official bond, conditioned for the faithful discharge of his duties according to the laws of the United States, which require him safely to keep such moneys as come to his hands by virtue of his office. Smythe v. United States, 425

**Railroad-aid bonds.**

Impairment of Obligation as to, see CONTRACTS, 11.

Conclusiveness of State Decisions as to, see COURTS, 30.

2. Purchasers of county bonds purporting to be issued for subscriptions to the capital stock of a railroad company, under the authority of N. C. Code, §§ 1996–1999, authorizing such subscriptions when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest, are not entitled to assume, for the purpose of sustaining the validity of the bonds, that the railroad had been begun before the adoption of N. C. Const. 1868, which antedated the charter of the railroad company. Stanly County Comrs. v. Coler, 1126

3. An interest in an unfinished railroad begun before the adoption of N. C. Const. 1868, cannot be deemed essential to the exercise by a county of the power to issue bonds in aid of railroad construction, conferred by N. C. Code, §§ 1996–1999, "when necessary to aid in the completion of any railroad in which the citizens of the county may have an interest," on the theory that such sections, being a reproduction of a statute passed shortly after the adoption of such Constitution, must be construed in the light of the constitutional provision which forbade the state to lend its aid to any corporation except in aid of the completion of such railroads as might be unfinished at the time of its adoption, or in which the state had a direct pecuniary interest. Id.

4. Any county near or through which a railroad running *via* Salem and Winston, North Carolina, in the direction of some point in the northwestern boundary line of that state, might pass, was authorized to take, and pay for in county bonds, capital stock of the Northwestern North Carolina Railroad Company, by the North Carolina Ordinance of March 8, 1868, incorporating such company for the purpose of constructing a line *via* Salem and Winston "to some point in the northwestern boundary line of the state, to be hereafter determined," and providing that counties subscribing stock to such company should do so in the same manner and subject to the same restrictions as were prescribed by N. C. Laws 1852, chap. 136, which empowered any county near or through which the railroad incorporated by that act should pass to subscribe for its stock, payable in county bonds. Wilkes County Comrs. v. Cbler, 971

5. Recitals in county bonds that they were issued, under the authority of N. C. Code, §§ 1996–1999, to pay a subscription to the capital stock of a railway, entitled bona fide purchasers to assume that the condition of the railroad as to construction and the "interest" of the county therein were such as, by § 1996, were required to exist before the power to issue such bonds could be exercised. Id.

**BOUNDARY.**

Between Mining Claims, see ESTOPPEL, 1.

The boundary line between the states of Tennessee and Virginia is established as described and delineated in the report of commissioners appointed to retrace and remark such line, with the modification necessitated by the compact with reference thereto expressed in Tenn. act January 28, 1901, and Va. act February 9, 1901, and assented to by Congress by joint resolution of March 3, 1901 (31 Stat. at L. 1465). Tennessee v. Virginia, 956

**BOUNTY.**

On Sugar, see DUTIES, 2.
For Destruction of Enemy's Vessels, see PRIZE, 1, 2, 5, 6.

**BRIBERY.**

Of Negro Voters, see STATUTES, 5; VOTERS, AND ELECTIONS, 1.

**BUILDING AND LOAN ASSOCIATIONS.**

Foreign, see CORPORATIONS, 14.
Foreign; Effect of Foreign Judgment as to, see JUDGMENT, 7.

1. An absolute promise by a building and loan association to mature its shares in a specified time is not changed to a conditional one dependent upon the success of the enterprise, by the shareholder's agreement, as expressed in the certificate of stock, to pay a specified monthly instalment on each share until it matures or is withdrawn, and the provision of the by-laws, accepted by him, that such instalment shall be paid until each share is fully paid. Eastern Bldg. & L. Asso. v. Williamson, 735

2. The defense that an absolute promise, contained in a certificate of stock issued by a building and loan association incorporated under the laws of the state of New York, to mature its shares in a specified time, was *ultra vires* the corporation, is not available in an action on such promise by a shareholder who has in good faith fully performed his part of the contract. Id.

3. The undertaking of a building and loan association to mature certain shares of its stock in a specified time is not affected by the fact that the holder of such shares obtained a loan from the association on the security of his shares after the by-laws of the corporation had been amended to provide that its stock should mature and be payable when the dues paid thereon, with the apportioned profits, equaled the par value thereof. Id.

**BUILDINGS.**

Restriction on Height of, see CONSTITUTIONAL LAW, 18.

**BURDEN OF PROOF.**

See EVIDENCE, 1–4.

**BUSINESS.**

By Foreign Corporation, see CORPORATIONS, 12–14.

**BUTLER.**

Charles Henry, appointment as Supreme Court Reporter. 1197

**CALLS.**

On Stockholders, see CORPORATIONS, 3.

**CANAL.**

Defense to Suit for Surplus Moneys above Cost of, see LIMITATION OF ACTIONS.
See also SHIP CANAL.

**CAPTURE.**

See PRIZE.

**CARRIERS.**

Governmental Control of, see also COMMERCE, 6, 7.
Jurisdiction as to Rates, see COURTS, 11.
Jurisdiction of Suit to Enjoin Enforcement of Unlawful Statute as to Rates, see COURTS, 23.
Suit to Prevent Enforcement of Act Fixing Rate, see STATE.

1. Freight rates from New Orleans, Louisiana, to LaGrange, Georgia, arrived at by charging the through rate to Atlanta, Georgia, fixed as the result of competition at that point, and adding thereto the local rate back over the same line from Atlanta to LaGrange, are not obnoxious to the prohibition of the Interstate Commerce Act against undue discrimination and a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions, because stations between

LaGrange and Atlanta to which the same rule is applied receive lower rates from New Orleans than LaGrange, where the LaGrange rates, if based on the nearest competitive point south, with the local rate from such point added, would be still higher. Interstate Commerce Commission v. Louisville & N. R. Co 1047

2. The possibility of competition arising at a particular point does not render freight rates to that point, though higher than those for a longer haul to a point where competition prevails, obnoxious to the prohibition of the Interstate Commerce Act against a greater charge for a shorter than for a longer haul under substantially similar circumstances and conditions. Id.

**CASES CERTIFIED.**
Certiorari, see CERTIORARI.

**CASHIER.**
Instruction as to Authority of, see APPEAL AND ERROR, 77.

**CATTLE.**
Prohibiting Importation of Diseased Cattle, see COMMERCE, 8, 9.

**CERTIFICATE.**
That Federal Question Involved, Effect, see APPEAL AND ERROR, 15.
Of Trial Judge as to Questions Involved, see APPEAL AND ERROR, 59.

**CERTIORARI.**

1. Certiorari to the circuit court of appeals, sought because of the apprehension that a writ of error was improperly sued out, will not be granted where the judgment sought to be reviewed was rendered December 7, 1900, a rehearing denied February 23, 1901, the writ of error brought April 15, 1901, and the record filed and case docketed April 29, 1901, and the motion for such certiorari was not made until October 9, 1902. Ayres v. Polsdorfer, 314

2. A writ of certiorari to the circuit court of appeals may be allowed by the Supreme Court of the United States under the judiciary act of March 3, 1891, where the cause has been improperly brought up by writ of error; and in such case the copy of the record filed under the writ of error may be directed to be taken and deemed a sufficient return to the certiorari. Security Trust Co. v. Dent, 158

**CESSION.**
Of Philippines, see PHILIPPINE ISLANDS, 3, 4.

**CHALLENGES.**
Waiver of Objection as to, see APPEAL AND ERROR, 65.

**CHEROKEE OUTLET.**
Race for Land in, see PUBLIC LANDS, 28.

**CHEROKEES.**
See INDIANS, 1; PLEADING, 13.

**CHROMOLITHOGRAPHIC ADVERTISEMENT.**
As Subject of Copyright, see COPYRIGHT, 3.

**CIRCUIT COURTS.**
Jurisdiction of Appeal from Judgment of, see APPEAL AND ERROR, 8.
Jurisdiction of, see COURTS, 10–23.

**CIRCUIT COURT OF APPEALS.**
Jurisdiction of, on Appeal, see APPEAL AND ERROR, 2.
Jurisdiction of Appeal from Judgment, see APPEAL AND ERROR, 3–6.
Certiorari to, see CERTIORARI.

**CIRCUS POSTERS.**
As Subjects of Copyright, see COPYRIGHT, 3.

**CIVIL RIGHTS.**
Compelling County Board to Enroll Negro Voters, see VOTERS AND ELECTIONS, 2, 3.
Discrimination against Negroes in Selection of Grand Jurors, see APPEAL AND ERROR, 51.
Discrimination against Negroes in Selecting Jury, see CRIMINAL LAW, 3.

**CLAIMS.**
Against Bankrupt's Estate, see BANKRUPTCY, 12–20.

1. Substantial compliance with the requirements of the Comptroller of the Treasury that the original telegrams relating to the business of the Interstate Commerce Commission, or copies thereof, or certificates that such telegrams are of a confidential nature, shall accompany telegraph vouchers for which credit is asked, is made by an order of the Commission, filed by the secretary with his accounts, which directs him to disregard such requirement as to copies of telegrams, and declares that such messages are so far confidential as to justify the refusal to disclose their contents, and that the requirement for their production is unreasonable and against public interest. United States v. Moseley, 198

2. Congress by making an appropriation in the act of March 3, 1899 (30 Stat. at L. 1161, chap. 426, U. S. Comp. Stat. 1901, p. 751), in accordance with the report of the court of claims on certain French spoliation claims, to an administratrix "representing" a designated firm, and a similar appropriation to the same person as administratrix of the estate of a person designated as "the surviving partner" of such firm, cannot be deemed thereby to have determined that the next of kin of such surviving partner should share in the distribution, where such administratrix represented in the court of claims all the interested parties, and that court mistakenly supposed such surviving partner to have

been a member of the firm at the time of the illegal seizures of its property, but must be regarded as having intended such appropriation for the next of kin of those composing the firm at the time of the seizures, without attempting to identify the particular persons belonging to that class. Buchanan v. Patterson, 1093

**Jurisdiction of court of claims.**

3. Jurisdiction of a petition which raises the question as to the due and proper execution of a prior judgment of the court of claims making an award to the Pottawatomie Indians, but leaving to the Indian Department the identification of the claimants entitled to share in its distribution, was given such court by the act of March 19, 1890 (26 Stat. at L. 24, chap. 39), conferring upon it jurisdiction to try all questions arising out of treaty stipulations between such Indians and the United States, and to render judgment thereon. Pam-to-pee v. United States, 221

4. Jurisdiction over the claims of individual members of the Shawnee tribe of Indians was not included in the grant of jurisdiction to the court of claims by the act of October 1, 1890 (26 Stat. at L. 636, chap. 1249), to hear and determine the rights of the Shawnee Indians to moneys, lands, and rights which may be due to "the said Shawnees" under the treaty of July 19, 1866 (14 Stat. at L. 803), between the United States and the Cherokee Nation, and under articles of agreement between such nation and the Shawnees, Delawares, and Cherokee freedmen, and to moneys due from the United States "to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom;" nor was such jurisdiction conferred by the act of July 6, 1892 (27 Stat. at L. 86, chap. 151); enlarging the scope of the earlier act so as to include all claims of "the Shawnee tribe or band . . . arising out of treaty relations with the United States, rights growing out of such treaties, and from contracts, expressed or implied, under such treaties." Blackfeather v. United States, 1099

**CLERKS.**

Right to Examine Indices of Judgment Records Prepared by, see RECORDS.

**CLOUD ON TITLE.**

Sufficiency of Bill for Removal of, see PLEADING, 8–10.

Bona fide purchasers of forfeited lands from a railroad company, who are not in possession and have not attempted to exercise their right under the act of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 5, to purchase the lands from the United States, are not, by reason of such right to purchase, entitled to maintain an action to quiet title against persons claiming an adverse interest therein. San José Land & Water Co. v. San José Ranch Co. 765

**COLLATERAL-INHERITANCE TAX.**

See TAXES, 10–12.

**COLLIER.**

Right to Share in Prize Money, see PRIZE, 9.

**COLLISION.**

Division of Damages by, see APPEAL AND ERROR, 80.

**COMITY.**

See CONFLICT OF LAWS, 1.

**COMMERCE.**

Retroactive Statute as to, see STATUTES, 8.

Taxation against Persons Engaged in, see TAXES, 6, 7.

**Licenses and taxes.**

1. An ordinance under which a license fee may be required from an agent of a nonresident portrait company, who receives from such company pictures and frames manufactured by it to fill orders previously obtained, and, after breaking bulk and placing each picture in the frame designed for it, delivers them to the respective purchasers, is invalid as an attempt to interfere with and regulate interstate commerce. Caldwell v. North Carolina, 336

2. A telegraph company, though engaged in interstate commerce, may be compelled by a municipality to pay a reasonable license fee for the enforcement of local government supervision of its poles and wires. Atlantic & P. Teleg. Co. v. Philadelphia, 995

3. An ordinance imposing a license fee on telegraph poles and wires within the limits of the municipality is not obnoxious to the commerce clause of the Federal Constitution when applied to poles and wires used for interstate business, although it yields a return in excess of the amount necessary to reimburse the municipality for the cost of supervision and inspection. Western U. Teleg. Co. v. New Hope, 240

4. A flock of 10,000 sheep, which is being driven from the territory of Utah by a direct route across the state of Wyoming to the state of Nebraska at a rate of about 9 miles per day, is the subject of interstate commerce, and is therefore exempt from taxation under Wyo. Laws 1895, chap. 61, authorizing the taxing of live stock brought into the state for grazing purposes, although the sheep may while actually in transit have been permitted incidentally to support themselves by grazing over land ¼ of a mile in width, and might have been transported by rail. Kelley v. Rhoads, 359

5. The privilege tax imposed by Miss. Code 1892, §§ 3317, 3387, on sleeping and palace car companies carrying passengers from one point to another within the state, cannot be deemed an unconstitutional regulation of commerce because of the declaration in Miss. Const. § 195, that sleeping car companies are common carriers and subject to liability as such, where such provision is

regarded by the state courts as imposing no obligation on the company to transport local passengers. Pullman Co. v. Adams, 877

**Interstate transportation.**

6. The railroad commission of Arkansas cannot, without violating the commerce clause of the Federal Constitution, fix and enforce rates for the continuous transportation of goods between two points within the state of Arkansas, where a large part of the route is outside of the state, through the Indian territory or Texas. Hanley v. Kansas City S. R. Co. 333

7. A suit to enjoin a common carrier from discriminating between localities in violation of the Act to Regulate Commerce could not be brought on behalf of the United States by its law officers at the request of the Interstate Commerce Commission prior to the passage of the act of Congress of February 19, 1903, the 3d section of which expressly authorizes the prosecution of such suits. Missouri P. R. Co. v. United States, 811

**Diseased animals.**

8. No unconstitutional burden on interstate commerce is made by the provisions of Colo. Sess. Laws 1885, p. 335, prohibiting the importing of cattle from south of the 36th parallel of north latitude between April 1st and November 1st, unless first kept for ninety days at some place north of that parallel, or unless a certificate of freedom from contagious or infectious disease has been obtained from the state veterinary sanitary board. Reid v. Colorado, 108

9. The subject of transportation of cattle from one state to another is not so far covered by the provisions of the animal industry act of May 29, 1884 (23 Stat. at L. 31, chap. 60; U. S. Comp. Stat. 1901, p. 299), for the investigation and suppression of diseases of cattle, or those relating to the exportation of diseased cattle to ports in foreign countries, and the transportation between the states of live stock known to be diseased, as to preclude the enactment of Colo. Sess. Laws 1885, p. 335, prohibiting the importation of cattle from south of the 36th parallel of north latitude between April 1st and November 1st, unless first kept for ninety days at some place north of that parallel, or unless a certificate of freedom from contagious or infectious disease has been obtained from the state veterinary sanitary board. Id.

**Lottery tickets.**

10. The carriage of lottery tickets from one state to another by an express company engaged in carrying freight and packages from state to state is interstate commerce, which Congress, under its power to regulate, may prohibit by making it an offense against the United States to cause such tickets so to be carried. Champion v. Ames, 492

11. Policy slips written by a customer to indicate his choice of numbers, and delivered by him to an agent of the policy game, to be forwarded by him to headquarters in another state, are not within the provisions of the act of Congress of March 2, 1895, chap. 191 (28 Stat. at L. 963 ;U. S. Comp. Stat. 1901, p. 3178), making it an offense against the United States to cause to be carried from one state to another any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in a lottery. Francis v. United States, 508

**Seamen's wages.**

See also SHIPPING, 4.

12. The restriction on contracts of seamen engaged in interstate or foreign commerce, which is made by the provisions of the act of December 21, 1898, § 24, making it a misdemeanor to pay any seamen wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, is a valid exercise of the power of Congress to regulate commerce. Patterson v. The Eudora, 1002

13. Congress was not without power to provide by the act of December 21, 1898, § 24, that the provisions of that section, making it a misdemeanor to pay any seamen wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, should extend to seamen shipping in an American port on a foreign vessel engaged in interstate commerce. Id.

**COMMISSIONERS.**

Sufficiency of Exceptions to Findings of, see APPEAL AND ERROR, 49.
Jurisdiction over Extradition Proceedings, see EXTRADITION, 4.
Repeal of Statute as to, see STATUTES, 9.

**COMMUNISTIC SOCIETY.**

Presumption as to Discharge of Obligations by, see EVIDENCE, 3, 4.
Resulting Trust in Property for Benefit of, see TRUSTS, 1.

**COMPLAINT.**

In Extradition Proceedings, see EXTRADITION, 5–8.

**COMPTROLLER OF TREASURY.**

Compliance with Requirements of, see CLAIMS, 1.

**CONCESSION.**

Agreement as to Indemnity on Surrender of, see CONTRACTS, 3, 4.

**CONFLICT OF LAWS.**

As to Subscription to Stock in Foreign Corporation, see CORPORATIONS, 5.

1. Whether a state court should permit an action to be maintained therein on the principle of comity between the states is a question exclusively for the courts of that state to decide. Finney v. Guy, 839

2. Whether the patentee of the United States to land bounded on a non-navigable lake belonging to the United States takes title to the adjoining submerged land is de-

termined by the law of the state where the land lies. Hardin v. Shedd, 1156

3. The validity of an assignment for the benefit of creditors which requires a release by creditors as a condition of preference is determinable by the state law as interpreted by its highest courts. Robinson v. Belt, 65

**CONGRESS.**

Powers over Navigable Waters, see APPEAL AND ERROR, 7.
Power over Interstate Commerce, see COMMERCE.
Power over Indians, see INDIANS.
Power to Provide for Punishment for Bribery of Negro Voters, see VOTERS AND ELECTIONS, 1.

**CONSPIRACY.**

Admissibility of Declarations of Parties, see EVIDENCE, 13.

**CONSTITUTIONAL LAW.**

Impairment of Obligation, see CONTRACTS, 5–13.
Extension of Federal Constitution over Philippine Islands, see PHILIPPINE ISLANDS.
Exemption from Taxation, see TAXES, 3–7.
Constitutionality of Transfer Tax, see TAXES, 10–12.
Right to Jury Trial, see TRIAL, 3.

**Ex post facto laws.**

1. The provision against the practice of medicine by unregistered persons, which is made by Mich. Pub. Acts 1899, act No. 237, creating a board of registration in medicine, does not render such act *ex post facto* as to one licensed under a prior act, where provision is made for registration of persons presenting sufficient proof of legal registration under such prior act. Reetz v. Michigan, 563

**Delegation of power.**

2. Congress could lawfully delegate to the Philippine Commission the power to enact laws, including the libel law enacted by it in October, 1901 (Act No. 277, Philippine Commission). United States v. Dorr (Philippine Sup. Ct.) 1187

**Equal protection.**

Uniformity in Taxation, see TAXES, 2.
See also PUBLIC IMPROVEMENTS, 3.

3. The equal protection of the laws is not denied insurance companies by the provisions of Neb. Comp. Stat. chap. 43, §§ 43–45, allowing a reasonable attorney's fee to plaintiff in case of the unsuccessful defense by an insurance company of a suit on a policy of insurance covering real property which has been totally destroyed by the causes insured against. Farmers' & M. Ins. Co. v. Dobney, 821

4. The equal protection of the laws is not denied by the provisions of Ala. Code 1886, § 453, cl. 13, and Code 1896, § 3911, cl. 14, for the taxation of railroad stock, because of the exemption of stock in domestic railroads and in others that list substantially all their property for taxation. Kidd v. Alabama, 669

5. None of the privileges and immunities of citizens of the state of New York are denied the beneficiaries under the will of a nonresident by a tax imposed under the New York inheritance-tax law, on the transfer, under such will, of debts due the decedent by citizens of that state. Blackstone v. Miller, 439

6. The equal protection of the laws is not denied by the Illinois inheritance-tax law because, under that statute as interpreted and enforced by the state courts, certain life estates may be taxed when the remainder is to lineal descendants of the decedent, but not when the remainder is to collateral heirs or strangers in blood. Billings v. Illinois, 400

7. The imposition of a tax, under the New York inheritance-tax law, on the transfer, under the will of a nonresident, of debts due the decedent by residents of that state, does not violate the 14th Amendment to the Federal Constitution. Blackstone v. Miller, 439

8. A state statute under which three fourths of the cost of paving a city street may be assessed upon abutting property in proportion to foot frontage, such assessment to be a lien thereon, is not obnoxious to the 14th Amendment to the Federal Constitution. Chadwick v. Kelly, 293

9. The privileges and immunities of citizens in the several states are not denied by the provisions of Colo. Sess. Laws 1885, p. 335, for the protection of domestic cattle against the communication of disease by cattle from other states, where the statute is equally applicable to citizens of all states. Reid v. Colorado, 108

10. The Texas statute authorizing the recovery of damages and attorneys' fees for failure by life and health insurance companies to pay losses is not repugnant to the guaranty of the equal protection of the laws, made by the Federal Constitution. Iowa L. Ins. Co. v. Lewis, 204

11. The equal protection of the laws is not denied by Cal. Const. art. 4, § 26, avoiding all contracts for the sale of shares of corporate stock on margin, because this provision strikes only at some, and not all, objects of possible speculation. Otis v. Parker, 323

12. Neither due process of law nor the equal protection of the laws is denied a street railway company by an order of the commissioner of railroads made and issued under Mich. Pub. Acts 1893, act No. 171, § 5, requiring such street railway to pay one half of the expense of constructing and maintaining safety appliances at a grade crossing of a steam railroad which was not built until after the street railway had been constructed. Detroit, Ft. W. & B. I. R. Co. v. Osborn, 860

**Due process of law.**

To Whom Invalidity of Act Available, see STATUTES, 1.
See also *supra*, 12; PLEADING, 10; PUBLIC IMPROVEMENTS.

13. Due process of law requires no special

provision for granting a hearing to applicants for registration by the board of registration in medicine created by Mich. Pub. Acts 1899, act No. 237, where such act provides for semiannual meetings of the board at specified times at the state capitol. Reetz v. Michigan, 563

14. The grant to a board of registration in medicine, by Mich. Pub. Acts 1899, act No. 237, of the power to decide whether an applicant for registration had been "legally registered" under a prior statute, with no provision in terms for a review of the proceedings of such board, does not render the act obnoxious to the Federal Constitution. Id.

15. Due process of law in making sales of land for unpaid taxes, even if it requires the observance of all the steps prescribed by a state statute, does not demand that they shall be made matter of record, much less that they shall be made matter of a particular record, such as the return of the sheriff of the sale of the lands. Turpin v. Lemon, 70

16. A Kentucky corporation operating a ferry across the Ohio river is deprived of its property without due process of law by the action of that state in including, for purposes of taxation, in the valuation of the franchise derived by the corporation from Kentucky, the value of an Indiana franchise for a ferry from the Indiana to the Kentucky shore, which such corporation had acquired. Louisville & J. Ferry Co. v. Kentucky, 513

17. Due process of law is not violated by proceedings taken in conformity with a state statute providing that personal property held in trust shall be assessed to the trustee, which requires the assessors to give public notice to the inhabitants to return a list of their personal estates, and, in case of failure to make such return, to ascertain as nearly as possible the particulars of the estate, and estimate its just value, which shall be conclusive upon the owner unless he can show a reasonable excuse for omitting to make his return; and which makes provision for an application to the assessors for an abatement of taxes, and for an appeal to the county commissioners in case of a refusal of the assessors to abate the tax. Glidden v. Harrington, 798

18. Due process of law is not denied the owners of property damaged by the enforcement of a restriction on the height of buildings on certain Boston streets, imposed by Mass. act May 23, 1898, on the theory that the right of action thereby given to recover the damages from the city of Boston "in the manner prescribed by law for obtaining payment for damages by any person whose land is taken in the laying out of a highway" does not afford adequate provision for compensation because the city, not being a party to the taking, is not technically estopped to deny its liability, since such statutory liability is of a character which, under the decisions of the state courts, the legislature may impose on a municipality. Williams v. Parker, 559

19. The right to the due process of law guaranteed by the 14th Amendment to the Federal Constitution is not infringed by the decision of a state court sustaining the validity of the Illinois indeterminate sentence act of 1899, although such statute may confer judicial powers upon nonjudicial officers, and, in effect, invest them with the pardoning power of the Executive. Dreyer v. Illinois, 79

20. The refusal of a state court to review the question whether the officers in charge of the jury on a trial for a felony were sworn, as prescribed by statute, when the jury retired, because such question was first raised on a motion for a new trial, infringes no right secured to the accused by the 14th Amendment to the Federal Constitution, even if the swearing of such officers when the jury retire is essential to the due process of law prescribed by that amendment; but such a ruling is simply an adjudication of a question of criminal practice and local law. Id.

**Liberty to contract.**

21. The liberty of contract guaranteed by U. S. Const. 14th Amend. is not invaded by the provisions of the act of December 21, 1898, § 24, making it a misdemeanor to pay any seaman wages in advance, and declaring that such payment shall not absolve the vessel or its master or owner from full payment of wages actually earned. Patterson v. The Eudora, 1002

22. No unconstitutional interference with the right of contract is made by Cal. Const. art. 4, § 26, avoiding all contracts for sales of shares of corporate stock on margin, and providing for the recovery of any money paid on such contracts, although this provision may be construed to apply to bona fide as well as gambling contracts. Otis v. Parker, 323

**CONSTRUCTION.**

Of Statute, see STATUTES, 5.

**CONSUL.**

Evidence as to Authority of, see EXTRADITION, 12.

**CONTAGIOUS DISEASES.**

Of Animals, see CONSTITUTIONAL LAW, 9.

Prohibiting Importation of Animals Affected with, see COMMERCE, 8.

**CONTEMPT.**

Appeal in Case of, see APPEAL AND ERROR, 9.

Advice of attorneys to a state court, pursuant to which that court compelled the surrender by a receiver in bankruptcy of property which had, without the consent of the state court, been voluntarily turned over to him by a receiver appointed by such court, cannot be deemed to constitute contempt of the bankruptcy court, where there is no evi-

dence that their advice was given otherwise than in good faith and in the discharge of their duty as counsel. Re Watts, 933

**CONTINUANCE.**

Discretion as to Refusing, see APPEAL AND ERROR, 62.

Of Term of Court, see COURTS, 7, 8.

**CONTRACTS.**

Construction, Federal Question as to, see APPEAL AND ERROR, 32.

Act Avoiding Sales of Stocks on Margin, see CONSTITUTIONAL LAW, 11.

Interference with Right of, see CONSTITUTIONAL LAW, 21, 22.

Implied Contract by United States, see COURTS, 13.

Specific Performance of Contract within Statute of Frauds, see SPECIFIC PERFORMANCE.

1. Stipulations and exemptions from liability for loss caused by fire, contained in a lease under which the lessee holds possession and occupancy of a storage platform near a railroad, are not binding on one not in privity with such lessee, who, without knowledge of such stipulations, stores his cotton on such platform. Texas & P. R. Co. v. Watson, 1057

2. The right to recover money paid to a national bank on a contract sought to be rescinded for fraud is not defeated because the parties were attempting a transaction forbidden by law, since to deny the right to rescind is to rely on the contract, which must be accepted, if at all, with the burden of the fraud. National Bank & Loan Co. v. Petrie, 879

3. The salaries and traveling expenses of executive officers of a railway construction company devoting itself solely to the business of building a railroad in the Republic of Colombia, and the office expenses of its New York office, are elements of the indemnity which that Republic agreed, in exchange for the surrender of the concession and the railroad, to pay to the assignee of such concession for the works and labors (*las obras y trabajos*) executed by it, and its expenditures on the works and labors executed by it in the construction of such railroad. Colombia v. Cauca Co. 1159

4. Cash paid by a railway construction company for the purchase of a railway concession granted by the Republic of Colombia, and sums voted by that company to its officers for services in securing an agreement to submit to arbitration the question of the amount of the indemnity to be paid by such Republic to the assignee of the concession in exchange for the latter's surrender of the concession and railroad, for the works and labors (*las obras y trabajos*) executed by it, and expenditures on works and labors executed by it in the construction of the railroad, are not properly allowed as elements of such indemnity. Id.

**Impairment of obligations.**

Federal Question as to, see APPEAL AND ERROR, 33.

Appellate Jurisdiction of Suit Involving, see APPEAL AND ERROR, 8.

5. The obligation of a contract cannot be said to be impaired by a statute in force when the contract was made. Blackstone v. Miller, 439

6. The obligation of a contract which calls for the transaction of business within the state by a foreign corporation which has not filed a copy of its charter with the secretary of state is not impaired by Wis. Stat. 1898, §§ 1770*b*, 4978, making such contracts wholly void on the corporation's behalf, but enforceable against it, although such statute was by its terms not to go into effect until after the contract was entered into,—at least where it was enacted before the contract was made. Diamond Glue Co. v. United States Glue Co. 328

7. A state statute fixing the rate of taxation on the gross receipts of a railroad company, enacted for the purpose of settling by agreement a pending controversy as to a charter right of the company to exemption from taxation, must, notwithstanding its contractual form, be regarded as an amendment to such charter, and therefore subject to repeal by reason of a provision of the state Constitution in force at the time of its passage, reserving the power to repeal, alter, or amend corporate charters. Northern C. R. Co. v. Maryland, 167

8. The obligation of the contract of the state of Texas with a purchaser of public lands was not impaired by Tex. Laws 1897, chap. 37, p. 39, which repealed a statute in force when the contract was made, denying the remedy of forfeiture for nonpayment of interest as agreed upon, and provided such a forfeiture as a remedy, since the prior act did not amount to a contract that the state would not enlarge the remedy, or grant another on account of the purchaser's violation of his contract. Waggoner v. Flack, 609

9. Conceding that by the repeal, as to insurance companies doing business on the assessment plan, of the provisions of Mo. Rev. Stat. 1879, § 5982, that suicide shall be no defense to a suit on a policy of insurance, a provision in a policy issued prior to such repeal, relieving the company from liability in case of suicide, became effective, no impairment of the obligation of such contract was made by a subsequent enactment specially applying the provisions of the former statute to such companies, since all that the later act purported to do was to reinstate the parties in their original rights prior to the repealing act, which rights had not been affected by anything done during the period which had elapsed between the two statutes. Knights Templars' & M. L. Indemnity Co. v. Jarman, 139

10. The obligation of contracts with a municipality is not impaired by subsequent

changes in its charter, which protect it from suit upon claims against it which have not first been presented to the city council and wholly or partly disallowed, either by affirmative action or by the failure of that body for more than sixty days to pass thereon, and provide that disallowance is final and conclusive unless within twenty days an appeal therefrom be perfected to the proper circuit court, in which the case is to be tried as though originally commenced therein. Oshkosh Waterworks Co. v. Oshkosh, 249

11. A purchaser of county bonds issued in aid of a railroad, under the supposed authority of the act incorporating the road, which is subsequently held unconstitutional by the state courts because the provisions for the transfer to the railroad company of municipal subscriptions in aid of another railroad were not within its title, has no contract rights protected by the Federal Constitution against impairment because the purchase was made on the faith of prior decisions that municipal subscriptions to railroad stock were so far germane to railroad incorporation as not to require specific mention in the title of an act providing for the incorporation of a railroad. Zane v. Hamilton County, 858

12. The obligation of contracts between a water company and private consumers by which the latter were to pay for the water in accordance with the rates "now or hereafter in force" is not impaired by a municipal ordinance reducing such rates, enacted in the exercise of the power of the municipality to regulate water rates. Knoxville Water Co. v. Knoxville, 887

13. A provision in a contract between a water company and a municipality, that the company shall supply water to private consumers at a specified rate, does not amount to an implied undertaking by the municipality not to disturb such rates, the obligation of which is impaired by an ordinance reducing them, where the company was incorporated under an act which, while conferring upon it power to charge such rates as might be agreed upon with its consumers, expressly recognized the power of the municipality to regulate water rates. Id.

**COPYRIGHT.**

1. Printing and engraving, though not for a mechanical end, are not excluded from the useful arts, which Congress is empowered by the Constitution to promote by copyright laws. Bleistein v. Donaldson Lithographing Co. 460

2. Pictorial illustrations are none the less within the protection of the copyright law (U. S. Rev. Stat. § 4952, U. S. Comp. Stat. 1901, p. 3406) because they are drawn from real life. Id.

3. Chromolithographic advertisements of a circus, portraying a ballet, a number of persons performing on bicycles, and groups of men and women whitened to represent statues, are proper subjects of copyright, under U. S. Rev. Stat. § 4952 (U. S. Comp. Stat. 1901, p. 3406), as amended by the act of 1874, § 3 (18 Stat. at L. 78, 79, chap. 301, U. S. Comp. Stat. 1901, p. 3412), as "pictorial illustrations," even assuming that only such illustrations as are "connected with the fine arts" are within the protection of such laws. Id.

4. Any copyright protection for a work secured, under the act of February 3, 1831 (4 Stat. at L. 436, chap. 16), by entering for copyright in the name of the publishers the issues of a magazine which contain instalments thereof, is lost by the subsequent publication of the work in book form with no other notice of copyright than that of an entry in the author's name. Mifflin v. R. H. White Co. 1040

5. A copyright of a book, obtained by an author in her own name, is vitiated for failure to comply with the requirement of the act of February 3, 1831, § 5 (4 Stat. at L. 436, chap. 16), that notice of copyright be inserted in each copy of the work, by its subsequent publication, with her consent, in a magazine with no other notice of copyright than that of the entry of the magazine in the name of its publishers. Mifflin v. Dutton, 1043

**CORPORATIONS.**

Impairment of Obligation as to, see CONTRACTS, 6.
Extradition of Directors, see EXTRADITION, 1, 2.
Fraud in Prospectus of, see FRAUD.

**Calls; assessments.**

Presumption of Liability for, see EVIDENCE, 15.

1. Courts cannot, in the absence of fraud, inquire into the necessity for an assessment by the directors of a foreign corporation upon its capital stock. Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. 782

2. A sale or forfeiture of a stockholder's shares in an English corporation is not a condition precedent to the maintenance of an action against him to recover an assessment on the capital stock of the corporation, although a remedy by forfeiture is given by its articles of association. Id.

3. The posting of a notice of a call upon shareholders in an English corporation, in a conspicuous place in the registered office of the company, for more than a month before the call was payable, and the forwarding of a printed notice of the call to a foreign shareholder, are a sufficient compliance with the provisions of the articles of association that notices for a nonresident shareholder who neglects to give his address as therein provided, shall be posted in a conspicuous place in such office, which, for all purposes of the regulations, shall be deemed to be his registered place of abode. Id.

4. An express promise by a stockholder in an English corporation need not be proved in an action to recover an assess-

ment on its capital stock, in view of the promise implied from a subscription to the shares, by 25 & 26 Vict. chap. 89, which declares that all moneys payable by any member in pursuance of the articles of the company shall be deemed a debt due by such member. Id.

**Subscriptions.**

By Counties, see BONDS, 2–5.

5. By subscribing to stock in a foreign corporation the subscriber subjects himself to the laws of the foreign country in respect to the powers and obligations of such corporation. Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. 782

**Action by stockholders.**

6. A stockholder cannot maintain an equitable suit against the corporation, its president, and treasurer, to restrain it from paying certain taxes, where no showing of the residence of the directors, or of any application to them or to such president and treasurer to take action to relieve from the burden of the taxes, is made. Stewart v. Washington & A. S. S. Co. 261

7. A suit in equity by a stockholder against the corporation to restrain it from paying an Alaskan license tax was properly dismissed, where the corporation made no serious defense, and there was no showing of irreparable injury or of any effort to secure action by the corporation or its directors, as is required by equity rule 94, other than a demand on the resident managing agent, the distance of such directors from the place where plaintiff resides and in which the court is held being relied upon as an excuse for not making any further effort. Corbus v. Alaska Treadwell Gold Min. Co. 256

**Liability of stockholders.**

Jurisdiction of Suit to Enforce, see EQUITY, 1, 4.

Admissibility of Evidence as to, see EVIDENCE, 6, 7.

Effect of Foreign Judgment as to, see JUDGMENT, 6.

Right of Receiver to Enforce, see RECEIVERS.

Estoppel of Pledgee to Deny Liability, see TRIAL, 6.

See also BANKS, 2–4.

8. A pledgee of national bank stock which he took as collateral security for a loan is not chargeable with the personal liability for the debts of the bank imposed on "shareholders" by U. S. Rev. Stat. § 5151 (U. S. Comp. Stat. 1901, p. 3465), unless he has either become the owner of the shares in fact, or has held himself out to be the owner, and thereby estopped himself to deny his personal liability as such. Rankin v. Fidelity Ins. T. &. S. D. Co. 792

9. The receiver of the assets of a corporation is not authorized to maintain an action to enforce the liability of a stockholder, by Kan. Gen. Stat. 1868, §§ 32, 44, since that act made the liability of the stockholder, not an asset of the corporation, but an asset which a creditor of the corporation alone could recover for his individual benefit to the extent required to pay a judgment obtained by him against the corporation. Evans v. Nellis, 173

10. The remedy against a stockholder of an insolvent corporation, given to the receiver of its assets by Kan. Laws 1899, chap. 10, cannot be enforced until such receiver has first brought suit against the corporation and all resident stockholders, in order to fix the sum required to pay the corporate debts. Id.

11. A Federal court cannot enforce the statutory liability of a nonresident stockholder of a foreign corporation at the suit of a receiver of its assets, where the latter has not first taken the steps which the statutes of the state, as construed by its courts, make a prerequisite to any action against an individual stockholder. Id.

**Foreign corporations.**

Impairing Obligation of Contract as to, see CONTRACTS, 6.

Federal Jurisdiction in Actions By or Against, see COURTS, 19, 20.

Jurisdiction of Suit to Enforce Stockholder's Liability, see EQUITY, 1, 4.

Effect of Foreign Judgment as to, see JUDGMENT, 7.

Receiver's Right to Enforce Stockholder's Liability, see RECEIVERS.

Right to Remove Cause to Federal Court, see REMOVAL OF CAUSES, 1.

Partial Invalidity of Act as to, see STATUTES, 2.

Retroactive Statute as to, see STATUTES, 6.

Service of Summons on, see WRIT AND PROCESS.

See also *supra*, 1–5, 11.

12. A contract under which a foreign corporation was to superintend the operation of a factory within the state, and control, handle, and sell its output, is not relieved from the operations of Wis. Stat. 1898, §§ 1770*b*, 4978, prohibiting foreign corporations from transacting business within the state until they have filed a copy of their charter with the secretary of state, because the contemplated traffic in the product might extend beyond the limits of the state. Diamond Glue Co. v. United States Glue Co. 328

13. A contract under which a foreign corporation is to have the management of the manufacturing in a factory within the state, and is to assist in the operation of such factory and keep it supplied with a superintendent, calls for the transaction of business within the state, within the meaning of Wis. Stat. 1898, §§ 1770*b*, 4978, forbidding foreign corporations to transact business in the state until they have filed a copy of their charter with the secretary of state. Id.

14. The granting of a loan by a Tennessee building and loan association to a citizen of Alabama upon the latter's signed application, solicited by a traveling agent for the association, and the taking as security of a note and mortgage executed within the state by the borrower, constitute, regardless

of the form and terms of such instruments, the doing of business in the state, within the meaning of Ala. Const. art. 14, and Ala. Code 1896, §§ 1316, 1318, 1319, requiring foreign corporations doing any business within the state to designate a local agent for service of process, and to have a known place of business within the state. Chattanooga Nat. Bldg. & L. Asso. v. Denson, 870

**COSTS.**

Allowing Attorney's Fee against Insurance Company, see CONSTITUTIONAL LAW, 3, 10.

Attorney's Fees for Dissolving Attachment, as Element of Damages, see DAMAGES, 3.

**COUNTIES.**

Bonds of, see BONDS, 2–5.

**COURTS.**

Inquiry by, into Necessity of Assessment on Stockholders, see CORPORATIONS, 1.

**Relation to other departments.**

1. A decision of the Land Department upon questions of fact is conclusive on the courts. De Cambra v. Rogers, 734

2. The Federal courts cannot finally determine the respective interests of claimants to public lands of the United States while the question of issuing a patent therefor is properly before the Land Department and not yet decided. Cosmos Exploration Co. v. Gray Eagle Oil Co. 1064

3. The courts cannot interfere with the executive administration of the Land Department by enjoining, at the instance of persons claiming to be the owners of the land, a survey, under the direction of such Department, of certain lands lying between an alleged meander line and the actual waters of a lake, which are claimed by the Department to be unsurveyed public lands of the United States. Kirwan v. Murphy, 698

4. Courts will not entertain an inquiry as to the extent of the investigation by the Secretary of the Interior and his knowledge of the points involved in his decision of a contest in the Land Department, nor as to the methods by which he reached his determination. De Cambra v. Rogers, 734

5. The action taken by the Secretary of the Interior upon applications for leases for mining purposes of tribal lands in the Indian territory, under the act of June 28, 1898 (30 Stat. at L. 459, chap. 517), authorizing him to execute such leases, is a matter of administration, cognizable solely by the executive department. Cherokee Nation v. Hitchcock, 183

6. The determination of the Postmaster General that letters addressed to a certain corporation should be refused delivery is not so conclusive on the Federal courts as to preclude them from granting injunctive relief to such corporation, where his action was not authorized by the statutes under which he assumed to act. American School of Magnetic Healing v. McAnnulty, 90

**Terms.**

7. The supreme court of the District of Columbia is not bound to prolong its term by the adjournment, authorized by rule 2 of that court, for "not longer than thirty-eight days" to enable bills of exceptions to be prepared, where its duty under such rule is not invoked. Gordon v. Randle, 875

8. The October term, 1900, of the circuit court branch of the supreme court of the District of Columbia ending on December 31st, 1900, although the first Tuesday in the following January, on which, by rule 3 of that court, the January term began, fell on a holiday; since the effect was not to postpone the commencement of the January term, but to deprive the court of the power to do any business other than to discharge those who had been required to attend, until the succeeding day, when its general powers and duties could be legally exercised. Id.

**Territorial courts.**

9. A prosecution for murder, pending at the time of the passage of the act of March 3, 1899, establishing a criminal code and code of criminal procedure for Alaska, must, in view of the provision therein for the preservation of pending causes, be regarded as within the "general jurisdiction" in criminal cases conferred upon the district court for the district of Alaska by the act of June 6, 1900 (31 Stat. at L. 321, chap. 786), whether that court be one newly created by that act, which contains no provision for a transfer of pending causes, or by an existing tribunal continued thereby. Bird v. United States, 100

**Federal courts.**

In Proceedings for Deportation of Alien, see ALIENS, 4.

Jurisdiction of Court of Claims, see CLAIMS, 3, 4.

Enforcement in, of Nonresident Stockholder's Liability, see CORPORATIONS, 11.

Jurisdiction in Equity, see EQUITY, 5.

Showing Jurisdiction by Allegations, see PLEADING, 6, 7.

Suit to Prevent Enforcement of Act Fixing Railroad Rates, see STATE.

See also BANKRUPTCY, 7.

10. Jurisdiction, if conferred on a circuit court of the United States by averments in the bill as to the defense which defendants intend to assert, is ousted by the filing of answers which disclaim any intention or relying on such defense. Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 626

11. A Federal court has jurisdiction to extend to and against the successors in the office of attorney general of a state, duly substituted, the provisions of an order enjoining the enforcement of an unconstitutional state statute fixing maximum railroad fares by a board of which the attorney general is a member. Prout v. Starr, 584

12. A circuit court of the United States has jurisdiction of a suit against the United States to recover compensation for the alleged total destruction of the value of the real property as a necessary result of the acts of its officers and agents in improving navigation, where the government does not deny plaintiff's title, and admits that the work done was authorized by Congress, but denies that such work produced the alleged injury and destruction. United States v. Lynah, 539

13. The United States does not, by undertaking to carry a passenger in an elevator in one of its public buildings, impliedly contract that its employees in charge of it will exercise due care, so as to confer jurisdiction on a Federal court, under the Tucker act of March 3, 1887, chap. 359 (24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 752), of an action to recover damages for personal injuries sustained by reason of the negligence of such employees, on the theory that such action is upon a "contract, express or implied, with the government of the United States," within the meaning of that act; but the case is one "sounding in tort," which by that act is excluded from judicial cognizance. Bigby v. United States, 519

14. A Federal court is not vested with jurisdiction of a suit in equity to enjoin the collection of a state tax because the case is one arising under the Constitution and laws of the United States, within the meaning of the judiciary act of August 13, 1888 (25 Stat. at L. 433, chap. 866), § 1, unless there is apparent some ground of equitable jurisdiction recognized by the Federal courts. Indiana Mfg. Co. v. Koehne, 651

15. A suit over the ownership of real property, in which plaintiff's title rests upon a proper interpretation of the exception of mineral lands in the Northern Pacific Railroad land grant act of July 2, 1864 (13 Stat. at L. 365, chap. 217), is one arising under the laws of the United States, of which a circuit court has jurisdiction wholly independent of citizenship. Northern P. R. Co. v. Soderberg, 575

16. A suit over the ownership of ore taken by defendants from a mining claim alleged to be the property of complainant by virtue of a patent from the United States is not brought within the jurisdiction of a circuit court of the United States by allegations in the bill that defendants intend to assert a defense based on certain other patents and the mining laws of the United States, on the theory that such suit, being alleged to have been brought in equity to avoid a multiplicity of suits, is in effect one to quiet title, and that such averments are therefore necessarily set forth as part of the cause of action. Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 626

17. A suit which involves the question of the right to construct a dock in a navigable river under certain acts of Congress and a permit from the Secretary of War, which are alleged to be in execution of the power of Congress under the Constitution, over the navigable waters of the United States, is one arising under the Constitution and laws of the United States, of which, under the act of March 3, 1887, chap. 373 (24 Stat. at L. 552, U. S. Comp. Stat. 1901, pp. 514, 582), as corrected by the act of August 13, 1888, chap. 866 (25 Stat. at L. 434), a circuit court of the United States has jurisdiction without diversity of citizenship. Cummings v. Chicago, 525

18. The guardian, and not the ward, is the party plaintiff, so far as Federal jurisdiction invoked solely on the ground of diverse citizenship is concerned, where the guardian has, under the state laws, the right to bring the suit in his own name. Mexican C. R. Co. v. Eckman, 245

19. The jurisdiction of a circuit court of the United States, on the ground of diverse citizenship, of a suit by a foreign corporation against residents of the state, is not defeated on the theory that plaintiff is suing as the assignee of a domestic corporation, where the bill, although emphasizing the existence of certain contracts between defendants and its assignor, and alleging that it became substituted for such assignor as a party thereto, contains allegations which show that the parties, having the old contracts before them, entered into new agreements determined by reference to the terms of the old contracts, but none the less personal and immediate. American Colortype Co. v. Continental Colortype Co. 404

20. A foreign railroad corporation does not become a citizen of North Carolina, so far as to affect the jurisdiction of the Federal courts upon the question of diverse citizenship, by complying with N. C. Pub. Acts 1899, chap. 62, which declares that such a corporation becomes a domestic corporation by filing with the secretary of state duly authenticated copies of its charter and by-laws. Southern R. Co. v. Allison, 1078

21. The "further sum," equal to 2 per cent of the appraised value of imported merchandise for each 1 per cent that such appraised value exceeds the value declared in the entry, which, under the customs administrative act of June 10, 1890, § 7 (26 Stat. at L. 131, chap. 407, U. S. Comp. Stat. 1901, p. 1892), may be collected from an importer for undervaluation "in addition to the duties imposed by law," is a penalty, and exclusive jurisdiction of a suit to recover such sum is, therefore, by U. S. Rev. Stat. § 563 (U. S. Comp. Stat. 1901, p. 455), vested in the district courts of the United States. Helwig v. United States, 614

22. A nonresident owner of a claim against a decedent's estate cannot maintain a suit against the administrator in a Federal court, where the suit, if brought in the state courts, would have been barred by the statutes of the state as construed by its courts because instituted after the expiration of the period limited by the order of

the probate court for the presentation of claims against the estate, and after the administrator's final account had been allowed and the final distribution of the estate decreed. Security Trust Co. v. Black River Nat. Bank, 147

23. A Federal court is not without jurisdiction of a suit to enjoin the attorney general of Nebraska from enjoining, as a member of the Nebraska board of transportation, the provisions of an unconstitutional state statute fixing maximum railroad rates, on the theory that it seeks to restrain him as attorney general from enforcing the criminal laws of the state. Prout v. Starr, 584

**Conflict of jurisdiction.**

In Bankruptcy Proceedings, see BANKRUPTCY, 3–6.

See also *supra*, 14.

24. The jurisdiction of a circuit court of the United States over a cause properly before it cannot be defeated by the institution, by one of the parties in a state court, of subsequent proceedings, whether civil or criminal, involving the same legal questions. Prout v. Starr, 584

25. Habeas corpus in favor of a person who has been convicted and sentenced in a state court for an alleged violation of the criminal statutes of the state will not be granted by a Federal court on the ground that he is held in violation of the Federal Constitution, where the case presents no exceptional facts which will take it out of the rule that he must ordinarily first take his case to the highest court of the state in which the judgment can be reviewed, and if unsuccessful therein, bring it to the Supreme Court of the United States by writ of error. Reid v. Jones, 116

26. A Federal court is without jurisdiction to enjoin proceedings in a state court sought to be removed to the Federal court, where such proceedings are not removable because regarded by the state court merely as supplementary in character and as a mere continuation of an action already passed into judgment, and in aid of the execution of such judgment. Mutual Reserve Fund Life Asso. v. Phelps, 987

27. The offense of extorting money under a threat to accuse a person of a criminal violation of a Federal internal revenue law, though made a crime by U. S. Rev. Stat. § 5484 (U. S. Comp. Stat. 1901, p. 3702), is excepted from the exclusive jurisdiction conferred on the Federal courts by §§ 629, 711 (pp. 507, 577), of "all crimes and offenses cognizable under the authority of the United States," by the provision of § 5328 (p. 3622), that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several states under the laws thereof." Sexton v. California, 833

**Effect of decisions generally.**

28. The authority of a decision of the Supreme Court of the United States upholding a rule of a court of the District of Columbia is not lessened by the former court's failure to give the grounds for its decision, as this omission does not give rise to an inference that it had doubts as to the validity of the rule, but rather that it regarded the grounds of challenge to such validity as without foundation. Fidelity & D. Co. v. United States, 194

29. The courts of the Indian territory are bound to respect the decisions of the supreme court of Arkansas interpreting laws of that state which were adopted and extended over the Indian territory by the act of Congress of May 2, 1890. Robinson v. Belt, 65

**Federal courts following state decisions.**

30. Federal courts, in determining the validity, in the hands of bona fide purchasers, of county bonds issued in aid of railroad construction under the authority of N. C. Code, §§ 1996–1999, are not bound by the construction given such statute by a decision of the highest state court subsequent to such purchase, but will exercise an independent judgment as to its meaning. Stanly County Comrs. v. Coler, 1126

31. The construction of the state courts of a state statute which penalizes life insurance companies for failure to pay losses, as requiring a demand of payment notwithstanding the company's denial of liability, which demand can be made, however, after suit, and can be set up by an amended petition as an original suit, will be adopted by the Federal courts. Iowa L. Ins. Co. v. Lewis, 204

32. The decisions of the Missouri supreme court that a repeal of Mo. Rev. Stat. 1879, § 5982, declaring that suicide shall be no defense to a suit on a policy of insurance, was effected as to all policies issued upon the assessment plan after the insurance company had obtained its certificate of authority to do business as an assessment insurance company under Mo. Laws 1887, p. 199, by the provision of § 10 of that act, that corporations doing business thereunder shall not be subject to any provisions of the general insurance law of the state, "except as herein distinctly set forth,"—are binding on the Supreme Court of the United States. Knights Templars' & M. L. Indemnity Co. v. Jarman, 139

33. The ruling of the highest court of a state, that, under the state Constitution and laws, property situated in that state, the title to which is vested in a nonresident executor to whom letters testamentary have been issued by a court of another jurisdiction, may be attached and sold in an action of debt against such nonresident executor, is binding upon the Supreme Court of the United States on writ of error to the state court. Manley v. Park, 296

34. The settled rule of a state court that objections to the manner of selecting grand jurors on behalf of one who has been indicted by such jurors must be taken by plea in abatement, and not by motion to quash the venire and panel, is binding on the Su-

preme Court of the United States on writ of error to the state court. Tarrance v. Florida, 572
Appointment of Supreme Court justices, 1197, 1200
Allotment of justices among circuits, 1196, 1197
Resignation of Supreme Court Justice, 1200

**COVENANT.**
In Lease, see LANDLORD AND TENANT.

**CREDITOR'S BILL.**
Against Bankrupt, Injunction against, see BANKRUPTCY, 4-6.
Against Bankrupt, Lien Acquired on Bankrupt's Property, see BANKRUPTCY, 16.

**CRIMINAL LAW.**
Validity of Indeterminate Sentence Act, see CONSTITUTIONAL LAW, 19.
Instruction as to Criminal Liability, see TRIAL, 14.

1. A person does not become an accomplice by not disclosing the fact that a homicide has been committed, until some time afterward. Bird v. United States, 100

2. The denial of a motion to quash an indictment, and the overruling of challenges to the array of jurors, which raise the objection that negroes were discriminated against in the selection of grand and petit jurors, is not error, where no evidence is received or offered in support of such charge except defendants' affidavit attached to the motion to quash, stating that the facts set up in such motion are true "to their best knowledge, information, and belief." Tarrance v. Florida, 572

3. A plea of former jeopardy cannot be based upon the discharge of the jury for their inability to agree on a verdict after considering the cause from four o'clock in the afternoon until half past nine in the morning of the succeeding day. Dreyer v. Illinois, 79

**CURRENCY.**
Payment in Embezzled Currency, see ASSUMPSIT.

**DAMAGES.**
For Unlawful Capture of Vessels, see APPEAL AND ERROR, 49.
In Collision between Vessels, Division of, see APPEAL AND ERROR, 80.
For Personal Injury, Instruction as to, see TRIAL, 13.

1. Mere notice to a seller of some interest or probable action of the buyer is not enough necessarily and as matter of law, to charge the seller with special damage on that account if he fails to deliver the goods. Globe Ref. Co. v. Landa Cotton Oil Co. 1171

**Bonds.**

2. The injury to a vendee's credit, resulting from the bringing of actions by his vendor for a breach of contract and for a balance due thereunder, and any loss of profits because of the vendor's refusal to make further deliveries under the contract, are not elements of damages recoverable in a suit on the attachment bonds issued in such actions. Fidelity & D. Co. v. L. Bucki & Son Lumber Co. 744

3. Attorneys' fees incurred in dissolving an attachment, which by the local law of the state in which the attachment was issued can be recovered in an action in a court of such state on the attachment bond, are no less an element of damages because the action has been removed to a Federal court. Id.

4. The face value of Treasury notes destroyed by fire while in the custody of the superintendent of the Mint at New Orleans, and not the cost to the United States government of issuing new notes, is the measure of damages in an action on his official bond, conditioned for the safe keeping of the moneys in his custody, to recover the amount of a shortage in his accounts caused by the destruction of such notes. Smythe v. United States, 425

5. The sureties on the bond of the superintendent of the Mint at New Orleans, conditioned for the faithful discharge of his duties according to the laws of the United States, must be deemed to have signed it in view of the requirement of U. S. Rev. Stat. § 3624 (U. S. Comp. Stat. 1901, p. 2418), that interest on any unpaid balance due from one accountable for public moneys shall be computed from the time when he received such moneys. Id.

6. The amount of Treasury notes charred by fire, but in condition to be identified as to amount and date of issue, cannot be allowed as a credit in a suit on the official bond of the superintendent of the Mint at New Orleans to recover the amount of a shortage in his accounts, where no claim for such credit was first presented to the accounting officers of the Treasury, as is required by U. S. Rev. Stat. §§ 951, 957 (U. S. Comp. Stat. 1901, pp. 695, 698), in order to make a claim for a credit available on the trial. Id.

**DAVIS.**
J. C. Bancroft, resignation as Supreme Court Reporter, 1196

**DAY.**
William R., appointment of, as Associate Justice, 1200

**DECLARATIONS.**
Admissibility of, see EVIDENCE, 12, 13.

**DEFENSE.**
Against Collection of Tax, see TAXES, 1.

**DEFINITION.**
Accomplice, see CRIMINAL LAW, 1.
Fugitive from Justice, see EXTRADITION, 16, 17.
Week, see PUBLICATION.

**DELEGATION OF POWER.**
See CONSTITUTIONAL LAW, 2.

**DEMURRER.**
See PLEADING, 1.

**DEPORTATION.**
See ALIENS.

**DEPOSITION.**
Prejudicial Error as to, see APPEAL AND ERROR, 76.

**DERRICKS.**
As Subject of Capture, see PRIZE, 4.

**DESERT LAND**
See WATERS, 3, 4.

**DIPLOMATIC AND CONSULAR OFFICERS.**
Evidence as to Authority of Consul, see EXTRADITION, 12.

**DIRECTORS.**
Of Corporation, Extradition of, see EXTRADITION, 1, 2.

**DISCHARGE.**
In Bankruptcy, see BANKRUPTCY, 22, 25.

**DISCRETIONARY MATTERS.**
See APPEAL AND ERROR, V. b.

**DISCRIMINATION.**
By Carrier, see CARRIERS; COMMERCE, 7.

**DISEASED ANIMALS.**
Equal Privileges as to, see CONSTITUTIONAL LAW, 9.
Prohibiting Importation of, see COMMERCE, 8, 9.

**DISMISSAL.**
Of Writ of Error, see APPEAL AND ERROR, IV.

**DISTRICT COURT.**
Jurisdiction of, see COURTS, 10–23.

**DISTRICT OF COLUMBIA.**
Finality of Decision of Courts of, see APPEAL AND ERROR, 46, 47.

**DIVERSE CITIZENSHIP.**
As Ground of Federal Jurisdiction, see COURTS, 18–20.

**DIVORCE.**
Divorced Wife's Interest in Insurance on Husband's Life, see APPEAL AND ERROR, 29.
Effect of Foreign Divorce, see JUDGMENT, 5.

**DOCK.**
Federal Jurisdiction as to, see COURTS, 17.

**DOCUMENTARY EVIDENCE.**
See EVIDENCE, 5–7.

**DRAWBACK.**
See DUTIES, 3.

**DUE PROCESS.**
Of Law, see CONSTITUTIONAL LAW, 12–20.

**DUTIES.**
Jurisdiction of Suit to Recover Penalty for Undervaluation, see COURTS, 21.

1. That portion of a cargo of pineapples which on arrival within the limits of a port of entry of the United States was found to be so decayed as to be utterly worthless is not dutiable, though the loss was less than 10 per cent of the total invoice, as entirely worthless articles are not within the provision of the customs administrative act of June 10, 1890, § 23, that no allowance shall be made for damage to "goods, wares, and merchandise" imported into the United States, unless the importer shall abandon to the United States a portion of such articles amounting at least to 10 per cent of the total invoice. Lawder v. Stone, 178

2. The Russian laws regulating the production and exportation of sugar, under which an exporter of sugar is remitted the excise tax imposed on sugar sold in Russia, and obtains a certificate because of such exportation, which has a substantial market value, allow a bounty upon the exportation of sugar which, under the act of Congress of July 24, 1897, § 5 (30 Stat. at L. 205, chap. 11, U. S. Comp. Stat. 1901, p. 1693), subjects such sugar upon its importation into the United States to an additional duty equal to the entire amount of such bounty as ascertained and determined by the Secretary of the Treasury. Downs v. United States, 275

3. The drawback provided for by the act of Congress of August 27, 1894, § 22 (28 Stat. at L. 551, chap. 349), re-enacted as the act of July 24, 1897, § 30 (30 Stat at L. 211, chap. 11, U. S. Comp. Stat. 1901, p. 1991), "on the exportation" of articles manufactured from imported materials on which duties had been paid, will not be allowed on goods placed on board a vessel bound for a foreign port, to be used and consumed on board the vessel during its voyage, and in fact so used and consumed. Swan & Finch Co. v. United States, 984

**EASEMENTS.**
Conveyance of Tide Lands Free from, see PUBLIC LANDS, 32.

**EJECTMENT.**
Appeal in Action in, see APPEAL AND ERROR, 34.

**ELECTRICAL USES AND APPLIANCES.**
Reasonableness of License Fee on Poles and Wires, see TRIAL, 5.

**EMINENT DOMAIN.**
Jurisdiction of Appeal in Condemnation Proceedings, see APPEAL AND ERROR, 14.
Finality of Decision in Condemnation Proceedings, see APPEAL AND ERROR, 47.
Compensation for Restricting Height of Buildings, see CONSTITUTIONAL LAW, 18.
Duty of United States to Make Compensation for Land Taken, see UNITED STATES.

The turning of a valuable rice plantation into an irreclaimable and valueless bog, as the necessary result of an improvement in navigation undertaken by the United States government, is a taking of the land, within the meaning of the 5th Amendment to the Federal Constitution. United States v. Lynah, 539

**EMPLOYEES.**
See GOVERNMENT EMPLOYEES.

**ENGRAVING.**
As Subject of Copyright, see COPYRIGHT, 1.

**ENTRY.**
On Public Land, see PUBLIC LANDS.

**EQUAL PROTECTION.**
See CONSTITUTIONAL LAW, 3-12.

**EQUITY.**

1. Equity is without jurisdiction, on the ground of the prevention of a multiplicity of suits, of a suit to enforce the statutory liability of the stockholders of a foreign corporation, in which the amount demanded is the full amount of the par value of the shares held by each defendant. Hale v. Allinson, 380

2. The prevention of irreparable injury and of a multiplicity of suits cannot be invoked as grounds for equitable relief against a threatened survey, under direction of the Land Department, of lands to which complainants assert title, but which the Department claims to be unsurveyed public lands of the United States, where such survey can be made without material injury to the soil or timber, and the persons directly interested in such survey are not made parties, are not numerous, and assert separate and independent rights. Kirwan v. Murphy, 698

3. The United States has no such prompt and efficacious remedy at law as will deprive it of the right to equitable relief against the unlawful taxation by a state of permanent improvements upon, and personal property used in the cultivation of, lands allotted to Indians in severalty, under the act of February 8, 1887 (24 Stat. at L. 389, chap. 119), the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, and then convey the fee free of all encumbrance. United States v. Rickert, 532

4. A suit to enforce the statutory liability of stockholders in a foreign corporation cannot be maintained in a court of equity on the theory that it is an ancillary or auxiliary proceeding brought in aid of and to enforce an equitable decree of a court of the state where the corporation resides in a suit to enforce the liability of its stockholders, where the nonresident stockholders were merely nominal parties in that suit, and no judgment was rendered against them because of a want of jurisdiction over them. Hale v. Allinson, 380

5. The scope of the equitable jurisdiction of the Federal courts was not extended beyond what was an appropriate subject-matter for equitable relief according to existing standards, by the provision of U. S. Rev. Stat. § 1979 (U. S. Comp. Stat. 1901, p. 1262), that every person who, under color of state legislation, subjects, or causes to be subjected, any citizen of the United States to the deprivation of any rights, privileges, or immunities secured by the Federal Constitution and laws shall be liable to the party injured "in an action at law, suit in equity, or other appropriate proceeding for redress." Giles v. Harris, 909

**ERROR.**
See APPEAL AND ERROR.

**ESCAPE.**
Of Prisoner, see MARSHAL, 2.
Presumption of Officer's Negligence, see EVIDENCE, 2.
Instructions as to Effect of Attempt at, see TRIAL, 151.

**ESTOPPEL.**
Federal Question as to, see APPEAL AND ERROR, 31.
Of Pledgee to Deny Liability as Stockholder, see TRIAL, 6.
To set up Invalidity of Lease Executed by One of Several Trustees, see TRUSTS, 3.

1. One of two coterminous mining proprietors is estopped to assert that, because of the nonparallelism of the end lines of the other's claim, it did not carry extralateral rights defined by extending the common end line between the two surface locations, where such common line, described as crossing the lode, was established by the patent surveys as the result of an adverse proceeding in the Land Office, and a compromise agreement with respect thereto entered into by the immediate predecessors in title of such proprietors, who succeeded to the interests of their predecessors with a knowledge of the boundary line so determined. Kennedy Min. & Milling Co. v. Argonaut Min. Co. 685

2. The failure of some of the claimants under a judgment awarding a certain sum to unidentified Pottawatomie Indians, to furnish any evidence of their right to share therein until after the Indian Department, in pursuance of the judgment, has attempted to identify the claimants, and the fund has been distributed to the claimants thus

identified, will preclude them from maintaining a suit against the government for the share which they should have received. Pam-to-pee v. United States, 221

**EVIDENCE.**

In Extradition Proceedings, see EXTRADITION, 12, 13.

**Presumptions and burden of proof.**

As to Malice, see LIBEL AND SLANDER, 2.

As to Correctness of Marshal's Mileage Items, see MARSHAL, 1.

As to Grounds for Removal of Officer, see OFFICERS, 1.

From Grant of Letters Patent, see PATENTS, 1.

See also *infra*, 15; INSURANCE, 6.

1. The burden of proof on the issue of the mental soundness of a testator is, in the District of Columbia, upon the caveators. Leach v. Burr, 567

2. A prisoner who escapes from the custody of a deputy marshal while going to supper in a hotel will be presumed to have escaped through the officer's negligence. United States v. Nix, 775

3. A communistic society will be presumed so to have discharged its obligation to deceased members who contributed no property to the society, but in consideration of support dedicated their labor and services, as to leave no undischarged obligations or rights for distant relatives of such deceased members to assert or claim against the community or its property. Schwartz v. Duss, 53

4. Any claim which, as a matter of right, could have been made on a communistic society under a provision of its plan that members who contributed no property to the society should, on withdrawing, receive such sum as the leaders of the society should determine, will from long lapse of time be presumed to have been demanded and the demand satisfied. Id.

**Documentary evidence.**

Certificate of Ambassador to Russia, see EXTRADITION, 13.

5. Copies of acts of Parliament are sufficiently authenticated to be admissible in evidence in a Federal court sitting in New Hampshire, when produced by an attorney and solicitor of the supreme court of judicature in England of thirty years' experience, in connection with his testimony that he was intimately acquainted with such acts, and that the copies were "issued by authority, being printed by Her Majesty's printer, and are as such by law receivable in evidence without further proof." Nashua Sav. Bank v. Anglo-American Land, Mortg. & Agency Co. 782

6. A memorandum made by the assignee of a pledgeor of national bank stock, without the knowledge or acquiescence of the pledgee, to the effect that such stock had been converted by the latter and did not sell for enough to pay the debt for which it was pledged, is inadmissible in evidence on the issue whether such pledgee had become the owner of the shares, and as such chargeable with the personal liability of the shareholders,—especially where such memorandum was obviously untrue, as the stock had never been sold. Rankin v. Fidelity Ins. T. & S. D. Co. 792

7. A pencil memorandum in the stock ledger of a national bank, at the top of an account with the person to whom certain pledged shares of stock had been transferred at the request of the pledgee, which consists merely of the name of the latter, with whom the correspondence in regard to such account was carried on, is inadmissible in evidence on the issue whether such pledgee had become the owner of the stock and was chargeable with the personal liability of a shareholder. Id.

**Opinion evidence.**

8. The testimony of witnesses to the effect that they did not know of or see any opportunity for certain cotton to have caught fire except from a passing locomotive is not inadmissible on the question of the liability of the railroad company for the value of such cotton, if objected to, not because of any omission to state the facts which induced the witnesses' belief, but because negative in character, irrelevant, and in the nature of a conclusion. Texas & P. R. Co. v. Watson, 1057

9. A competent expert witness may, on the trial of an action to recover the value of cotton claimed to have been destroyed by a fire set by a passing locomotive, give his opinion on a hypothetical state of facts based on the evidence as to whether a locomotive which in moving 4¼ miles should set from five to eight fires and should emit live cinders was properly operated or constructed, where there is evidence that it is impossible, even with the most effective spark arresters, to prevent the escape of sparks. Id.

10. An expert witness cannot base his opinion as to the mental capacity of a testator upon his personal knowledge of any undisclosed facts concerning the testator's condition. Raub v. Carpenter, 119

11. A nonexpert witness cannot give his opinion formed since the commission of a crime, as to the accused's mental condition at the time the offense was committed, where his only knowledge in respect thereto was derived from his familiarity with the accused as a patron of the latter's barber shop. Queenan v. Oklahoma, 1175

**Declarations.**

See also WITNESSES, 2.

12. Evidence of the declarations of the trustee in several assignments executed by a bank president, that the earlier assignment was made to secure the bank generally for his assignor's liability to it, is admissible as against those claiming under the subsequent assignments, which were made for the purpose of enabling the trustee "to pay himself for any paper" on which he was liable with such assignor. Fourth Nat. Bank v. Albaugh, 673

13. Declarations of the parties to an alleged conspiracy by an insured and others

to defraud an insurance company, which relate to their purpose and were made about the time the policy was taken out, are, where there is evidence of the existence of the conspiracy, admissible in evidence against the beneficiary in a suit on such policy, although she is not alleged to have been a party to such conspiracy. Connecticut Mut. L. Ins. Co. v. Hillmon, 446

**Relevancy.**

As to Reasonableness of Water Rates, see WATERS, 5–7.

See also *supra*, 6, 7.

14. Evidence that, at or about the time of a fire and of the passing of a locomotive which is claimed to have caused it, other fires were observed at various nearby points along the railroad track, is admissible on the issue of the liability of the railroad company for the value of the property destroyed by such fire, as tending to establish that such fire was caused by the locomotive in question, and as tending to show negligence in its construction or operation. Texas & P. R. Co. v. Watson, 1057

**Weight; sufficiency.**

Of Extradition Warrant, see EXTRADITION, 15.

Consideration of, on Habeas Corpus, see HABEAS CORPUS.

Effect of Not Objecting to Variance, see PLEADING, 2.

15. The presumption of liability for an assessment on shares of stock in an insolvent national bank, arising from the presence of a person's name on the stock register, is rebutted by evidence that a bona fide sale of the stock had been made, and that the vendor had performed every duty which the law imposed in order to secure the transfer on the registry of the bank. Earle v. Carson, 373

16. A supposition of a claimant under an alleged Spanish land grant, that such grant once existed and has been lost by time or accident, is no evidence of an actual grant. Mobile Transp. Co. v. Mobile, 266

**EXCEPTIONS.**

Sufficiency of, see APPEAL AND ERROR, 48, 49.

**EXECUTION.**

Lien on Proceeds of Sale under, see BANKRUPTCY, 17.

Of Insured, Effect on Right to Insurance Money, see INSURANCE, 8.

**EXECUTORS AND ADMINISTRATORS.**

Limitation of Action against, see COURTS, 22.

Absolute Judgment against Administrator of Surety on Bond, see JUDGMENT, 1.

**EXEMPTION.**

To Bankrupt, see BANKRUPTCY, 7, 21.

From Taxation, see TAXES, 3.

**EXPERTS.**

Evidence of, see EVIDENCE, 8–11.

**EX POST FACTO LAW.**

See CONSTITUTIONAL LAW, 1.

**EXTORTION.**

Jurisdiction of Offense of, see COURTS, 27.

**EXTRADITION.**

I. INTERNATIONAL.

II. INTERSTATE.

Dismissal of Appeal in Proceedings in, see APPEAL AND ERROR, 54.

Denial of Bail, see APPEAL AND ERROR, 72.

I. INTERNATIONAL.

1. Absolute identity of statutes in Great Britain and the United States defining the offense of fraud by a corporate director is not necessary to make such offense "criminal by the laws of both countries," within the meaning of the provisions of the treaty with Great Britain of 1889, art. 1 (26 Stat. at L. 1508), defining extraditable crimes; it is sufficient if the essential character of the transaction is the same and is made criminal by both statutes. Wright v. Henkel, 948

2. A fugitive from the justice of Great Britain, charged with the commission of fraudulent acts as a corporate director, which are made criminal by the laws of that country and by the laws of the state of the United States in which the fugitive is found, is extraditable under the treaty with Great Britain of 1889, art. 1, including among other extraditable crimes, fraud by a corporate director "made criminal by the laws of both countries." Id.

**Jurisdiction of commissioner.**

3. A United States commissioner was not without jurisdiction over extradition proceedings because at the time the warrant of arrest was issued he had not been specially designated to act in such proceedings, as required by U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), where he did not assume to act therein until after he was so specially designated. Grin v. Shine, 130

4. No preliminary requisition from the demanding government is essential to the jurisdiction of a United States commissioner, under U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), over extradition proceedings. Id.

**Sufficiency of complaint.**

5. A complaint in extradition proceedings, sworn to before a United States commissioner authorized generally to take affidavits, but not specially designated to act in extradition proceedings, is sufficient under U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), which only requires that the warrant of arrest in such proceedings shall issue upon complaint made under oath. Id.

6. The omission of the word "fraudulent-

ly" from a complaint in extradition proceedings charging embezzlement does not render such complaint defective, where it alleges that the accused "wrongfully, unlawfully, and feloniously" appropriated the property. Id.

7. A sufficient showing that one accused, in extradition proceedings, of the crime of embezzlement, had the care and control of the property within the meaning of Cal. Pen. Code, § 508, defining that crime, is made by a complaint which charges him with having converted to his own use the proceeds of a check after having cashed it at a bank to which he had taken it in accordance with his employer's instructions to draw the money and take it to a railroad station, to be forwarded to another city. Id.

8. A complaint in extradition proceedings does not insufficiently charge the crime of embezzlement, as defined in Cal. Pen. Code, § 508, because it alleges that the money embezzled was intrusted to and received by the accused "in his capacity as clerk," instead of charging, in the language of that section, that such money came into his control or care "by virtue of his employment as such clerk." Id.

**Warrant.**

9. The production of a certified copy of an order purporting to be signed and sealed by a Russian examining magistrate, which, though not in the form of a warrant of arrest as used in the United States, was evidently designed to secure the apprehension of the accused and his production before an examining magistrate, satisfies the requirement of the extradition treaty with Russia of June 5, 1893 (28 Stat. at L. 1071), that applications for extradition shall be accompanied by an authenticated copy of the warrant of arrest, or of some other equivalent judicial document issued by a judge or magistrate duly authorized to do so. Id.

10. Congress has dispensed with the requirement of the extradition treaty with Russia of June 5, 1893 (28 Stat. at L. 1071), with respect to the production of a copy of a warrant of arrest, or other equivalent document issued by a magistrate of the Russian Empire, by U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), which is applicable to all foreign governments with which extradition treaties have been considered, and simply requires a complaint under oath, a warrant of arrest, evidence of criminality sufficient to sustain the charge under the provisions of the proper treaty, and a certificate by the magistrate of such evidence and his conclusions thereon, to the Secretary of State. Id.

11. The objection that the judge issuing the warrant of arrest in extradition proceedings made the warrant returnable before a United States commissioner specially designated, as required by U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), to act in such cases, is not available when first made on habeas corpus, even though such section seems technically to require the warrant to be made returnable before the magistrate issuing it. Id.

**Evidence.**

Considering Sufficiency of, on Habeas Corpus, see HABEAS CORPUS.

12. No evidence is required in extradition proceedings, that the consul of the foreign government who made the complaint had authority to do so, since all that is required by U. S. Rev. Stat. § 5270 (U. S. Comp. Stat. 1901, p. 3591), is that such complaint be made under oath. Id.

13. The certificate of the ambassador to Russia that the depositions and other documents offered in evidence in an extradition case "are properly and legally authenticated so as to entitle them to be received and admitted as evidence for similar purposes by the tribunals of Russia," which, except for the introduction of the words "as evidence," is in the language of the act of August 3, 1882, § 5 (22 Stat. at L. 216, chap. 378, U. S. Comp. Stat. 1901, p. 3595), by which the proceeding is governed, is not defective because of the addition of these words. Id.

## II. INTERSTATE.

14. A stipulation that a person sought to be extradited was not within the demanding state on the date specified in the indictment as the time of the commission of the crime charged is an admission that he was not within the state when the crime was, if ever, committed, where there is no claim of any error in the date named in the indictment. Hyatt v. New York, 657

15. An extradition warrant issued by the governor of a state is but prima facie sufficient to hold the accused; and it is open to him to show on habeas corpus, by admissions or by other conclusive evidence, that the charge upon which his extradition is demanded assumes his absence from the demanding state at the time the crime was, if ever, committed. Id.

**Who is a fugitive from justice.**

16. One who was not within a state when the crime of larceny or false pretense was, if ever, committed therein, cannot be deemed a "fugitive from justice" within the meaning of U. S. Rev. Stat. § 5278 (U. S. Comp. Stat. 1901, p. 3597), providing for the interstate extradition of a fugitive from justice on demand of the executive of the state from which he has fled. Id.

17. One who comes into a state on business for a single day, eight days after the alleged commission of a crime therein, and months before an indictment is found against him for such offense, does not, by his departure from the state after the conclusion of his business, become a "fugitive from justice" within the meaning of U. S. Rev. Stat. § 5278 (U. S. Comp. Stat. 1901, p. 3597), providing for the interstate extradition of a fugitive from justice on demand of the executive of the state from which he has fled. Id.

**EXTRALATERAL RIGHTS.**
In Mine, Estoppel as to, see ESTOPPEL, 1.

**FEDERAL COURTS.**
Appellate Jurisdiction of United States Supreme Court as to, see APPEAL AND ERROR, II. a.
Jurisdiction of, see COURTS.

**FEDERAL OFFICER.**
Removal of, see OFFICERS.

**FEDERAL QUESTION.**
As Ground for Writ of Error, see APPEAL AND ERROR, II.

**FEES.**
Of Marshal, see MARSHAL.

**FELLOW SERVANTS.**
See MASTER AND SERVANT, 3.

**FERRIES.**
Taxation of, see CONSTITUTIONAL LAW, 16.

**FILING.**
Of Instruments Sued on, see PLEADING, 4.

**FINDINGS.**
Of Commissioners, Sufficiency of Exceptions to, see APPEAL AND ERROR, 49.
Review of, see APPEAL AND ERROR, V. e,
Of Jury, see TRIAL, 16.

**FIRE.**
Release of Railroad from Liability for Damage by, see CONTRACTS, 1.
Opinion Evidence as to, see EVIDENCE, 10, 11.
Evidence as to Other Fires along Railroad Track, see EVIDENCE, 14.
Instruction as to Liability of Railroad Company for, see TRIAL, 8, 12.

**FOREIGN CORPORATIONS.**
See CORPORATIONS, 1–5, 11–14.

**FOREIGN DIVORCE.**
Effect of, see JUDGMENT, 5.

**FOREIGN JUDGMENT.**
See JUDGMENT, 4–8.

**FOREIGN LAWS.**
As to Subscription to Stock in Foreign Corporation, see CORPORATIONS, 5.
Admissibility of, see EVIDENCE, 5.

**FOREIGN STATE.**
As Party to Suit, Jurisdiction on Appeal, see APPEAL AND ERROR, 4.

**FOREST RESERVATION.**
See MANDAMUS, 2; PUBLIC LANDS, 25.

**FORFEITURE.**
Of Insurance Policy, see INSURANCE, 4–6.
Of Public Land, see CONTRACTS, 8.

**FRAUD.**
In Transfer of National Bank Stock to Avoid Liability as Stockholder, see BANKS, 3, 4.
Recovery back of Money Paid on Contract Rescinded for, see CONTRACTS, 2.
By Corporate Directors, see EXTRADITION, 1, 2.
Authorizing Retention of Letters, see POSTOFFICE.

The owners of the legal title to a group of mines being operated by a corporation pursuant to the terms of an escrow agreement which required the proceeds of operation to be applied on the purchase price, and provided for a forfeiture in case of default in payment, are not chargeable, because of their silence, with the fraud perpetrated on subscribers to the stock of such corporation by misstatements as to the corporation's title, contained in prospectuses, issued to promote the sale of its stock, although they may have known the contents of such prospectuses, and that some of the payments on account of the purchase price were from proceeds of the sales of the stock. Wiser v. Lawler, 802

**FRENCH SPOLIATION CLAIMS.**
See CLAIMS, 2.

**FRONTAGE TAX.**
Constitutionality of, see CONSTITUTIONAL LAW, 8.
See also PUBLIC IMPROVEMENTS, 1.

**FUGITIVE FROM JUSTICE.**
See EXTRADITION.

**FULL FAITH AND CREDIT.**
To Foreign Judgment, see JUDGMENT, 4–8.

**GOVERNMENT EMPLOYEES.**

1. Mere temporary employees in the government printing office are not entitled to leave of absence with pay, by virtue of the provisions of the sundry civil appropriation bill of June 11, 1896 (29 Stat. at L. 413, chap. 420, U. S. Comp. Stat. 1901, p. 1556), recapitulating the previous statutes regulating this subject, which have from the beginning been construed by the Public Printer as excluding temporary employees from the provisions for leaves of absence. United States v. Barringer, 602

2. Temporary employees of the government printing office who have from the beginning been denied leaves of absence by a rule of the Public Printer ratified or approved by the legislation of Congress on this subject, were not affected by the provisions of the act of Congress of July 19, 1897 (30 Stat. at L. 134, chap. 9), authorizing the Public Printer to pay employees, former em-

ployees, and the legal representatives of deceased former employees such sums as may be due for accrued and unpaid leaves of absence for the fiscal years 1887 to 1894, both inclusive, and appropriating a sum of money therefor. Id.

**GRAND JURY.**
Following State Decisions as to Manner of Selecting, see COURTS, 34.
Discrimination against Negroes in Selection of, see APPEAL AND ERROR, 51; CRIMINAL LAW, 2.
Criminal Proceedings by, in Hawaii, see HAWAII.

**GRANT.**
Evidence of, see EVIDENCE, 16.
Of Public Land, see PUBLIC LAND.
To City of Shore and Soil under Tidal Stream, see VESTED RIGHTS.
See also PRIVATE LAND CLAIMS.

**GRAY.**
Horace, in memoriam services, 1198

**GUARDIAN AND WARD.**
Guardian as Party Plaintiff, see COURTS, 18.

**HABEAS CORPUS.**
To Prevent Deportation of Alien, see ALIENS, 4.
Dismissal of Appeal from Order in, see APPEAL AND ERROR, 54.
In Federal Court in Favor of One Convicted in State Court, see COURTS, 25.
By One Arrested in Extradition Proceedings, see EXTRADITION, 11.
By One Sought to be Extradited, see EXTRADITION, 15.

Whether the depositions and other documents offered under the act of August 3, 1882, § 5 (22 Stat. at L. 216, chap. 378, U. S. Comp. Stat. 1901, p. 3595), governing evidence in extradition cases, sufficiently establish the criminality of the accused for the purposes of extradition, cannot be reviewed upon habeas corpus. Grin v. Shine, 130

**HARBORS.**
Extension of Wharf beyond Harbor Line, see WHARVES.

**HAWAII.**
Jurisdiction to Review Judgments of Courts of, see APPEAL AND ERROR, 10.
Treaty with, see APPEAL AND ERROR, 29.
Federal Question as to Denial of Full Faith and Credit of Judgment of Courts of, see APPEAL AND ERROR, 43.
Dismissal of Writ of Error to Judgment of, see APPEAL AND ERROR, 57.

Criminal proceedings by grand and petit juries as prescribed by U. S. Const. Amends. 5, 6, were not substituted for the existing criminal procedure in the Hawaiian islands by their annexation, "as a part of the territory of the United States and subject to the sovereign dominion thereof," by the Newlands Resolution of July 7, 1898 (30 Stat. at L. 750), accepting the cession theretofore made by the Republic of Hawaii, and continuing the municipal legislation of such islands not inconsistent with such resolution "nor contrary to the Constitution of the United States," until Congress should otherwise determine. Hawaii v. Mankichi, 1016

**HEADLINES.**
Libel by, see LIBEL AND SLANDER.

**HIGHWAYS.**
Improvement of, see PUBLIC IMPROVEMENTS.

**HOLMES.**
Oliver Wendell, Appointment of, as Associate Justice. 1197.

**HOMESTEAD.**
See PUBLIC LANDS, 3–5, 22.

**HOMICIDE.**
One Failing to Disclose Fact of, as Accomplice, see CRIMINAL LAW, 1.
Instruction as to Self-Defense, see TRIAL, 10.

**HUSBAND AND WIFE.**
Divorced Wifes' Interest in Insurance on Husband's Life, see APPEAL AND ERROR, 29.
Effect of Discharge in Bankruptcy on Agreement to Pay Divorced Wife, BANKRUPTCY, 22, 23.
Effect of Foreign Divorce, see JUDGMENT, 5.
Competency of Divorced Woman as Witness, see WITNESSES, 1.

The appearance of the nonresident defendant cannot invest a court with jurisdiction of a suit for divorce instituted by a person who has no bona fide domicil within the state. Andrews v. Andrews, 366

**IMMIGRATION.**
See ALIENS.

**IMPAIRING OBLIGATIONS.**
See CONTRACTS, 5–13.

**IMPROVEMENT.**
Of Navigation, see COURTS, 12; EMINENT DOMAIN; UNITED STATES.
On Land Allotted to Indians, Exemption of, from Taxation, see TAXES, 5.

**INDEMNITY LANDS.**
See PUBLIC LANDS, 8–14.

**INDETERMINATE SENTENCE.**
Validity of Statute for, see CONSTITUTIONAL LAW, 19.

**INDEX.**
Of Judgment Records, Right to Examine, see RECORDS.
Of Report of Judicial Proceedings, Published Headlines as, see LIBEL AND SLANDER, 5.

**INDIAN RESERVATION.**
Uniformity in Taxation on, see TAXES, 2.

**INDIANS.**
Parties in Action on Application to Lease Land of, see ACTION OR SUIT, 1.
Jurisdiction over Claims of, see CLAIMS, 3, 4.
Action on Application for Lease of Land of, see COURTS, 5.
Preventing Unlawful Taxation of Property of, see EQUITY, 3.
Estoppel of, see ESTOPPEL, 2.
Right of United States to Enjoin Taxation of Land of, see INJUNCTION, 6.
Bill to Restrain Action on Application for Lease of Lands of, see PLEADING, 13.
Taxation of Property of, see TAXES, 3–5.

1. The Cherokee Nation was not so vested, by the treaty of 1835 (7 Stat. at L. 478), and the patent based thereon, with the sole control over the lands thus ceded to it as to preclude Congress, under its plenary power of control over the Indian tribes in the Indian territory, from enacting those provisions of the act of June 28, 1898 (30 Stat. at L. 459, chap. 517), which authorize the Secretary of the Interior to prescribe regulations for the leasing of minerals in its tribal lands for the purpose of making them productive and of securing therefrom an income for the benefit of the tribe. Cherokee Nation v. Hitchcock, 183

2. The plenary power of Congress over the tribal relations and lands of the confederated tribes of Kiowa, Comanche, and Apache Indians could not be so limited by any of the provisions of a treaty with such Indians as to preclude the enactment by Congress of the act of June 6, 1900 (31 Stat. at L. 677, chap. 813), providing for allotments to the Indians in severalty out of the lands held in common within the reservation and purporting to give an adequate consideration for the surplus lands not allotted among the Indians or reserved for their benefit. Lone Wolf v. Hitchcock, 299

**INDIAN TERRITORY.**
Action on Application for Lease of Tribal Lands in, see COURTS, 5.

**INDICTMENT, INFORMATION, AND COMPLAINT.**
Indictment; Quashal of, for Discrimination against Negroes in Selecting Grand Jurors, see CRIMINAL LAW, 2.
Sufficiency of Complaint in Extradition Proceedings, see EXTRADITION, 5–8.

**INFANTS.**
Effect of Father's Discharge in Bankruptcy on Duty to Pay for Support of, see BANKRUPTCY, 22.

**INFECTIOUS DISEASES.**
Of Animals, see CONSTITUTIONAL LAW, 9.
Prohibiting Importation of Animals Affected with, see COMMERCE, 8, 9.

**INFRINGEMENT.**
Of Patent, see PATENTS, 3.

**INHERITANCE TAXES.**
See TAXES, 10–12.

**INJUNCTION.**
Judgment on Reversal of Order Granting, see APPEAL AND ERROR, 79.
Jurisdiction to Enjoin Action against Bankrupt, see BANKRUPTCY, 3–6.
Against Discrimination by Carrier, see COMMERCE, 7.
By Stockholder against Corporation, see CORPORATIONS, 6, 7.
Sufficiency of Petition for, see PLEADING, 11–13.
Of Attorney General, Jurisdiction of Suit, see COURTS, 23.
In Federal Court against Proceeding in State Court, see COURTS, 26.

1. A railroad company which enters upon the use and occupation of real property under a lease, with a view to its purchase when that can properly be effected, and constructs a portion of its line thereon, is entitled to an injunction restraining its lessors for a reasonable time from proceeding to dispossess the company from the land, in order to enable it to condemn such land in proper proceedings for that purpose. Winslow v. Baltimore & O. R. Co. 635

2. The absence of an adequate remedy at law cannot be urged by a subcontractor who has contracted to erect gas works on certain premises, as a ground for injunctive relief to prevent the enforcement, by criminal proceedings against his employees, of municipal ordinances prohibiting the erection or maintenance of such structures within certain limits, which are alleged to infringe the obligation of the contract of the owner of the land with the municipality under prior ordinances, since his remedy, if any, is by action against the principal contractor, who is presumed to be able to respond in damages for all such which the subcontractor may have suffered by the interruption of the contract. Davis & F. Mfg. Co. v. Los Angeles, 778

3. The use of the term "Syrup of Figs" to designate a laxative medicinal preparation, together with printed statements and designs upon the bottles containing the compound and on the cartons and wrappers, calculated to induce the public falsely to believe that fig juice is an important element in the composition of such preparation, whose operative laxative element is senna,

involves such deceit and misrepresentation as will deprive the manufacturer of equitable relief against the sale by another of a medicinal preparation named, marked, and packed in imitation of the older medicine, for the purpose and with the design and intent of deceiving purchasers and inducing them to buy the new preparation instead of the old one. Clinton E. Worden & Co. v. California Fig Syrup Co. 282

**As to taxes.**

Federal Jurisdiction, see COURTS, 14.

Sufficiency of, see PLEADING, 11, 12.

4. Irreparable injury cannot be inferred as the result of the enforcement of an illegal tax, so as to sustain a suit in equity to enjoin its collection, where there is a plain and adequate remedy at law to recover the amount of the tax wrongfully assessed. Indiana Mfg. Co. v. Koehne, 651

5. The prevention of multiplicity of suits cannot successfully be invoked to sustain a suit in equity to enjoin the collection of an illegal tax, where complainant's remedy under the state statutes was to have its objections to the assessment reviewed by a state board, and, if unsuccessful, to pay the tax and file a petition with the board of county commissioners to have it refunded, and, if still unsuccessful, to appeal from the decision of such board to the courts. Id.

6. The United States has such an interest in preventing the taxation by a state of permanent improvements on, and personal property used in the cultivation of, lands allotted to Indians in severalty, under the act of February 8, 1887 (24 Stat. at L. 389, chap. 119), the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, and then convey the fee free of all encumbrance, as entitles it to maintain a suit in equity to restrain the collection of such tax. United States v. Rickert, 532

**INSOLVENCY.**

First Raising on Appeal for Objections to Validity of Assignment, see APPEAL AND ERROR, 63.

Effect of Bankruptcy Proceedings on Prior Assignment for Creditors, see BANKRUPTCY, 9, 10.

Claims against Bankrupt of Assignee for Creditors, see BANKRUPTCY, 12–20.

Of National Banks, see BANKS, 2–4.

Law Governing Validity of Assignment for Creditors, see CONFLICT OF LAWS, 3.

Admissibility of Declarations of Assignee for Creditors, see EVIDENCE, 12.

An assignment for the benefit of creditors, although requiring a release by creditors as a condition of preference, must be deemed valid in the Indian territory, in view of the decisions of the courts of Arkansas upholding such assignments under the statutes of that state concerning assignments for the benefit of creditors and the statute of frauds, which were adopted and extended over the Indian territory by the act of Congress of May 2, 1890 (26 Stat. at L. 94, § 31). Robinson v. Belt, 65

**INSTRUCTIONS.**

Prejudicial Error as to, see APPEAL AND ERROR, 77, 78.

See also TRIAL, 8–15.

**INSURANCE.**

Allowing Attorney's Fee in Action against Insurance Company, see CONSTITUTIONAL LAW, 3, 10.

Federal Courts Following State Decisions as to, see COURTS, 31, 32.

Declaration of Parties to Conspiracy to Defraud Company, see EVIDENCE, 13.

Service of Process on Foreign Insurance Company, see WRIT AND PROCESS, 3.

1. An agreement in an application for a policy of insurance issued on the assessment plan to abide by the constitution, rules, and regulations of the company as they then were or might be constitutionally changed thereafter, did not amount to a consent to such changes which on their face indicated that they applied only to policies thereafter to be issued. Knights Templars' & M. L. Indemnity Co. v. Jarman, 139

**Warranties; conditions.**

Prejudicial Error as to, see APPEAL AND ERROR, 75.

2. Declarations of an insured to the medical examiner for the insurance company are not made warranties by the provision of the application that the applicant warrants that the statements in it "are true, full, and complete, . . . and are offered to the company, together with those contained in the declaration to the . . . medical examiner as a consideration for, and as the basis of, the contract." Home L. Ins. Co. v. Fisher, 667

3. The operative effect of a policy of fire insurance may, by oral agreement, between the agents respectively of the insurance company and the insured, made at the time the policy was issued, be made to depend upon the company's acceptance of the risk, notwithstanding various provisions of the policy restricting the powers of agents to alter its terms, and requiring all additional terms and conditions to be indorsed thereon in writing, as such provisions apply only when the contract has been completed by an absolute delivery. Hartford F. Ins. Co. v. Wilson, 261

**Forfeitures.**

4. A notice upon the back of a premium receipt, that if a note is given for payment of premium, and is not paid at maturity, the policy shall determine, constitutes a part of the contract of insurance, where such receipt states on its face that it is subject to the terms of the contract and the conditions on the back, which the assured is directed to read. Iowa L. Ins. Co. v. Lewis, 204

5. A policy of life insurance is forfeited, without any affirmative action on the part

of the insurance company, by the failure to pay at maturity a note given for the payment of the premium, which was accepted on the condition that if not paid at maturity the policy shall "cease and determine." Id.

**Waiver.**

6. The authority of an agent of an insurance company to waive a forfeiture which had accrued by reason of nonpayment of a premium note at maturity cannot be inferred from the act of the company in sending such note to the agent for collection some time before it was due,—especially where his contract with the company and the provisions of the policy prohibited the exercise of such authority. Id.

**Cause of death.**

Repeal of Provision as to Suicide, see CONTRACTS, 9.

Following State Decisions as to, see COURTS, 32.

Sufficiency of Title of Act as to, see STATUTES, 4.

Retroactive Statute as to, see STATUTES, 7.

7. Self-destruction while insane is as much within the provisions of Mo. Rev. Stat. 1879, § 5982, that it shall be no defense to a suit on a policy of life insurance that the insured "committed suicide," unless the same was contemplated at the time application was made for the policy, as is the taking of one's own life voluntarily while sane and in the full possession of one's mental faculties,—especially in view of Mo. Rev. Stat. 1889, § 6570, declaring that words and phrases shall be taken in their plain, ordinary, and usual sense. Knights Templars' & M. L. Indemnity Co. v. Jarman, 139

8. A policy of life insurance does not insure against the legal execution of the insured for crime, even though he may in fact have been innocent, and therefore unjustly convicted and executed. Burt v. Union Cent. L. Ins. Co. 216

**Interest in proceeds.**

See also APPEAL AND ERROR, 29.

9. The proceeds of policies of insurance on mortgaged property, taken out by the mortgagor's assignee for the benefit of creditors, inure to the trustee in the mortgage for the benefit of the bondholders secured thereby, where it requires the mortgagor to insure, and provides that in case of loss the insurance money may be applied by the trustee toward the renewal of, or additions to, the property destroyed, or, at his option, be retained and invested as a sinking fund for the redemption of the bonds, or applied to the payment of the principal. American Ice Co. v. Eastern Trust & Bkg. Co. 623

**INTEREST.**

The rate of interest on judgments and decrees, fixed in Michigan at 7 per cent by a statute originally enacted in 1838 and carried forward in the various compilations of the statutes of that state, was not changed by a statute enacted in 1891, which, according to its title, was one to regulate the interest of money on account and interest on money judgments, but which actually provided only for the reduction of the rate of "interest of money" to 6 per cent, and which was amended by the act of September 22, 1899, by a further reduction of such rate to 5 per cent. Union Steamboat Co. v. Erie & W. Transp. Co. 854

**INTERNAL REVENUE.**

Bonds required to be given to the state of Illinois and city of Chicago as a condition precedent to the issue of a liquor license were exempted from the stamp tax requirement of the war revenue act of 1898 (30 Stat. at L. 448, chap. 448), either as bonds issued by a state or city within the meaning of the exemption conferred by § 17 of that act, or by virtue of the proviso in that section that it was thereby intended to exempt the state and municipalities in respect of the exercise of strictly governmental functions. Ambrosini v. United States, 49

**INTERSTATE COMMERCE COMMISSION.**

See COMMERCE, 7.

**INTOXICATING LIQUORS.**

Exemption from Stamp Tax of Bonds Required before Issuing License, see INTERNAL REVENUE.

**IRRIGATION.**

See WATERS, 3-8.

**ISLANDS.**

Conveyance of Tide Lands Contiguous to, see PUBLIC LANDS, 32, 33.

**JAPANESE.**

See ALIENS.

**JEOPARDY.**

Discharge of Jury as Former Jeopardy, see CRIMINAL LAW, 3.

**JUDGMENT.**

On Appeal, see APPEAL AND ERROR, VI.

Rate of Interest on, see INTEREST.

On Pleadings, see PLEADING, 4, 5.

Right to Examine Indices of, see RECORD.

1. An absolute judgment against the administrator of a surety on the official bond of a Federal official, rendered by a Federal court sitting in Louisiana, is not objectionable on the theory that it should have been against the administrator, payable only in due course of administration, since, if by the law of that state the judgment is so payable, it will be thus interpreted and enforced, subject to the priority given to the Federal government by U. S. Rev. Stat. §§ 3466, 3467 (U. S. Comp. Stat. 1901, p. 2314), in the distribution of the proceeds of the estate of any person indebted to the United States, whose estate is insufficient to pay all debts against it. Smythe v. United States, 425

**Effect and conclusiveness generally.**

2. An adjudication in a suit in equity brought by a receiver of mortgaged property against persons claiming the land under an execution sale, that such property was subject to the mortgage, did not so bring the property into the custody of the court as to invalidate a prior sale of the same property on execution to other persons, strangers to the suit. Pardee v. Aldridge, 833

3. A judgment of a state court sustaining the exemption claimed by a bank, under its charter, from municipal taxation on its capital stock, which, under the local law of the state, is only *res judicata* in respect to the identical taxes litigated in the suit, can be accorded no greater efficacy in the Federal courts. Union & P. Bank v. Memphis, 712

**Foreign judgments.**

Federal Question as to, see APPEAL AND ERROR, 43.

4. Full faith and credit is not denied a judgment of an Illinois court taxing the entire inheritance under the will of a resident of that state, by a tax imposed under the New York inheritance-tax law on the transfer, under such will, of debts due the decedent by citizens of the latter state. Blackstone v. Miller, 439

5. The full faith and credit clause of the Federal Constitution is not violated by the refusal of the Massachusetts courts, acting in accordance with Mass. Pub. Stat. chap. 146, § 41, to give effect to a decree of divorce rendered by a court of another state in a suit instituted by one who temporarily left the state of Massachusetts, where he was domiciled, for the purpose of obtaining a divorce for a cause which occurred in that state while the parties resided there, but which was not a ground for divorce in that state. Andrews v. Andrews, 366

6. Full faith and credit are not denied to a judgment of a Minnesota court against resident stockholders of a domestic corporation in an action to enforce their statutory liability, by the judgment of a court of another state denying the right to maintain a further action to enforce such liability outside the state of incorporation, where, under the Minnesota laws as construed by its courts, the only remedy provided for the enforcement of the liability of stockholders in domestic corporations is a suit in equity in that state by a creditor in behalf of himself and all other creditors against the stockholders who can be served with process. Finney v. Guy, 839

7. The decision of a state court with reference to the effect which the charter and by-laws of a foreign building and loan association and the statutes of the state of its incorporation, together with the decisions of the courts of that state thereon, have upon the absolute promise of such association to mature its shares in a specified time, can involve no denial of the full faith and credit which, by U. S. Const. art. 4, § 1, must be given by the courts of each state to the public acts, records and judicial proceedings of other states. Eastern Bldg. & L. Asso. v. Williamson, 735

8. Due effect cannot be said to have been denied the decrees of courts of another jurisdiction by the construction placed upon them by a state court, where the construction contended for by those claiming that such decrees were not given the proper effect cannot be given without indulging in conjecture and giving to those making such contention the benefit of the doubts which arise as to the precise meaning of such decrees. Commercial Pub. Co. v. Beckwith, 598

**Setting aside.**

Prejudicial Error as to, see APPEAL AND ERROR, 74.

9. A judgment dismissing a case for want of prosecution cannot be set aside on application made after the close of the term at which it is entered, where no showing of fraud or surprise is made. Tubman v. Baltimore & O. R. Co. 946

10. The repugnancy of a state statute to the Federal Constitution cannot be successfully invoked in support of a motion to set aside a judgment as void, where the invalidity of such statute would have been available to defeat the recovery of a valid judgment, if it had been pleaded or otherwise presented in the state court as a defense in the proceedings in the original action. Manley v. Park, 296

**JUDICIAL SALE.**

Federal Question as to, see APPEAL AND ERROR, 42.

Lien on Proceeds of, see BANKRUPTCY, 17.

**JURISDICTION.**

Of Parties to Suits, see ACTION OR SUIT, 3.

On Appeal, see APPEAL AND ERROR, II.

In Bankruptcy Proceeding, see BANKRUPTCY, 3-7.

Of Court of Claims, see CLAIMS, 3, 4.

Of United States Commissioner over Extradition Proceedings, see EXTRADITION, 3, 4.

In Equity, see EQUITY; INJUNCTION.

Showing by Allegations, see PLEADING, 6, 7.

Sufficiency of Service to Give, see WRIT AND PROCESS.

**JURISDICTIONAL AMOUNT.**

For Purpose of Appeal, see APPEAL AND ERROR, 11.

First Objecting to, on Appeal, see APPEAL AND ERROR, 64.

**JURY.**

Refusal to Vacate Decree for Incompetency of Juror, see APPEAL AND ERROR, 61.

Quashing Indictment for Discrimination against Negroes in Selecting Jurors, see CRIMINAL LAW, 2.

Criminal Proceedings by, in Hawaii, see HAWAII.

Right to Jury Trial, see TRIAL, 3.

**LACHES.**
Estoppel by, see ESTOPPEL, 2.
As Defense, see LIMITATION OF ACTIONS.

**LAND DEPARTMENT.**
Conclusiveness of Decision of, on Courts, see COURTS, 1–5.
Jurisdiction of Suit to Prevent Survey by, see EQUITY, 2.
See also PUBLIC LANDS, 29–31.

**LANDLORD AND TENANT.**
Specific Performance of Covenant for Renewal of Lease, see SPECIFIC PERFORMANCE.
Power of One Trustee to Make Lease Containing Covenant to Renew, see TRUSTS, 2, 3.

A covenant in a lease to renew at its expiration with the same covenants and privileges as contained in the original lease is satisfied by one renewal without the insertion of another covenant to renew. Winslow v. Baltimore & O. R. Co. 635

**LEAVE OF ABSENCE.**
Of Government Employees, see GOVERNMENT EMPLOYEES.

**LETTERS.**
Conclusiveness of Postmaster General's Determination Refusing Delivery of, see COURTS, 6.
Fraud Authorizing Refusal to Deliver, see POSTOFFICE.

**LEVY AND SEIZURE.**
Following State Decisions as to What is Subject to, see COURTS, 33.

**LIBEL AND SLANDER.**
Delegating to Philippine Commission Power to Enact Libel Law, see CONSTITUTIONAL LAW, 2.

1. Philippine Commisison act No. 27, § 1, defines libel as malicious defamation, expressed either in writing or printing, or by signs or pictures or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead, or to impeach the honesty, virtue, or reputation, or publish the alleged or natural defects, of one who is alive, and thereby expose him to public hatred, contempt, or ridicule. *Held*, that headlines above an article published in a newspaper, reading: "Traitor, Seducer, and Perjurer. Sensational Allegations against Commissioner Legarda. Made of Record and Read in English. Spanish Reading Waived. Wife would have Killed Him. Legarda Pale and Nervous,"—were libelous, under the act. United States v. Dorr (Philippine Sup. Ct.) 1187

2. No attempt having been made to show a justifiable motive, the publication of libelous headlines was "malicious defamation," within the meaning of the act, as § 3 provides that an injurious publication is presumed to have been malicious if no justifiable motive for making it is shown. Id.

3. Philippine Commission act No. 277, § 7, provides that no reporter, editor, or proprietor of a newspaper is liable to prosecution for a fair and true report of any judicial, legislative, or other public proceedings, or of any special argument or debate in the course of such proceedings, except upon proof of malice in making the report, which shall not be implied from the mere fact of publication. Section 8 provides that libelous remarks or comments connected with matters privileged by the last section receive no privilege by reason of being so connected. *Held*, that libelous headlines were not privileged because appended to a privileged report of judicial proceedings. Id.

4. The fact that libelous headlines were inserted in a newspaper to aid the reader in determining whether he cared to read the article was no defense. Id.

5. The privileged report was a written statement prepared by an attorney in a prosecution for libel, in which he made an offer to prove the truth of certain statements regarded as material in the defense, and which was by the court excluded. *Held*, that the headlines could not be considered as a fair index to the report. Id.

6. The fact that headlines were no worse than the matter contained in a privileged report was immaterial. Id.

**LIBERTY.**
To Contract, see CONSTITUTIONAL LAW, 21, 22.

**LICENSE.**
For Vessels, see APPEAL AND ERROR, 45.
Of Physicians, Due Process as to, see CONSTITUTIONAL LAW, 13, 14.
Of Physician, *Ex Post Facto* Law as to, see CONSTITUTIONAL LAW, 1.
As Interference with Interstate Commerce, see COMMERCE, 1–3.
Reasonableness of License Fee, see TRIAL, 5.

**LIEN.**
On Vessel, see ADMIRALTY.
On Proceeds of Seat in Stock Exchange, see BANKRUPTCY, 2.
On Bankrupt's Estate, see BANKRUPTCY, 14–17.

**LIEU LANDS.**
See PUBLIC LANDS, 7, 15–19.

**LIGHTERAGE.**
See SHIPPING, 1.

**LIMITATION OF ACTIONS.**
Of Claim by Nonresident against Decedent's Estate, see COURTS, 22.

Laches is no defense to a suit by the United States to compel the state of Michigan to account for surplus moneys over and above the cost of the ship canal at Saint Marys Falls, arising from sales of the public lands granted by the act of August 26, 1852 (10 Stat. at L. 35, chap. 92), to that

state in aid of its construction on a right of way therein granted to the state for that purpose, and for any surplus tolls remaining after the formal transfer of such canal to the United States, and for all tools and machinery on hand at the time of such transfer. United States v. Michigan, 1103

**LOCAL IMPROVEMENTS.**
See PUBLIC IMPROVEMENTS.

**LOCAL PREJUDICE.**
As Ground for Removal of Cause, see REMOVAL OF CAUSES, 1.

**LOGS.**
Taxation of, see TAXES, 7–9.

**LONG AND SHORT HAUL.**
See CARRIERS.

**LOTTERY TICKET.**
Power of Congress to Prevent Interstate Carriage of, see COMMERCE, 10, 11.

**MAGAZINE.**
Copyright on Issues of, see COPYRIGHT, 4, 5.

**MAIL.**
See POSTOFFICE.

**MAJORITY.**
Of Arbitrators, Award by, see ARBITRATION.

**MALICE.**
Presumption as to, see LIBEL AND SLANDER, 2.

**MANDAMUS.**
Appeal in Case of, see APPEAL AND ERROR, 28.

1. A writ of mandamus will not lie to compel the court of appeals of the District of Columbia to reinstate an appeal from the supreme court of the District, in an action originally brought before a justice of the peace, where such appeal was dismissed by the court of appeals for want of jurisdiction, although the decree of dismissal cannot be reviewed on appeal or writ of error. Re Key, 720

2. Mandamus will not lie against the Secretary of the Interior to compel him to vacate his decision that a selection of public land, under the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), in lieu of land relinquished in a forest reservation, must be rejected because of the failure of the selector to show in due and proper form that the land was, at the date of selection, subject to selection as "vacant land open to settlement," which the Secretary construed as meaning to exclude land in the actual possession of any person under the local customs or rules of miners which are by statute incorporated into and have become part of the laws of the United States. United States ex rel. Riverside Oil Co. v. Hitchcock, 1074

**MANDATE.**
On Appeal, see APPEAL AND ERROR, 80.

**MARGIN.**
Statute Avoiding Sale of Stock on, see CONSTITUTIONAL LAW, 11, 22.

**MARSHAL.**
Repeal of Statute as to Fees of, see STATUTES, 9.

1. The allowance by the district judge of the account of a United States marshal is prima facie evidence of the correctness of the mileage items of such account. United States v. Nix, 775

2. The expense of transporting a prisoner under a warrant of commitment cannot be allowed a United States marshal, where such prisoner escaped from the custody of his deputy before he could be delivered to the penitentiary, and there is no finding of due diligence on the part of the officer to prevent the escape. Id.

3. The *per diem* fee for the attendance of a United States marshal at a court which has been opened for business by order of the judge is allowable, although business may not have been transacted in court on such day, and the judge may not have been present. Id.

4. A United States marshal is not entitled to mileage for the distance traveled in serving warrants of arrest, in excess of the usually traveled route between the place of receiving the writs and the place of service, however great the necessity of pursuing a circuitous route, in view of U. S. Rev. Stat. § 829 (U. S. Comp. Stat. 1901, p. 636), which directs such mileage to be computed "from the place where the process is returned to the place of service." Id.

**MASTER AND SERVANT.**
Liability for Injury to Seamen, see SHIPPING, 2.
Question for Jury as to Negligence of Foreman, see TRIAL, 7.

1. Whether a freight train was handled with ordinary care, and not whether it was handled in the usual and ordinary way, is the test by which to determine the liability of a railroad company for injuries received by a brakeman because of a sudden bump or jerk while he was standing, in obedience to orders, on the icy roof of a car in such train. Texas & P. R. Co. v. Behymer, 905

2. The risk of injury from a sudden bump or jerk in the management of a freight train is not, as a matter of law, assumed by a brakeman standing, in obedience to orders, upon the icy roof of a car in such train. Id.

3. The neglect, by the foreman of a railway bridge gang, of his special duty to see that the workmen under him performed

their duty to leave a clear track for an approaching train, is the neglect of a duty which he owes, not as a fellow servant with such workmen, but as a vice principal of the railroad company, under Sayles's (Tex.) Civ. Stat. 1897, art. 4560*g*, providing that railroad employees intrusted with the control or command of other employees, or with the authority to direct any other employee in the performance of his duty, are vice principals of the railway company, and not fellow servants with their coemployees. Texas & P. R. Co. v. Carlin, 849

**MAXIMS.**
Expressio unius est exclusio alterius. Shurtleff v. United States, 828

**MEANDERED LAKES.**
Federal Question as to, see APPEAL AND ERROR, 35, 36.

**MEANDER LINE.**
Federal Question as to, see APPEAL AND ERROR, 35, 36.
See also PUBLIC LANDS, 21.

**MEDICINE.**
*Ex Post Facto* Law as to Practice of, see CONSTITUTIONAL LAW, 1.
Due Process as to Registration of Physicians, see CONSTITUTIONAL LAW, 13, 14.

**MEDIUM.**
Of Payment, see ASSUMPSIT.

**MEMORANDUM.**
Admissibility of, see EVIDENCE, 6, 7.

**MENTAL HEALING.**
Prohibiting Delivery of Letters Addressed to One Claiming Power of, see POSTOFFICE.

**MEXICAN LAND GRANTS.**
Federal Question as to, see APPEAL AND ERROR, 41.

**MILEAGE FEES.**
Of Marshal, see MARSHALS, 1, 4.

**MINES.**
Parties in Action on Application for Land for Mining Purposes, see ACTION OR SUIT, 1.
Federal Question as to, see APPEAL AND ERROR, 37, 40.
Federal Jurisdiction as to, see COURTS, 15, 16.
Estoppel as to Extralateral Rights, see ESTOPPEL, 1.

**MINT.**
Superintendent of; Liability on Bond, see BONDS, 1; DAMAGES, 4–6.

**MONEY.**
Federal Question as to, see APPEAL AND ERROR, 30.

**MORTGAGE.**
Federal Question as to Rendition of Foreclosure Decree, see APPEAL AND ERROR, 44.
Interest in Proceeds of Insurance on Mortgaged Property, see INSURANCE, 9.
Conclusiveness of Judgment that Property Subject to, see JUDGMENT, 2.

1. Real property only temporarily used for railroad purposes, having been acquired by a railroad company with the intention of subdividing such portions as should not be needed for railroad purposes into lots to be sold to its employees, is not covered by a mortgage of all the property of such company "used for and pertaining to the operation of said railroad." Pardee v. Aldridge, 833

2. The grantee of a purchaser at a foreclosure sale cannot, because of the insufficiency of the affidavit for service by publication, be dispossessed, or the judgment set aside by a court of equity at the instance of one claiming under the mortgagor by a deed subsequent to the mortgage, which remains unpaid; but the latter is only entitled to be let in to make any equitable defense which he may have. Romig v. Gillett, 97

**MUNICIPAL CORPORATIONS.**
Jurisdiction of Appeal in Suit Based on Invalidity of Ordinances, see APPEAL AND ERROR, 8.
Estoppel of, Federal Questions as to, see APPEAL AND ERROR, 31.
Validity of Limitation on Height of Buildings, see CONSTITUTIONAL LAW, 18.
Power to Regulate Water Rates, see CONTRACTS, 12, 13.
Succession Tax on Bequest to, see TAXES, 12.

**NATIONAL BANKS.**
See BANKS.

**NAVAL STORES.**
As Subject to Capture, see PRIZE, 3.

**NAVIGABLE WATERS.**
See WATERS.

**NAVIGATION.**
Jurisdiction of Suit for Compensation for Property Destroyed in Improvement of, see COURTS, 12.
Liability for Damages in Improvement of, see EMINENT DOMAIN.
Duty to Make Compensation for Land Taken in Improvement of, see UNITED STATES.

**NEGLIGENCE.**
Presumption of, from Escape of Prisoner, see EVIDENCE, 2.

**NEGROES.**
Discrimination against, in Selection of Grand Jurors, see APPEAL AND ERROR, 51.
Discrimination against, in Selecting Jurors, see CRIMINAL LAW, 2.
Construction of Act as to Bribery of Negro Voters, see STATUTES, 5.
Power of Congress to Provide Punishment for Bribery of, see VOTERS AND ELECTIONS, 1.
Compelling County Board to Enroll, see VOTERS AND ELECTIONS, 2, 3.

**NEWSPAPER.**
Libel in, see LIBEL AND SLANDER, 3.

**NONRESIDENTS.**
Bar, by Limitation, of Right to Sue Administrator, see COURTS, 22.
Effect of Appearance in Divorce Suit, see HUSBAND AND WIFE.
Equal Protection of, see TAXES, 5.
Transfer Tax against Debts Due Nonresident Decedent, see TAXES, 10, 11.

**NOTES (Editorial) INDEX TO.**
**Animals;** constitutionality of state legislation regulating the importation of infected animals. 108
**Bankruptcy;** allowances in bankruptcy proceedings to bankrupt's assignee for creditors. 1165
**Commerce;** interstate character of transportation between points in same state over route which passes outside such state. 333
**Constitutional law;** unconstitutional inequality or discrimination in statutes allowing attorneys' fees. 821
**Evidence;** proof of the statute law of foreign countries. 782
**Extradition;** the necessity, for extradition purposes, of the actual presence of the accused in the demanding state. 657
**License;** validity of charges on telegraph and telephone poles and wires. 240
**Receivers;** right of receiver to enforce liability of corporate stockholder outside the state of his appointment. 380
**Records;** right of access to public records for private abstract purposes. 741
**Taxes;** exemption of property of educational institutions from taxation, as affected by use for other than educational purposes. 642
**Trademark;** deception as a bar to relief for infringement of a trademark. 282
**Writ and process;** service on state officer as service on foreign corporations. 987

**NOTICE.**
Of Copyright, see COPYRIGHT, 4, 5.
Of Call on Stockholders, see CORPORATIONS, 3.
Right of Officer to, before Removal, see OFFICERS.

**OATH.**
Of Officers in Charge of Jury, see CONSTITUTIONAL LAW, 20.

**OFFICERS.**
Dismissal of, from Proceedings after Expiration of Terms of Office, see APPEAL AND ERROR, 53.
Compensation of Army Officer, see ARMY, 1.
Bond of, see BONDS, 1.
Extent of Liability on Bond of, see DAMAGES, 4–6.

1. The removal of a Federal official by the President without notice or opportunity to defend will be presumed to have been made for other causes than those specified by Congress as grounds for his removal. Shurtleff v. United States, 828

2. A Federal official sought to be removed from office by the President for any of the causes specified by Congress as grounds for such removal is entitled to notice and hearing. Id.

3. The general power of the President to remove a Federal official for any reason he may think sufficient, even though such official was appointed by and with the advice and consent of the Senate, is not restricted, as regards general appraisers of merchandise, to a removal for "inefficiency, neglect of duty, or malfeasance in office" by the provision in the customs administrative act of June 10, 1890, § 12 (26 Stat. at L. 131, 136, chap. 407, U. S. Comp. Stat. 1901, pp. 1886, 1895, 1922, 1924, 1931), which authorizes the appointment of such officials, that they "may be removed from office at any time by the President" for those causes. Id.

**OKLAHOMA.**
Race for Land in, see PUBLIC LANDS, 27, 28.

**OPINION EVIDENCE.**
See EVIDENCE, 8–11.

**ORE.**
Federal Jurisdiction as to, see COURTS, 16.

**OREGON DONATION ACT.**
See PUBLIC LANDS, 7, 26.

**PALACE CAR COMPANY.**
Privilege Tax on, see COMMERCE, 5.

**PARDON.**
Interference with, by Indeterminate Sentence Act, see CONSTITUTIONAL LAW, 19

**PARENT AND CHILD.**
Release by Discharge in Bankruptcy from Duty to Support Children, see BANKRUPTCY, 22.

**PARTIES.**
See ACTION OR SUIT, 1, 2.

**PARTNERSHIP.**
Rights of Members of, in Claim Allowed by Government, see CLAIMS, 2.

**PATENTS.**
Judgment on Reversal of Order Enjoining Infringement of, see APPEAL AND ERROR, 79.
To Public Land, see PUBLIC LANDS.

1. There is a presumption, from the grant of separate letters patent for two improvements on a prior art, that there is a substantial difference between the inventions. Kokomo Fence Mach. Co. v. Kitselman, 689

2. The Kitselman patent, No. 356,322, for an improvement in wire-fabric machines cannot be regarded as embodying a pioneer invention of a field machine for weaving wire-fencing fabric, in view of prior patents for stationary machines for weaving such fabric and for field machines for making wire-and-picket fence, and of the rejection of the claim for a pioneer field machine by the Patent Office, with the acquiescence of the patentee, who thereupon withdrew such claim; and the claims of such patent must therefore be limited in their scope to the actual combination of essential parts as shown, and cannot be construed to cover other combinations of elements of different construction and arrangement. Id.

3. No infringement of either the Kitselman patent, No. 356,322, the Davisson patent, No. 289,507, or the Connor patent, No. 357,067, for improvements in wire-fabric machines, or of the Pope patent, No. 505,-607, for wire-fabric machines, results from the manufacture, under the Whitney patent, No. 502,025, of wire-fence machines which are substantially differentiated from those manufactured under the earlier patents, none of which embody pioneer invention. Id.

**PAUPERS.**
Aliens, deportation of, see ALIENS.

**PAYMENT.**
In Embezzled Currency, see ASSUMPSIT.

**PEDDLERS.**
License of, see COMMERCE, 1.

**PENALTY.**
For Undervaluation of Imported Merchandise, see COURTS, 21.

**PER DIEM.**
Of Marshal, see MARSHAL, 3.

**PEREMPTORY CHALLENGES.**
Waiver of Objection as to, see APPEAL AND ERROR, 65.

**PHILIPPINE COMMISSION.**
Delegation of Power to, see CONSTITUTIONAL LAW, 2.

**PHILIPPINE ISLANDS.**

1. While the Philippine islands belong to the United States, there is a difference between them and the territories which are a part of the United States, with reference to the Constitution of the United States. United States v. Dorr (Philippine Sup. Ct.) 1187

2. The Constitution of the United States was not extended to the Philippine islands by the terms of the treaty of Paris, April 11, 1899, but by such treaty the status of the ceded territory was to be determined by Congress. Id.

3. The mere cession of the Philippines to the United States did not extend the Constitution to those islands, except such parts as fall within the principles of fundamental limitations in favor of personal rights formulated in the Constitution and its amendments, and which exist rather by inference and the general spirit of the Constitution, and except those express provisions of the Constitution which prohibit Congress from passing laws in their contravention under any circumstances. The provisions contained in the Constitution in relation to jury trials do not fall within either of these exceptions, and hence the right to trial by jury was not extended to the Philippines by the mere cession of the territory. Id.

4. Congress having passed no law extending to the Philippines the provision of the Constitution relating to jury trials, and there having been no laws in existence in the Philippines at the date of their cession providing for trial by jury, it was not error for the court of first instance to overrule the application of defendants in a prosecution for criminal libel for a trial by jury. Id.

**PHYSICIANS.**
*Ex Post Facto* Law as to Registration of, see CONSTITUTIONAL LAW, 1.
Due Process as to Registration of, see CONSTITUTIONAL LAW, 13.

**PICTORIAL ILLUSTRATIONS.**
As Subjects of Copyright, see COPYRIGHT, 2.

**PLEADING.**
Federal Question as to Right to File Supplemental Answer, see APPEAL AND ERROR, 44.

1. A state court is not concluded as to the proper construction of the statutes of another state and the decision of its courts construing them, on the theory that defendant, by demurring to the complaint, which contained an allegation in the form of an averment of fact as to the meaning of such laws and decisions set forth therein, admitted that such was the correct conclusion to be drawn from them. Finney v. Guy, 839

2. The lack of essential averments in a declaration in *indebitatus assumpsit* is cured by the verdict, if the evidence offered was sufficient to support the verdict, and no objection was made to a variance between allegations and proof. Nashua Sav. Bank

v. Anglo-American Land, Mortg. & Agency Co. 782

**Amendment.**

3. An amendment of plaintiff's petition, after verdict and judgment thereon, with no further proceedings taken, by inserting the words, "and is a citizen of said state and of the United States of America," after the allegation therein that "plaintiff resides in El Paso, in El Paso county, state of Texas," may be allowed by a circuit court of the United States, under U. S. Rev. Stat. § 964 (U. S. Comp. Stat. 1901, p. 697), giving the trial court the right at any time to permit either of the parties to amend any defect in process or pleadings, upon such conditions as it shall prescribe. Mexican C. R. Co. v. Duthie, 715

**Judgment on Pleading.**

See also TRIAL, 3.

4. Copies of the bonds in suit, and of the contracts the faithful performance of which they were executed to secure, need not be filed in order to comply with the provisions of rule 73 of the supreme court of the District of Columbia, that in actions *ex contractu* a plaintiff who has filed an affidavit setting out distinctly his cause of action shall be entitled to judgment unless a sufficient affidavit of defense is filed. Fidelity & D. Co. v. United States, 194

5. An action against principal and surety on a bond to insure the faithful performance of a contract is one "arising *ex contractu*," within the meaning of rule 73 of the supreme court of the District of Columbia, authorizing judgment for plaintiff in such actions for want of a sufficient affidavit of defense. Id.

**Plaintiff's pleadings.**

See also *supra*, 3.

6. Complainants' description of themselves, in a bill in a suit against a citizen of Nebraska, as "all of Cognac in France, and citizens of the Republic of France," is sufficient, without any averment of alienage, to bring the suit within the provisions of 25 Stat. at L. 433, chap. 866, conferring original jurisdiction upon circuit courts of the United States of all suits in which there is "a controversy between citizens of a state and foreign states, citizens, or subjects." Hennessy v. Richardson Drug Co. 697

7. The amount of the damages involved in an action for the breach of a written contract to deliver oil at a specified price f. o. b. buyer's tanks at seller's mill is not increased, for jurisdictional purposes, over and above the difference between the contract and market value by allegations in the petition that the seller had notice that the buyer would be compelled to send its tanks from distant points to the seller's mill; that in so doing transportation charges were incurred and the use of the tanks lost for thirty days; that seller was well aware that buyer had contracts over, and "had contracted to that end" with buyer; and that seller, contemplating the breach of its contract, maliciously caused the buyer to send the tanks a specified distance at a specified cost. Globe Ref. Co. v. Landa Cotton Oil Co. 1171

8. A bill to quiet title against a single adverse claimant must aver that complainant's title has been successfully tried at law at least once. Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 626

9. An averment of possession in the complainant is essential to the maintenance of a bill to quiet title in a Federal court, although under the state practice a person not in possession may maintain an action to quiet title. Id.

10. A bill to set aside a tax sale, which does not charge that the statutory procedure was not strictly pursued, but relies on the failure of the sheriff's return of sale to set forth a compliance with such procedure, cannot be maintained on the theory that, as the statute validated tax deeds notwithstanding any irregularities in the sale not appearing on the record, plaintiff was deprived of his property without due process of law, as this is an attempt to test the constitutionality of the law without showing that plaintiff was injured by its application. Turpin v. Lemon, 70

11. An averment that an assessment upon the capital stock and franchises of a corporation constitutes a cloud upon title is not sufficient to sustain a bill in equity which seeks to enjoin the collection of such tax as illegal, where it contains no allegation that the corporation owns any real property. Indiana Mfg. Co. v. Koehne, 651

12. The absence of an adequate remedy at law is not shown by an averment in a bill which seeks to enjoin the collection of a tax on property alleged to be exempt from taxation, that a portion of the tax is to be paid to the state of Indiana, which cannot be sued, where, under the general tax laws of that state, complainant might have had its objections to the assessment reviewed by a state board, and, if unsuccessful, might have paid the tax, and then, under Burns's (Ind.) Rev. Stat. 1894, §§ 7915, 7916, have filed a petition with the board of county commissioners to recover it back as "wrongfully" assessed, and, if still unsuccessful, might have appealed from the decision of such board to the courts. Id.

13. A sufficient showing of equitable jurisdiction is made by a bill filed by the Cherokee Nation to restrain any further action by the Secretary of the Interior upon applications for leases of its tribal lands for mining purposes, which contains general allegations of the absence of an adequate remedy at law, the necessity of relief to avoid a multiplicity of suits and to prevent the casting of a cloud upon the title, and a claim that irreparable injury will be caused, and wrong and oppression result, and that there will be a deprivation of property rights. Cherokee Nation v. Hitchcock, 183

**PLEDGE.**
Of Corporate Stock; Liability of, see CORPORATIONS, 8.
Estoppel of Pledgee to Deny Liability of Shareholder, see TRIAL, 6.

**POLES.**
Reasonableness of License Fee on, see TRIAL, 5.

**POLICY SLIPS.**
Preventing Carriage from One State to Another, see COMMERCE, 11.

**POOR.**
Aliens; Deportation of, see ALIENS.

**POSTING NOTICE.**
Of Call on Stockholders, see CORPORATIONS, 3.

**POSTMASTER GENERAL.**
Conclusiveness on Courts of Determination of, see COURTS, 6.
Right to Prohibit Delivery of Letters, see POSTOFFICE.

**POSTOFFICE.**
Conclusiveness of Postmaster General's Determination, see COURTS, 6.

The Postmaster General is not justified in prohibiting the delivery of letters addressed to a corporation which assumes to heal disease through the influence of the mind, by the provisions of U. S. Rev. Stat. §§ 3929, 4041, and the act of Congress of March 2, 1895, § 4 (28 Stat. at L. 963, 964, chap. 191), which authorize the retention of letters directed to any person obtaining money through the mails by false pretenses or promises, as the effectiveness of such treatment is a mere matter of opinion, and the statutes are only intended to cover cases of actual fraud in fact. American School of Magnetic Healing v. McAnnulty, 90

**PREFERENCE.**
Requiring Release by Creditors as Condition of, see CONFLICT OF LAWS, 3.
In Bankrupt's Estate, see BANKRUPTCY, 9–11.

**PRELIMINARY REQUISITION.**
As Prerequisite to Jurisdiction over Extradition Proceedings, see EXTRADITION, 4.

**PRESIDENT.**
Removal of Officer by, see OFFICERS.

**PRESUMPTIONS.**
See EVIDENCE, 1–4.

**PRINCIPAL AND AGENT.**
Insurance Agent, see INSURANCE.

**PRINCIPAL AND SURETY.**
Surety on Bankrupt's Bail Bond, see BANKRUPTCY, 1, 3.
Absolute Judgment against Administrator of Surety, see JUDGMENT, 1.

**PRINTING.**
As Subject of Copyright, see COPYRIGHT, 1.

**PRINTING OFFICE.**
Leave of Absence of Employees in, see GOVERNMENT EMPLOYEES.

**PRIVATE LAND CLAIM.**
Dismissal of Appeal in Action Affecting, see APPEAL AND ERROR, 56.
Review of Findings as to, see APPEAL AND ERROR, 71.
Federal Question as to, see APPEAL AND ERROR, 41.
Evidence of Grant, see EVIDENCE, 16.

1. A report of the Commissioner of Public Lands in favor of a claim under an alleged Spanish land grant is insufficient to render applicable the provisions of the treaty with Spain of February 22, 1819 (8 Stat. at L. 252), for the confirmation of such grants, where it contains no other description of the land granted than its area in arpents and the statement that it is situated on the Mobile river, but that no survey of the land existed. Mobile Transp. Co. v. Mobile, 266

2. Confirmation of a Spanish land grant cannot be had in the court of private land claims, where possession of the land had been abandoned by the descendants of the grantee for at least nine years before the treaty of 1848 with Mexico, under which the land passed into the possession of the United States, and there has been no possession by representatives of such grantee since the treaty, and no attempt to assert their title thereto for more than fifty years thereafter. Sena v. United States, 787

**PRIVILEGED COMMUNICATIONS.**
See LIBEL AND SLANDER, 3, 5.

**PRIVILEGE TAX.**
On Sleeping and Palace Car Companies, see COMMERCE, 5.

**PRIVITY.**
See CONTRACTS, 1.

**PRIZE.**
Substitution of Parties in Libel for, see ACTION OR SUIT, 3.

**What subject to condemnation.**
1. The entire equipment of a vessel of war, including everything necessary to be used for the purposes of the vessel, is included in the words, "ship or vessel of war belonging to an enemy," as used in the provisions for bounty made by U. S. Rev. Stat. § 4635 (U. S. Comp. Stat. 1901, p. 3134), and is, therefore, not the subject of condemnation as prize of war. United States v. Taylor, 477

2. Appliances and outfit taken from an enemy's vessels of war sunk or otherwise destroyed in battle by naval vessels of the United States are not the subject of prize, but are included within the words "ship or vessel of war," as used in U. S. Rev. Stat. 78

§ 4635 (U. S. Comp. Stat. 1901, p. 3134), awarding a bounty for the destruction of an enemy's vessels. United States v. Dewey, 463

3. Naval stores captured at a naval station by a naval force of the United States, as the result of a naval engagement, are no less subject to condemnation as prize of war because taken on land, since, if the rights of captors were confined to the proceeds of ship and cargoes by the act of July 17, 1862 (12 Stat. at L. 600, chap. 204), § 2, providing for distribution among the captors of the proceeds "of all ships and vessels, and the goods taken on board them, which shall be adjudged good prize," such restriction was so far removed by the act of June 30, 1864 (13 Stat. at L. 306, chap. 174), which, in addition to the repeal of such section, provided that captors should be entitled to "the net proceeds of all property condemned as prize," as to permit such statute to extend to other property fairly coming within the accepted rules of prize. Id.

4. Barges propelled by sweeps and by poling, and nonseagoing floating derricks or wrecking boats without means of propulsion, the property of private citizens, are not the subject of capture as prize of war. Id.

5. An enemy's war vessel, raised and floated after a naval engagement, in an attempt by the United States, with the advice and concurrence of the captors, to save her, but which by reason of the injuries received in action was lost in an endeavor to reach the nearest practicable point at which she could be reconstructed, was not appropriated to the use of the United States so as to be lawful prize of war for the benefit of the captors, under U. S. Rev. Stat. § 4625 (U. S. Comp. Stat. 1901, p. 3130), but such captors are entitled to bounty under § 4635 (U. S. Comp. Stat. 1901, p. 3134), for her destruction in the engagement. United States v. Taylor, 477

6. An enemy's war vessels, run ashore in battle and sunk by their own commanders, though left in such condition as not to be floated by any of the means ordinarily possessed by a naval force, cannot be said to have been "sunk or otherwise destroyed," within the meaning of the bounty provisions of U. S. Rev. Stat. § 4635 (U. S. Comp. Stat. 1901, p. 3134), where they are afterwards raised, reconstructed, and commissioned in the United States Navy, but are vessels captured and appropriated to the use of the United States, within the meaning of §§ 4624, 4625 (U. S. Comp. Stat. 1901, p. 3130), and are therefore lawful prize of war for the benefit of the captors. United States v. Dewey, 463

**Who entitled to share in prize money.**

7. Naval vessels not within signal distance of a capture are not vessels "making the capture," within the meaning of U. S. Rev. Stat. § 4630 (U. S. Comp. Stat. 1901, p. 3132), and therefore cannot be taken into account in estimating the relative force of captor and prize, for the purpose of determining the proportion of the prize money to which the captor is entitled under that section, although their proximity may have induced the surrender of the prize to an inferior force. United States v. The Mangrove, 664

8. A vessel of the United States Navy was not "within signal distance" of another vessel making a capture, so as to be entitled to share in the distribution of the prize money under U. S. Rev. Stat. § 4632 (U. S. Comp. Stat. 1901, p. 3133), where the two vessels were from 12 to 15 miles apart, and the vessel making the capture was equipped with boat flags 3 feet by 4 in size, instead of the usual signal flags 8 feet by 11. Id.

9. Vessels used by the Navy of the United States as colliers, manned principally by unenlisted men, and armed only for purposes of defense, are not, though within signal distance of a capture, entitled to participate in the prize money awarded, under U. S. Rev. Stat. § 4632 (U. S. Comp. Stat. 1901, p. 3133), to "all vessels of the Navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required." United States v. Dewey, 463

**Liability on restitution.**

Sufficiency of Exception as to, see APPEAL AND ERROR, 49.

10. The government of the United States was absolved from all liability, under its prize statutes, to the captors of property of an enemy susceptible of condemnation as prize of war, by the restoration of such property to the enemy before condemnation. Id.

11. Naval captors of vessels as prize of war, the proceeds of which the prize courts have decreed should be restored to the claimants, with damages and costs, cannot be held liable therefor, where the libels were filed by the United States in its own behalf, praying a forfeiture to it, and alleging a capture pursuant to instructions from the President. United States v. The Habana, 900

12. A prize court may enter a decree against the United States for the damages sustained by the claimants of vessels captured by its Navy as prize of war, the proceeds of which have, in the prize proceedings, been ordered restored to such claimants, with damages and costs, where the libels were filed by the United States in its own behalf, praying a forfeiture to it, and alleging a capture pursuant to instructions from the President. Id.

**PRIZE MONEY.**

Right to Share in, see PRIZE, 7–9.

**PROBATE.**

Waiver of Objections to Proceedings for, see APPEAL AND ERROR, 67.

**PROOF OF CLAIM.**

Against Bankrupt's Estate, see BANKRUPTCY, 18–20.

**PROPERTY.**
Seat in Stock Exchange as, see BANKRUPTCY, 8.

**PUBLICATION.**
Without Notice of Copyright, see COPYRIGHT, 4, 5.

Two publications in each of four consecutive periods of seven days from the date of an order of publication satisfies the requirement of the act of Congress of June 8, 1898 (30 Stat. at L. 434, chap. 394, § 6), requiring such publication in the District of Columbia at least "twice a week for a period of not less than four weeks," although there was but one publication in the last calendar week of such period. Leach v. Burr, 567

**PUBLIC IMPROVEMENTS.**
Federal Question as to Estoppel of Municipality to Collect Cost of, see APPEAL AND ERROR, 31.
Validity of Frontage Tax, see CONSTITUTIONAL LAW, 8.

1. A state statute under which the cost of a public improvement may be assessed upon the abutting property in proportion to frontage does not violate the Federal Constitution, where, as construed by the state courts, it requires such assessment to conform to the actual special benefits accruing to each of the abutting property owners. Schaefer v. Werling, 570

2. The conjectural effect upon the property rights of an owner of property abutting on a street improvement, of an ordinance confining the right to labor on such improvement to resident citizens, is too remote and uncertain to be available as a defense to a suit to enforce payment of a lien on such property for its proportion of the cost of the improvement. Chadwick v. Kelly, 293

3. The objection that the privileges and immunities of citizens of the several states, secured to the citizens of each state by the Federal Constitution, are infringed by a municipal ordinance confining the right to labor on works of municipal improvement to resident citizens, is not available as a defense to a suit to enforce the payment of a lien on abutting property for its proportion of the cost of the improvement. Id.

**PUBLIC LANDS.**
I. OF UNITED STATES.
II. OF STATES.

Federal Question as to, see APPEAL AND ERROR, 35–40.
Conflict of Laws as to, see CONFLICT OF LAWS, 2.
Trust in Surplus Money Arising from Sale of, to Aid in Constructing Ship Canal, see SHIP CANAL.
Denial of Forfeiture of, as Impairment of Obligation, see CONTRACTS, 8.
As to Mines, see MINES.
Title of State to Land under Water, see WATERS, 1.

I. OF UNITED STATES.

**Railroad grants.**
Adverse Possession of Grant, see ADVERSE POSSESSION.
Suit to Quiet Title between Adverse Claimants, see CLOUD ON TITLE.
Federal Jurisdiction as to, see COURTS, 15.

1. Lands valuable solely or chiefly for granite quarries are "mineral lands" within the meaning of the exception of such lands, in the act of July 2, 1864 (13 Stat. at L. 365, chap. 217), from the grant made therein to the Northern Pacific Railroad Company. Northern P. R. Co. v. Soderberg, 575

2. Land within the 20-mile limit of the grant to the Texas Pacific Railroad Company by the act of March 3, 1871, chap. 122, § 9 (16 Stat. at L. 573), was excepted from the grant, by § 23 of that act, to the Southern Pacific Railroad Company, by the proviso therein that such section "shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company or any other railroad company." Southern P. R. Co. v. United States, 896

3. One who in good faith occupies unsurveyed public land within the exterior limits of the general route of the Northern Pacific Railroad Company, after an order of withdrawal based on the map of general route, but before the definite location of the road, is entitled to perfect his title under the homestead laws as soon as the land is surveyed, by act of Congress of May 14, 1880 (21 Stat. at L. 140, U. S. Comp. Stat. 1901, p. 1382), chap. 89, § 3, in force when the occupancy was begun, which allows one who has settled or "shall hereafter" settle on public lands, with a view to acquiring them under the homestead laws, the same time to file his homestead application and perfect his original entry as is allowed to settlers under the pre-emption laws, and declares that his rights shall relate back to the date of settlement. Nelson v. Northern P. R. Co. 406

4. Continuous occupation of public land, with a bona fide intention to acquire it under the homestead laws as soon as it should be surveyed, constitutes, when begun prior to the definite location by the Northern Pacific Railroad Company of its route, a "claim" upon the land within the meaning of the act of Congress of July 2, 1864, chap. 217 (13 Stat. at L. 365), § 3, restricting the grant in aid of such railroad to such odd-numbered sections within specified general limits as were free from pre-emption or "other claims or rights" at the date of definite location, and authorizing the company to select other lands in lieu of any found at that date to be "occupied by homestead settlers." Id.

5. The alternate odd-numbered sections within the exterior limits of the general route of the Northern Pacific Railway Company were not so vested in that company by the mere filing of the map of general route and a withdrawal order based thereon

as not to be subject to occupancy in good faith by homestead settlers prior to the definite location of the road, although the act of July 2, 1864, chap. 217 (13 Stat. at L. 365), § 6, declares that the "odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company," since this section must be read in connection with § 3, which restricts the grant to such odd-numbered sections as are free from pre-emption or other claims or rights at the date of definite location, and authorizes the company to select other lands in lieu of any found at that date to be "occupied by homestead settlers." Id.

6. One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded vested ditch and water rights by the act of Congress of July 26, 1866 (14 Stat. at L. 251, chap. 262), § 9, as against subsequent purchasers of the land from the Southern Pacific Railroad Company, whose only claim to such land rests upon the right of purchase from the United States, given by the act of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), § 5, to bona fide purchasers from railway companies or forfeited lands. San José Land & Water Co. v. San José Ranch Co. 765

7. Lands on which a settlement was made under the Oregon donation act of September 27, 1850 (9 Stat. at L. 496, chap. 76), and the act of February 14, 1853 (10 Stat. at L. 158, chap. 69), amendatory thereof, but which were abandoned, without compliance with the conditions as to residence or proof, fifteen years before their selection as lieu lands under the grant of July 25, 1866 (14 Stat. at L. 239, chap. 242), to the Oregon Central Railroad Company, were not "reserved" from sale, within the meaning of that act, so as to prevent the grant from attaching to such lands, although the donation notification had not been formally canceled. Oregon & C. R. Co. v. United States, 1012

8. No interest in any specific sections of land within the indemnity limits of the grant made by the act of July 25, 1866, chap. 242, to the California & Oregon Railroad Company, could be acquired by that company in advance of their actual and approved selection to supply deficiencies in the place limits. Oregon & C. R. Co. v. United States, 726

9. Indemnity selections cannot be made by the Southern Pacific Railroad Company from lands within the indemnity limits of the grant to it by the act of March 3, 1871, chap. 122, § 23 (16 Stat. at L. 573), which are also within the forfeited place limits of the grant to the Texas Pacific Railroad Company by § 9 of the same act. Southern P. R. Co. v. United States, 896

10. The selection of lands within the indemnity limits of the grant made by the act of July 25, 1866, chap. 242, to the California & Oregon Railroad Company to supply deficiencies in the place limits, cannot defeat or destroy the rights of a settler under that act arising from a previous bona fide occupancy with the intention of perfecting title under the homestead laws as soon as the land should be surveyed. Oregon & C. R. Co. v. United States, 726

11. Delay upon the part of the Commissioner of the Land Office in making the survey called for with all "convenient speed" by the act of May 4, 1870, chap. 69 (16 Stat. at L. 94), granting land in aid of railroad construction, cannot defeat the rights of a settler attaching under that act in virtue of his bona fide occupancy of lands within the indemnity limits of such grant in advance of their selection to supply a deficiency in the place limits, with the intention of perfecting his title under the homestead laws as soon as the lands should be surveyed. Oregon & C. R. Co. v. United States, 732

12. The Secretary of the Interior was not authorized, upon the mere acceptance of the map of definite location, to withdraw from the operation of the settlement laws any lands within the indemnity limits of the grant made to the California & Oregon Railroad Company by the act of July 25, 1866, chap. 242 (14 Stat. at L. 239), which provided for the selection of lands within such limits in lieu of any within the place limits which should be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, and empowered the Secretary of the Interior, upon the filing of the map of the survey, to withdraw from sale "public lands herein granted on each side of said railroad, so far as located and within the limits before specified." Oregon & C. R. Co. v. United States, 726

13. The rights of one who has settled in good faith on an odd-numbered section within the indemnity limits of the grant by the act of July 25, 1866, chap. 242, to the California & Oregon Railroad Company prior to their selection by that company to supply deficiencies in the place limits, cannot be affected by the fact, subsequently appearing, that all the odd-numbered sections within such indemnity limits were needed to supply deficiencies in the place limits. Id.

14. Land within the indemnity limits of the grant made by the act of Congress of July 27, 1866 (14 Stat. at L. 292, chap. 278), to the Atlantic & Pacific Railroad, did not, by reason of the forfeiture of such grant by the act of July 6, 1886 (24 Stat. at L. 123, chap. 637), pass to the Southern Pacific Railroad Company, although such land was within the place limits of the grant to the Texas & Pacific Railroad made by the act of March 3, 1871 (16 Stat. at L. 573, chap. 122), the rights under which subsequently became vested in the Southern Pacific Railroad Company, which built the road and selected the land under that act, since the forfeiture of the earlier grant did not inure to the benefit of the later grantee, but to the benefit of the United States. San

José Land & Water Co. v. San José Ranch Co. 765

**School lands.**

15. The approval by the Secretary of the Interior of a selection of public land in lieu of school sections, made by one claiming to be the agent of a territory, is, if nothing more, a withdrawal from private entry of the selected land, which continues until the approval of the selection is set aside. Johanson v. Washington, 1008

16. The provisions for selection of public land in lieu of school sections, which are made by the act of February 26, 1859 (11 Stat. at L. 385, chap. 58, U. S. Comp. Stat. 1901, p. 1381), are, as to cases not provided for by the special provisions of the act of March 2, 1853 (10 Stat. at L. 179, chap. 90, § 20, Rev. Stat. § 1947) for such selection by the territory of Washington, as applicable to that territory as to any other territory. Id.

17. The Secretary of the Treasury was not designated as the officer to make selections of public lands in lieu of school sections by the provision of the act of February 26, 1859, requiring such selections to be made "in accordance with the principles of adjustment and the provisions" of the act of Congress of May 20, 1826 (4 Stat. at L. 179, chap. 83), which act provided for selection by that officer; but such provision must, in view of the creation of the Interior Department by the act of March 3, 1849 (9 Stat. at L. 395, chap. 108), and the transfer, to the Secretary thereof, of the supervising powers of the Secretary of the Treasury in respect to public lands, be construed simply as describing the general mode of procedure. Id.

18. The approval, by the Secretary of the Interior, of a selection of public lands in lieu of school sections, by a person authorized to represent the territory of Washington, being that of the officer charged with the supervision of the landed interests of the United States, should, unless some direction of Congress manifestly has been violated, be held to be conclusive on the transfer of title. Id.

19. Past, as well as future, approval by the Secretary of the Interior of selections of public land in lieu of school sections, was covered by the provision of the act of December 18, 1902 (32 Stat. at L. 756, chap. 5), confirming title of the state of Washington to lands so selected, "when the same shall have been approved by the Secretary of the Interior." Id.

**Swamp lands.**

20. The title to lands embraced within patents from the United States in pursuance of the swamp land act of September 28, 1850, chap. 84 (9 Stat. at L. 520), cannot be affected by a resurvey of the land covered by water at the time of the original survey, and patents granted, pursuant to such resurvey, for tracts below the original water line. Kean v. Calumet Canal & Improv. Co. 1134

21. Letters patent from the United States to the state of Indiana, purporting to be in pursuance of the swamp land act of September 28, 1850, chap. 84 (9 Stat. at L. 520), which refer to the official plat of survey and describe the land as "the whole of fractional sections" therein enumerated, convey to the extent of full subdivisions the land under non-navigable water on which such fractional sections border, as appears from the meander line shown on such plat, beyond which the survey did not extend. Id.

**Town site.**

22. One claiming under the homestead laws of the United States cannot maintain a suit against Oklahoma town site trustees to devest them of the title held by them, under the act of May 14, 1890 (26 Stat. at L. 109, chap. 207, U. S. Comp. Stat. 1901, p. 1463), in trust for town site occupants, since, until conveyed to an occupant as provided in such act, the title remains, in every essential sense, in the United States. Bockfinger v. Foster, 975

**Timber act.**

23. The cancelation of a certificate of entry under the timber act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), is not conclusive as against a transferee who had no notice and no opportunity to be heard upon the question of the original validity of such entry, but he is left free to prove the validity of the entry by any means other than the certificate. Thayer v. Spratt, 845

24. Public land covered by a heavy growth of timber, which constituted its chief value, was subject to entry under the timber act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), although it would have been fit for cultivation when the timber had been removed. Id.

**Forest reservation.**

See also MANDAMUS, 2.

25. No equitable title to lands selected, under the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), in lieu of land relinquished in a forest reservation, vests in the selector because the local land officers received, accepted, and filed his deed of relinquishment, abstract of title, and non-mineral affidavit, entered his selection upon the official records, and certified that it was free from conflict, as such action could not amount to a decision that the statute had been complied with, since authority so to decide was not conferred on such officials by that statute, and the regulations of the Land Department required all applications for change of entry or settlement to be forwarded to the Commissioner of the General Land Office "for consideration," together with a report "as to the status of the tract applied for." Cosmos Exploration Co. v. Gray Eagle Oil Co. 1064

**Oregon donation act.**

See also *supra*, 7.

26. No right to perfect claims, under the

Oregon donation act of September 27, 1850 (9 Stat. at L. 496, chap. 76), to lands which have been abandoned before completing the requisite residence thereon, was given by the provisions of the act of July 26, 1894, according the donees the right "to make and file final proofs and fully establish their rights to donations,"—especially in view of the 2d section, which authorizes the Commissioner of the Land Office to cancel a claim proved to be invalid or abandoned, and the 3d section, which expressly saves adverse claims arising under any law other than the donation act. Oregon & C. R. Co. v. United States, 1012

**Race for land.**

27. One who was outside the territory opened to settlement by the acts of March 1, 1889, (25 Stat. at L. 757, chap. 317), March 2, 1889 (25 Stat. at L. 980, 1005, chap. 412), and the President's proclamation of March 23, 1889 (26 Stat. at L. 1546), at the time of such opening, was not disqualified from participating in the race for the land, because, prior to that date and within the prohibited period, he had been within such territory, where no manifest advantage over his competitors resulted to him from his prior entry into such territory. Potter v. Hall, 817

28. The final conclusion of the Land Department that no substantial advantage over others taking part in the race for land opened to settlement by the acts of March 1, 1889, March 2, 1889, and the President's proclamation of March 23, 1889, resulted to an entryman who made the start from the boundary line with the others, because of his prior entry into such territory some three or four hours before the start was made, involves but the finding of an ultimate fact, and not a conclusion of law, and is therefore not reviewable by the courts. Id.

29. The description in the President's proclamation of August 19, 1893, opening to settlement a portion of the land ceded by the Cherokee Nation, of the 100-foot strip which might, without gaining any settlement right, be occupied in advance of the time set for the opening by persons intending to take part in the race for the land, as running "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation," controls any doubt arising from the further statement in that portion of the proclamation defining the purposes for which the strip was to be used, that the inner boundary of such strip "shall be 100 feet from the exterior boundary of the country known as the Cherokee Outlet." Winebrenner v. Forney, 754

**Acts of Land Department generally.**

Conclusiveness of Decision of, on Courts, see COURTS, 1–5.

Jurisdiction of Suit to Prevent Survey, see EQUITY, 2.

30. Local land officers were given no power to decide upon the sufficiency of an application, under the act of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), for vacant public lands in lieu of lands relinquished in the forest reservation, by the act of 1883 (22 Stat. at L. 484, chap. 101, U. S. Comp. Stat. 1901, p. 1369) imposing upon them the duty of furnishing plats of townships showing what lands were vacant and what lands taken. Cosmos Exploration Co. v. Gray Eagle Oil Co. 1064

31. The Land Department has full jurisdiction over matters involving the right of parties to a patent for public lands selected under the act of Congress of June 4, 1897 (30 Stat. at L. 36, chap. 2, U. S. Comp. Stat. 1901, p. 1541), in lieu of lands relinquished in a forest reservation. Id.

II. OF STATES.

32. The state of California has the right to convey its title to tide lands contiguous to, and immediately surrounding, certain islands in the bay of San Francisco, free from any easement appurtenant to such islands. United States v. Mission Rock Co. 865

33. The order of the President of January 13, 1899, reserving for naval purposes "Mission island and the small island southeast thereof" in the bay of San Francisco, cannot be construed as an appropriation for such purposes of the surrounding tide land, which had been reclaimed by a grantee from the state of California, and upon which had been erected extensive warehouses and wharves. Id.

**PUBLIC MONEY.**

Destruction of, while in Custody of Superintendent of Mint, see BONDS, 1.

**PUBLIC RECORDS.**

See RECORD.

**PUBLIC WATERS.**

See WATERS.

**QUARANTINE.**

Against Diseased Cattle, see COMMERCE, 8, 9.

**QUESTION FOR JURY.**

See TRIAL, 4–7.

**QUIETING TITLE.**

Pleading in Bill for, see PLEADING, 8–10.

**RACE.**

For Public Land, see PUBLIC LANDS, 27–29.

**RAILROAD-AID BONDS.**

See BONDS, 2–5.

**RAILROAD COMMISSION.**

See COMMERCE, 6, 7.

**RAILROAD GRANTS.**

See PUBLIC LANDS, 1–14.

**RAILROADS.**
Bonds in Aid of, see BONDS, 2–5.
Release of, from Liability for Damage by Fire, see CONTRACTS, 1.
Agreement as to Indemnity on Surrender of, see CONTRACTS, 3, 4.
Opinion Evidence as to Fires, see EVIDENCE, 8, 9.
Evidence as to Other Fires, see EVIDENCE, 14.
Injunction against Dispossession of, under Lease, see INJUNCTION, 1.
What Property Included in Mortgage by Company, see MORTGAGE, 1.
Grants of Public Lands to, see PUBLIC LANDS, 1–14.
Instruction as to Liability as to Fires, see TRIAL, 8, 12.

**RATES.**
Of Interest on Judgment, see INTEREST.
For Water, see ACTION OR SUIT, 2; WATERS, 5–8.
For Water, Impairment of Obligation as to, see CONTRACTS, 12, 13.

**RATIFICATION.**
Of Lease by Trustees, see TRUSTS, 3.

**RECEIVERS.**
Action by, to Enforce Liability of Stockholders, see CORPORATIONS, 9–11.

A receiver appointed by a court of equity in the exercise of its general jurisdiction cannot, by virtue of his appointment and the direction to sue contained therein, maintain a suit in equity in a foreign jurisdiction to enforce the statutory liability of stockholders in an insolvent corporation,—especially where the courts of the state where the receiver was appointed have held that such an action cannot be maintained by him in the courts of that state. Hale v. Allinson, 380

**RECORD.**
On Appeal, see APPEAL AND ERROR.
Of Proceedings on Sale of Land for Taxes, see CONSTITUTIONAL LAW, 15.

A corporation engaged in examining titles and certifying thereto may, so far as necessary to assist in the examination of a title for which it is employed, inspect and examine the indices and cross indices of the judgment records prepared by the clerks of United States courts, which, by the act of August 1, 1888, § 2 (25 Stat. at L. 357, chap. 729, U. S. Comp. Stat. 1901, p. 701), "shall at all times be open to the inspection and examination of the public," so long as it does not interfere with the clerk or his assistants in the discharge of their duties, or with the equal rights of other persons to make such inspection and examination. Bell v. Commonwealth Title Ins. & T. Co. 741

**REFERENCE.**
Sufficiency of Exceptions to Findings of Commissioners, see APPEAL AND ERROR, 49.

**REGISTRATION.**
Of Physician, *Ex Post Facto* Law as to, see CONSTITUTIONAL LAW, 1.
Of Physicians, Due Process as to, see CONSTITUTIONAL LAW, 13, 14.
Compelling County Board to Enroll Negro Voters, see VOTERS AND ELECTIONS, 2, 3.

**REINSTATEMENT OF APPEAL.**
Mandamus to Compel, see MANDAMUS, 1.

**RELEASE.**
Requirement of, in Assignment for Creditors as Condition of Preference, see CONFLICT OF LAWS, 3.
By Creditor, as Condition of Preference in Assignment of Creditors, see INSOLVENCY.

**REMOVAL OF CAUSES.**
Sufficiency of Record on Appeal from Denial of, see APPEAL AND ERROR, 52.

1. The right of a foreign railroad corporation under the act of Congress of August 13, 1888, chap. 866, § 2 (25 Stat. at L. 433), to remove to a Federal court, for prejudice or local influence, a suit brought in a court of North Carolina by a citizen of that state, is not defeated because such corporation has complied with the provisions of N. C. Pub. Acts 1899, chap. 62, which declares that foreign railroad corporations shall become domestic by filing with the secretary of state duly authenticated copies of their charters and by-laws. Southern R. Co. v. Allison, 1078

2. A separable controversy which justifies a removal to a Federal court, where there is diverse citizenship, exists between plaintiffs and two corporations named as defendants in a complaint which seeks to set aside for fraud a conveyance between such corporations, and to prevent the directors of the grantor from making any further disposition of its property, and prays for a reconveyance of such property and an accounting by the grantee for the damages sustained by the transfer, and also asks that such directors, who are joined as defendants and are not all residents of different states from plaintiffs, be compelled to account as agents and trustees for their actions in the premises, and be required to make good all loss and damage caused by their wrongful conduct. Geer v. Mathieson Alkali Works, 1122

**REPORT.**
Of Judicial Proceeding, see LIBEL AND SLANDER, 3–6.

**REPORTER.**
Resignation and appointment of, 1196, 1197.

**REQUISITION.**
As Prerequisite to Jurisdiction over Extradition Proceedings, see EXTRADITION, 4.

**RESERVATION.**
Indian, Uniformity in Taxation of, see TAXES, 2.
Forest Reservation, see MANDAMUS, 2; PUBLIC LANDS, 25.

**RESURVEY.**
Of Public Land, see PUBLIC LANDS, 20.

**RULES.**
Of Court, Authority of Decisions Upholding, see COURTS, 28.
Of Court, Denial of Right to Jury Trial, see TRIAL, 3.

**SAFE PORT.**
See SHIPPING, 1.

**SALE.**
Damages for Failure to Deliver, see DAMAGES, 1.

**SANITY.**
Opinion Evidence as to, see EVIDENCE, 10, 11.

**SCHOOL LANDS.**
See PUBLIC LANDS, 15–19.

**SEAMEN.**
Prohibiting Payment of Wages in Advance, see COMMERCE, 12, 13; CONSTITUTIONAL LAW, 21.
See also SHIPPING, 2–4.

**SECRETARY OF THE INTERIOR.**
Parties in Action by, see ACTION OR SUIT, 1.
Conclusiveness of Decision of, on Courts, see COURTS, 4, 5.
Regulation by, of Leasing of Minerals in Tribal Lands, see INDIANS, 1.
Mandamus against, see MANDAMUS, 2.
Sufficiency of Bill to Restrain Action by, see PLEADING, 13.
Authority of, as to Public Lands, see PUBLIC LANDS, 12, 15, 18, 19.

**SECRETARY OF TREASURY.**
Authority to Select Public Lands, see PUBLIC LANDS, 17.

**SELF-DEFENSE.**
Instruction as to, see TRIAL, 10.

**SEMINARY.**
Exemption of Property of, from Taxation, see APPEAL AND ERROR, 73.

**SEPARABLE CONTROVERSY.**
As Ground for Removal of Cause, see REMOVAL OF CAUSE, 2.

**SERVICE.**
By Publication, Setting aside Judgment for Insufficiency of Affidavit for, see MORTGAGE, 2.
Of Process, see WRIT AND PROCESS.

**SETTLER.**
On Public Lands, see PUBLIC LANDS.

**SHAWNEES.**
Jurisdiction over Claims of, see CLAIMS, 4.

**SHEEP.**
Taxation of, while Being Driven through State, see COMMERCE, 4.

**SHIP CANAL.**
Defense to Suit for Surplus Moneys above Cost of, see LIMITATION OF ACTIONS.

1. Surplus moneys over and above the cost of the ship canal at Saint Marys Falls, arising from sales of the public lands granted by the act of August 26, 1852 (10 Stat. at L. 35, chap. 92), to the state of Michigan in aid of its construction on a right of way therein granted to the state for that purpose, and any surplus tolls remaining after the formal transfer of such canal to the United States, and all the tools and machinery on hand at the time of such transfer, must be deemed to be held in trust by the state for the United States, in view of the provision of such act, which was accepted by the state subject to all its conditions, by Michigan act February 5, 1853, that the tolls which the state might charge were to be only such, after it was repaid for the cost, as should be sufficient to pay the necessary expenses for the care, charge, and repairs. United States v. Michigan, 1103

2. The ownership by the state of Michigan of surplus tolls and surplus moneys arising from sales of public lands granted by the act of August 26, 1852 (10 Stat. at L. 35, chap. 92), in aid of the construction of a ship canal at Saint Marys Falls, and of the tools and machinery belonging thereto, was not acknowledged to be free from the trust in favor of the United States created by the acceptance by the state, through Michigan act February 5, 1853, of the conditions of such grant by the offer of the United States, under the act of June 14, 1880 (21 Stat. at L. 189, chap. 211), to accept a transfer of the canal without liability for debts or claims in regard thereto; nor was the liability of such state as trustee altered by its attempt, in accepting such offer through Mich. Pub. Acts 1881, act No. 17, to impose the condition upon its payment of such moneys and its transfer of material belonging to the canal that the United States should build a dry dock to be operated in connection therewith. Id.

**SHIPPING.**
Lien on Vessel, see ADMIRALTY.
License for Vessels, see APPEAL AND ERROR, 45.

1. The cost of lightering a vessel's cargo to the discharging berth designated by the assigns of the charterers under the charter party, which the vessel was prevented by an overhead bridge from reaching without cutting off or removing her steel masts, cannot be deducted from the freight, where the charter party required the vessel to discharge "always afloat" at a "safe port," or

"so near the port of discharge as she may safely get," and provided that the anchorage directed must be the most convenient, and that if lighterage was necessary, either to reach the port or to deliver the cargo, the expense thereof was chargeable to the receivers of the goods, regardless of any local port custom. Mencke v. Cargo of Java Sugar, 163

**Seamen.**

Prohibiting Payment of Wages of, in Advance, see COMMERCE, 12, 13; CONSTITUTIONAL LAW, 21.

2. A vessel is not liable *in rem* to one of the crew, under the general principles of admiralty, for damages for personal injuries sustained by him through the improvident and negligent order of the master in directing a gangway for the discharge of cargo to be hoisted before the arrival of the vessel at her dock and during a heavy wind. The Osceola, 760

3. Injuries sustained by a member of the crew on board a ship in attempting to hoist a gangway in a heavy wind are not done "by such ship," within the meaning of Wis. Rev. Stat. 1898, § 3348, imposing liability on every ship "for all damages arising from injuries done to persons or property by such ship," as such statute was intended to cover only cases of damage done by the ship herself, as the offending thing, to persons or property outside the ship. Id.

4. Seamen shipping in an American port on a foreign vessel engaged in foreign commerce are within the protection of the act of December 21, 1898 (30 Stat. at L. 755, 763, chap. 28, U. S. Comp. Stat. 1901, pp. 3071, 3080), § 24, making it a misdemeanor to pay any seaman wages in advance, and providing that advance payment shall not absolve the vessel or its master or owner from full payment of wages actually earned, which provisions are expressly declared applicable "as well to foreign vessels as to vessels of the United States," although such act is entitled "An Act to Amend the Laws Relating to American Seamen." Patterson v. The Eudora, 1002

**SHIRAS.**

George, Jr., retirement of, 1200.

**SILVER DOLLAR.**

Federal Question as to, see APPEAL AND ERROR, 30.

**SITUS.**

Of Taxation, see TAXES, 8, 9.

**SLEEPING-CAR COMPANY.**

Privilege Tax on, see COMMERCE, 5.

**SOLDIERS.**

See ARMY.

**SPANISH LAND GRANTS.**

Federal Questions as to, see APPEAL AND ERROR, 41.

Dismissal of Appeal in Action Affecting, see APPEAL AND ERROR, 56.

Evidence of, see EVIDENCE, 16.

See also PRIVATE LAND CLAIMS.

**SPECIFIC PERFORMANCE.**

1. The continued possession of land by a lessee after the expiration of a five years' lease which contained a covenant to renew for a like period, and the payment and acceptance of rent therefor during the period covered by the renewal clause, are not such part performance as calls for the specific performance of a covenant to renew contained in a lease which purports to have been executed in compliance with the renewal covenant in the prior lease, but which is invalid under the statute of frauds because signed by only one of the trustees in whom the title to the property was vested. Winslow v. Baltimore & O. R. Co. 635

2. The receipt of rent by the beneficiary in a trust, after the expiration of a lease containing a covenant to renew, in ignorance of the invalidity of such lease under the statute of frauds, is not such part performance as calls for the specific performance of such covenant,—especially where her action was unknown to the trustees, who had substantially refused to renew on the old basis, and took place while negotiations were pending between them and the lessee relative to the terms of a continued occupation of the land. Id.

**STAMP TAX.**

See INTERNAL REVENUE.

**STATE.**

Control over National Banks, see BANKS, 1.

Boundaries between, see BOUNDARIES.

Public Lands of, see PUBLIC LANDS, II.

Ownership by, of Surplus after Completion of Ship Canal, see SHIP CANAL.

Right of, to Tax Property of Indians, see TAXES, 3–5.

Title of, to Land below High-Water Mark, see WATERS, 1.

Authority to Prohibit Erections in Navigable River, see WATERS, 2.

A suit against the Nebraska board of transportation for the purpose of preventing the enforcement of the Nebraska act of April 12, 1893, fixing the maximum railroad rates, on the ground of the invalidity of such statute under the Constitution and laws of the United States, is not a suit against the state within the meaning of the 11th Amendment to the Federal Constitution. Prout v. Starr, 584

**STATE COURTS.**

Jurisdiction on Appeal from, see APPEAL AND ERROR, II. b.

Conflict of Jurisdiction of, see COURTS, 24–27.

Conclusiveness of Decisions of, on Federal Courts, see COURTS, 30–34.

**STATUTE OF FRAUDS.**

Specific Performance of Agreement within, see SPECIFIC PERFORMANCE.

**STATUTES.**

Impairment of Obligations by, see CONTRACTS, 5–10.

1. An objection that a state statute vio-

lates the Federal Constitution because it does not provide for notice to those who may be affected by it is not available to a party who was in fact given notice, and who at the hearing objected to the action proposed to be taken under such statute. Detroit, Ft. W. & B. I. R. Co. v. Osborn, 860

2. The validity of Wis. Stat. 1898, §§ 1770b, 4978, so far as it prohibits foreign corporations from transacting business within the state until they have filed a copy of their charter with the secretary of state, is not affected by its possible invalidity as respects partnerships, where it is apparent on the face of the statute that the application of its provisions to corporations is severable from and independent of its application to partnerships. Diamond Glue Co. v. United States Glue Co. 328

**Title.**

As to Municipal Subscription in Aid of Railroad, see CONTRACTS, 11.

3. An amendatory state statute will not be declared invalid by the Supreme Court of the United States on the ground that some of its provisions are not within the scope of its title, where such title contains a reference to the statute amended, which, under the decisions of the state courts, is sufficient to sustain its validity. Knights Templars' & M. L. Indemnity Co. v. Jarman, 139

4. A provision of a statute amending Mo. Rev. Stat. 1889, § 5869, which had exempted insurance companies doing business on the assessment plan from any provisions of the general insurance laws of the state except as therein distinctly set forth, by specially applying to such corporations the provisions of § 5855, that suicide shall be no defense to a suit upon a policy of insurance, is within the title, "An Act to Repeal" Mo. Rev. Stat. 1889, § 5869, and "to Enact a New Section in Lieu Thereof." Id.

**Construction.**

Conclusiveness of Decision as to, see COURTS, 29.

Conclusiveness of Decision of State Court as to, see APPEAL AND ERROR, 58.

Conclusiveness of Construction, see also PLEADING, 1.

5. The operation of U. S. Rev. Stat. § 5507 (U. S. Comp. Stat. 1901, p. 3712), which was manifestly enacted to punish the bribery at all elections, state and Federal, of persons guaranteed the right to vote by U. S. Const. 15th Amend., cannot be limited by judicial construction, for the purpose of sustaining its constitutionality, to the bribery of voters at elections for Federal officers. James v. Bowman, 979

**Retroactive.**

6. A statute which prohibits a foreign corporation which has not filed a copy of its charter with the secretary of state, from transacting business in the state after the date on which such statute goes into effect, is not retroactive with regard to that business, even though such business be done in pursuance of an earlier contract. Diamond Glue Co. v. United States Glue Co. 328

7. Only policies of insurance issued on the assessment plan after the insurance company obtained its certificate of authority to do business as an assessment insurance company under Mo. Laws 1887, p. 199, are relieved from the provisions of Mo. Rev. Stat. 1879, § 5982, declaring that suicide shall be no defense to a suit on a policy of insurance, by the proviso of § 10 of the later act, that corporations doing business thereunder shall not be subject to any provisions of the general insurance law of the state, "except as herein distinctly set forth." Knights Templars' & M. L. Indemnity Co. v. Jarman, 139

8. The new remedies to compel compliance with the Act to Regulate Commerce, given by the act of Congress of February 19, 1903, § 3, are so far made applicable to prior pending proceedings to enforce the former act by the provision of § 4, that pending causes shall not be affected by the repeal of conflicting laws provided for therein, but shall be prosecuted to a conclusion in the manner theretofore provided "and as modified by the provisions of this act," that a decree granting the relief prayed for in a suit brought on behalf of the United States by its law officers to enjoin discrimination between localities, which suit was unauthorized because brought before the passage of the later act, must be reversed and the cause remanded for further proceedings consistent with the Act to Regulate Commerce as originally enacted and subsequently amended. Missouri P. R. Co. v. United States, 811

**Repeal.**

Of Provision as to Suicide by Insured as Impairment of Obligation, see CONTRACTS, 9.

9. The special provision of 26 Stat. at L. 81, chap. 182, § 10, that persons charged with any offense against the territory of Oklahoma shall in all cases be taken before the United States commissioner whose office is nearest to the place where the offense was committed, was not repealed by the general provisions of the sundry civil appropriation bill of August 18, 1894 (28 Stat. at L. 372, chap. 301), that marshals shall take arrested persons before the commissioner nearest the place of arrest, or shall be entitled to no mileage therefor. United States v. Nix, 775

**STIPULATION.**

Binding Effect of, see CONTRACTS, 1.
See also EXTRADITION, 14; TRIAL, 2.

**STOCK.**

Of Building and Loan Associations, see BUILDING AND LOAN ASSOCIATIONS.
Statute Avoiding Sales of, on Margin, see CONSTITUTIONAL LAW, 11, 22.
See also CORPORATIONS.

**STOCK EXCHANGE.**

Seat in, as Property, see BANKRUPTCY, 8.
Lien on Proceeds of Seat in, see BANKRUPTCY, 2, 15.

Exemption of Seat in, see BANKRUPTCY, 21.

**STOCKHOLDERS.**
Of National Bank, see BANKS, 2–4.
See also CORPORATIONS.

**STREET RAILWAYS.**
Apportioning Expense of Maintaining Grade Crossing over Railroad, see CONSTITUTIONAL LAW, 12.

**SUBCONTRACTOR.**
Injunction against Enforcement of Ordinances against Employees of, see INJUNCTION, 2.

**SUBSCRIPTION.**
For Corporate Stock, see CORPORATIONS, 5.

**SUCCESSION TAXES.**
See TAXES, 10–12.

**SUGAR.**
Bounties on, see DUTIES, 2.

**SUICIDE.**
Of Insured, see INSURANCE, 7; STATUTES, 4, 7.

**SUMMONS.**
See WRIT AND PROCESS.

**SUPERINTENDENT OF MINT.**
Liability on Bond, see BONDS, 1; DAMAGES, 4–6.

**SUPPLEMENTAL ANSWER.**
Federal Question as to, see APPEAL AND ERROR, 44.

**SUPREME COURT OF UNITED STATES.**
Appellate Jurisdiction of, see APPEAL AND ERROR, II.
Authority of Decisions of, see COURTS, 28.
Resignation of justice of. 1200
Appointment of justices for. 1197, 1200

**SUPREME COURT REPORTER.**
Resignation and appointment of. 1196, 1197

**SURPLUS.**
Above Cost of Ship Canal; Defense to Suit for, see LIMITATION OF ACTIONS.
After Completion of Ship Canal, see SHIP CANAL.

**SURRENDER.**
Of Preferred Payment Made by Bankrupt, see BANKRUPTCY, 11.

**SURVEY.**
Of Public Lands, see EQUITY, 2; PUBLIC LANDS, 11, 20, 21.

**SURVIVORSHIP.**
See WILLS.

**SWAMP LANDS.**
See PUBLIC LANDS, 20, 21.

**TAXES.**
Due Process of Law as to, see CONSTITUTIONAL LAW, 15–17.
Impairment of Obligations as to, see CONTRACTS, 7.
Federal Jurisdiction of Suit to Enjoin, see COURTS, 14.
Injunction as to, see INJUNCTION, 4–6.
Sufficiency of Pleading in Action to Enjoin, see PLEADING, 11, 12.

1. Discrimination or overvaluation by a state board of equalization in assessing property for purposes of taxation is not a ground of defense to an action at law to collect the taxes. Western U. Teleg. Co. v. Missouri, 1116

**Uniformity.**
See also CONSTITUTIONAL LAW, 4–7.

2. An Indian reservation attached to a county for judicial purposes by order of the supreme court of the territory of Oklahoma pursuant to the orginzation act of May 2, 1890, § 9 (26 Stat. at L. 81, 85, chap. 182), was not, by Okla. Sess. Laws 1895, chap. 43, art. 6, making personal property in such reservations subject to taxation in the counties to which they were so attached, so made a part of the same taxing district as the county as to render invalid for want of uniformity Okla. Sess. Laws 1899, p. 216, limiting the right of taxation in such reservations to taxes for territorial and court purposes. Foster v. Pryor, 835

**What subject to taxation generally.**
Property of Theological Seminary, see APPEAL AND ERROR, 73.
Corporation Operating Ferry, see CONSTITUTIONAL LAW, 16.
Preventing Unlawful Taxation of Property of Indians, see EQUITY, 3.
Conclusiveness of Judgment Sustaining Exemption, see JUDGMENT, 3.
See also *infra*, 12.

3. Cattle, horses, and other property of like character furnished by the United States to Indian allottees, under the act of February 8, 1887 (24 Stat. at L. 389, chap. 119), in order to enable them to maintain themselves while the land should, under § 5 of that act, be held in trust by the United States for their sole use and benefit, are not subject to state taxation. United States v. Rickert, 532

4. A state may not tax lands allotted to Indians in severalty, under the act of February 8, 1887 (24 Stat. at L. 389, chap. 119), the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, when, unless the time shall be extended by the President, they shall be conveyed free from any charge or encumbrance, and declares that any conveyance thereof, or any contract touching the same, before the expiration of such period, shall be absolutely null and void. Id.

5. Permanent improvements on lands al-

lotted to Indians in severalty, under the act of February 8, 1887 (24 Stat at L. 389, chap. 119), the 5th section of which requires the United States to hold such lands in trust for the allottees for twenty-five years, and then, unless the time shall be extended by the President, convey the fee free from any charge or encumbrance, cannot be taxed by a state as personal property. Id.

**Interstate commerce.**
See also COMMERCE, 1–5.

6. A state tax on the property within the state belonging to a foreign telegraph corporation, the value of which was determined by regarding it as a part of a system operated in other states, is not invalid because such corporation is engaged in interstate business, and has accepted the provisions of the act of July 24, 1866, giving it the privilege of operating a line over military and post roads, and was not created by such state or given any franchise by it. Western U. Teleg. Co. v. Missouri, 1116

7. Logs which have been cut and floated down a stream and its tributaries to a boom or sorting gap from which they are to be shipped by rail as needed to a point outside the state are not, while awaiting delivery to the railroad company, the subject of interstate commerce so as to be exempt from state taxation. Diamond Match Co. v. Ontonagon, 394

**Situs of taxation.**
Trust Property, see CONSTITUTIONAL LAW, 17.

8. Transportation of logs partly by water and partly by rail is included in the provision of Mich. act April 8, 1899, making forest products in transit to a point outside the state assessable at the place in the state nearest to the last boom or sorting gap of the stream in or bordering on such state in which they will naturally be last floated during such transit, although the statute also provides that, if the transit "is to be other than through any watercourse in or bordering on" the state, such property shall be assessed at the point where it will naturally leave the state in the ordinary course of its transit. Diamond Match Co. v. Ontonagon, 394

9. Forest products in transit to a point outside the state may be given by the legislature a situs, for the purpose of taxation, at the place nearest to the last boom or sorting gap of the stream in or bordering on the state in which such products naturally will be last floated during such transit. Id.

**Inheritance tax.**
Equal Protection of Laws as to, see CONSTITUTIONAL LAW, 5–7.
Conclusiveness of Foreign Judgment as to, see JUDGMENT, 4–8.

10. The beneficiaries under the will of a nonresident cannot invoke the Federal Constitution to prevent the taxation, under the New York inheritance-tax law, of the transfer, under such will, of debts due the decedent by its citizens, because the entire inheritance is taxable in the state of the decedent's domicil. Blackstone v. Miller, 439

11. A state may tax the transfer, under the will of a nonresident, of debts due the decedent by its citizens. Id.

12. A succession tax imposed under the authority of the act of Congress of June 13, 1898 (30 Stat. at L. 448, chap. 448, U. S. Comp. Stat. 1901, p. 2286), upon a bequest to a municipality for public purposes, is not unconstitutional as a tax upon an agency of the state since such tax, being collected from the property while in the hands of the executor, who is required by § 30 of that act to liquidate it "before payment and distribution to the legatees," cannot be regarded as a tax upon the municipality, although it may operate incidentally to reduce the bequest by the amount of the tax. Snyder v. Bettman, 1035

**TELEGRAPHS.**
Requiring Telegrams to Accompany Telegraph Vouchers, see CLAIMS, 1.
License Fee on Poles and Wires, see COMMERCE, 2, 3; TRIAL, 5.
Engaged in Interstate Commerce, Exemption of, see TAXES, 6.

**TEMPORARY EMPLOYEES.**
See GOVERNMENT EMPLOYEES.

**TERMS.**
Of Court, see COURTS, 7, 8.

**TERRITORIAL COURTS.**
Jurisdiction of, see COURTS, 9.
Dismissal of Appeal or Writ of Error to, see APPEAL AND ERROR, 57.
Jurisdiction of Appeal from Judgment of, see APPEAL AND ERROR, 10, 11.

**TERRITORIES.**
Territorial Regulation of Use of Waters, see WATERS, 3, 4.
See also PHILIPPINE ISLANDS.

**THEOLOGICAL SEMINARY.**
Exemption of Property from Taxation, see APPEAL AND ERROR, 73.

**TIDAL STREAM.**
Vested Rights of Owners of Land Adjacent to, see VESTED RIGHTS.

**TIDE LANDS.**
See PUBLIC LANDS, 32, 33.

**TIDE WATERS.**
Federal Question as to Private Ownership, of, see APPEAL AND ERROR, 33.

**TIMBER ACT.**
See PUBLIC LANDS, 23, 24.

**TIME.**
For Motion to Set aside Judgment, see JUDGMENT, 9.
For Amending Pleading, see PLEADING, 3.
See also PUBLICATION.

**TITLE.**
Of Statute, see STATUTES, 3, 4.

**TITLE GUARANTY COMPANY.**
Right to Examine Indices of Judgment Records, see RECORDS.

**TOLLS.**
On Ship Canal, Right of State to Surplus above Expenses, see SHIP CANAL.

**TOWN SITE.**
See PUBLIC LANDS, 22.

**TRADEMARK.**
Enjoining Imitation of, see INJUNCTION, 3.

**TRANSFER TAXES.**
See TAXES, 10–12.

**TREATY.**
Dismissal of Appeal in Action Affecting, see APPEAL AND ERROR, 56.
Jurisdiction of Question as to, see APPEAL AND ERROR, 29.
As to Extradition, see EXTRADITION, 9, 10.
With Indians, see INDIANS.

**TRIAL.**
Objections as to Peremptory Challenges, see APPEAL AND ERROR, 65.
Refusal to Review Question Whether Officers in Charge of Jury Sworn, see CONSTITUTIONAL LAW, 20.

1. The fact that a white testator devised his entire estate to a negro who had been for years his business and household companion, to the exclusion of his cousins, does not require the submission of the issue of his mental soundness to the jury, where the only conclusion that can be drawn from the direct testimony is in favor of his mental soundness when the will was made. Leach v. Burr, 567

2. The parties to a suit may make a valid agreement to dispense with the taking of evidence, and to accept the evidence taken and abide by the decrees which shall be entered in certain other cases in which the allegations of fact and the contentions of law are identical with those in the suit in question. Prout v. Starr, 584

**Right to jury trial.**
In Philippines, see PHILIPPINE ISLANDS, 3. See also APPEAL AND ERROR, 23.

3. The constitutional right of trial by jury is not denied by rule 73 of the supreme court of the District of Columbia, authorizing judgment for plaintiff for want of a sufficient affidavit of defense in actions *ex contractu* in which plaintiff has filed a supporting affidavit. Fidelity & D. Co. v. United States, 194

**Questions for jury.**
4. A case which turns upon the proper conclusions to be drawn from a commercial correspondence, in connection with other facts and circumstances, is properly referred to a jury, although the construction of written instruments is ordinarily a question for the court. Rankin v. Fidelity Ins. T. & S. D. Co. 792

5. The reasonableness of a municipal license charge of $1 per telegraph pole and $2.50 for each mile of overhead telegraph wires within the city limits must be submitted to the jury, where there is testimony that the actual cost of maintenance, repairs, and supervision by the telegraph company, was less than one half the sum thus charged by the city for supervision alone, and that an additional charge of $1 per mile for underground wires had been removed as an inducement to the removal of all overhead wires. Atlantic & P. Teleg. Co. v. Philadelphia, 995

6. Whether a pledgee of national bank stock is estopped to deny his personal liability as a shareholder by speaking of himself as holding or owning the stock, in letters to the officers of the bank, who understood perfectly the capacity in which such stock was retained, is a question for the jury. Rankin v. Fidelity Ins. T. & S. D. Co. 792

7. The question of the negligence of the foreman of a railway bridge gang in failing to discover a spike maul upon or near the bridge, immediately prior to the passage of a train, is for the jury in an action to recover damages from the railroad company for personal injuries received by a member of such gang, for which there is no other cause assignable than that the train in passing struck the maul and threw it against the workman, although the foreman testified that he looked for and did not discover any obstruction to the approaching train, where there was nothing to prevent its discovery if it was there and the glance of the foreman was anything more than a casual or formal one. Texas & P. R. Co. v. Carlin, 849

**Instructions.**
Prejudicial Error as to, see APPEAL AND ERROR, 77, 78.

8. A requested instruction that a person storing his cotton near a railroad assumed the risks which were to be anticipated from engines properly equipped with appliances for preventing the escape of sparks when properly operated need not be given in an action to recover the value of such cotton claimed to have been destroyed by a fire set by a passing locomotive, where the jury are told that no recovery could be had if the railroad company was not negligent in respect to the equipment and operation of the engine, and were fully instructed as to contributory negligence and its effect. Texas & P. R. Co. v. Watson, 1057

9. A requested instruction, though expressing the law correctly, is properly refused where there are no facts in the case to justify it. Bird v. United States, 100

10. An instruction that, in determining the issue of self-defense, the jury must, under the evidence, consider the situation of

the parties and the surrounding circumstances, "together with the testimony of witnesses for the prosecution as well as the evidence of the defendant," is not open to the objection that it authorized the consideration of the testimony of the witnesses for the prosecution even if untrue, and withdrew from the jury in passing on that issue all of the evidence for the defendant except his own testimony, when considered with other instructions giving the rule as to the credibility of witnesses, and enjoining the jury to consider the whole evidence and render a verdict in accordance with the facts proved, and to determine from the evidence the respective situations of the several parties. Id.

11. A requested instruction that an affidavit produced by defendant on cross-examination, to impeach the credibility of the witness who made it, may be considered, in connection with the affiant's deposition, as evidence against the plaintiff of the facts therein stated under oath, with like effect as his deposition,—should be given where such affidavit is introduced in evidence by plaintiff on the cross-examination of another witness. Connecticut Mut. L. Ins. Co. v. Hillmon, 446

12. An instruction that a railroad company was not liable for a loss from a fire set by a passing locomotive, if it used "the most approved spark arrester, at the time in good condition," and the engine was then and there operated with ordinary care and prudence; but that it was so liable if it failed "to use the most approved spark arrester and apparatus connected with the engine as in ordinary use by properly conducted railways to prevent the escape of fire," so far as it could consistently be done in its business,—is not open to the objection that it left the jury to consider the original construction of the spark arrester irrespective of its condition at the time of the fire. Texas & P. R. Co. v. Watson, 1057

13. An instruction that it was the duty of an injured employee to submit to all treatment that a reasonably prudent person would have submitted to, in order to improve his condition, and that his employer was liable for no damages which might have been prevented by reasonable care, is not objectionable as authorizing the inference that as a prudent man the employee might have postponed recovery from his injury to recovery of damages. Texas & P. R. Co. v. Behymer, 905

14. An instruction to find defendant not guilty of murder if it should be found that he was not able to know that the act of killing was wrongful, and was not able to comprehend and understand the consequences of such act, is not open to the objection that it made it necessary for the jury to find that both conditions existed in order to acquit, where the condition of a verdict of guilty was made by the same instruction to be a finding beyond a reasonable doubt that the prisoner knew and understood that it was wrong to take the life, and was able to comprehend and understand the consequences of such act. Queenan v. Oklahoma, 1175

15. An instruction that an attempt to escape, made after many months of confinement, and comparatively without danger, tended, though only slightly, to prove guilt, was as favorable to the accused as he could demand where the only testimony on that subject related to an escape made in October following an arrest in June, and was objected to solely on the ground that the escape was too remote from the commission of the offense and the arrest and imprisonment to be entitled to go to the jury. Bird v. United States, 100

**Verdict.**

16. The findings of the jury upon special issues of fact submitted to them for their determination, where warranted by the evidence, control conflicting findings made under the instructions of the court. Pardee v. Aldridge, 833

**TRUSTS.**

Assessing Trust Property to Trustee, see CONSTITUTIONAL LAW, 17.

In Surplus Money from Sale of Public Lands to Aid in Constructing Ship Canal, see SHIP CANAL.

1. The adoption by the members of a communistic society of a plan by which all property contributed to the use and benefit of the community was to be "joint and indivisible stock," and all contributions were to be irrevocable, was not the creation by the members of a trust in the property for the benefit of the society, as such, which, on the doctrine of resulting trusts, conferred on the descendants of members who contributed no property to the society any such proprietary right or interest as entitled them on the dissolution of the society to share in its property or assets, or to have an accounting. Schwartz v. Duss, 53

2. A valid lease of real property containing a covenant to renew cannot be made by one of the trustees in whom the title to the property is vested, as such an act is of a nature to require the deliberate discretion and judgment of all the trustees. Winslow v. Baltimore & O. R. Co. 635

3. Recognition by all the trustees of a lease for five years of a portion of the realty included in the trust estate, executed by one of their number, even assuming that it could cure the invalidity of such lease under the statute of frauds, must have been founded upon full knowledge of all the facts, in order to have that effect. Id.

**ULTRA VIRES.**

Contract by Building and Loan Association, see BUILDING AND LOAN ASSOCIATIONS, 2.

**UNIFORMITY.**

In Taxation, see TAXES, 2.

**UNITED STATES.**
As Party, Effect on Jurisdiction, see COURTS, 12, 13.
Right to prevent Taxation of Lands Allotted to Indians, see EQUITY, 3.
Right to Enjoin Taxation of Indian Lands, see INJUNCTION, 6.
Laches as Defense to Suit by, see LIMITATION OF ACTIONS.
Liability of, on Restitution of Vessels Captured, see PRIZE, 10–12.
Public Lands of, see PUBLIC LANDS, 1.
Right to Surplus after Completion of Ship Canal, see SHIP CANAL.

The liability of the United States, under the 5th Amendment to the Federal Constitution, to make just compensation for an appropriation of land for public use, is not defeated because such land was taken by the government in the exercise of its power to improve navigation. United States v. Lynah, 539

**UNITED STATES COMMISSIONER.**
Repeal of Statutes as to, see STATUTES, 9.
Jurisdiction over Extradition Proceedings, see EXTRADITION, 4.

**UNITED STATES MARSHAL.**
See MARSHAL.

**UNITED STATES SUPREME COURT.**
Appellate Jurisdiction of, see APPEAL AND ERROR, II.
Authority of Decisions of, see COURTS, 28.
Resignation of justice of. 1200
Appointment of justices for. 1197, 1200, 1201

**VARIANCE.**
Between Pleading and Proof, see PLEADING, 2.

**VERDICT.**
See TRIAL, 16.

**VESSELS.**
License for, see APPEAL AND ERROR, 45.
Capture of, see PRIZE.

**VESTED RIGHTS.**
Under Entry in Public Land, see PUBLIC LAND, 6.

No vested rights of owners of land adjacent to a tidal stream were disturbed by the Alabama act of January 31, 1867, granting to the city of Mobile so much of the shore and soil under such stream as is within the city boundaries, since such act amounts to no more than a declaration that the rights possessed by the state in such shore and soil were granted to such city. Mobile Transp. Co. v. Mobile, 266

**VICE PRINCIPAL.**
See MASTER AND SETVANT, 3.

**VOTERS AND ELECTIONS.**
Act as to Bribery of Voters, see STATUTES, 5.

1. The provision which is made by U. S. Rev. Stat. § 5507 (U. S. Comp. Stat. 1901, p. 3712), for the punishment of individuals who, by means of bribery, prevent persons to whom the right of suffrage is guaranteed by U. S. Const. 15th Amend. from exercising that right, cannot be sustained as an exercise of the power granted to Congress by such Amendment, to prevent the denial of such right by state action. James v. Bowman, 979

2. Equity will not compel a county board of registrars to enroll a negro on the voting lists as a duly qualified voter, under the registration provisions of Ala. Const. art. 8, where the main object of the bill is to have these registration provisions, upon which the right to register is founded, declared void as a fraud upon the Federal Constitution because of discrimination against negroes, since, if that is the character of these provisions, the court will not require officials to proceed to act under them. Giles v. Harris, 909

3. The inadequacy of the relief which can be afforded by its decree will preclude a court of equity from compelling a county board of registrars to enroll a negro upon the voting lists, where the refusal to register him is alleged to be a part of a general scheme by the white population of the state, and the state itself, to disfranchise a large part, if not all, of the negroes within the state. Id.

**WAGES.**
Of Seamen, see SHIPPING, 4.
Of Seamen, Prohibiting Payment in Advance, see COMMERCE, 12, 13; CONSTITUTIONAL LAW, 21.

**WAR DEPARTMENT.**
Practice of, as to Compensation of Army Officer, see ARMY, 1.

**WARRANT.**
In Extradition Proceedings, see EXTRADITION, 9–11, 15.
Fees of Marshal for Serving, see MARSHALS, 4.

**WARRANTY.**
By Insured, see INSURANCE, 2.

**WAR VESSELS.**
Capture of, see PRIZE.

**WATERS.**
Appellate Jurisdiction of Suit Relating to, see APPEAL AND ERROR, 7.
Federal Question as to Ownership of, see APPEAL AND ERROR, 33.
Federal Question as to Meandered Lakes, see APPEAL AND ERROR, 35, 36.
Federal Question as to Riparian Rights, see APPEAL AND ERROR, 41.

Conflict of Laws as to, see CONFLICT OF LAWS, 2.
Federal Jurisdiction as to Construction of Dock in Navigable River, see COURTS, 17.
Vested Rights of Owners of Land Adjacent to Tidal Stream, see VESTED RIGHTS.
Conveyance of Tide Lands Contiguous to Islands, see PUBLIC LANDS, 32, 33.
See also WHARVES.

1. The state of Alabama when admitted into the Union became entitled to the soil below high-water mark, under the navigable waters within the limits of the state, where it had not been previously granted. Mobile Transp. Co. v. Mobile, 266

2. The authority of a state to prohibit the erection, without its permission, of a structure in a navigable river wholly within its limits, was not superseded by the provision of the river and harbor act of March 3, 1899, chap. 425, § 10 (30 Stat. at L. 1121, 1151, U. S. Comp. Stat. 1901, p. 3541), that it shall not be lawful to erect any structure in a navigable river except on plans recommended by the chief of engineers and authorized by the Secretary of War. Cummings v. Chicago, 525

**Irrigation.**

3. Territorial as well as state legislation with respect to the regulation of the use of public waters was authorized by the provisions of the acts of Congress of March 3, 1891 (26 Stat. at L. 1095, chap. 561, U. S. Comp. Stat. 1901, p. 1570), and of July 26, 1866 (14 Stat. at L. 253, chap. 262, § 9, Rev. Stat. § 2339, U. S. Comp. Stat. 1901, p. 1437), recognizing, so far as the United States is concerned, the validity of local customs and decisions in respect to the appropriation of water, and those of the desert land act of March 3, 1877 (19 Stat. at L. 377, chap. 107, U. S. Comp. Stat. 1901, p. 1549), permitting the appropriation of water for irrigation and the reclamation of desert land. Gutierres v. Albuquerque Land & Irrig. Co. 588

4. Power to authorize irrigation corporations organized under N. M. act February 24, 1887, to take and divert surplus public waters over and above the needs of prior appropriators, was not denied to the legislature of that territory by the proviso in the desert land act of March 3, 1877 (19 Stat. at L. 377, chap. 107, U. S. Comp. Stat. 1901, p. 1549), that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights. Id.

**Rates for water.**

Parties in Action to Have Rates Declared Void for Unreasonableness, see ACTION OR SUIT, 2.
Impairment of Obligation as to, see CONTRACTS, 12, 13.

5. The price which a waterworks plant brought on foreclosure is evidence which a board of supervisors when regulating water rates may take into consideration in estimating the value of the plant, on which the water company is entitled to a fair return from its rates. San Diego Land & Town Co. v. Jasper, 892

6. The valuation of a waterworks plant for purposes of taxation may be considered by the courts in determining the reasonableness of water rates as fixed by a board of supervisors,—especially where such valuation was sworn to by officers of the water company. Id.

7. The depreciation in value of a waterworks plant, and in the value of the services rendered to consumers, due to a diminution in the water supply from a long-continued drought from which the surrounding country has suffered since the passage of an ordinance regulating water rates, may be considered in determining the reasonableness of such rates. Id.

8. Irrigation rates established by a board of supervisors are not necessarily unreasonable because they will only yield a full return on the total value of the plant when the water company shall serve the entire area which its system will supply. Id.

**WEEK.**

Definition of, see PUBLICATION.

**WHARVES.**

Federal Jurisdiction as to Dock, see COURTS, 17.

The extension of wharves beyond harbor lines established by local law, in navigable waters of the United States wholly within the limits of a state, cannot be justified by the relocation of such harbor lines by the Secretary of War acting under the authority of the river and harbor act of September 19, 1890, § 12 (25 Stat. at L. 400, 425, chap. 860), which forbids the construction or extension of any such structures beyond the harbor lines established under his direction, except under such regulations as he may prescribe, since Congress has not, by such act, indicated any purpose wholly to ignore the original power of the states to regulate the use of navigable waters entirely within their respective limits. Montgomery v. Portland, 965

**WILLS.**

Waiver of Objections to Proceedings to Probate, see APPEAL AND ERROR, 67.
Opinion Evidence as to Testator's Mental Capacity, see EVIDENCE, 10.
Burden of Proving Testator's Capacity, see EVIDENCE, 1.
Submitting to Jury Issue as to Testator's Capacity, see TRIAL, 1.

The intention of a testatrix that, failing husband or son surviving, her estate should go to a designated charity, is so manifest from the terms of her will, by which she devised her entire estate to her son, subject to a provision for her husband's support, and provided that in case she survived both husband and son it should go to such charity, which was also to receive the estate

at the husband's death in case he alone survived, that such charity will take to the exclusion of the next of kin of either the testatrix or her son, where both survive the husband, but perish in a common disaster with nothing to show the order of death. Young Women's Christian Home v. French, 233

**WIRES.**
Reasonableness of License Fee on, see TRIAL, 5.

**WITNESSES.**
Instruction as to Impeachment of, see TRIAL, 11.

1. A woman who has been married and divorced is not incompetent as a witness in a capital cause because she is designated on the list of witnesses furnished to the defendant in compliance with U. S. Rev. Stat. § 1033, by her maiden name, under which she has gone since her divorce some ten or twelve years ago. Bird v. United States, 100

2. Declarations of a witness, introduced, not merely to contradict his testimony on cross-examination, but as evidence of the facts which he declares, are not inadmissible because the party offering such evidence may, by extending the cross-examination of the witness to such facts, have made him his own witness. Fourth Nat. Bank v. Albaugh, 673

**WRECKING BOATS.**
As Subject of Capture, see PRIZE, 4.

**WRIT.**
Writ of Error, see APPEAL AND ERROR.

**WRIT AND PROCESS.**
Setting aside Judgment for Insufficiency of Affidavit for Service by Publication, see MORTGAGE, 2.

1. Service of summons within the state on resident directors of a foreign corporation is insufficient to give the court jurisdiction of such corporation, where, at the time of such service, it had ceased to do business within the state, and had designated no agent upon whom service could be made. Conley v. Mathieson Alkali Works, 1113

2. Service of summons within the state on resident directors of a foreign corporation is insufficient to give the court jurisdiction of such corporation, where at the time of such service it had ceased to do business within the state, and had designated no agent on whom service could be made. Geer v. Mathieson Alkali Works, 1122

3. The cancelation, by the insurance commissioner of Kentucky, of the license to do business in that state, granted to an insurance company which had consented, pursuant to Ky. Stat. 1899, § 631, that service of process upon such commissioner in any action brought in the state should be a valid service upon the company, does not render such service insufficient to bring that company into a court of the state as a party defendant to a suit brought by a citizen of such state upon a cause of action which arose out of transactions between the parties while the insurance company was carrying on business in Kentucky under the license. Mutual Reserve Fund Life Asso. v. Phelps, 987



MAR 3 - 1916